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An International Criminal Framework to Prosecute the Legacy of Forced Internal Displacement in Iraq

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An International Criminal Framework to Prosecute the Legacy of Forced Internal Displacement in Iraq

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ABSTRACT

This thesis examines the question of whether the Iraqi High Criminal Tribunal, as a domestic court relying on international law, respected the principle of *nullum crimen sine lege* when prosecuting the Ba'ath Party legacy of internal displacements under the heading of forcible transfer as an international crime *per se*. If it did not do so, then which other international criminal frameworks, the thesis enquires, would have been adequate and valid? The research focuses on internal displacements in the cases of Al-Dujail, the Marshlands population and the Al-Anfal campaigns. These cases are significant in relation to the aforementioned principle, especially since there are some that have yet not been tried. The research conducted doctrinal legal research, and employed both primary and secondary resources: scholarly writings and publications, case law, Iraqi laws, instruments of international tribunals, international conventions and reports.

The key findings establish that the reliance on international law to criminalize the Ba'ath Party legacy did not challenge the principle of *nullum crimen sine lege*. However, this was not the case with the criminalization of acts of internal displacement under the heading of forcible transfer as an international crime *per se*, whether under the category of crimes against humanity or that of war crimes in internal armed conflict. The research findings are that the Iraqi High Criminal Tribunal derived these categories from the Rome Statute and applied them retroactively. This Statute, however, entered into force only in July 2002, and forcible transfer was not recognised as a category of crime under international law during the periods when the Ba'ath Party abuses took place. Under international law at that period, forcible transfer was recognised as a war crime only in international armed conflicts; as a sub-heading of the crime of apartheid, and as a sub-heading of the crime of genocide through the transfer of children. These three exemplars were not applied to the Iraqi cases, and thus there is a considerable gap between the practice of the Iraqi High Criminal Tribunal and international law. The research therefore suggests alternative criminal frameworks: it demonstrates that the crime of persecution, the crime of other inhumane acts, and the crime of genocide through the sub-headings of both 'causing serious bodily or mental harm' and 'inflicting conditions of life to bring a group about its physical destruction' can serve to criminalize the Iraqi cases of internal displacement, particularly since these crimes were well established in customary international law and/or treaty law at the material time.

The research concludes that violation of the principle of *nullum crimen sine lege* threatens the legitimacy of the Iraqi trials. It is therefore recommended that Iraqi legislators and judges

should take the opportunity to amend Iraqi law and the Statute of the Iraqi High Criminal Tribunal to ensure that trials dealing with the Ba'ath legacy, or with future atrocities, are in line with the principle of *nullum crimen sine lege* and with international law. Finally, this work concludes with some suggestions that would help to ensure that similar trials, procedures, punishments and other criminal acts or frameworks in the future do not violate the principles of criminal law.

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ABBREVIATIONS

CCL No. 10	Control Council Law No. 10 of 1946
CCPR	Committee of the International Covenant on Civil and Political Rights
CESCR	Committee of International Covenant on Economic, Social and Cultural Rights
CPA	Coalition Provisional Authority
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
Genocide Convention	International Convention on the Prevention and Punishment of the Crime of Genocide of 1948
Geneva Convention IV	Fourth Geneva Convention relative to the Protection of Civilian Persons of 1949
Hague Convention IV	Hague Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land of 1907
HRW	Human Rights Watch
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICR	Iraqi Council of Representatives
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Tribunal for the Former Yugoslavia
IGC	Iraqi Governing Council
IHT	Iraqi High Criminal Tribunal
ILC	International Law Commission

Nuremberg Charter	Charter of International Military Tribunal of Nuremberg of 1945
Tokyo Charter	Charter of the International Military Tribunal for the Far East of 1946
IPL	Iraqi Penal Law No. (111) of 1969
IST	Iraqi Special Tribunal for Crimes against Humanity
LAT	Law of Administration for the State of Iraq for the Transitional Period of 2003
PCI	Permanent Constitution of Iraq of 2005
PCIJ	Permanent Court of International Justice
Protocol I	Additional Protocol I of 1977 thereto of the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts
Protocol II	Additional Protocol II of 1977 thereto the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts
RCC	Revolutionary Command Council
Rome Statute	Rome Statute of International Criminal Court of 1998
TNA	Iraqi Transitional National Assembly
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCHR	United Nations Commission on Human Rights
UNCHR Sub-Commission	Sub-Commission on Prevention of Discrimination and Protection of Minorities
UNESC	United Nations Economic and Social Council
UNSC	United Nations Security Council
UNSG	United Nations Secretary-General
UNGA	United Nations General Assembly
Vienna Convention	Vienna Convention on the Law of Treaties of 1969
WGEID	Working Group on Enforced or Involuntary Disappearances

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CHAPTER ONE

INTRODUCTION

'Ladies and Gentlemen,

We got him!

This is a great day in your history. For decades hundreds of thousands of you suffered at the hands of this cruel man. For decades, Saddam Hussein divided you citizens against each other. For decades he threatened and attacked your neighbors. Those days are over forever.'[1]

Paul Bremer

Baghdad, 14th December 2003

After a dark period of dictatorship that lasted three and half decades, the hope of the Iraqi people was to live under a democratic regime based on the protection and exercise of human rights and freedoms, respect for the rule of law and participation in civic life. As with any people who have suffered under a bloody dictatorial regime, the majority of Iraqis aspired to achieve justice and to put on trial those Ba'ath party members responsible for crimes and atrocities. Trials were seen as the foundation of the new democratic Iraq and an affirmation that any future atrocities would not go unpunished.[2] In December 2003, Mowaffak Al-Rubaie and Judge Dara Nur al-Din declared that the Iraqi Governing Council (IGC) had promulgated Law No. 1 of 2003, thus indicating that the time had come to initiate a review of past Ba'athist crimes and violations of justice. This law created the Iraqi Special Tribunal for Crimes against Humanity (IST) and legislated its Statute.[3] This name was later changed under a new law of Tribunal No. 10 in 2005. The latter law re-named the Tribunal the 'Iraqi High Criminal Tribunal (IHT)'.[4] The first of the names, however, will be used when necessary. Thus, the IST, or its new version the IHT was designed in order to consider the legacy of atrocities and violations committed during the era of the Ba'ath Party's rule in Iraq and to prosecute those

[1] Text of Ambassador Bremer's Opening Remarks at the CPA Conference Center, Baghdad, 14th December 2003, available at <http://www.iraqcoalition.org/transcripts/20031214_Dec14_Saddam_Capture.htm> accessed on October 14, 2015.

[2] M. Cherif Bassiouni, 'Post-conflict justice in Iraq: An appraisal of the Iraq Special Tribunal' 38 (2005) *Cornell International Law Journal*, 324-325.

[3] See Law No. 1 of 2003. The word 'Statute' will be used to refer to the substantive provisions of the crimes listed in the laws of the Iraqi Tribunal, while the other provisions will be referred to by use of the word 'Law'.

[4] See, Law of the Tribunal No. (10) of 2005.

involved in their commission. It should be noted here that, although the IHT is an Iraqi national tribunal, its law and statute are based on international law.

This study focuses on the way in which the Statute and judgements of the IHT have dealt with the acts of forced internal displacement committed during the era of the Ba'athist regime in Iraq. Both the Statute and the judgements have criminalized and convicted such acts under criminal framework of forcible transfer of populations as crime *per se* under the heading of crimes against humanity and/or as war crimes during a time of internal armed conflict. This study will argue that such procedures violate the essential principle of *nullum crimen sine lege* because they lead retroactively to the application of the criminal framework of forcible transfer as crime *per se*.

The IHT Statute refers in Article 12(First)(d) to the forcible transfer as crime *per se* under the category of crimes against humanity, and further specifies that:

> [D]eportation or forcible transfer of population' means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.[5]

In addition, the IHT Statute specifies in Article 13(Fourth)(h) that displacement is a crime *per se* within the category of war crimes in internal armed conflict. This article sets forth that:

> '[O]rdering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand,'[6]

In a number of cases, the IHT charged and convicted defendants in relation to the crime of forcible transfer as an independent crime *per se* under the category of crimes against humanity and/or war crimes committed during a time of internal armed conflict. For example, the accused convicted by the IHT numbered three in the Al-Dujail case,[7] three in the Al-Anfal case,[8] thirty-

[5] Art. 12(Second)(d) of the Statute of the IHT.
[6] Art. 13(Fourth)(h) of the Statute of the IHT.
[7] Al-Dujail Lawsuit (Final Trial Verdict) IHT-1/C First 2005 (11/5/2006). (Therein after Al-Dujaul Final Trial Verdict).
[8] Al-Anfal Lawsuit (Trial Verdict Decisions) IHT-1/ (C) Second/2006 (24 June 2007). (Therein after Al-Anfal Trial Verdict Decisions).

two in the Marshlands case,[9] eight in the case of ethnic cleansing of the Kurdish people,[10] four in the Halabja case,[11] five in the Faili Kurds case,[12] and four in the Al-Barzanyen case.[13] These defendants were convicted of the crime of forcible transfer as a crime *per se* against humanity. Among them were Saddam Hussein and his brother Barzan Ibrahim al-Hassan, his deputy Taha Yassin Ramadan, Ali Hassan al-Majid and Sultan Hashim Ahmed, Tariq Aziz, Saber Abdel Aziz al-Douri, Iyad Fatih al-Rawi, Abdul Hamid Hamoud, and Ebrahim Hassan Sabawi. The IHT also convicted Ali Hassan al-Majid, Farhan Mutlaq al-Jubouri, and Sultan Hashim Ahmed of the crime of forcible transfer *per se* as a war crime in the Al-Anfal case.[14] Others were charged with the crime of forcible transfer *per se*, but these cases were not addressed by the IHT because the defendants were fugitives, refugees in other countries, or their place of residence unknown.[15] The IHT therefore decided to recommend the adoption of legal and judicial procedures and the instigation of investigations aimed at the arrest and trial of those

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[9] The IHT issues its rulings in the 'Case of the Marshelands drying' on 2 August 2010 available at <http://burathanews.com/news/100360.html> accessed on March 12, 2016.
المحكمة الجنائية العليا تصدر احكامها في قضية تجفيف الاهوار.
See also, 'An Iraqi court issued a death sentence on Khadr Hadi in the 'Case of the Marshlands drying' No. A0 - 11356 (4 August 2010), *Alrai newspaper* available at <http://s1.alraimedia.com/CMS/PDFs/2010/8/4/11356/P31.pdf> accessed on March 12, 2016.
محكمة عراقية تصدر حكما بالأعدام على خضر هادي في قضية تجفيف الأهوار، 11356 (4 أغسطس 2010).

[10] See, Decisions of the IHT in the 'Case of ethnic cleansing of the Kurdish people on 2 August 2009' available at <http://faylee.org/2009/908087.htm> accessed on March 14, 2016.
نص القرارات الصادرة عن المحكمة الجنائية العراقية العليا في قضية التطهير العرقي ضد الكرد.
See the same decisions available at <https://www.youtube.com/watch?v=1OqbAMIf7Hw>, and <https://www.youtube.com/watch?v=cySFZYx3RZI>, and <https://www.youtube.com/watch?v=KEldHmO8k9w> accessed on March 14, 2016.
نص القرارات الصادرة عن المحكمة الجنائية العراقية العليا في قضية التطهير العرقي ضد الكرد.

[11] Verdicts against those convicted in the 'Case of Halabja on 17 January 2010' available at <http://www.gov.krd/a/d.aspx?a=33437&l=14&r=81&s=010000> accessed on March 12, 2016.
نص الأحكام التي صدرت بحق المدانين في قضية حلبجة الشهيدة.
See also, 'Final Verdicts of the IHT which was imposed on those convicted in the 'Case of the bombing of Halabja with chemical weapons', available at <http://www.chemical-victims.com/DesktopModules/Articles/ArticlesView.aspx?TabID=3961&Site=chemical-victims&Lang=ar-SA&ItemID=5819&mid=13053> accessed on March 12, 2016.
نص الاحكام النهائية للمحكمة الجنائية العراقية بحق المدانين في قضية قصف حلبجة بالاسلحة الكيمياوية.

[12] The IHT issued its final decision in the 'Case of Faili Kurds' available at <http://www.ekurds.com/arabic/kurdfylee3.htm> accessed on March 12, 2016.
محكمة الجنايات العليا تصدر قرارها النهائي في قضية الكورد الفيليين.

[13] 'Life sentence on Tareq Aziz in the 'Case of killing Albarrazanyen' available at <http://www.bna.bh/portal/news/455180?date=2011-05-3> accessed on March 12, 2016.
الحكم بالسجن مدى الحياة على طارق عزيز في قضية تصفية البارازانيين.

[14] See, Al-Anfal Trial Verdict Decisions (n 8).

[15] Statement made by the head of IHT. See, 'Aref Al Shaheen for Al-Mada: I wished that the case of the Ba'athists execution in 1979 is the first case before the Tribunal' 1720 *AlMada Newspaper* (10 February 2010). See also, Statement made by judge Raed Juhi who was head of the investigative panel in the IHT, 'Wafiq Al- Samarrai is required among 400 would be tried in the second part of the Anfal case ... satisfaction in Kurdistan after the issuance of death sentences' available at <http://www.akhbaar.org/home/2007/06/32040.html?print> accessed on March 12, 2016.
وفيق السامرائي مطلوب بين 400 سيحاكمون في الجزء الثاني من قضية الأنفال ... الارتياح في كردستان بعد صدور أحكام الإعدام.

defendants.[16] For example, the IHT recommended taking such procedures and investigations against 15 accused in the case of Al-Dujail and 423 accused in the Al-Anfal case.[17]

This study contends that it is doubtful whether forcible transfer constituted an independent international crime *per se* at the time of the Ba'ath regime. It proposes that the forced internal displacement of populations was not recognized as a criminal framework or crime *per se* in international law during the era of Ba'athist rule in Iraq. The study argues that forcible transfer became an independent crime *per se* with the adoption and entry into force of the Rome Statute of International Criminal Court, ICC, (Rome Statute) of 1998 and July 2002 respectively. Thus, the IHT cannot legitimately draw on the more recent provisions of the Rome Statute concerning the crime of forcible transfer and apply them to the Ba'ath legacy of forced internal displacements that preceded the Rome Statute. It is notable that neither those who drafted the IHT Statute nor the IHT during its trials held an investigation into this question. This study focuses on this matter and provides evidence that the stance of the IHT is untenable and in conflict with the principle of *nullum crimen sine lege*. As mentioned above, the Statute and judgements of the IHT are based on international law. It is for this reason that the study tests the IHT attitude regarding the application of the criminal framework of forcible transfer as a crime *per se* in the light of international law. As this was the case with the Ba'ath campaigns of internal forced displacement executed against the population of Al-Dujail in 1982, the Marshlands in 1989 and the Kurds during the Al-Anfal operations of 1987-1988. This study also examines and investigates international law in order to provide legal solutions capable of criminalizing and convicting members of the former Ba'ath regime of forced internal displacement, especially with regard to the last three campaigns. On the other hand, such legal solutions should ensure respect for the principle of *nullum crimen sine lege.*

It is notable that the Statute of the IHT was, as will be seen later, criticized on the grounds that it listed the international crimes of genocide, war crimes and crimes against humanity, since the inclusion of these international crimes in the domestic Iraqi law gives rise to a legal defect in that it fails to comply with the principle of *nullum crimen sine lege.*

In addition, there were, from the beginning, plausible criticisms that challenged the legitimacy of the IHT and the legal validity of the international crimes contained in its Statute. This is

[16] See, Al-Dujaul Final Trial Verdict (n7). See also, Al-Anfal Trial Verdict Decisions (n 8). See also, Decisions of the IHT in the case of ethnic cleansing of the Kurdish people (n 10).
[17] See, Al-Dujaul Final Trial Verdict, ibid. See also, Al-Anfal Trial Verdict Decisions, ibid.

because the occupying power played a major role in the process of the establishing the IST and the drafting of its Statute. It is well known that power in Iraq was mainly confined to the occupying power.

1.1. Background and the traditional view challenging the IHT

1.1.1. Background on the IHT

The elected Iraqi Transitional National Assembly (TNA) established the IHT under Law No. 10 of 2005. In fact, it is a modified version of its predecessor, the IST which was based on the Coalition Provisional Authority (CPA) Order No. 48 of 2003 and Law No. 1 of 2003, issued by the IGC appointed by the CPA.[18] The IHT, therefore, is a substitute for the IST and has faced severe criticisms due to it beings seen as an institution set up by the occupying power. The aim of the IHT is to consider and prosecute the full period of violations committed by the Ba'ath party, from the moment of its seizure of power in Iraq on 17 July 1968. According to the IHT's law, these violations include both those committed against the Iraqi people and during the aggressive wars against Iran and Kuwait.[19] Thus, the territorial jurisdiction of the IHT extends beyond Iraq.[20] However, the IHT's jurisdiction over persons only covers those defendants who are Iraqi citizens and/ or are resident in Iraq.[21] Thus, the jurisdiction of the IHT excludes those non-Iraqis accused or criminals who had contributed to or been involved in Ba'ath abuses. Such exclusion is an important factor with regard to the closing date of the temporal jurisdiction of IHT, since the IHT is authorised to deal only with offences that took place before 1 May 2003.[22] It thus cannot consider the abuses that took place after the said time, regardless of whether the perpetrators were Ba'athists, other Iraqi citizens, foreigners, or individuals and personnel of the occupying power. Thus, the temporal jurisdiction of the IHT covers the period from 17 July 1968 -1 May 2003 and this latter date marks the end of the principal military operations of the international coalition forces led by the United States and the United Kingdom.

[18] The Coalition Provisional Authority (CPA) was the civil administration of the occupying power in Iraq.
[19] Art. 1(Second) of the Law of the IHT No. 10 of 2005.
[20] Ibid.
[21] Ibid.
[22] Ibid.

With respect to subject matter jurisdiction, the Statute of the IHT[23] gives the Tribunal the power to handle two types of crime: international crimes and a number of local crimes referenced by some Iraqi laws. According to Article 1(Second)(a), (b) and (c) of the IHT Law, the Tribunal has the right to consider the international crimes of genocide, crimes against humanity and war crimes.[24] The IHT Statute defines international crimes in largely the same manner as the Rome Statute. These crimes are tried without consideration of whether they were committed in peacetime or wartime or whether they occurred in connection with an international or a non-international armed conflict. Consequently, the IHT Statute not only encompasses Ba'athist abuses against the Iraqi people or groups, but also offences committed during the Iraq-Iran war and the Iraqi invasion of Kuwait. The other crimes considered by the IHT are certain crimes contained in the Iraqi laws.[25] These include 'interference in the affairs of the judiciary or attempting to influence its functioning',[26] 'wastage and squandering of national resources',[27] 'the abuse of position and the pursuit of policies that have led to the threat of war or the use of the Iraqi armed forces against an Arab country'.[28] There are other acts punishable under an Iraqi law 'when such acts cannot be internationally punished due to missing an element of international crime.'[29] It is noteworthy that the jurisdiction over this type of crime is evenly shared between the IHT and other Iraqi courts,[30] while the IHT is given precedence with regard to international crimes.[31] Regarding the procedure before the IHT, the Tribunal should mainly apply the Iraqi Code of Criminal Procedure No. 23 of 1971. Between 2005 and 2011 the IHT considered a number of important cases, such as Al-Dujail, Al-Anfal, Halabja, Al-borzanyen, the Merchants' Executions, the ethnic cleansing of the Faili Kurds, the Friday Prayers incident and the killing of Grand Ayatollah Mohammad Mohammad Sadeq al-Sadr, the Al-Shabania Uprising, the Marshlands, the religious parties and the secular parties. In 2011, the Iraqi Council of Ministers finally attempted to dissolve the IHT. The Council, however met with strong disagreement because the Tribunal had not finalised all the cases relating to the atrocities

[23] It is notable that the IHT is still in operation and many cases of the Ba'ath legacy were addressed and others being under its consideration, available at <http://www.iraqja.iq/view.2287/>, and <http://www.iraqja.iq/view.2192/>, and <http://www.iraqja.iq/view.2124/> accessed on 14 March 2016.
[24] Art. (1)(Second) (a), (b) and (c) of the Law of the IHT No. (10) of 2005.
[25] Art. (1)(Second) (d) of the Law of the IHT No. (10) of 200
[26] Art. (14)(First) of the Statute of the IHT.
[27] Art. (14)(Second) of the Statute of the IHT.
[28] Art. (14)(Third) of the Statute of the IHT.
[29] Art. (14)(Fourth) of the Statute of the IHT. This provision was not included in the first version, which was Law No. (1) of 2003 of the IST. Instead it was added to the Law of the IHT No. (10) of 2005.
[30] Art. (29) (First) of the Law of the IHT No. (10) of 2005.
[31] Art. (29) (Second) of the Law of the IHT No. (10) of 2005.

of the Ba'athist regime.[32] Later, the Iraqi Council of Representatives (ICR) promulgated Law No. 35 of 2011 on modifying the Law of IHT No. 10 of 2005. This new law linked the IHT to the Supreme Judicial Council and reduced its size so that it consisted of one criminal Chamber and one Bureau of Inquiry.[33] The new law had no effect on the jurisdiction of the IHT, and permitted the IHT to continue its work of completing other cases and bringing to trial those accused who had not been tried.[34]

It is worth mentioning here that, although the IHT was the first of its kind in Iraq, the notion of criminalizing Ba'athist violations and prosecuting Iraqi offenders dates back to the invasion of Kuwait in 1990. The Kuwaiti Government and others had sought to bring Saddam Hussain and his aides to trial before an international tribunal.[35] Non-governmental and human rights organizations also developed such plans.[36] In the USA there were plans to put Ba'athist offenders on trial, particularly during the presidencies of Bill Clinton and George W. Bush.[37] Drawing upon the experience of the United Nations Security Council (UNSC) in dealing with violations in the former Yugoslavia, it was proposed to establish a commission to investigate Ba'athist regime violations and to establish an international tribunal to prosecute the perpetrators.[38] This scheme is reflected in the US Congress Act on the Iraq Liberation of 1998, which states in its Section (6) that

> '[t]he Congress urges the President to call upon the United Nations to establish an international criminal tribunal for the purpose of indicting, prosecuting, and imprisoning Saddam Hussein and other Iraqi officials who are responsible for crimes against humanity, genocide, and other criminal violations of international law.'[39]

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[32] Special statement concerning attempts to abolish the Iraqi High Tribunal (IHT) made by the Chairman for the Defence of Victims in each of Ethnic cleansing, the Albarzanyen and Faili Kurds cases; and by the Rapporteur of the Follow-up Committee on the Kurdish cases before the IHT.

[33] Arts. (1) and (2) of the Law No. (35) of 2011 on modifying the Law of IHT No. (10) of 2005.

[34] According to Art. (19) of the Law of the IHT, the trial should be held in the presence of defendant. This is required as one of his/ her legal guarantees.

[35] M. Cherif Bassiouni (n 2) 338-339.

[36] Ibid. See also, Sonya Sceats, 'The trial of Saddam Hussein' Briefing Paper *Chatham House-The Royal Institute of International Affairs*, 3. See also A Human Rights Watch Policy Paper on 'Justice for Iraq' (December 2002), available at <http://www.hrw.org/legacy/backgrounder/mena/iraq1217bg.htm#_ftnref4> accessed on September 15, 2015.

[37] M. Cherif Bassiouni, ibid, 339-340. See also John Laughland, *A History of Political Trials: From Charles I to Saddam Hussein* (Peter Lang Ltd, England, 2008), 240.

[38] M. Cherif Bassiouni, ibid. See also ICTJ Briefing Paper on 'Creation and First Trials of the Supreme Iraqi Criminal Tribunal' (October 2005) *International Center for Transitional Justice (ICTJ)*, 5-6. See also Sonya Sceats (n 36). 3.

[39] Section (6) of the US Congress Act on the Iraq Liberation of 1998.

Although, these efforts remained merely suggestions, they prepared the way for the IHT. For example, the US administration project on Iraq's Future planned to prosecute the Ba'athist violators,[40] although for certain reasons the formation of a tribunal to try Ba'athist officials did not occur. One of the main reasons for this was that rulers of other Arab totalitarian regimes had no wish to see such trials conducted because of concerns about creating a precedent that could lead to themselves being put on trial in the future.[41] Another reason was that such tribunals would not be effective was due to their inability to arrest culprits.[42] This changed after the defendants lost their ruling power, which had given them impunity for so long, due to the overthrow of the Ba'athist regime in April 2003 by an international military coalition led by the United States and Britain. After this event, a number of senior Ba'athist leaders were arrested.

1.1.2. A traditional view challenging the legitimate basis of the establishment of the IHT

After 16 April of 2003, power in Iraq was held by the CPA, which was the civil administration of the occupying power.[43] The CPA in turn, and in accordance with UNSC Resolution No. 1483 of 2003, constructed an Iraqi domestic administration called the Iraqi Governing Council (IGC), which was intended to function as a transitional parliament.[44] What is remarkable is that the Iraqis did not elect members of the IGC: instead the CPA chose them on the basis of their belonging to the different segments of Iraqi society, religious, ethnic, national and political.[45]

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[40] For more details, see M. Cherif Bassiouni (n 2) 340.

[41] M. Cherif Bassiouni, ibid, 338. See also, ICTJ Briefing Paper (n 38) 21.

[42] Sonya Sceats (n 36) 3.

[43] For more details on the origins, building and practice of the CPA see, James Dobbins, Seth G Jones, Benjamin Runkle and Siddharth Mohandas, *Occupying Iraq: A history of the Coalition Provisional Authority* (RAND Corporation, 2009).

[44] See the CPA Regulation No. (6) on the formation of the Governing Council of Iraq, (CPA/REG/13 July 2003/06). See also, UNSC Res. No. 1483 of (2003) 'Situation between Iraq and Kuwait' UN Doc. S/RES/1483 (22 May 2003). This resolution specified the broad authority and responsibilities of the United States and the United Kingdom as occupying powers through the (CPA) in their to management of the occupied Iraqi territory. Para. (9) of this resolution affirms that the UNSC 'Supports the formation, by the people of Iraq with the help of the Authority and working with the Special Representative, of an Iraqi interim administration as a transitional administration run by Iraqis, until an internationally recognized, representative government is established by the people of Iraq and assumes the responsibilities of the Authority.' It is notable that according to the above-mentioned resolution of the UNSC, the CPA enjoyed and exercised broad powers as required to ensure security, including the security of the personnel of the occupying power; to maintain public order; and to rebuild the country almost entirely in all fields, whether political, economic, legal or others. See, Ilias Bantekas and Susan Nash, *International criminal law* (Taylor & Francis e-Library, 2009), 573.

[45] The IGC was basically composed of seven diverse political parties, the leaders and members of which had lived in exile and had nationalities other than Iraqi. Depending on the percentages of population, the IGC consisted of 25 members, of whom the backgrounds were 13 Shia, 5 Sunna, 5 Kurds, 1 Assyrian Christian and 1 Turkman. Interestingly, some of them won the confidence of the Iraqi people after 2005, to judge from their four winning results in parliamentary elections since that time. See Glen Segell, *Disarming Iraq* (Glen Segell, United Kingdom, 2004), 441, 451. See also Jordan E. Toone, 'Occupation law during and after Iraq: The expedience of conservationism evidenced in the minutes and resolutions of the Iraqi Governing Council' 24 (2012) *Florida Journal of International Law*. See also, Saad N. Jawad, 'The Iraqi Constitution: Structural flaws and Political

Although authority in Iraq was ostensibly held jointly by the CPA and the IGC, in reality the CPA was the foremost authority because it possessed the power to veto any IGC actions[46] The IGC was unable therefore to pass, enact or implement a decision or a law without the consent of the CPA. Accordingly, it is reasonable to argue that the IGC functioned solely as an instrument of the occupying power. This assertion led to the first contestation regarding the legitimate basis of the establishment of the IST and then the IHT, [47] since the legitimacy, the Statute and the proceedings of the IST were derived from Law No. 1 of 10 December, 2003, which was promulgated by the IGC on the basis of its delegation by CPA Order No. 48 of 9 December of 2003.[48] This latter Order involved the details on the establishment, organization, competence and Statute of the IST.[49] Therefore, the IST and its Statute were viewed as an instrument and practice of the occupying power, especially since the latter's power was the product of what was deemed under international law to have been an unlawful war.[50] This view did not change even after the IST was provided with a transitional constitution, the 'Law of Administration for the State of Iraq for the Transitional Period (LAT)' of 2004, because this

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Implications' 1 (2013) *LSE Middle East Centre Paper Series*, 8. See also, Iraqi Governing Council members, available at <http://news.bbc.co.uk/1/hi/world/middle_east/3062897.stm> accessed on June 17, 2016. See also, Bernhard Kuschnik, 'The legal findings of crimes against humanity in the Al-Dujail Judgements of the Iraqi High Tribunal: A forerunner for the ICC?' 7 (2008) *Chinese Journal of International Law*. See also, Olaoluwa Olusanya, 'The Statute of the Iraqi Special Tribunal for Crimes Against Humanity– progressive or regressive?' 5 (2004) *German Law Journal*, 865.

[46] See, Section (3)(1) of the CPA Regulation No. (1) on the precedence of the CPA regulations and orders over Iraqi laws and legislation. (CPA/REG/16 May 2003/01). See for more details, Jordan E. Toone, ibid, 474, 485, 493. See also, Carsten Stahn, *The Law and Practice of International Territorial Administration: Versailles to Iraq and beyond* (Cambridge University Press, New York, 2008), 371. See also, Kaiyan Homi Kaikobad and Michael Bohlander, (ed), *International law and power: Perspectives on legal order and justice* (Martinus Nijhoff Publishers, Netherlands, 2009), 477. See also Ilias Bantekas and Susan Nash (n 44) 573-574.

[47] See, M. Cherif Bassiouni (n 2) 345, 361-362. See also, Marco Sassoli, 'Legislation and maintenance of public order and civil life by occupying powers' 16 (2005) *The European Journal of International Law*, 675. See also, Angeline Lewis, *Judicial reconstruction and the rule of law: Reassessing military intervention in Iraq and beyond* (Martinus Nijhoff Publishers, Netherlands, 2012), 100-102. See also, Kaiyan Homi Kaikobad and Michael Bohlander, ibid, 477. See also, Carsten Stahn, ibid, 378-379. See also, Michael A. Newton, 'The Iraqi High Criminal Court: controversy and contributions' 88 (2006) *International Review of Red Cross*, 418. See also, Christian Eckart, 'Saddam Hussein's trial in Iraq: Fairness, legitimacy & alternatives, a legal analysis' (2006) *Cornell Law School Papers Series*, 14-15.

[48] See CPA Order No. (48) on 'Delegation of Authority Regarding Establishment of an Iraqi Special Tribunal with Appendix A' (CPA/ORD/9 September 2003/48). Section (1)(1) of this Order sets forth that 'The Governing Council is hereby authorized to establish an Iraqi Special Tribunal (the "Tribunal") to try Iraqi nationals or residents of Iraq accused of genocide, crimes against humanity, war crimes or violations of certain Iraqi laws, by promulgating a statute, the proposed provisions of which have been discussed extensively by the Governing Council and the CPA and are set forth at Appendix A.' See also, Law No. (1) of 2003 on the Iraqi Special Criminal Tribunal for the crimes against humanity. See also, James Dobbins, Seth G Jones, Benjamin Runkle and Siddharth Mohandas (n 43) 161-164.

[49] See the Appendix of CPA Order No. (48) of 2003 on the Statute of the Iraqi Special Tribunal.

[50] Ilias Bantekas and Colin Warbrick (eds), 'The Iraqi Special Tribunal for Crimes against Humanity' 54 (2005) *The International and Comparative Law Quarterly*, 238-241. See also John Laughland (n 37) 237-240. See also, Angeline Lewis (n 47) 101-102. See also Kaiyan Homi Kaikobad and Michael Bohlander (n 46) 477. See also Carsten Stahn (n 46) 378-379. See also M. Cherif Bassiouni (n 2) 358, 361, 364. See also Christian Eckart (n 47) 14.

Law was adopted by the IGC and the CPA was also involved in its creation.[51] Such practices by the occupying power were perceived as undisputedly conflicting with the powers and practices of an occupying power as regulated and defined by international humanitarian law.[52] For example, changes to the criminal laws or the establishment of courts in occupied territory are prohibited by the Hague Convention (IV) of 1907 respecting the Laws and Customs of War on Land and its Annex Regulations (Hague Convention IV), the Fourth Geneva Convention relative to the Protection of Civilian Persons of 1949 (Geneva Convention IV), Additional Protocol I of 1977 thereto of the Geneva Conventions of 1949 (Protocol I) and the customary rules.[53] These bodies of international humanitarian law forbid the occupying power to abrogate or suspend or even to disrespect laws that are in effect, particularly penal laws.[54] Such a prohibition cannot be derogated unless the laws in question endanger the security of the occupying powers, hinder compliance with the duties of the four Geneva Conventions, or jeopardise the safety or the orderly government of the territory.[55] Likewise, such prohibition can be suspended if its respect by the occupying power is impossible based on a reason or necessary.[56] It should be emphasised that this prohibition and its derogations are with regard to the laws in effect, and what the occupying power did regarding the IST was to enact a new law. Respecting this, the Geneva Convention IV stipulates in Article 65 that a new penal enactment

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[51] On the law-making process of this law, see also James Dobbins, Seth G Jones, Benjamin Runkle and Siddharth Mohandas (n 43) 289-292.

[52] See, Marco Sassoli (n 47) 675. See also, Nehal Bhuta, 'Between liberal legal didactics and political manichaeism: The politics and law of the Iraqi Special Tribunal' 6 (2005) *Melbourne Journal of International Law*, 18. See also, M. Cherif Bassiouni (n 2) 361-362. See also, Kaiyan Homi Kaikobad and Michael Bohlander (n 46) 477.

[53] Ibid. See also, John Laughland (n 37) 240, 242. See also Kaiyan Homi Kaikobad and Michael Bohlander (n 46) 477. Other views assert that the occupying power can change the penal laws when one of the exceptions provided by Art. 64 of the Geneva Convention IV exists. See Yutaka Arai-Takahashi, *The law of occupation: Continuity and change of international humanitarian and its interaction with international human rights law* (Martinus Nijhoff Publishers, Netherlands, 2009), 121-122.

[54] Art. 43 of the Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (Hague Convention IV) (adopted 18 October 1907, entered into force 26 January 1910). This Article asserts that '[T]he authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.' See also, Art. 64 of the Geneva Convention IV of 1949 stipulates that '[T]he penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. ... The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the_Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.'

[55] See, Art. 64 of the Geneva Convention IV of 1949, ibid. For a discussion on this point see, Yutaka Arai-Takahashi (n 53) 123.

[56] See art. 43 of the Hague Convention IV.

should not be retroactive.[57] Consequently, if the Law and Statute of the IST as promulgated by the occupying power is new law within Iraqi legal system, then it infringes the provision of Article 65. The Law and Statute of the IST was passed in December of 2003 to deal with abuses that occurred under the Ba'ath regime, that is, between 17 July 1968 and 1 May 2003. Nonetheless, this cannot extend to cover all the provisions of the Law and Statute of the IST. Certainly, the occupying power has the authority to prosecute breaches of the laws and customs of war. This is set forth explicitly in Article 70 of the Geneva Convention IV.[58] Moreover, some crimes included in the Statute of the IST and then the IHT already existed in Iraqi law before the occupation.[59] According to some views, the CPA was authorized to create the IST and to legislate its Statute according to the UNSC resolutions, especially UNSC Resolution No. 1483, which called upon all States, including the occupying power to bring to justice all culpable Ba'athists.[60] Such views, however, ignore the fact that this resolution confirms that the practice of the occupying power should be in agreement with international law, including the Hague Convention IV and the Geneva Convention IV of 1949.[61] On the other hand, the occupying power in Iraq claimed that it had a duty to protect public order and that this justified its practice.[62] Such a claim, however, is not convincing because, as mentioned above, Article 65 of the Geneva Convention IV expressly prevents the retroactive application of any criminal provisions. The only exception here is when the past misdeeds amount to breaches of the laws and customs of war.[63] Moreover, it can be argued that the occupying power could fulfil its duties if it brought the Ba'athist offenders to justice in order to prosecute them under Iraqi

[57] Art. (65) of the Geneva Convention IV of 1949 affirms that '[T]he penal provisions enacted by the Occupying Power shall not come into force before they have been published and brought to the knowledge of the inhabitants in their own language. The effect of these penal provisions shall not be retroactive.'

[58] Art. (70) of the Geneva Convention IV of 1949 declares that '[P]rotected persons shall not be arrested, prosecuted or convicted by the Occupying Power for acts committed or for opinions expressed before the occupation, or during a temporary interruption thereof, with the exception of breaches of the laws and customs of war.'

[59] See Art. (14) of the Law and Statute of the IST of 2003.

[60] UNSC Res. No. (1483) of 2003 affirms in its preamble 'the need for accountability for crimes and atrocities committed by the previous Iraqi regime'. Also, paragraph 3 appeals to Member States 'to deny safe haven to those members of the previous Iraqi regime who are alleged to be responsible for crimes and atrocities and to support actions to bring them to justice.' UNSC Res. No. (1483/2003) (n 44). See also Elizabeth Wilmshurst, (ed), *International Law and the Classification of Conflicts* (Oxford University Press, Oxford, 2012), 383. See also Kaiyan Homi Kaikobad and Michael Bohlander (n 46) 478. See Yutaka Arai-Takahashi (n 53) 127.

[61] Paragraph (5) of UNSC Res. No. (1483) of 2003 '[C]alls upon all concerned to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907.' UNSC Res. No. (1483/2003), ibid.

[62] See also Elizabeth Wilmshurst (n 60) 128. See also Angeline Lewis (n 47) 102. See also, Kaiyan Homi Kaikobad and Michael Bohlander (n 46) 477. See Yutaka Arai-Takahashi (n 53) 127-128.

[63] See Art. 70 of the Geneva Convention IV of 1949.

Penal Law (IPL) No. 111 of 1969. In addition, the prosecution of those offenders could take place regardless of the state of public order because, as mentioned previously, such prosecution was planned as a basic part of the project for the future of Iraq after the overthrow the Ba'ath regime.

In addition to all the aforesaid criticisms of the legitimacy of the IST and the IHT, which described them as "puppet tribunals" or "victor's justice,"[64] the challenges are further strengthened due to the remarkable role played by the USA on the ground in support of the IST.[65] The Americans contributed to the infrastructure and financing of the IST, on which it spent $128 million.[66] It also provided advisors, prosecutors and investigators to work with, assist and train the IST and its personnel.[67] In addition, it was involved in the investigations and the process of classification and storing of the evidence.[68] In May 2004, through its Ministry of Defence and Justice Department, it instituted the Regime Crimes Liaison's Office, which made extensive efforts to ensure that the IST and its personnel achieved success in their tasks.[69] Later, attention was given to the need to address the problem of legitimacy. Some writers suggested that this could be achieved by restructuring the IST, and by its Statute being reissued by an Iraqi national authority independent of the occupying power.[70] The elected TNA followed two approaches in order to provide a legitimate basis for the tribunal. It repealed Law No. 1 of 2003, by which the IST was created, and then enacted Law No. 10 of 2005 to replace the IST by a new tribunal, called the Iraqi High Criminal Tribunal (IHT).[71] However, the latter Law did not differ from the prior Law insofar as it maintained the same temporal, substantive, personal and territorial jurisdiction. Moreover, the IHT had received constitutional status under Article 130 of the new Iraqi constitution, the so-called Permanent Constitution of Iraq (PCI) of

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[64] Jose E. Alvarez, 'Trying Hussein: Between hubris and hegemony' 2 (2004) *Journal of International Criminal Justice*, 319. 319-329. See also, Michael A. Newton (n 47) 404. See also, Olaoluwa Olusanya (n 45) 865. See also Anja Seibert-Fohr, 'Reconstruction through accountability' 9 (2005) *Max Planck Yearbook of United Nations Law*, 574.

[65] Ian M. Ralby, 'Joint criminal enterprise liability in the Iraqi High Tribunal' 28 (2010) *Boston University International Law Journal*, 311.

[66] Ibid. See also Nehal Bhuta (n 52) 19-20.

[67] For this purpose, the CPA created the Crimes Against Humanity Investigations Unit operated by US investigators and prosecutors. See William A. Schabas and Nadia Bernaz, (ed), *Routledge Handbook of International Criminal Law* (Routledge, 2011). See also, Nehal Bhuta, ibid.

[68] See, Nehal Bhuta, ibid. See also, John C. Johnson, 'The Iraqi High Tribunal and the Regime Crimes Liaison's Office' 36 (July 2008) *The Army Lawyer*, 40.

[69] See for more details, John C. Johnson, ibid. See also, Ian M. Ralby (n 65) 311. See also Sarah Williams, *Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictional Issues* (Hart Publishing Ltd, Oxford, 2012), 468, 485-486.
See also William A. Schabas and Nadia Bernaz (n 67) 90.

[70] Marco Sassoli (n 47) 675. See also, M. Cherif Bassiouni (n 2) 360-361. See also, Christian Eckart (n 47) 15-16.

[71] See the Law of the IHT No. (10) of 2005.

2005, which was drafted by an elected committee and passed by a popular referendum. The said Article 130 provides that

> '[T]he Iraq High Criminal Court shall continue its duties as an independent judicial body, in examining the crimes of the defunct dictatorial regime and its symbols. The Council of Representatives shall have the right to dissolve by law the Iraqi High Criminal Court after the completion of its work.'[72]

Moreover, the IHT came more under the control of Iraqis.[73] However, it is significant that it accepted the assistance and technical and logistics support offered by the US, despite the fact that the US is the occupying power. Due to its capacity to impose the death penalty, many countries, principally the European States, and also the UN, refrained from affording assistance and participating in the trial process.[74] Even the United Kingdom preferred to play only an indirect role through a British 'advisor' and through working with the Iraqi Human Rights Minister.[75] Further, there was a shortage of trained and experienced staff, because the Iraqi judges, prosecutors and personnel who ran the tribunal had never dealt with the complex and sizable cases of violations that constitute international crimes. In addition, there was a considerable need for training and experience with regard to the management, conservation and utilisation of forensic evidence.[76]

1.1.2.1. The personal jurisdiction of the IHT

The personal jurisdiction of the IHT was also criticized, because it did not extended to cover the grave violations committed by the individuals and forces of the occupying power, such as the violations that occurred in Abu Ghraib prison.[77] According to Article 1(2) of its Law, the

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[72] Art. (130) of the Permanent Constitution of Iraq (PCI) of 2005.

[73] M. Cherif Bassiouni (n 2) 346.

[74] See, Nehal Bhuta (n 52) 20. See also Sarah Williams (n 69) 467.
For example, due to prevention by the UN Secretary-General, the ICTY did not respond to the request from the US on the training of the IST's judges and prosecutors. Sean D. Murphy, *United States practice in international law: Volume 2: 2002-2004* (Cambridge University Press, New York, 2005), 355-356.

[75] Eric Stover, Hanny Megally, and Hania Mufti, 'Bremer's 'Gordian knot': transitional justice and the US occupation of Iraq'. In: Naomi Roht-Arriaza and Javier Mariezcurrena, (ed), *Transitional justice in the twenty-first century: Beyond truth versus justice* (Cambridge University Press, Cambridge, 2006), 246. See also on the attitude of the United Kingdom, Report of the Foreign Affairs Committee of House of Commons on 'Human Rights Annual Report 2003, Fourth Report of Session 2003–04', 27-28.

[76] See, Nehal Bhuta (n 52) 19-20.

[77] Leila Nadya Sadat and Michael P. Scharf, (ed), *The theory and practice of international criminal law: Essays in Honor of M. Cherif Bassiouni* (Martinus Nijhoff Publishers, The Netherlands, 2008), 381-382. See also, Robert Cryer, *Prosecuting international crimes: Selectivity and the international criminal law regime* (Cambridge University Press, New York, 2005), 71-72. Stahn adds that the Coalition failed to establish mechanisms to ensure impartial and independent investigations of violations of international human rights and humanitarian law committed by the CPA and Coalition forces. CPA officials and Coalition forces personnel were exempted from the jurisdiction of Iraqi courts in civil, criminal and administrative matters. Later, this protection was even extended to cover foreign private actors, such as contractors or sub-contractors of the CPA. The system created an accountability gap for both public and private foreign entities which exceeded previous UN practice.

IHT had jurisdiction only upon Iraqi nationals and residents of Iraq who had committed crimes between 17 July of 1968 and 1 May 2005.[78] Therefore, this provision excluded the forces and individuals of the occupying power from the jurisdiction of the IHT. This provision was seen as complementary to the Order of the CPA No. 17, which prevented the Iraqi judiciary from prosecuting the personnel of the occupying power.[79] Despite this important criticism, the fact is ignored that an extension of the mandate of the IHT in order to make it possible to try occupying power personnel could threaten and undermine the entire trial process. It is not to be expected that the USA would allow its soldiers and personnel to be tried before a foreign court, or that the recently emerged Iraqi authorities would have the capacity to dispute the matter with the occupying power. In addition, any such dispute would have motivated the US to discontinue the provision of technical, logistical, financial support for the pursuit and capture of wanted members of the Ba'ath regime. As mentioned, it was the Americans who were mainly responsible for supporting the IHT and enabling it to achieve its objects and functions, especially since many countries were unwilling to lend such support. It seems that the Iraqi authorities chose to apply one important branch of justice rather than no justice at all.

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[78] Art. 1(Second) of the IHT Law No. 10) of 2005 set forth that '[T]he Tribunal shall have jurisdiction over every natural person, whether Iraqi or non-Iraqi resident of Iraq, accused of committing any of the crimes listed in Articles 11, 12, 13 and 14 of this law, committed during the period from 17 July 1968 to 1 May 2003, in the Republic of Iraq or elsewhere.'

[79] See, CPA Order No. (17) of 2004 on the 'Status of the Coalition Provisional Authority, MNF - Iraq, Certain Missions and Personnel in Iraq' (CPA/ORD/27 June 2004/17). Section (2)(1) on the 'Iraqi Legal Process' of this Order stipulates '[U]nless provided otherwise herein, the MNF, the CPA, Foreign Liaison Missions, their personnel, property, funds and assets, and all International Consultants shall be immune from Iraqi legal process.' Section (2)(3) also states that '[A]ll MNF, CPA and Foreign Liaison Mission Personnel, and International Consultants shall be subject to the exclusive jurisdiction of their Sending States. They shall be immune from any form of arrest or detention other than by persons acting on behalf of their Sending States, except that nothing in this provision shall prohibit MNF Personnel from preventing acts of serious misconduct by the above-mentioned Personnel or Consultants, or otherwise temporarily detaining any such Personnel or Consultants who pose a risk of injury to themselves or others, pending expeditious turnover to the appropriate authorities of the Sending State. In all such circumstances, the appropriate senior representative of the detained person's Sending State in Iraq shall be notified immediately.' It is notable that the US military courts held a number of trials to prosecute those members of the American forces who had perpetrated torture and other abuses in Abu Ghraib prison. Eleven of the accused were sentenced to imprisonment for up to ten years or to payment of fined. In addition, a number of countries such as Germany, Argentina, France, Sweden and Belgium conducted criminal procedures and laid charges against US political and military leaders, including former US Secretary of Defense Donald Rumsfeld because of the violation in Abu Ghraib prison. See, Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law* (Oxford University Press, New York, 2014), 143. See also, Naomi Roht-Arriaza and Menaka Fernando, 'Universal Jurisdiction'. In: Bartram S. Brown, (ed). *Research Handbook on International Criminal Law* (Edward Elgar Publishing Limited, United Kingdom, 2011), 363-365. Moreover, there were indictments for the commission of manslaughter, inhuman treatment, negligence and other offences directed by a General Court-Martial against a number of British soldiers. See for more details, Nathan Rasiah, 'The court-martial of Corporal Payne and others and the future landscape of international criminal justice' 7 (2009) *Journal of International Criminal Justice*, 177.

1.1.3. A traditional view challenging the jurisdiction of the IHT on international crimes

The other main and significant criticism concerning the competence of the IHT is with regard to the legality of the subject matter and the temporary jurisdiction of the application of international crimes listed in the IHT Law. The international crimes cited by the Statute of IHT differ slightly from those included in the Rome Statute. Articles 12 and 13 of the IHT Statute appear symmetrical with articles 7 and 8 of the Rome Statute, which relate to crimes against humanity and war crimes respectively. This means, therefore, that the Statute of the IHT depends on the Rome Statute in this respect.[80] However, this seems strange given that Iraq is non-party to the Rome Statute, and moreover the date of entry into force of the Rome Statute is July 2002, while the jurisdiction of the IHT predates this time by up to thirty-five years. That is why the IHT faced serious problems with respect to the principle of *nullum crimen sine lege* and the non-retroactivity of law. It is well known that many of the crimes within the category of crimes against humanity and war crimes appeared for the first time as new crimes *per se* in 1998 as a consequence of the Rome Statute. It cannot therefore be said that such new crimes could be construed as applying to past abuses carried out by Ba'athists. For instance, this argument is applicable to the crime of forcible transfer or internal displacement, whether as a crime against humanity *per se* or a war crime *per se* during an internal armed conflict. Such an argument does not, however, arise in the case of genocide, because the criminality of acts belonging to this category has been well-established since the International Convention on the Prevention and Punishment of the Crime of Genocide of 1948 (Genocide Convention).

A basic legal challenge that has given rise to serious debate is related to the temporary and substantive jurisdictions of the IHT. The temporal jurisdiction of the IHT authorises it to consider violations that occurred during the era of Ba'ath Party rule, that is, between 17 July 1968 and 1 May 2003.[81] This shows explicitly that the temporal jurisdiction is deemed to be applicable retroactively, because it came into force with Law No. 1 of 2003 and was then superseded by Law No. 10 of 2005 and was to deal with atrocities that preceded these Laws. Consequently, the charge of violation of the non-retroactivity of law was directed at the IHT.[82] What is even more controversial is the link between this retroactive or temporal jurisdiction and the substantive jurisdiction. The substantive jurisdiction has principally involved the international crimes of 'genocide crime, war crimes and crimes against humanity'. It is

[80] See and compare Arts. (12) and (13) of the IHT Statute of 2005 with Arts. (7) and (8) of the Rome Statute of 1998.
[81] Art. 2(Second) of the IHT Law.
[82] M. Cherif Bassiouni (n 2) 373-374.

apparent that the IHT's Statute depended on the Statutes of International Criminal Tribunals, and especially the Rome Statute, and some commentators have suggested that this was not an entirely wise option.[83] One view is that the subject matter of the jurisdiction of the IHT is in conflict with both Iraqi law and the status and definitions of international crime under customary international law prior to the 1990s. This view engenders doubt concerning the legal status of actions such as internal displacement or forcible transfer, and leads to the invocation of the principle of *nullum crimen sine lege.*

The defendants, their attorneys and others argued that the IHT's jurisdiction was a violation of the said legal principle, for the reason that Iraqi law, including IPL, which was effective during the Ba'athist era, had not included the aforesaid international crimes.[84] To this argument, some added the assertion that the Iraqi legal system is of a strict nature in dealing with the principle of legality.[85] This can be understood within an interpretation concerning the relationship between the Iraqi law and international law, since there is a view that international law does not enjoy an automatic influence upon the Iraqi domestic system of law.[86] The contrary view is that even if this argument on the legality of international crime within Iraqi law is correct, such legality can derived from international law itself and this would be sufficient.[87] From yet another perspective, it is asserted that the definitions of international crime contained in the IHT Statute are consistent with customary international law.[88] Nonetheless, there some who have not been entirely convinced with the latter supposition. E. Alvarez argues that the problem with the principle of *nullum crimen sine lege* is not that the IPL has no counterpart to international crimes, as long as the national courts can resolve such a problem by depending on customary international law and universal jurisdiction.[89] The problem is rather with the temporal remit of

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[83] Ilias Bantekas and Susan Nash (n 44) 576. See also, John C. Johnson (n 68) 38-39.

[84] See also, Michael A. Newton (n 47) 407. See also the briefs of the defence counsel on the legitimacy and the lack of jurisdiction of the IHT. See also, M. Cherif Bassiouni (n 2) 363, 365. See also, Christian Eckart (n 47) 16. See also, Michael Whaid Hanna, 'An historical overview of national prosecutions for international crimes'. In: M. Cherif Bassiouni, (ed), *International criminal law: International enforcement* (Volume III) (Martinus Nijhoff Publishers, Netherlands, 2008), 315.

[85] M. Cherif Bassiouni (n 2) 373. See also, Michael Whaid Hanna, ibid.

[86] M. Cherif Bassiouni, ibid, 275.

[87] Christian Eckart (n 47) 17. See also M. Cherif Bassiouni, ibid. See also Nehal Bhuta (n 52) 18. See also John C. Johnson (n 68) 39. In this respect, Shany annotates that the Tribunal has leeway to fulfil the principle of nullum crimen sine lege through the interpretation of international obligations or general principles of Iraqi criminal law. However, he indicates that this might reduce the credibility of the tribunal and any benefits of international legitimacy resulting from the jurisdictional parts of the international criminal tribunals' model being incorporated into the Iraqi Tribunal Statute. See, Yuval Shany, 'Does one size fit all?: Reading the provisions of the new Iraqi Special Tribunal Statute in the light of the Statutes of International Criminal Tribunals' 2 (2004) *Journal of International Criminal Justice*, 6-7.

[88] John C. Johnson (n 68). See also Christian Eckart (n 47) 17.

[89] Jose E. Alvarez (n 64) 320.

the jurisdiction of the IHT: it is disputable whether in 1994 international crimes existed as such in customary international law within the temporal boundaries of the IHT jurisdiction.[90] Relatedly, some writers opine that the principle of *nullum crimen sine lege* and non-retroactivity of law would be breached because there is a lack of suitability between the subject matter jurisdiction of the IHT and international law, which predates the 1990s.[91] Such writers take the view that, except for crime of genocide, the status of crimes against humanity and war crimes as customary international law is questionable with regard to most of the period of temporal jurisdiction of IHT.[92] Regarding crimes against humanity, there are two controversies. First, the definitions of sub-crimes under the heading of crimes against humanity listed in the IHT's Statute and adopted in its judgements have a wide-ranging scope by comparison with such definitions under customary international law during the period of the commission of Ba'ath abuses.[93] Potentially, this breaches the principle of *nullum crimen sine lege*.[94] For example, one observation used comment from Tomuschat concerning the International Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) when objected the jurisdiction of the IHT.[95] Tomuschat commented as follows:

> '[O]ne has to admit, however, that a formulation in writing of rules that supposedly pre-exist as customary norms may cross the line between codification and creation of new law. This difficulty may affect in particular Article 5 of the Statute of the International Tribunal for the Former Yugoslavia and article 3 of the Statute of the International Tribunal for Rwanda. It is by no means certain that before 1993 crimes against humanity had acquired the status of customary law with as large a scope as is attributed to them by those articles...It should also be noted, in this connection, that the International law Commission's Draft Code of Crimes against the Peace and Security of Mankind offers a widely divergent categorization of crimes against humanity, labelling them systematic or mass violations of human rights. Given this substantial difference in treatment, it might be argued that in some borderline cases the international and customary law character of the relevant offence has not been sufficiently established.'[96]

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[90] Ibid.
[91] Michael Whaid Hanna (n 84) 315. Yuval Shany (n 87) 6-7.
[92] Yuval Shany, ibid. See also Nehal Bhuta (n 52) 104.
[93] Olaoluwa Olusanya (n 45) 868. See also Nehal Bhuta, ibid. See also Michael Whaid Hanna (n 84) 315. See also Ilias Bantekas and Susan Nash (n 44) 576. For details on the development of definitions of crimes against humanity, see for example, Olivia Saak-Goldman, 'Crimes against humanity'. In: Gabrielle Kirk McDonald and Olivia Swaak-Goldman, (eds), *Substantive and procedural aspects of international criminal law: The experience of international and national courts* (2000) Vol. I Commentary (Kluwer Law International, Hague, 2000) 145-152.
[94] Nehal Bhuta, ibid.
[95] Olaoluwa Olusanya (n 45) 868.
[96] C. Tomuschat, 'International Criminal Prosecution: The Precedent of Nuremberg Confirmed' 5 CLF Vols. 2-3, 242(1994). Cited in: Olaoluwa Olusanya, ibid.

For example, it is debatable whether or not each sub-offence of forcible transfer, enforced disappearance, sexual slavery and forced prostitution handled as sub-crime *per se* under the category of crimes against humanity within the temporal boundaries of the IHT's jurisdiction or not.[97] If not, then the provisions and judgements of the IHT concerning, for example, the forcible transfer or forced internal displacements, violate the principle of *nullum crimen sine lege*. In some cases such as those of Al-Dujail, Al-Anfal and the Shiites Marshlands populations, the IHT criminalized and convicted Ba'ath actions of internal displacement under criminal framework of forcible transfer as sub-crimes *per se* of crimes against humanity, regardless of when these actions had occurred. The use of the word 'deportation' by one view shows that the IHT committed a legal error under Article 12(4) of its Statute owing to the fact that the Rome Statute described deportation as a sub-heading of crimes against humanity for the first time.[98] Indeed, the view mentioned is in disaccord with international instruments, since the deportation was included in the Charter of International Military Tribunal of Nuremberg of 1945 (Nuremberg Charter). In addition, this view does not differentiate between deportation and forcible transfer. In contrast, another view recognizes that deportation was a crime against humanity under customary international law, and then it finds no problem with the fact that the IHT adjudicates internal displacement cases under the title of deportation.[99] Thus, according to the latter view, the IHT has respected the principle of *nullum crimen sine lege* in relation to litigation in the cases of internal displacement as a crime against humanity *per se*, but it has not respected the principle according to the former view.

The second controversial matter concerning crimes against humanity in the IHT Statute is that such crimes need not have taken place in connection with a war or an armed conflict in order to be criminalized and prosecuted. In addition, it can be concluded, from the IHT's conduct of the Al-Dujail Case that its jurisdiction over peacetime crimes against humanity is not faced with the charge of having breached the principle of *nullum crimen sine lege,* since these crimes existed in conventional or customary international law.[100] The IHT certainly addressed many abuses, such as internal displacements, authored by the Ba'ath regime from 1968 until the1990s. A discussion held that such an approach on the part of the IHT might be in conflict with the definition of crimes against humanity as it stands in customary international law,

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[97] See also, Michael Whaid Hanna (n 84) 315. For a comparison of different definitions different times, see for example Olivia Saak-Goldman (n 93) 145-152.
[98] Jose E. Alvarez (n 64) 320.
[99] Bernhard Kuschnik (n 45) 474, 480. See also, L. Elizabeth Chablee, 'Post-war Iraq: Prosecuting Saddam Hussein' 7 (2004) *California Criminal Law Review*, 41.
[100] Ian M. Ralby (n 65) 337.

which predates the 1990s and which requires connection with a war.[101] This leads it to be said that the IHT has not complied with the principle of *nullum crimen sine lege* and of then non-retroactivity of law. A contrary perception would be that the IHT has adhered to that principle. This perception suggests that it is unnecessary to link those crimes against humanity considered by the IHT to an armed conflict under the customary international law that has existed since 1945.[102]

There is also contention with regard to war crimes. The Statute of the IHT resembles Article 8 of the Rome Statute, in that it involves serious violations of the Geneva Conventions, the Protocols thereto and the laws and customs of war, regardless of whether the violations were committed during international or non-international armed conflict. The opposing standpoints manifest that it is extremely unlikely that the criminal liability caused by violations of common Article 3 of the Geneva Conventions and its Additional Protocol II of (1977) relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) was established in customary international law which dates back to 1968.[103] This should be taken into account, even though Common Article 3 had acquired the status of a customary norm in the 1970s.[104] One commentator borrows the following words from Shraga and Zacklin on Article 4 of the ICTR and uses them in a criticism directed at the IHT Statute:

> '[I]n empowering the Rwanda Tribunal to prosecute persons responsible for violations of Article 3 common to the Geneva Conventions and Article 4 of Additional Protocol II, the Council has elected to follow less strict criteria for the choice of the applicable law than that which it adopted in the Statute of the Yugoslav Tribunal. Unlike the Yugoslav Tribunal which was empowered to apply provisions of a customary international law nature entailing the criminal responsibility of the perpetrator of the crime, the Rwanda Tribunal is empowered to apply provisions of Additional Protocol II which as a whole has not yet been recognized as part of customary international law, and of common Article 3 which for the first time has been read as founding criminal responsibility.'[105]

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[101] Nehal Bhuta (n 52) 19. See also Ian M. Ralby, ibid, 337. See also Michael Whaid Hanna (n 84) 315. Shany states that the most conspicuous indication of such uncertainty is Art. 5 of the ICTY Statute., which requires such a nexus. However, the Secretary-General's Report, appended to the Statute, insinuated that customary law does not require such a nexus. He comments that the literature is divided on the question of whether the removal of the nexus requirement in Art. 3 of the ICTR reflected existing law at the time. Yuval Shany (n 87) 7.

[102] M. Cherif Bassiouni (n 2).

[103] Eve La Haye, *War Crimes in Internal Armed Conflicts* (Cambridge University Press, New York, 2008), 267. See also, Ilias Bantekas, Susan Nash (n 44) 576. See also Nehal Bhuta (n 52) 19. See also Yuval Shany (n 87) 7. See also Mechael Whaid Hanna (n 84) 315.

[104] Eve La Haye, ibid.

[105] Olaoluwa Olusanya (n 45) 869. See, Daphna Shraga and Ralph Zacklin, 'Symposium towards an International Criminal Court: The International Criminal Tribunal for Rwanda' 7 (1996) *European Journal of International Law*, 510.

Consequently, it is revealed that the jurisdiction of the IHT on war crimes during internal armed conflict may not have abided by the principle of *nullum crimen sine lege*.[106] Such a conclusion influences on addressing acts of forced internal displacement as war crime *per se* during a non-international armed conflict, since the IHT Statute refers to this crime in the provision of Article 13(h).[107] Moreover, the IHT used this provision to criminalize and convict the practice of forcible transfer as war crime *per se* when it considered the Al-Anfal case, on the occasion of the internal armed conflict taking place in Northern Iraq in 1988s.[108] It is obvious that the said provision derived from Article 8 (2)(e)(viii) of the Rome Statute which is adopted in 1998 and entered into force in July 2002. Prior 1998, Article 17 of the Protocol II defined the displacement acts in time of internal armed conflict as a violation but without criminal liability. Therefore, the approach of IHT seems controversial; especially since Iraq is non-party to the Rome Statute and Protocol II.

1.2. The Ba'ath Party in power and the policies of the regime

It is important to show whether the abuses and atrocities committed by the Ba'ath Party were part of a deliberate and systematic policy or whether they were simply individual violations. This should be done in order to determine whether these abuses and atrocities can be criminalized as international crimes, particularly crimes against humanity, as will be discussed in a later chapter.

1.2.1. The Ba'ath Party and its route to power in Iraq

The Ba'ath Party held power in Iraq twice. It seized power by a military coup on 8 February 1963 in alliance with other nationalist faction that overthrew the republican regime of Abd al-Karim Qasim, who was killed in the Radio and Television building.[109] These events were the origin of the first Ba'ath republic, in which the party came to dominate state organs and institutions.[110] This Ba'athist republic remained in power for only nine months, after which

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[106] Nehal Bhuta (n 52) 19.

[107] See, Art. 13 (Fourth)(h) of the IHT Statute.

[108] Al-Anfal Trial Verdict Decisions (n 8).

[109] The Ba'ath Party firsts emerged in Syria in the 1940s, and became a presence in Iraq in the 1950s. During this time, Iraq was under the rule of the monarchy. The latter was brought to an end by the 14 July 1958 Revolution led by 'Abd al-Karim Qasim' who established a republican regime. A first attempt by the Ba'athists to seize the power from Qasim was an unsuccessful attempt to assassinate him in 1959. Hanna Batatu, *Iraq: Communists, Ba'thists and free officers* Translated by: Afif Al-Razzaz (Arab Research Foundation, Beirut, 1999), 29, 48. حنا بطاطو، *العراق: الشيوعيون والبعثيون والضباط الأحرار* ترجمة: عفيف الرزاز (مؤسسة الأبحاث العربية، بيروت، 1999).

[110] Although no Ba'ath party member held the post of President of the Republic it had de facto power through its domination on the membership of the National Council for the Command of the Revolution (NCCR) which was the highest legislative and executive authority. Ba'athists also dominated the composition of the government particularly the post of Prime Minister, military, political and security ministries and other senior positions.

power was seized by Abdul-Salam Arif (on 18 November 1963).[111] On 17 July 1968, the Ba'ath Party regained power by a coup that brought down the regime of 'the second Arif.'[112] The Ba'ath Party then controlled Iraq for thirty-five years, until the overthrow of the regime in 2003. During the Ba'ath party's rule, Ahmed Hassan Al-Bakr was named as president of Republic and head of the Revolutionary Command Council (RCC) and a commander of the Regional Command of the Ba'ath Party.[113] Saddam Hussein was the second most powerful officeholder in the power and the first in terms of exercising power on the ground and policy-making.[114] He served as Vice-President of the State and Vice-Chairman of the RCC, which was the highest political, legislative and executive authority and dominated all other institutions including the judiciary, security and the military.[115] In addition, he was a member of the Regional Command and head of the National Security Bureau of the Ba'ath Party.[116] He

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See, Kazem Habib, *Glimpses of the Iraq of twentieth century* (Aras Publishing House, Erbil, 2013), 25-28. Hanna Batatu, ibid, 317-318, 324-325.

كاظم حبيب، *لمحات من عراق القرن العشرين* (دار ناراس، اربيل، 2013).

[111] 'Abdul-Salam Aref' was one of the nationalist leaders who allied himself with the Ba'ath Party to get rid of the regime of 'Abd al-Karim Qasim' in the coup of 8 February 1963. After the coup he occupied the position of President of the Republic controlled by the Ba'ath Party. Later, he took advantage of discord between senior Ba'athists leaders discord and persuaded some Ba'athists to seize power from the Ba'ath Party (on 18 November 1963). Later, Arif excluded from his government those Ba'athists who had contributed to his coup. See, Hanna Batatu, ibid, 331-342. See also, Courtney Hunt, *The History of Iraq* (Greenwood Press, London, 2005), 81-82. See also, Adeed Dawisha, *Iraq: A Political History from Independence to Occupation* (Princeton University Press, New Jersey, 2009), 183-187.

[112] The government of the 'second Arif' (Abdul Rahman Arif) began in 1966 after his brother Abdul-Salam Arif' was killed in an airplane accident. On 17 July of 1968, the latter Ba'athists returned to power by a coup, after acts of treason by three officers who were mainly responsible for the protection of the regime of the second Aref. On 30 July of 1968, the Ba'athists eliminated two of those officers and attracted the third to their side. See, Hanna Batatu, ibid, 377, 389-393. See also, Adeed Dawisha, ibid, 187, 209-210.

[113] See, Hanna Batatu, ibid, 399-400. See also, Adeed Dawisha, ibid, 210-211. See also Courtney Hunt (n 109) 85.

[114] After the reign of the first Ba'ath government and in 1964, Saddam had become a member of the Interim Regional Command with the task of reshaping the Ba'ath Party in Iraq. In the coup of 17 July1968, he was one of those Ba'athists who entered the Republican Palace hidden in a military truck with the collusion of an officer in charge security. Ba'athists then seized the power from the Second Arif. See, Hanna Batatu, ibid, 399-400. See also, Adeed Dawisha, ibid, 210-211. See also Courtney Hunt, ibid, 85.

[115] Hanna Batatu, ibid, 399-400.

It is noteworthy that the head and vice-chairman of the RCC simultaneously occupies the position of President and Vice-President of the State. Security and military institutions were completely purges of non-Ba'athists and became subject to the management and will of the Ba'ath Party, whose members presided over commanding and influential positions, and spread within these institutions what was known as 'Altbaaith policy'. In this respect, the Human Rights Committee stated that it '[i]s deeply concerned that all government power in Iraq is concentrated in the hands of an executive which is not subject to scrutiny or accountability, either politically or otherwise. It operates without any safeguards or checks and balances designed to ensure the proper protection of human rights and fundamental freedoms in accordance with the Covenant. This appears to be the most significant factor underlying many violations of Covenant rights in Iraq, both in law and in practice.' See CCPR Report on 'Concluding observations of the CCPR in (61st Session) on considerations of Reports submitted by States Parties under article 40 of the Covenant - Fourth periodic report of Iraq' UN Doc. CCPR/C/79/Add.84 (19 November 1997), para. 7, 19. (Therein after Concluding observations of the CCPR on Fourth periodic report of Iraq).

[116] Ibid.

therefore controlled the departments of homeland security and civil and military intelligence.[117] Since the beginning he had prepared himself and mapped out arrangements to seize power from Ahmed Hassan al-Bakr. This goal was completely achieved in 1979.[118] From then onwards, Iraq moved from a one-party dictatorship to the dictatorship of the individual who led the party.[119]

1.2.2. A policy of terror as a most reliable instrument for the exercise of power

From the moment it seized power in the military coup of 8 February of 1963, and again in the second coup of 17-30 July 1968, the Ba'ath Party made every effort to be exclusive and tyrannical. This was so not only at the level of practice. More than that, it was through the constitutions, laws and other legislative or legal resolutions, especially those issued by the RCC and the NCRL as the highest political, legislative and executive authority which overrode all State institutions and organs.[120] In particular, the Ba'ath Party followed a 'tba'ith policy' to

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[117] Hanna Batatu, ibid, 400. See also, Adeed Dawisha (n 111) 211-Saddam's name first appears at the level of political events in 1959, when he participated with other Ba'athists in the attempted of assassination of Abd al-Karim Qasim. Later he appeared as one of the officials of the repressive security apparatus during the government of the first Ba'ath coup (8 February - 18 November 1963). In particular, he was a member of one of the repressive central commissions of inquiry created under the supervision of the Ba'ath Party in order to hunt down all those who were suspected of being loyal to Qassem or to the Communist Party, or to others whose loyalty to the Ba'ath party was dubious. These commissions committed egregious violations. Ali Karim Said Abdullah, *Iraq 8th February 1963: from the dialogue of conceptions to the dialogue of blood: Reviews in memory of Talib Ash-Shibib* (Dar Al Konoz Al- Adabiha, Beirut, 1999), 165. 175-178, 191-193.
علي كريم سعيد عبد الله، *عراق 8 شباط 1963: من حوار المفاهيم إلى حوار الدم: مراجعات في ذاكرة طالب شبيب* (دار كنوز الأدبية، بيروت، 1999).

See also, Courtney Hunt (n 111) 86.

[118] This happened after Saddam had purged the military, security and intelligence and other repressive organs from competitors and Ba'athist opponents. Those Ba'athists faced various charges and punishments. Saddam made elaborate allegations of plotting or planning a coup against the ruling regime. Many former Ba'athist leaders had to live abroad, and many others were murdered or convicted in sham trials and then either executed or killed in prisons. After 'Al-Bakr' had been forced to resign and pass power to Saddam, the latter and other Ba'athists executed and killed fellow Ba'athists who were loyal to the Al-Bakr or unwilling to transfer power to Saddam. This event was known as the leadership conspiracy, or the Khalad Hall meeting of 1979. In this meeting, Saddam called all the leaders and members of the Ba'ath party in Iraq to attend an emergency meeting where he alleged that there was a conspiracy involving some Iraqi Ba'athists and some 'Hafez al-Assad loyalists'. This was no more than a justification for culling all those others who were not convinced that the power should be transferred to Saddam. See, Adeed Dawisha, ibid, 210-214. See also, Courtney Hunt, ibid, 87, 88, 90. See also, Ali Karim Said Abdullah, ibid, 218, 345-3513. See also, Nathan Gonzalez, *The Sunni-Shia conflict: Understanding sectarian violence in the Middle East* (Nortia Press, California, 2009), 92. See also, Jawad Hashim, *Memories of Iraqi minister with Al-Bakr and Saddam: Memories in Iraqi politics 1967- 2000* (Dar Al-Saqi, 2003), 338-344.

جواد هاشم، *مذكرات وزير عراقي مع البكر وصدام: ذكريات في السياسة العراقية 1967- 2000* (دار الساقي، 2003).

[119] Adeed Dawisha, ibid, 216-219.

[120] See, Suad Joseph, (ed), *Gender and Citizenship in the Middle East* (Syracuse University Press, New York, 2000), 195-196. See also, Ali Karim Said Abdullah (n 117) 150.

ensure its control over society and its institutions.[121] The violence and widespread terror are a formative element of Ba'athist ideology. The founder of the Ba'ath Party had written:

> '[i]n this struggle [for Arab unity] we retain our love for all. When we are cruel to others, we know that our cruelty is in order to bring them back to their true selves, of which they are ignorant.'[122]

Al-Bakr and Saddam expressed themselves in more ferocious words. Al-Bakr had threatened that

> '[t]his time, I will not leave the presidential palace unless I am carried out in a coffin, ..., if anyone plots, even if he is my son Haitham, I will cut his throat'[123]

Saddam vowed that

> 'If anyone hinders the Revolution ... whether there is a thousand of them ... or two thousand ... or three thousand, ... I will cut off their heads without one of my hairs or a sliver of my heart pitying them.'[124]

It is no exaggeration to say that savage terror and large scale atrocities were a prominent feature of Ba'athist rule, both under its first republic (8 February-18 November of 1963) or the second republic of 1968-2003. In 1963, fierce repression and violence were practiced, especially by the Ba'athist militia, the 'Nationalist Guard' and commissions of inquiry, against supporters of the Iraqi Communist Party, army officers and other people who were deemed to have endorsed Qasim's regime or to have opposed the Ba'ath Party, regardless of whether such allegations were true.[125] After the coup of 1968, these atrocities and abuses became more brutal

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[121] This policy aimed to make society and its institutions such as education and its curriculums, police and army, unions and employment conform to the doctrine and will of the ruling Ba'ath Party In addition, the policy was to appoint Ba'athists and to exclude those whose loyalty was in doubt. For instance, a Ba'athist document emphasized that '[T]he next five years must be devoted to building an educational system compatible with the principles and aims of the Party and the Revolution. [...] New syllabuses must at once be prepared for every level from nursery school to university, inspired by the principles of the Party and the Revolution. [...] Reactionary bourgeois and liberal ideas and trends in the syllabus and the educational institutions must be rooted out. The new generation must be immunized against ideologies and cultures conflicting with our Arab nation's basic aspirations and its aims for unity, liberty and socialism.' See, Thabit A. J. Abdullah, *Dictatorship, Imperialism and Chaos: Iraq since 1989* (Fernwood Publishing, Nova Scotia, 2006), 26-27. See also, James DeFronzo, *The Iraq War: Origins and Consequences* (Westview Press, Boulder, 2010), 72.

[122] See, Thabit A. J. Abdullah, ibid, 29. See also, Adeed Dawisha (n 111) 215.

[123] Ali Karim Said Abdullah (n 117) 349.

[124] Mohammed Majid, *Saddam Hussein's cruelty: An attempt to provide an analysis of Saddam Hussein's personality" through the presentation and documentation of events during his era* (the House of Wisdom, Baghdad), 262.
محمد مجيد، *القسوة لدى صدام حسين: محاولة لتقديم تحليل لشخصية صدام حسين من خلال عرض وتوثيق الأحداث خلال عهده* (بيت الحكمة، بغداد).

[125] See for more details on the 'Nationalist Guard' and commissions of inquiry and their terror misdeeds, Kazem Habib (n 110) 43-68. See also Hanna Batatu (n 109) 283, 300-304. See also Suad Joseph (n 120) 195-196. See also Adeed Dawisha (n 111) 185. Before the seizure of power in 1963, the Ba'ath Party formed its own commissions that were converted after the coup into the Nationalist Guard militia and then recognised by law, although this militia was not subject to any State institution other than the Ba'athist officials. The militia was the

and were executed on a massive scale, with a huge number of casualties.[126] The Ba'ath regime employed all the State's military and security institutions in addition to its repressive organs in order to perpetrate these deeds.[127] The atrocities included assassinations, killings, extrajudicial executions or executions after short and artificial trials. There were mass executions and executions carried out in public places or during public celebrations, many of them shown on television or in the presence of relatives of the victims in order to spread terror.[128] Many were killed by the use of horrific methods. People were minced in a giant meat mincer, blown up by linking them to bombs, placed in basins of nitric acid, run over by motor vehicles, poisoned by thallium, drowned, incinerated, buried alive or sent explosive packages by post.[129] There was

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main tool for the implementation of the Ba'athist agenda of terror, murder and other serious violations, perpetrated even against government officials if they were not Ba'athists. Ali Karim Said Abdullah (n 117) 165-178.

[126] In this respect one author, Kanan Makiya '[m]akes an interesting claim that by 1980 "one fifth of the economically active Iraqi labour force was institutionally charged . . . with one form or another of violence." The slightest divergence (not even dissent) from state policy would result in years of incarceration and barbaric atrocities. People would be picked up from their homes, imprisoned and tortured for no reason other than appearing amused by an innocuous joke about the regime. School teachers were in a state of constant panic lest they said something in class that might contradict a passing utterance by Saddam. Even inside the supposed sanctity of the home, parents would be wary about saying something that might be related outside the home by their children. Families conversed in accordance with an Iraqi dictum, ilhitan 'idha adhan (the walls have ears). And when the reckless few attempted a move against the President, the sadistic wrath of the state would descend not just on the perpetrators, but on their families, clans, and villages as well. A horrific example of this were the assaults of genocidal proportions that the state waged against the Kurds in the late 1980s, and again in 1991, this time along with the Shi'ites. See also, Adeed Dawisha, ibid, 215. See also, Suad Joseph, ibid, 196-197. See also, Courtney Hunt (n 111) 84, 87.

[127] See, Ibrahim Al-Marashi, 'Saddam's security apparatus during the invasion of Kuwait and the Kuwiti resistance' 3 (2003) *The Journal of Intelligence History*, 63-69.

[128] Raef Ahmed, *Country of fear and land of horror: A study in the Republic of Saddam* (Zahra Arab Media, Cairo, 1990), 49-58.

رائف أحمد، *بلاد الخوف وأرض الرعب: دراسة في جمهورية صدام* (الزهراء للإعلام العربي، القاهرة، 1990).

See also, Aziz Sudanee, *Documents do not die: Evidence of the crimes of the Ba'ath Party.* Part III (Martyrs Foundation, Baghdad), 33-35, 136-138, 165-186. See also: Report of Iraqi Human Rights Ministry of the 'Proceedings of the Geneva Conference held in September of 2012 concerning the definition of the former regime's crimes', 18, 80-81. See also James DeFronzo (n 121) 71. Jenab Tutunji, 'Sources and consequences of human rights violations in Iraq'. In: Shale Horowitz, Albrecht Schnabel, (eds), *Human rights and societies in transition: Causes, consequences, responses* (United Nations University Press, 2004), 201. See also, UNCHR Report of the Special Rapporteur on 'Situation of human rights in Iraq, submitted by the UNCHR-UNESC in its (48th Session), pursuant to UNCHR Res. 1991/74,' UN Doc. E/CN.4/1992/31 (18 February 1992), paras. 40-50. (Therein after, Report of the Special Rapporteur of UNCHR of 1992 on Iraq). See also the UNCHR Report of the Special Rapporteur on 'Situation of human rights in Iraq, submitted to the UNCHR-UNESC in its (53rd Session), pursuant to UNCHR Res. 1996/72,' UN.Doc. E/CN.4/1997/57 (21 February 1997), paras. 9-14. (Therein after, Report of the Special Rapporteur of UNCHR of 1997 on Iraq). See also the UNCHR Report of the Special Rapporteur on 'Summary or arbitrary executions submitted to the UNCHR-UNESC in its (47th Session), pursuant to UNCHR Res. 1990/5,' UN.Doc. E/CN.4/1991/36 (4 February 1991), paras. 269-281. (Therein after, Report of the Special Rapporteur of UNCHR of 1991 on Iraq). See also the CCPR Report on 'Summary record of 1626th Meeting in (61st Session) on considerations of Reports submitted by States Parties under Article 40 of the Covenant - Fourth periodic report of Iraq,' UN Doc. CCPR/C/SR.1626 (22 January 1998), paras. 32, 37, 46. (Therein after, Summary record of the CCPR on Fourth periodic report of Iraq). See also Report of the Foreign and Commonwealth Office on 'Saddam Hussein: Crimes and human rights abuses' A report on the human cost of Saddam's policies (November 2002), 12-13. (Therein after, Report of the Foreign and Commonwealth Office)

[129] Raef Ahmed, ibid. See also, Aziz Sudanee, ibid, 33-35. See also, Report of Documenting Centre of the Violations of Dictatorial Regime on '*The most prominent crimes of the former dictatorial regime*, Iraqi Ministry of Human Rights', 15.

arbitrary arrest, lengthy detention in inhumane conditions, disappearances, abductions, torture, mistreatment and barbaric punishments [130] such as cutting off a hand, ear, foot or tongue; eye-gouging, tattooing of foreheads with an 'X,' and the use of electric shocks.[131] Other means of torture included burning and maiming of body parts by electric irons, boiling water or lighted cigarettes; scalping by boiling water, enforced sitting on piles of iron and glass, squashing of body parts using machines and a massive incidence of rape.[132] Other barbarities included violent beatings using kicks or various tools; dissolution of salt in the wounds, cells with wet paint on floors paint to prevent standing, sleeping, and sitting; cells filled with excreta and bad odours, and deprivation of use of the toilet.[133] Victims were tortured using devices that raised or lowered the temperature to insupportable levels, and by individual or mass rape.[134] The death penalty was imposed for minor infringements, such as making insulting remarks about Saddam or defacing pictures of him or making innocuous jokes about the regime.[135] The death penalty was inflicted with a sword on women, including many falsely charged with prostitution.[136] It was applied retroactively, as in the case of thousands members of the Shiite Islamic Dawa Party.[137] The perpetrators of these heinous violations did not distinguish between men, women, elderly, children and infants, and many cases punishments were imposed on entire families, or implemented before family members.[138] For example, burns were inflicted on a four- months-old infant before the eyes of her father in order to extract from him a confession that he belonged to the Islamic Dawa Party.[139] No one was free from the threat of violence. Although

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[130] UNCHR Res. No. (1991/74) on 'Situation of human rights in Iraq' UN Doc. E/CN.4/RES/1991/74 (6 March 1991). See also: Concluding observations of the CCPR on Fourth periodic report of Iraq (n 115) para. 8. See also Jenab Tutunji (n 128) 201.

[131] Abd al-Hadi Al-Rikabi, *Documents do not die: Black pages of the history of the Ba'ath Party* (Martyrs Foundation, Baghdad, 1430 Hijri/2009), 58-66.

عبد الهادي الركابي، *وثائق لا تموت: صفحات سوداء من تاريخ حزب البعث* (مؤسسة الشهداء، بغداد، 1430هـ/ 2009).

See also, Raef Ahmed (n 128) 36-42. See also Aziz Sudanee (n 128) 18. See also Report of the Special Rapporteur of UNCHR of 1992 on Iraq (n 128) paras. 51-57. See also Report of the Foreign and Commonwealth Office (n 128) 5-7, 21. See also, Concluding observations of the CCPR on the fourth periodic report of Iraq, ibid, para. 12.

[132] Abd al-Hadi Al-Rikabi, ibid. See also, Aziz Sudanee, ibid, 28-29. See also Report of the Special Rapporteur of UNCHR of 1992 on Iraq, ibid. See also Report of the Foreign and Commonwealth Office, ibid.

[133] Abd al-Hadi Al-Rikabi, ibid. See also, Aziz Sudanee, ibid. See also, Report of the Special Rapporteur of UNCHR of 1992 on Iraq, ibid.

[134] Abd al-Hadi Al-Rikabi, ibid. See also, Aziz Sudanee, ibid.

[135] Adeed Dawisha (n 111) 215. See also Concluding observations of the CCPR on Fourth periodic report of Iraq (n 115) para. 10-11, 16. See also Mohammed Majid (n 124) 31, 63-66. Many of these abuses took place outside legal and judicial contexts. The RCC, however, tried to cover such abuses by law by passing a resolution that imposed the death penalty and life imprisonment, with expropriation of real and movable property and funds. See, RCC Res. No. (840) on (4 November 1986).

[136] Report of the Foreign and Commonwealth Office (n 128) 7-9.

[137] Concluding observations of the CCPR on Fourth Periodic Report of Iraq (n 115) para. 10-11. See also Abd al-Hadi Al-Rikabi, ibid, 46.

[138] Report of the Foreign and Commonwealth Office (n 128) 6.

[139] Abd al-Hadi Al-Rikabi, ibid.

directed primarily at members of ethnic, religious, national and political groups, the violence was also inflicted on journalists, military personnel, intellectuals, students, doctors, academics, athletes, scholars, writers, artists, merchants and other Iraqi people; irrespective of whether or not there were legitimate reasons for believing them to be guilty.[140]

1.2.3. Ba'athist policies of discrimination and persecution

Membership of any political party other than the Ba'ath party, or the endorsement or publication or possession of the publications of any other party was enough to charge and supress tens thousands of persons under titles of conspiracy, espionage or as agents in favour of foreign agencies and States against Iraq interests and its internal and external security.[141] This happened particularly to the Islamic Dawa Party, the Communist Party, the Kurdistan Democratic Party and the Patriotic Union of Kurdistan.[142]

The ethnic and sectarian origin of the formation of the Ba'ath Party that led the coup of 1968 affected its policy, since the most influential policy-makers were derived from the Arabic Sunni group.[143] Consequently, this put other religious, ethnic or/ and nationalist groups under suspicion, and these groups suffered most from massacres and persecution.[144] The majority of Iraqi people are Shia, and the Ba'ath regime focussed on identifying and eliminating the two principal sources of Shia power. These were the religious establishment of 'Al-Hawza Al-eilmiyah', led by the 'Marjieiat,'religious and spiritual leaders with the title of 'Grand Ayatollah'; and the Husseini religious rites.[145] The Ba'ath regime created a special intelligence branch to deal with the Hawza and clerics.[146] Early in its rule, in 1969, during the time of the

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[140] Suad Joseph (n 120) 195-197.

[141] See, Abd al-Hadi Al-Rikabi (n 131) 26-29. See also, Aziz Sudanee (n 128) 151-165. See also, Report of the Special Rapporteur of UNCHR of 1992 on Iraq (n 128) paras. 52, 76-80. See also, Hanna Batatu (n 109) See also Adeed Dawisha (n 111) 185. See also Thabit A. J. Abdullah (n 121) 28-29. See also Concluding observations of the CCPR on Fourth periodic report of Iraq (n 115) para. 16. See also James DeFronzo (n 121) 71. See also, Jenab Tutunji (n 128) 201. See also, Report of the Center of Halabja against Anfalization and genocide of the Kurds on 'Anfal: The Iraqi State's Genocide against the Kurds' (The Center of Halabja against Anfalization and genocide of the Kurds 'CHAK', 2007), 11.

[142] There were other political groups prohibited and persecuted by the Ba'ath regime, See Aziz Sudanee, ibid, 151-165.

[143] Hanna Batatu (n 109) 397-400. See also Courtney Hunt (n 111) 86. See also Adeed Dawisha (n 111) 236. See also Marius Lazar, Ecaterina Cepoi, 'Sh'ism and State in contemporary Iraq: From discrimination to political power' 16 (2014) *The Romanian Journal of Society and Politics*, 118-119. See also James DeFronzo (n 121) 69-71. See also, Vali Nasr, *The Shia revival: How conflicts within Islam will shape the future* (W.W. Norton and Company Ltd., New York, 2006), 186-187. See also, Nathan Gonzalez (n 118) 92.

[144] Marius Lazar and Ecaterina Cepoi, ibid. See also Hanna Batatu, ibid.
Concluding observations of the CCPR on Fourth periodic report of Iraq (n 115) para. 20.

[145] See also, for example, Marius Lazar and Ecaterina Cepoi (n 143) 119-120. See also Abbas Kadhim, 'The Hawza under siege: A study in the Ba'th party archive' Occassional Paper 1 (2013) *Boston University Institute for Iraqi Studies*.

[146] Peter Sluglett, 'Shi'i actors in late nineteenth and twentieth century Iraq: A brief introduction and a survey of the literature'. In: Iraqi history and economics, 3 (2012) *The Singapore Middle East Papers*, 12.

Husseini rites, religious leaders in the Shiite holy cities were assaulted and a number of the clerics and students of religious schools deported to Iran.[147] This sparked protests among the followers of the Hawza and Shiite leaders, to which the regime responded with detentions and a campaign of torture.[148] The regime attempted to extract false confessions from detainees that Al-Hawza harboured three hundred spies and agents of foreign powers.[149] Later, religious study was harassed and Shia schools were reduced to a minimum by closing or destroying them, meanwhile, students and clerics and their families and relatives faced violent and bloody repression.[150] The regime killed many of the Grand Ayatollahs and their relatives and votaries,[151] and the campaign then expanded to the persecution of other Shia people. Rigid control was imposed over Shia holy shrines, mosques and other institutions, and many were destroyed.[152] From 1969 onwards, the Ba'athites prevented and suppressed various rituals and practices, especially the most essential one, which is called the 'Husseini rites' or 'Ashura rites'.[153] This gave rise to disaffection among the Shia and led to further bloody events.[154] The persecution increased greatly after the Iran-Iraq war began in 1980, because of the majority of Iranians and the new religious regime there were Shia and this raised concerns among the Ba'ath leadership.[155] This persecution amounted to genocide during and after the 'Al-Sha'bania Uprising' of 1991. The government campaign of repression resulted in large-scale massacres and mass graves.[156] The slogan 'No Shia after today' was written on the military's tanks as

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[147] Peter Sluglett, ibid 10, 12. See also, Abd al-Hadi Al-Rikabi (n 131) 23-24. See also Tripp Charles, A *History of Iraq* (Cambridge University Press, Cambridge, 2002), 202.

[148] Peter Sluglett, ibid 12. See also, Abd al-Hadi Al-Rikabi, ibid.

[149] Peter Sluglett, ibid 12. See also Abd al-Hadi Al-Rikabi, ibid, 24. See also Hamid Al-Bayati, *From dictatorship to democracy: An insider's account of the Iraqi opposition to Saddam* (University of Pennsylvania Press, Philadelphia, 2011), 18-19.

[150] See also Tripp Charles (n 147) 202-203. See also Abbas Kadhim (n 145) 18-22.

[151] See, Aziz Sudanee, *Scholars martyrs and religious seminary students* (Establishment of Martyrs, 2012). See also Vali Nasr (n 143) 187-188.

[152] See, Human Rights Watch, 'The Iraqi Government Assault on the Marsh Arabs' *Briefing Paper*: Human Rights Watch (January 2003), 2-4. (Therein after, The Iraqi Government Assault on the Marsh Arabs).

[153] Nir Rosen, *In the belly of the green bird: The triumph of the martyrs in Iraq* (Free Press, New York, 2006), 6.

[154] Peter Sluglett (n 146) 12. See for more details, Abd al-Hadi Al-Rikabi (n 131) 30-38. See also Abbas Kadhim (n 145) 17-18.

[155] See Karen Dabrowska and Geoff Hann, *Iraq Then and Now: A Guide to the Country and Its People* (Bradt Travel Guides Ltd., England, 2008), 15. See also, Hossein Askari, *Conflicts in the Persian Gulf: Origins and Evolution* (Palgrave Macmillan, New York, 2013), 35-36. See also, Courtney Hunt (n 111) 95. See also M. R. Alborzi, *Evaluating the Effectiveness of International Refugee Law: The Protection of Iraqi refugees* (Marinus Nijhoff Publishers, Leiden, 2006), 17-18.

[156] John Ehrenberg, J. Patrice McSherry, Jose Ramon Sanchez, and Caroleen Marji Sayej, (eds), *The Iraq Papers* (Oxford University Press, New York, 2010), 216-217. See also Hossein Askari, ibid, 36-37. See also See, Courtney Hunt, ibid, 102. See also M. R. Alborzi, ibid, 19-20.

they attacked the holy shrines and Shia cities.[157] Atrocities and massacres were also committed against the Shiite Faili Kurds and the Shia in Al-Dujail town and in the Marshlands regions.

The Kurdish people have a long history of armed rebellion against all Iraqi governments. The atrocities committed against them under the Ba'ath regime, however, reached extreme levels. In 1969, the Ba'ath regime and Kurdish opposition groups were involved in combative clashes.[158] These were suspended by an agreement on 11 March 1970, promising the Kurds autonomy and recognising their ethnic and national rights.[159] After a lull in hostilities between the two parties, government forces attacked and banished a number of people and officials from some Kurdish villages and replaced them with members of Arab clans in disputed areas.[160] The Arabic language was imposed in schools in place of Kurdish,[161] and the Ba'athists made two attempts to assassinate the Kurdish leader Mustafa Al-Barzani, although both were unsuccessful.[162] On the Kurdish side, there were provocations because of their relations and cooperation with Iran and the United States and because of the increase in Kurdish demands.[163] In 11 March 1974, the RCC released the law of 'Autonomy for the Kurdistan Region', which the Kurdish leaders rejected on the grounds that it did not meet with their aspirations, did not grant them real power and moreover excluded some of the Kurdish areas.[164] Consequently, fighting broke out again between April 1974 and April 1975.[165] Government forces shelled Kurdish villages and the civilian population, causing massacres, and committed extensive

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[157] John Ehrenberg, J. Patrice McSherry, Jose Ramon Sanchez and Caroleen Marji Sayej, ibid, 216-217. See also Hossein Askari, ibid, 36-37. See also See, Courtney Hunt, ibid, 102. See also M. R. Alborzi, ibid, 19-20.

[158] See, Hamid Mahmoud Issa, *The Kurdish issue in Iraq: From the British occupation to the American invasion 1914-2004* (Al-Arabiya for printing and publishing, Cairo, 2005), 363.
حامد محمود عيسى، *القضية الكردية في العراق: من الاحتلال البريطاني إلى الغزو الأميركي 1914-2004* (العربية للطباعة والنشر، القاهرة، 2005).

[159] Hamid Mahmoud Issa, ibid, 352-358, 363-364. See also Kerim Yildiz, *The Kurds in Iraq: The past, present and future* (Pluto Press, London, 2004), 17-19. See also David McDowall, *A modern history of the Kurds* (I.B.Tauris, 2004), 327-328.

[160] Hamid Mahmoud Issa, ibid, 365-366. See also David McDowall (n 158) 332.

[161] Hamid Mahmoud Issa, ibid. See also David McDowall, ibid.

[162] Hamid Mahmoud Issa, ibid, 366. See also David McDowall, ibid, 330, 332.

[163] See, David McDowall, ibid, 349-350.

[164] For more details, see Gerard Chaliand, (ed). *A People Without a Country: The Kurds and Kurdistan* (Zed Books Ltd., London), 162-165. See also, Hamid Mahmoud Issa (n 158) 367-368. See also Kerim Yildiz (n 159) 20-22. For the Kurdish objections, see David McDowall, ibid, 335-336.

[165] The agreement of 11 March 1970 was a tactical step by the regime to gain time and postpone the conflict until it had attained a more powerful position politically and militarily in relation to the Kurdish nationalist movement and the armed groups of the 'Peshmerga'. Three conventions helped the regime to take such a position. These conventions were first with the Soviet Union, Turkey, and then the regime of Shah in Iran. On the basis of the 'Algeria Convention' of 1975 signed between Iraq and Iran, the latter had ceased its support for the Kurdish armed groups. This led to the collapse of these groups and forced Mustafa Barzani to terminate the conflict on 19 March 1975.

violations and acts of expulsion in villages under their control.[166] After that time, many clashes took place and the Kurdish people suffered from ethnic cleansing, 'Arabisation' and abuses that culminated in the horrific chemical attacks on Halabja, which killed 5000 people, and the Al-Anfal campaigns, which resulted in 182,000 deaths and the destruction of some 5,000 villages.[167] This is in addition to other atrocities committed against 5000-8000 thousand people of the Barzani tribe, who were arrested, transferred and never seen again.[168]

Other minorities, such as the Assyrian Christians, Yazidis, Mandaeans, Turkmen, Assyrians, and Shabaks suffered from Ba'athist policies of terror, especially in the context of the Arabisation policy, as described below.

1.2.4. The Ba'athist policy of displacement and demographical change

Forced displacement constituted a firm and strategic policy throughout the era of the Ba'ath regime, and was carried out on a massive scale with people belonging to various religious, ethnic and/ or nationalist groups. As with other abuses, these began in the early years of the regime and increased in later years.

From 1974 onwards the government executed many campaigns of forced displacement against the Kurds. During the armed conflict of 1974, thousands of Kurdish families were expelled from their homes, while others were forced to flee due to a scorched earth policy and the use of phosphorus and napalm bombs and heavy aerial and artillery shelling.[169] The government resettled the displaced families in insanitary camps.[170] Even after a ceasefire, the government launched a revenge campaign, transferring Kurdish people and resettling them in western, southern and central Iraq in what were described as modern governmental complexes. The families transferred to these complexes underwent severe censorship and house arrest, and they lost their property and assets owing to arbitrary confiscation without just compensation.[171] At

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[166] Hamid Mahmoud Issa (n 158) 370-371. See also Kerim Yildiz (n 159) 23. Shelling was aimed even at schools and hospitals, as happened in the massacre of 'stubble Qala Diza' in 14 April 1974.

[167] Jamis Stokes, (ed), *Encyclopedia of the Peoples of Africa and the Middle* East (Facts on File, New York, 2009), 388. See also M. R. Alborzi (n 155) 28. See also Report of the Center of Halabja against Anfalization and genocide of the Kurds (n 141) 19-33. See also Courtney Hunt (n 111) 95. See also Abd al-Hadi Al-Rikabi (n 131) 71-80. See also, Bakr Hamah Seddik Arif, *Halabja in face of toxins of death: A legal reading on the reality of event and the papers of the Supreme Iraqi Criminal Tribunal* (2014).
بكر حمه صديق عارف، *حلبجة في مواجهة سموم الموت: قراءة حقوقية في واقع الحدث واوراق المحكمة الجنائية العراقية العليا* (٢٠١٤).

[168] Report of the Center of Halabja against Anfalization and genocide of the Kurds, ibid, 11. See also Abd al-Hadi Al-Rikabi (n 131) 77.

[169] Raef Ahmed (n 128) 74, 75.

[170] These camps were made from reeds and papyrus, lacked the necessities of life and were vulnerable to destruction by fires or rain. See, Raef Ahmed, ibid.

[171] Raef Ahmed, ibid, 75. See also, Kerim Yildiz (n 159) 62-63.

the same time, the government used force or enticement to bring Arab tribes to settle in the Kurdish villages.[172]

In the 1970s, the Ba'ath regime implemented a policy of Arabisation (ta'rib), which was plan to erase the identity of non-Arab minorities and record them as of Arabic nationality.[173] The practice of naming new born children by traditional ethnic names was banned,[174] and minorities were prevented from dealing in property deals, registering their marriages, exercising their businesses and attending schools.[175] Moreover, this policy aimed to change the demography of the regions inhabited by minorities and replace them with Arab tribes,[176] or by severing some regions from a province and connecting them with another, and in addition renaming a number of regions using Arabic names.[177] Sometimes the government pressed the minorities to choose between changing their ethnicity and nationality or transfer from their homes and dismissal from their employment.[178] Meanwhile the government demolished, bulldozed and burned villages, land and houses, or confiscated them and gave them to Arabic tribes.[179] It is notable that the State authority codified these displacements with legal resolutions and decrees, and invalidated deeds of property and land by recorded them as the property of the State or of the new Arab settlers.[180] Although the Kurds were the most affected, other

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[172] Raef Ahmed, ibid, 76.

[173] Charis Ulack, 'Demography of race and ethnicity in Iraq'. In: Rogelio Saenz, David G. Embrick and Nestor P. Rodríguez, (ed), *The International Handbook of the Demography of Race and Ethnicity* (Springer, 2015), 375-376. See also, Joshua Castellino and Kathleen A. Cavanaugh, *Minority Rights in the Middle East* (Oxford University Press, Oxford, 2013), 200-201. See also, Kelsey Shanks, *Education and ethno-politics: Defending identity in Iraq* (Routledge, New York, 2016), 43-46.

[174] Joshua Castellino and Kathleen A. Cavanaugh, ibid.

[175] Farnaz Fassihi, *Waiting for an ordinary day: The unraveling of life in Iraq* (PublicAffairs, New York, 2008), 47. See also, John Fawcett and Victor Tanner, 'The internally displaced people of Iraq' An Occasional Paper (2002) *The Brookings Institution–SAIS Project on Internal Displacement*, 12.

[176] Charis Ulack (n 173) 200-201. See also Report of the Center of Halabja against Anfalization and genocide of the Kurds (n 141) 7. See also Eric Stover, *Unquiet graves: The search for the disappeared in Iraqi Kurdistan* (Human Rights Watch, 1992), 5.

[177] Mahir A. Aziz, *The Kurds of Iraq: Nationalism and identity in Iraqi Kurdistan* (I.B. Tauris Publishers, 2011), 75-76.

[178] Joshua Castellino and Kathleen A. Cavanaugh (n 173) 201. See also, Joseph Sassoon, *Saddam Hussein's Ba'th Party: Inside an authoritarian regime* (Cambridge University Press, New York, 2012), 217. It is noteworthy that the regime frequently exiled people and dismissed employees, even those that belonged to the minorities but had changed their nationality or ethnicity to Arab. See, Jabbar Qadir, *Contemporary Kurdish issues: Kirkuk, Anfal, Kurds and Turkey* (Aras Publishing House, Erbil, 2006), 80-81.
جبار قادر، *قضايا كردية معاصرة: كركوك - الأنفال - الكرد وتركيا* (دار ناراس، اربيل، 2006).

[179] Hania Mufti and Peter Bouckaert, *Iraq, Claims in Conflict: Reversing Ethnic Cleansing in Northern Iraq* (Human Rights Watch, New York, 2004), 7-13. See also the Report of Hammurabi Human Rights Organization (HHRO) on 'the Situation of Iraqi Minorities' (2011), 33-34. (Therein after, HHRO Report on the Situation of Iraqi Minorities). See also, John Fawcett and Victor Tanner (n 175) 12.

[180] Hania Mufti and Peter Bouckaert, ibid.

minorities such as the Yazidis, Mandaeans, Turkmen, Assyrians[181] Syriacs, and Shabaks[182] suffered in the same ways due to the Arabisation policy.[183] These measures show that the displacements were planned to be permanent, especially since the displaced were forbidden to come back to their areas. The displacement campaign reached a critical degree during the Halabja and Al-Anfal attacks, as will be seen in a later chapter.

Shiites had undergone the several campaigns of the forced displacement as part of the Ba'athist policy of systematic persecution.[184] Tens of thousands had been expelled to Iran under the policy of 'taba'iya iraniya' in 1969,[185] and there were special campaigns to displace the Shia of Feyli Kurds, the Shia of the Al-Dujail town and the Marshland regions. Regarding the Feyli Kurds, they had experienced the organised campaigns of ethnic cleansing and other violations in 1969, and also in 1971 and 1972, when tens of thousands of them had been deported to Iran.[186] These campaigns expanded greatly after the outbreak of Iran-Iraq war in 1980 to encompass 500,000 people and comprised whole families.[187] The pretext used by the regime was the 'taba'iya Iraniya', which meant that the Feyli Kurds were Iranian nationals and not Iraqis.[188] On this basis, the Feyli Kurds were stripped of their Iraqi nationality and documentation and their property, capital and personal effects confiscated.[189] The conditions in the camps and prisons to which they were sent were dire. Men and women were separated

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[181] See also, John Fawcett and Victor Tanner (n 175) 13-14.

[182] Michael M. Gunter, *The A to Z of the Kurds* (Scarecrow Press, Inc., Lanham, 2003), 183. See also Joseph Sassoon (n 178) 217.

[183] Joshua Castellino and Kathleen A. Cavanaugh (n 173) 200-201. See also, HHRO Report on the Situation of Iraqi Minorities (n 179) 33-34.

[184] See also M. R. Alborzi (n 155) 18, 20.

[185] Thabit A. J. Abdullah (n 121) 33-34. See also Tripp Charles (n 147) 202.

[186] Munir Murad, 'The situation of Kurds in Iraq and Turkey: Current trends and prosepects'. In: Philip G. Kreyenbroek and Stefan Sperl, *The Kurds: A contemporary overview* (Routledge, 2005), 100-103. See also Ali A. Allawi, 'The State and intergroup violence: The case of modern Iraq' In: Abdelwahab El-Affendi, (ed), *Genocidal nightmares: Narratives of insecurity and the logic of mass atrocities* (Bloomsbury, 2015), 178-179. See also Thabit A. J. Abdullah, ibid. See also Database of the Norwegian Refugee Council/Global IDP Project on 'Profile of internal displacement: Iraq, Compilation of the information available in the Global IDP Database of the Norwegian Refugee Council (as of 19 February 2004)', 12. (Therein after, Profile of internal displacement: Iraq.)

[187] Thabit A. J. Abdullah, ibid. See also Profile of internal displacement: Iraq, ibid. See also, Mundhir Al-Fadal, *Studies on the Kurdish case and the future of Iraq* (Aras Publishing House, Erbil, 2004), 70-72.
منذر الفضل، *دراسات حول القضية الكردية ومستقبل العراق* (دار ناراس، اربيل، 2004).
See, RCC Res. No. (666) of 7 May 1980. See also, Document of Presidency Bureau No. (Q/16/7415) on (7 June 1983). See also Document of Presidency Bureau No (S/40268) on (9 November 1988).

[188] Profile of internal displacement: Iraq, ibid. See for more detail, Munir Murad (n 186) 100-103.

[189] Thabit A. J. Abdullah (n 121) 33-34. See also Zuhair Kazem Abboud, *Legal liability in the case of Faili Kurds* (Aras Publishing House, Erbil, 2007), 68.
زهير كاظم عبود، *المسؤولية القانونية في قضية الكرد الفيليين* (دار ناراس، اربيل، 2007).
See also Mundhir Al-Fadal (n 187) 70-71, 77. See also RCC Res. No. (1131) of 18 August 1980). See also RCC Res. No. (1194) of 2 November 1980). See also RCC Res. No. (456) of 15 April 1985. See also Document of Presidency Bureau No 15227 of 25 December 1980. See also Telegram of the Ministry of Interior No. (2884) of 4 October 1980.

and many people were tortured and murdered.[190] Later, trucks moved families to the border regions, where they were forced at gunpoint to walk for several days across rugged territory and minefields toward the Iranian borders.[191] Many among the elderly, the women, the children and patients died under conditions of rain, snow, hunger and thirst, etc.[192] Thousands of male detainees between the ages of 18 and 28 years were taken away and detained for long periods under inhumane conditions in remote camps.[193] Later, those detainees were killed either by sending them to landmine locations or using them as laboratory samples for the purposes of testing the effectiveness of chemical weapons.[194] The RCC also released a resolution requesting Iraqis to divorce wives or husbands who were Feyli Kurds.[195]

Al-Dujail town was exposed to an organized campaign of violent revenge and collective punishment after a failed attempt to assassinate Saddam in 1982. Families including women, children and infants were arbitrarily arrested and ruthlessly tortured, while a number died under torture, 148 victims were executed after a sham trial.[196] Those families who remained alive were imprisoned in Abu Ghraib jail, and then transferred to the infamous 'Nugrat Al-Salman' camp which was located in Samawa in the southern Iraqi desert, near the border with Saudi Arabia.[197] During this time, a plan to destroy the town by demolishing the houses and bulldozing the lands and orchards was carried out.[198] Other campaigns targeted Shiite Marshlands dwellers, and some particularly harsh actions took place during the period 1989 to 1994. While the government professed that the draining of the marshlands was for reclamation and expansion of land suitable for agriculture,[199] surviving documents assert the falsity of this pretence. 'Plan of action for the Marshes', as it was called in a governmental document, reveals that the aim was the systematic destruction of the ecosystem and way of life of the Marshlands people in order to compel them to leave their land.[200] To achieve such an aim, there were

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[190] Zuhair Kazem Abboud, ibid.
[191] Ibid.
[192] Zuhair Kazem Abboud, ibid, 150. See, Telegram of the Ministry of Interior No. (2884) of 4 October 1980.
[193] Zuhair Kazem Abboud, ibid, 81. See also, Mundhir Al-Fadal (n 187) 70.
[194] Zuhair Kazem Abboud, ibid, 68, 73, 81. See also Mundhir Al-Fadal, ibid, 70, 77.
[195] RCC Res. No. (474) of 15 April 1981. See also RCC Res. No. (150) of 28 January 1980. See also, Document of RCC Secretariat Bureau No. (31/13/2469- secret and personal) on (22 April 1981).
[196] Michael J. Kelly, *Ghosts of Halabja: Saddam Hussein and the Kurdish genocide* (Praeger Security International, Westport, 2008), 70-72.
[197] Zuhair Kazem Abboud, *Al-Dujail case and the end of Saddam* (Aras Publishing House, Erbil, 2007), 15-16. زهير كاظم عبود، *قضية الدجيل ونهاية صدام* (دار ناراس، اربيل، 2007).
[198] Ibid.
[199] See also M. R. Alborzi (n 155) 20.
[200] The Iraqi Government Assault on the Marsh Arabs (n 152) 7, 8, 13-14. See also, Report of the Hearing before the Subcommittee on the Middle East and Central Asia of the Committee on International Relations - House of Representatives on 'United States and the Iraqi Marshlands: An environmental response, One Hundred Eighth Congress (2nd Session)' Serial No. 108–74 (24 February 2004), 1, 9-10. See also Usam Ghaidan, 'Damage to

killings, executions, torture, detention, forcible disappearances, persecution on religious and political grounds, random shelling and shooting, poisoning of water supplies, burning and demolition of homes, starvation through economic embargo; withdrawal of food agencies; and prohibition of the grazing and hunting, which were essential to the livelihood of the Marshland population.[201]

1.3. Statement, questions and methodology of thesis

1.3.1. Thesis statement and questions

1.3.1.1. Thesis statement

This thesis focuses on the abuses of the past, especially the acts of forced internal displacement committed prior the entry into force of the Rome Statute of ICC,[202] and also discusses how such abuses may be addressed under international criminal law. The Statute and judgements of the IHT, which are based on international law, found that the acts of forced internal displacement that occurred in Iraq during the era of the Ba'athist regime were international crimes *per se* under sub-heading of 'crimes of forcible transfer' or/ and 'forced displacement'.[203] It is noteworthy that such a stance is derived from the provisions of Articles 7(1)(d), 7(2)(d) and Article 8(2)(e)(viii) of the Rome Statute, which are related to the criminal framework of forcible transfer as crime *per se*.[204]

This thesis will demonstrate that the reliance on international law by the domestic Iraqi High Criminal Tribunal (IHT) is an inadequate and invalid basis for the prosecution of internal

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Iraq's wider hertige'. In: Peter G. Stone and Joanne Farchakh Bajjaly, (ed), *The destruction of Cultural Heritage in Iraq* (The Boydell Press, Woodbridge, 2008), 90. See also Donald K. Anton and Dinah L. Shelton, *Environmental protection and human rights* (Cambridge University Press, New York, 2011), 718-719. See also U. C. Jha, *Armed Conflict and Environmental Damage* (Vij Books India Pvt Ltd, New Dehi, 2014), 141-143.

[201] The Iraqi Government Assault on the Marsh Arabs, ibid, 1-2, 7-11. See also M. R. Alborzi (n 155) 20. See also Susan Madoff, (ed), *Discovering world cultures: The Middle East: Iran, Iraq, Israel*, Vol.2 (Greenwood Press, Westport, 2004), 44.

[202] As mentioned before, the Rome Statute was adopted in 1998, and came into force in July of 2002.

[203] The temporal Jurisdiction of the IHT covers the whole period in which the Ba'ath Party held power. Accordingly, Art. (1)(Second) of the Statute states that '[T]he Tribunal shall have jurisdiction over ... those accused of committing any of the crimes listed in Articles 11, 12, 13 and 14 of this law, committed during the period from 17 July 1968 to 1 May 2003'.

[204] Art. (7)(1)(d) of the Rome Statute includes 'Deportation or forcible transfer of population' as a sub-heading of crimes against humanity per se. Art. (7)(2)(d) of the Statute lays down that the 'Deportation or forcible transfer of population' means forced displacement of the persons concerned, by expulsion or other coercive acts, from the area in which they are lawfully present, without grounds permitted under international law.' Regarding the war crimes committed during an internal armed conflict, it is stipulated that the displacement is a sub-crime of the aforementioned crimes according to Art. 8(2)(e)(viii) of the Rome Statute, which forbids '[O]rdering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand.' The same text appear in Arts. 12(First)(d) and 12(Second)(d) of the Statute of the IHT in relation to crimes against humanity, and Art. 13(Fourth)(h) of the said Statute in relation to war crimes during a non-international armed conflict.

displacement as the crime of forcible transfer in itself. International law, however, could provide other criminal frameworks based on specific international crimes to prosecute internal displacement before the IHT without violation to the principle of *nullum crimen sine lege*.

1.3.1.2. Significance of study

It is important that the IHT's Statute and judgements concerning the acts of forced internal displacement are subject to investigation and analysis. The latter ensure that the objectives of justice and respect for the principles of *nullum crimen sine lege* will be achieved. The study will aim to prove that Iraqi legislators and judges have been mistaken in invoking international criminal law in order to criminalize and prosecute the Ba'athist legacy on the grounds of acts of forced internal displacement. It is doubtful whether such displacements had the status of international crime *per se* at the time when the Ba'ath regime committed these acts in Iraq. However, this thesis calls the attention of both Iraqi legislators and Iraqi judges to some suggestions and solutions that are valid grounds for conviction for acts of internal displacement perpetrated by the Ba'ath regime. Moreover, the proposed approach guarantees the achievement of justice, non-impunity and respect for principle of *nullum crimen sine lege*. This will constitute a necessary contribution to legal, academic, judicial and jurisprudential debate and analysis, and is moreover a necessary contribution to the field of judicial practice. For example, despite the fact that the IHT has addressed a number of cases relating to forced internal displacement, these and other cases have not been completed or not addressed.[205] In particular, many defendants, including those were responsible for overseeing internal displacement cases, have not been tried, either because they are awaiting trial or have not been caught.[206] The IHT charged some of the accused, and according to the Law of the IHT they must not be tried *in absentia* but when the authorities have succeeded in arresting them.[207] Thus, it is important that the legal truths and analyses which are demonstrated in this thesis are taken into consideration by the Iraqi legislature and its judges when they address cases of forced internal displacement in the future. In addition, these legal truths and analyses can be useful in

[205] See, Special statement concerning attempts to cancel the IHT signed by the counsels on behalf the victims of the ethnic cleansing, the Barazani massacre, the Feylis Kurds, as well as by the Chairman and Rapporteur of the Commission on the follow-up of the Kurdish cases in the IHT. See also, Law amending the Law of IHT No. (35) of 2011.

[206] It is noteworthy that the IHT have issued 3200 arrest warrants against accused and that just 126 of these were implemented. These arrest warrants relate to many cases, some of which were considered by the IHT, including cases involving charges of forced internal displacements, such as the cases of Al-Dujail, Al-Anfal, the Marshlands, the demolition of Said Sadiq town and the displacement of its population. Also the displacement of the people of the Bashdar area, the Halabja, Albarzanyen ethnic cleansings, the March and Shabbanyia Uprisings. ibid.

[207] For example, on 27 June of 2015 the Iraqi authority captured 'Abdel Baqi al-Saadoun' who is one of the main accused. This defendant was convicted *in absentia* of crimes including internal displacement in the case of the Marshlands.

dealing with crimes committed by ISIS. Some ISIS crimes, such as the widespread imposition of forced marriage, the sale of women and enforced changes of religion have not been recognized as international crimes *per se*. It is noteworthy that the ICR, the 'Iraqi Parliament', decided on 18 April of 2015 to expand the IHT Law and jurisdiction in order to address these ISIS atrocities.

1.3.1.3. Thesis Questions and background of study

It has already been mentioned that the IHT and its jurisdictions were established by virtue of Law No. 10 of 2005, which was adopted to replace and rename the old version of the Tribunal, the IST, under CPA Order No. 48 and Law No. 1 of 2003. This means that the IHT and its law emerged after the entry into force of the Rome Statute in July 2002. However, what is important is that the IHT was founded in order to prosecute and criminalize abuses that had occurred during the rule of the Ba'ath Party (1968-2003) and prior to the entry into force of the Rome Statute. One of these abuses is the act of forced internal displacement, which was perpetrated on numerous occasions against ethnic and religious groups and minorities such as the Kurds, the Shia, the Shiite Faili Kurds, Turkmen and others. The IHT and its Statute addressed such displacements as crime *per se* under the sub-heading of crime of deportation or forcible transfer as crimes against humanity, or as crimes *per se* under the sub-heading of crime of forced displacement as war crimes during an internal armed conflict. Therefore, the main question to be posed is whether or not the Statute and judgements of the IHT are in conformity with those provisions and rules of international criminal law that were in force at the time when the acts of internal displacement were committed. If not then, can the latter law criminalize internal displacement under a criminal framework other than those which are pursued by the IHT's Statute and judgements? Consequently, the key question is: "Could international law provide a valid and legal criminal framework for the prosecution of perpetrators of internal displacement by a domestic Iraqi criminal court?"

This question requires answers concerning other important questions. Such questions are, for example, what is the status of forced internal displacement under treaties and customary international law relating to international crimes during the rule of the Ba'ath Party in Iraq? Are Articles 7(1)(d), 7(2)(d) and 8(2)(e)(viii) of the Rome Statute which are quoted by the Statute and verdicts of IHT, well-established as a part of the conventional and/or customary international law when the forced internal displacements were committed in Iraq by Ba'ath regime? This will determine whether or not the positions of both the Iraqi legislature and IHT are based on a legitimate approach. If the previously mentioned articles of the Rome Statute

were not in force as part of the international law during the Ba'ath rule era, then is there a criminal framework that is adequate to criminalize acts of forced internal displacement during the era in question? If yes, does this mean that such a criminal framework will not violate the principle of *nullum crimen sine lege* and then non-retroactivity of law? What are these criminal formulas and what are their elements and requirements? Can cases of forced internal displacement in Iraq be subject under such formulas and fulfil their elements and requirements? Can this apply on the cases of forced internal displacement that were committed against the Shiites of Al-Dujail town, the Shiite Marshlands Arabs and Kurds during the Al-Anfal campaigns?

This thesis demonstrates that there are certain international criminal frameworks in customary international law and/or treaties, and that such frameworks are valid and enforceable in relation to the criminalization and prosecution of acts of internal displacement. For example, internal displacement acts can be tried under the crime of apartheid and/or the sub-heading of the crime of genocide, which is 'the forcible transfer of children from their group to another group'. However, it will prove that both of these crimes should be excluded because certain elements and conditions are not met with regard to situations of internal displacement in Iraq. On the other hand, it will be argued that other international criminal frameworks are adequate to criminalize and prosecute Ba'athist acts of forced internal displacement perpetrated in Iraq. For example, the matter can be examined under sub-headings of crimes against humanity such as 'other inhumane acts' and 'persecution'. In addition investigations can be pursued under each of the sub-headings of the crime of genocide, such as 'causing serious bodily or mental harm to members of the group' and 'deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part'. Moreover, it will be demonstrated that the said sub-headings of crimes against humanity and their requirements are valid and sufficient to criminalize and convict in cases of internal displacement such as those that targeted the Shiite people of Al-Dujail, the Shiite Arabs of the Marshlands, and the Al-Anfal campaigns against the Kurdish people. It will be shown that the aforementioned sub-headings of the crime of genocide and crimes against humanity are valid for the trial of those charged with the forced internal displacement campaigns perpetrated against the Kurdish people on the occasion of the Al-Anfal campaigns.

1.3.2. Review of the previous literature

Most of the literature surrounding the IHT on the legal legitimacy of the establishment of the IHT under the occupation power; especially since it was established in accordance with CPA

Order No. 48, and has therefore led some writers to consider it as an instrument of the occupation authority.[208]

Other studies have discussed the legality of the list of international crimes contained in the law of the IHT and are of the opinion that such crimes are not a part of Iraqi law, and thus violate the principle of legality.[209] Some writers hold the view that international law could be invoked in order to prosecute the crimes of the Ba'athist regime, because the provisions and obligations of that law are binding on Iraq.[210] Others argue that it is not enough to depend on international law alone unless those crimes are recognised in Iraqi law, which is not the case.[211] Notably, neither of these views take into account that some of the provisions and rules of international law, including those regarding international crimes, can be effective within Iraqi law without violating the principle of legality. Moreover, those who hold these opinions have not examined the attitude of the Iraqi law and judiciary in dealing with the application of international law within the domestic field during the period of temporal jurisdiction of the IHT. Indeed, more than one law governs such an application.[212] This is important, because Iraq ratified the Genocide Convention on 20 January 1959, the Geneva Convention IV was ratified by Iraq in 1956 and the International Covenant on Civil and Political Rights (ICCPR) in 1970. These instruments focused in whole or in part on international crimes and their status, as well as the meaning of the principle of legality. It is important to investigate these matters to see whether international law can be relied upon to criminalize the Ba'ath legacy of atrocities, or any trials in the future before a domestic Iraqi court, such as those that are planned in order to deal with ISIS atrocities.

Moreover, the literature does not discuss and investigate the subheadings of international crimes, including 'forcible transfer', which is listed in IHT Statute. Instead, controversy focused on the three main categories of international crime and, in particular, aspects of the legality of including them in the Statute of the IHT. However, it should be noted that there are two undetailed and inconsistent views concerning the forcible transfer as crime *per se* and as listed in the Statute of and applied by the IHT. These views hold that forcible transfer and

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[208] For the details, see the discussion in the present chapter at, 8-13.
[209] For the details concerning the discussion of these studies, see the present chapter at, 14-20.
[210] See the present chapter at, 15-16.
[211] Ibid.
[212] For example, these laws are contained in the Iraq Interim Constitution of 1970, the Law of the Publishing of laws No. (59) of 1926 the Publishing Law in the Official Gazette No. (78) of 1977, the Law of Treaties, Conclusion No. (111) of 1979. The National Council Law No. (55) of 1980 and the Interior Regulation of the National Council of 1980.

deportation are the same.[213] One of these denies that deportation was considered as an international crime prior to the Rome Statue.[214] This is questionable, because deportation has been referred to as such a crime since the Nuremberg Charter.[215] Moreover, this view has not afforded an approach or a solution to address the legacy of deportation or forcible transfer. Neither did it discuss the displacements that occurred in Iraq, especially the cases of Al-Dujail, Al-Anfal and Shiite Marshland Arabs. The second view holds that deportation and then forcible transfer have been criminalized since the Nuremberg Charter. However, these view did not investigate or pay attention to the effects of the difference between deportation and forcible transfer,[216] and whether it is legitimate to apply the criminal framework of deportation onto the forcible transfer. Indeed, there is a jurisprudential debate on dealing with forcible transfer under the heading of the crime of deportation.[217] Some parties to this debate deny that the crime of deportation can apply to forcible transfer. This is because the former requires that the displaced people cross the state borders as a definite element, while the second does not require such an element since the transfers occurred within the national borders. Another view of this debate argues that this element has no capacity to exclude forcible transfer or internal displacement from the framework of the crime of deportation. Therefore, an investigation is required, particularly as this debate has not included a discussion that examines cases of displacement committed in Iraq by the Ba'ath regime. In addition, no evidence has been presented to show whether the Iraqi cases of displacement can be subject to the provisions of the Rome Statute on the sub-heading of forcible transfer or displacement as crime *per se*. This sub-crime was established by the adoption of the Rome Statute and came into force in July 2002. Moreover, displacement or forcible transfer was recognized as an international crime *per se* prior to the Rome Statute in the case of two crimes. These are crimes recognised by the Apartheid Convention of 1973, and the sub-crime of forcible transfer of children from their own group to another is also recognised as the crime of genocide. The relevance of both of these crimes to the criminalization of Iraqi cases of displacement is a question that still needs to be investigated and answered.

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[213] For these views, see the present chapter at, 18.
[214] Ibid.
[215] See, Art. (6)(c) of the Nuremberg Charter of 1945, Art. (2)(c) of the Control Council Law No. 10 of 1946 (CCL No. 10), Art. (5)(d) of the ICTY of 1993, Art. (3)(d) of the ICTR of 1994.
[216] See the present chapter at, 18.
[217] See for an example of this controversy, see Prosecutor v. Milomir Stakic (Judgement) ICTY-IT-97-24-T 931 July 2003). See also, Prosecutor v. Radislav Krstic (Judgement) ICTY-IT-98-33-T (02 August 2001).

Regarding the war crimes in a non-international armed conflict, the IHT ruled that the displacement of Kurdish people during the internal conflict in 1987-1988 amounted to a war crime of displacement *per* se.[218] It is doubtful whether this occurrence can be shown to be displacement as such. This is because it is not clear whether war crimes occurring within an internal armed conflict had been established as such at the time in question. They appeared for the first time as such when they were considered by the ICTR and ICTY.[219] If they were not war crimes as such there should be an investigation to decide whether there are other criminal frameworks that can be applied to the said displacements of Kurdish people.

The crime of genocide also needs to be examined in connection with acts of forced internal displacement in order to establish whether any of the Iraqi cases can amount to genocide. The Genocide Convention does not single out a specific and explicit provision on the displacement of the members of a protected group. This matter also needs to be discussed, as different doctrines have been applied to it. It is notable that these doctrines have not addressed the Iraqi cases of displacement. One doctrine suggests that the displacements amount to the genocide crimes, especially when their purpose was ethnic cleansing or demographic change or dissolving the social unity of a group.[220] They argue that such displacement is intended to eliminate the presence of the targeted group from a particular place. This certainly seems questionable, as the intention of genocide crime is supposedly to eliminate a targeted group entirely, by 'physical and biological destruction'. Other doctrines do not acknowledge that the displacement of a group constitutes the crime of genocide.[221] Therefore, it is questionable whether the elimination of the presence of a group in a particular area constitutes physical and/or biological destruction. Similarly, there needs to be a discussion as to whether Iraqi cases of displacement amounted to genocide, especially if such displacement caused the

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[218] See, Al-Anfal Lawsuit (Special Verdict) IHT-1/C Second/2006 (24 June 2007).

[219] See such discussion in the present chapter at, 19-20.

[220] See Partial dissenting opinion of Judge Shahabuddeen in the Appeal judgement in the case of the Prosecutor v. Krstic. See also Caroline Ehlert, *Prosecuting the destruction of cultural property in international criminal law: with a case study on the Khmer Rouge's destruction of Cambodia's heritage* (Koninklijke Brill NV, The Netherlands, 2014). See also, H.G. van der Wilt, J. Vervliet, G.K. Sluiter and J.Th.M. Houwink ten Cate, *The Genocide Convention: The legacy of 60 years* (Koninklijke Brill NV, Leiden- The Netherlands, 2012). See also Claus Kress, 'The International Court of Justice and the elements of the crime of genocide' 18 (2007) *The European Journal of International Law* (4). The separate opinion of Judge Lauterpacht in the case 'Application of the Convention on the Prevention and Punishment of the Crime of Genocide' (*Bosnia and Herzegovina v. Serbia and Montenegro*) (ICJ Order on Provisional Measures, 13 September 1993).

[221] See Prosecutor v. Stakic (Trial Judgement) ICTY-IT-97-24-T (31 July 2003). See also Prosecutor v. Krstic (Appeals Judgement) ICTR-IT-98-33-A (19 April 2004). See also Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*) (Judgement) (ICJ Reports 2007). See also, Larry May, *A normative account: Genocide* (Cambridge University Press, New York, 2010). See also, William A. Schabas, *Genocide in International Law* (Cambridge University Press, United Kingdom, 2000).

disappearance of a group from a specific area and destroys its social unity. It is also necessary to establish whether those Iraqi displacements destroyed the members of a group physically or biologically.

Thus, the question that is raised in this thesis has not been discussed and investigated thoroughly. It is also true that, although there has been some debate intended to assess the relationship between international law and Iraqi law, it has not been sufficient to establish the nature of this relationship properly and precisely, particularly with respect to international crimes and the principle of *nullum crimen sine lege*. This thesis therefore fills the gaps in the legal literature. With regard to the literature relating to international criminal law in general, although there is some a debate regarding the displacement, cases of forced internal displacement in Iraq have not been discussed and examined within such literature. This thesis examines the Iraqi cases in the context of international criminal law. More detailed discussion of the views given above will be found in subsequent chapters.

1.3.3. Methodology, scope and structure of study

1.3.3.1. Methodology of study

For the purpose of the achieving the objectives of the thesis and answer the questions that are raised above, doctrinal legal research will be examined. In this respect, secondary resources such as articles and books are used. The primary resources are significant and essential in the processes of investigation, analysis, evidence and inference. For instance, the black latter law is employed through the provisions of Iraqi laws, such as the IHT law and others. And also the provisions of the statutes and instruments of the international criminal tribunals such as those that are related to the trials of Nuremberg, Charter of International Military Tribunal for the Far East (Tokyo Charter), Control Council Law No. 10 of 1946 (CCL No. 10), the former Yugoslavia, Rwanda and the Rome Statute. In particular, the provisions of these statutes will be examined in order to decide whether they are part of customary international law and then whether they are adequate to address the Iraqi cases of forced internal displacement. In addition, the latter cases need to be analysed and investigated in the context of the provisions of the Genocide Convention, the Apartheid Convention, the Geneva Conventions and its Additional Protocols, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Both of the covenants named serve the process of determining whether the forced internal displacement violates certain human rights blatantly and then whether such blatant violation can amount to an international crime, such as the crime of persecution and/or the crime of committing other

inhumane acts. Moreover, these covenants are necessary to ascertain whether or not internal displacement is unlawful, and this is important to the investigation of whether or not internal displacement is a criminal offence, especially since each of the covenants and also international humanitarian law allow acts of internal displacement in accordance with specific conditions and in exceptional cases.

Case law is considered in relation to the IHT and other Iraqi precedents, as well as those derived from the jurisprudence of international tribunals such as the Nuremberg judgement, Tokyo, ICTY, ICTR, ICC, International Court of Justice (ICJ) and other precedents. This case-law, particularly the precedents of the ICTY and the ICTR, is useful and significant in disclosing and determining the substantive provisions of international criminal law that are part of customary international law. In addition, the jurisprudence of the international courts is necessary in order to interpret the substantive provisions relating to international crimes and to identify their elements and requirements. This affects the argument as to whether occurrences of internal displacement in Iraq fulfil the definitions of international crimes. Moreover, the aforesaid case law is a valuable means of examining whether both the Iraqi legislature and the IHT were in conformity with international law when they defined forced internal displacement in Iraq as an international crime of forcible transfer *per se*. This is of particular significance, since the Law of the IHT states in its Article 17(3) that the Tribunal can be guided by the jurisprudence and interpretations of international criminal tribunals.

Regarding analysis, interpretation and inference, use will be made of reports and documents released by the United Nations (UN) and international agencies. The reports of the International Law Commission (ILC), for example, are very influential in the discussion and investigation of the substantive provisions of international crimes. It is necessary to identify the elements and conditions of these crimes, and to assess which one of these crimes has the status of customary international law. This is important to examine the Statute and judgements of IHT on the Iraqi internal displacement cases. Besides, these reports, and the reports of the committees that drafted international treaties, such as the documents relating to the drafting of the Genocide Convention, can illustrate the provisions and requirement of international crimes and determine what the drafters intended. In addition, reports by human rights bodies carry weight in the process of theoretical and factual analysis, obtaining evidence, and examining violations and atrocities that occurred in Iraq to determine their legal elements.

1.3.3.2. Customary international law

Customary rules were considered to be the foundation stone of modern international law, especially before treaties became the primary source for the latter law. Customary law today provides a large part of the rules that govern States and other international legal persons. It is ideally suited for the development of general principles and is always available to fill the void when a treaty does not attain universal acceptance.[222] A confirmation of the essential role of customary law is recognized in Article 38 of the Statute of the ICJ. This article describes the sources of international law from which the Court should make its decisions when settling the disputes brought before it or when formulating its advisory opinions. Article 38(1)(b) of the Statute of the ICJ provides that the Court shall apply, among other sources,

> '[i]nternational custom, as evidence of a general practice accepted as law;...'.[223]

It is clear from this provision that customary rules should have evolved and are evident in the behaviour of States and that only these are to be exercised as binding law. In other words, two elements are needed to establish a custom: the material conduct of the State and the psychological element, the so-called "opinio juris", which reflects the belief of the State that its conduct is legally obligatory. The ICJ stated in its case law, referring to the case of Libya/Malta, that

> '[I]t is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and opinio juris of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them.'[224]

If otherwise, activities of States would be regarded as moral or social usages that fall outside the meaning of customary law.[225] In addition, the behaviour of States needs to meet certain conditions in order that State practice can develop a customary law. The development of these conditions is derived from the jurisprudence of the ICJ. The State practice needs to be consistent and general. These criteria, however, are not strict or absolute, since the weight given

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[222] Ian Brownlie, *Principles of public international law* (Oxford University Press, New York, 2008), 6.

[223] Article 38(1)(b) of the Statute of the ICJ of 1945.

[224] Case concerning the Continental Shelf (Libyan Arab Jamahiriya/ Malta) (ICJ Judgment) (3 June 1985), para.27, available at <http://www.icj-cij.org/docket/files/68/6415.pdf> accessed on May 4, 2017. See also, ICJ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) (8 July 1996), para.64, available at < http://www.refworld.org/cases,ICJ,4b2913d62.html> accessed on May 4, 2017.

[225] The behaviour of States may not be legally required, but it may be pursued as the practice of goodwill or to obtain benefits in its exchange relations. For example, there is no legal duty imposed upon States to provide economic aid to developing communities; States, however, do assist such communities. See, Malcolm N. Shaw, *International law* (Cambridge University Press, New York, 2008), 74-75.

to each condition or element can differ from one rule to another on the basis of the subject matter of the rule in question.[226]

1.3.3.2.1. Conditions of the material element 'State practice'

It is worth mentioning that the material sources of State practice that serve to formulate the customary rules are very numerous. A guideline, however, is provided by some material. Forexample, the following material serve to disclose the State practice:

> '[d]iplomatic correspondence, policy statements, press releases, the opinions of official legal advisers, official manuals on legal questions, e.g. manuals of military law, executive decisions and practices, orders to naval forces etc., comments by governments on drafts produced by the International Law Commission, state legislation, international and national judicial decisions, recitals in treaties and other international instruments, a pattern of treaties in the same form, the practice of international organs, and resolutions relating to legal questions in the United Nations General Assembly. Obviously the value of these sources varies and much depends on the circumstances.'[227]

The actual behaviour of a state as an initial ingredient of the customary law, has been discussed in terms of the factors of duration, consistency and generality.

Duration

Regarding duration, specified or rigid limitations of the passage of time are not necessary to qualify a state practice as a custom; instead, such qualification depends on the circumstances and nature of the practice.[228] For example, in the North Sea Continental Shelf case the Court stated that:

> '[t]he passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law'[229]

However, this does not deny the usefulness of the passage of time in supporting the evidence that shows the consistency and generality of the state practice.[230] Thus, an inference can be made that a short period of time or even a single and non-repeated act of a state does not prevent the formation of customary law: an 'instant custom' can be created, especially when there is a strong evidence that states regard such a custom as legally binding.[231] For example, the

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[226] Martin Dixon, *International law* (Oxford University Press, Oxford, 2013), 32-33.
[227] Ibid. See also, Ian Brownile (n 222) 6.
[228] Malcolm N. Shaw (n 225) 76.
[229] North Sea Continental Shelf Cases (Federal Republic of Germany/ Denmark; Federal Republic of Germany/ Netherlands) (ICJ Judgment) (20 February 1969), para.74, available at <http://www.icj-cij.org/docket/files/51/5535.pdf> accessed on May 4, 2017.
[230] Ian Brownlie (n 222) 7.
[231] Martin Dixon (n 226) 35-36.

customary law of outer space emerged quickly and the UN General Assembly resolutions were helpful in establishing the requirement of *opinion juris*.[232]

Uniformity or consistency of the practice

A degree of uniformity in the State practice, as the ICJ showed, is fundamental to the constitution of the custom.[233] Nonetheless, complete uniform or 'absolutely rigorous conformity' of State practice is not required; instead, it is sufficient thatsuch practice has general uniformity. With this meaning, the ICJ stated that

> '[T]he Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule.'[234]

Indeed, consistency as a condition of state practice establishing customary law is a matter of much discretion and allows a court to enjoy considerable freedom in its determination in many cases.[235] In addition, the ICJ observed that not all State practices can participate in creating customary law. On the contrary, some practices breach an existing or emerging customary rule and in these cases it cannot be argued that such breaches can engage in developing new, or clarifying existing, customary law.[236] In this respect, the ICJ stated that

> '[I]n order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of states should, in general, be consistent with such rules, and that instances of state conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.'[237]

Such understanding can be noted even with state practices that violate the rules derived from other sources of law. For example, although there are many obligatory treaty rules in relating to the protection of human rights, widespread violations of human rights nonetheless appear in state practices.

Generality of State practice

The generality refers to the fact that the practice need only be generally adopted in the state practice, however this does not require that the practice should be universal or that all states

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[232] Ibid, 36.

[233] In the Anglo-Norwegian Fisheries case, the ICJ emphasised its view that some degree of uniformity amongst state practices was essential before a custom could come into existence. See, Malcolm N. Shaw (n 225) 77.

[234] Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (ICJ Judgment) (7 June 1986), para.186. (Therein after ICJ Judgment on the Case concerning Military and Paramilitary Activities in and against Nicaragua).

[235] Ian Brownlie (n 222) 7.

[236] Martin Dixon (n 226) 33.

[237] ICJ Judgment on the Case concerning Military and Paramilitary Activities in and against Nicaragua (n 234) para.186.

should participate in order to convert the practice into customary rule.[238] Moreover and as the ICJ confirmed, it is important to take into account that a special weight may be given to the practice of the state affected by the subject matter of the rule; and if a state persistently objects to the acceptance of a customary rule, then such a state will not be bound by the said customary rule.[239] In addition, custom may be produced by the practice of a few states that are more powerful and influential than others, and the activities of which have a greater significance.[240] For example, in the 19th century a number of customs, such as navigation procedures related to the law of the sea and prize law were predominantly developed under the impact of the United Kingdom.[241] Another example is space law which has been influenced above all by the activity of the former Soviet Union and the United States.[242]

1.3.3.2.2. ***Opinio juris***

This is described as a psychological or subjective element which should be attached to a state practice aimed at developing a customary rule. It indicates the belief of a State that a certain practice should be followed because is obligatory as a law, and not as habitual usage based on such factors as morality, fairness or/ and courtesy.[243] In this respect, the ICJ emphasized that if the behaviours that constitute state practice need to be recognized as a custom, then it

> '[m]ust be accompanied by the opinio juris sive necessitatis. Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is 'evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the opinio juris sive necessitatis.'[244]

There is controversy over the difficult matter of proving the opinion juris.[245] However, as the majority in the case of Nicaragua v. USA held, opinion juris can be proved from other materials.[246] For example, the ICJ increasingly referred to the resolutions of the UN General Assembly, statements made by representatives of States, treaties covering similar ground or purposes in which customary law had been included, and the work of the International Law

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[238] Martin Dixon (n 226) 34.
[239] This was confirmed by the Judgments of ICJ in the Fisheries Case (United Kingdom v. Norway), and the North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands). Cited in: Martin Dixon, ibid.
[240] Malcolm N. Shaw (n 225) 79.
[241] Ibid, 79-80.
[242] Ibid, 80.
[243] Ian Brownlie (n 222) 8. See also, Malcolm N. Shaw, ibid, 75.
[244] ICJ Judgment on the Case concerning Military and Paramilitary Activities in and against Nicaragua (n 234) para. 207.
[245] See, Ian Brownlie (n 222) 8. See also Malcolm N. Shaw (n 225) 75-76.
[246] Martin Dixon (n 226) 37.

Commission.[247] Accordingly, it appears that the same activity of state can give evidence satisfying the conditions of generality and consistency of the State practice and fulfilling the juris opinio element.[248]

1.3.3.3. Scope of study

This study shows that the criminal framework of forcible transfer or forced internal displacement as an international crime *per se* is a new one. This is because such a crime appeared with the adoption and entry into force of the Rome Statute. Therefore, use of this crime to criminalize and prosecute past internal displacement, as was done by the IHT, contravenes the principle of *nullum crimen sine lege*. Thus, this study focuses on the acts of forced internal displacements and their criminal framework prior to the entry into force of the Rome Statute. It covers only the legacy of such acts and examines that a legacy in the context of the practices of the Ba'athist regime. Even within that context, it focuses only on three cases. These are the Al-Dujail case, the Al-Anfal case, and the case of the Marshlands Shiite Arabs. The study excludes other cases of the Ba'athist practices and crimes that happened after 2003. It determines a legal framework that can be appropriate and valid for the criminalization the aforementioned Ba'athist actions. It considers these occurrences in terms of the treaties and customary international law on genocide, war crimes and crimes against humanity. It investigates the law and judgements of the IHT regarding past Ba'ath violations in the form of internal displacement. Where the judgements of the IHT are found to be wrong or illegal, then this study examines some other criminal forms of law and suggests which of them can apply to the three cases of displacement cited above. In other words, this study offers legal alternatives for addressing Ba'athist acts of internal displacement. Regarding the legality principles, the study discusses the suggested criminal forms in the context of conditions of the principle of *nullum crimen sine lege*. The study also analyses the status and effect of international law within the Iraqi domestic legal domain.

1.3.3.4. Structure of study

This study consists of six chapters. It begins with the present introductory chapter that reviews the subject of study through the thesis statement and explains why the problems cited in the research need to be resolved. Relatedly, the chapter considers the background of the IHT and the challenges afforded by the traditional views. Subsequently, it gives an illustration of the

[247] Ibid. See also, ICJ Judgment on the Case concerning Military and Paramilitary Activities in and against Nicaragua (n 234) para. 188-190. See also, Malcolm N. Shaw (n 225) 88-89.
[248] Martin Dixon, ibid, 38.

methodology, scope and structure of the research. In addition, it shows the terrorist of Ba'ath party policies, including its persecutions and displacement campaigns.

The second chapter examines the status of international law within Iraqi law and its implications on the legality of the Statute and trials of the IHT. This chapter will explore whether binding international rules for Iraq could play an effective role within the domestic field as a means of trying the perpetrators of internal displacement if it is found that Iraqi law lacks such provisions. It focuses on the application of international crimes within the domestic field and enquires whether such an application respects the principle of *nullum crimen sine lege* and the non-retroactivity of the law under international law and Iraqi law alike. The chapter demonstrates that such an application fulfils the requirements of the said principle. Therefore, the chapter investigates the different views that endorse or reject such an application by an examination of international doctrines and of the international judiciary, the legal attitudes of various countries, jurisprudential opinions on Iraqi law, and the various provisions of Iraqi law. In particular, the Iraqi laws which are concerning the treaties binding on Iraq over the term of the temporal jurisdiction of the IHT. Moreover, the chapter considers the meanings and legal elements of the principle of *nullum crimen sine lege* in order to establish that the subject matter of the jurisdiction of the IHT on international crimes conforms to this principle.

The third chapter focuses on the insufficiency of international law concerning the criminal framework of forcible transfer as crime *per se* to deal with forced internal displacements as a past legacy in Iraq, and examines whether forcible transfer as an international crime *per se* under the Rome Statute is applicable to the Ba'ath legacy of internal displacements in Iraq. The chapter expresses the view that the Rome Statute is inapplicable. It goes on to consider the attitudes of customary international law and the work of the international ad hoc tribunals and concludes that these do not recognize that the forcible transfer had had the status of international crime *per se* during the time when the internal displacements in Iraq was carried out. In addition, the chapter reveals that there are two possible legal frameworks that could judge forcible transfer to be an international crime *per se*: and these frameworks are listed under the headings of the crime of apartheid and the sub-heading of the crime of genocide, which is 'the forcible transfer of children from their group to another group'. The chapter discusses these two frameworks and shows that they too are inapplicable to the Iraqi internal displacements.

The fourth chapter endeavours to determine other alternative criminal framework in international criminal law that would cover the displacements cases in Iraq. It explores the legal

possibilities by means of which the IHT could criminalize and convict in cases involving the Ba'ath legacy of internal displacements. It examines specific international criminal forms that could apply to cases of internal displacements in a form that avoids impunity and respects the principle of *nullum crimen sine lege*. The chapter suggests that persecution, defined as a crime against humanity, is sufficient to cover the acts of internal displacement. It exposes the legal conception and the limitations of the crime of persecution as established in customary international law, and then decides whether the *actus reus* of persecution crime can involves acts of internal displacement. The chapter asserts that the crime described as "other inhumane acts" is a true basis under customary international law to criminalize and try the actions of internal displacements. It investigates the definition and parameters of the crime of 'other inhuman acts', and then contends that internal displacement amounts to the *actus reus* of such a crime. Thereafter, it examines and infers that the internal displacements caused by the Ba'ath regime during the campaigns of Al-Dujail, Marshlands and Al-Anfal can be subject to the crime of persecution and/ or the crime of "other inhumane acts".

The fifth chapter first discusses and examines the legal elements that determine whether and in what circumstances acts of forced internal displacement are illegal, criminal, or permissible. Therefore, the requirements and exceptions afforded by the ICCPR and international humanitarian law will be tested. If a forced internal displacement is illegal and criminal then it will be determined when such displacement will amount to international crime or what are the contextual and chapeau elements to constitute a crime against humanity. In the context of the investigation concerning the aforesaid requirements and chapeau elements it will be decided whether the Iraqi occurrences of internal displacement fulfil these requirements and elements.

The sixth chapter discusses forced internal displacements in the context of the criminal requirements of the crime of genocide. This chapter demonstrates that there are two *actus reus* of the crime of genocide that could cover acts of forced internal displacement. It then investigates whether the occurrences of internal displacement in Iraq could fulfil the requirements of the crime of genocide. It reviews the jurisprudential controversies on forced internal displacement as a cultural, social or physical destruction and the crime of genocide. It considers the limitations of destruction as a requisite for the definition of genocidal intent and discusses whether the destructive intent goes beyond physical and biological definitions. In addition, the chapter discusses, whether the destruction of the physical existence of a group must be exclusively understood to mean targeting the material existence of the individuals of one group. The argument leads it to be asserted that some examples of the forced displacement

fulfils the intent of physical and biological destruction. The chapter poses the question of whether forced displacement can be included in one or more of the underlying acts of genocide. The answer given in the chapter is that it can constitute the underlying act of serious bodily or mental harm and/or the destructive conditions of life. Moreover, the chapter affirms that these underlying acts and genocidal intent can apply to the forced displacement of Kurds during the Anfal campaigns.

Chapter Seven will consist of a final discussion and a summary of the conclusions of the study.

CHAPTER TWO

THE STATUS OF INTERNATIONAL LAW WITHIN IRAQI LAW AND ITS IMPLICATIONS FOR THE LEGALITY OF THE STATUTE AND TRIALS OF THE IHT

Introduction

This chapter will argue that international law can be used as the legal basis for the criminalisation of the atrocities that were committed in a domestic context by the Ba'ath regime in Iraq. This is so even though such international crimes were not listed in the IPL at the time when the former regime perpetrated its misdeeds. This is a significant matter, because it determines whether there are legal grounds for the IHT to consider the atrocities of the Ba'ath regime as international crimes. The chapter also considers whether such grounds ensure that the principle of *nullum crimen sine lege* and the prohibition of the retroactive effect of law have not been transgressed. The approach of relying on international law to criminalise the past violations of Ba'ath regime is a contentious matter. The accused and their attorneys, as well as some of the legal literature, have criticized such an approach, as they believe that it oversteps the principle of *nullum crimen sine lege* and non-retroactivity, due to the fact that the Iraqi legal system is a dualist one. Therefore, as they perceive it, the rules of international law should be regularized by municipal legislation and/or by publication in the Official Gazette in order to give them national legal force. In contrast, the IHT and some legal literature find that it is permissible to have recourse to international law in order to address the past violations of the Ba'ath regime as international crimes. They allege that this is consistent with international law as it respects the principle of *nullum crimen sine lege*.

Therefore, this chapter discusses and analyses each of the points of view above. It examines the approaches of both Iraqi law and international law and jurisprudence in dealing with the rules of international law at the national level. The chapter demonstrates that it is legally permissible to categorise the misdeeds of the former Ba'ath regime as international crimes under international and Iraqi law. It also shows, however, that the IHT analysis alone is inadequate because it fails to establish a clear legal criterion by which the rules of international law can be operative nationally in terms of the Iraqi legal order. Moreover, it argues that there are possible grounds for certain acts and violations deemed to be criminal acts under

international law to be regarded as such under Iraqi domestic law; and that such an approach would ensure respect for the principle of *nullum crimen sine lege*.

2.1. A controversy on the reliance on international law to criminalise violations of the former regime

A fundamental challenge raised by the trials before the IHT is that the international crimes for which the members of the former regime are prosecuted and convicted are based on international law, although their crimes were not recognised as such by any Iraqi domestic law. It is worth mentioning that the Statute of the IHT was initiated in 2003 and amended into its final form in 2005. It is clear through the provisions of this Statute, especially Articles 11, 12 and 13, which criminalise acts of genocide, crimes against humanity and war crimes respectively, that these texts are based on international law. On the other hand, it is clear through the temporal jurisdiction that these provisions came to criminalise and prosecute violations committed between 1968 and 2003 before the Statute's enactment. A challenge therefore arises regarding the violation of the principle of *nullum crimen sine lege*, since the aforementioned provisions of IHT's Statute are applied retroactively. Therefore, the subsequent enactment of the IHT Statute is a point of legal controversy between those who support the validity of such a Statute and others who are not convinced of that validity.

2.1.1. A dissenting opinion: the application of Iraqi domestic law to international crimes

Some writers, defence lawyers and defendants have alleged that the international crimes listed in the Statute of the IHT could not be deemed as having a legitimate basis at the time when the officials of the Ba'ath regime committed their crimes and violations.[1] These crimes, as included in the IHT Statute, cannot satisfy the principle of *nullum crimen sine lege* and non-retroactivity; this is because such crimes had not been mentioned in Iraqi domestic law prior to the IHT Statute.[2] For example, in the Al Dujail case, the Trial Chamber stated that

> '[T]he defense started by the argument of the Iraqi High criminal court of law which infringes on this main principle (Crimes and Penalties according to legal provisions) also infringes on the principle of the non-retroactive criminal law, considering that the actions attributed to their clients in Al Dujail case mentioned in article 12 of the court of law were not stipulated as crimes in the Iraqi law, and therefore it is impermissible to prosecute them for these actions and then question them about the crime because the law criminalizing it was

[1] Bill van Esveld, 'The Anfal Trial and the Iraqi High Tribunal: Complainant phase of the Anfal Trial' Update Number One (2009) *Series of International centre for Transitional Justice (ICTJ)*, 7. See also, Jennifer Trahan, 'A critical guide to Iraqi High Tribunal's Anfal Judgement: Genocide against the Kurds' 30 (2009) *Michigan Journal of International Law*, 314.

[2] See, Jennifer Trahan, ibid. See also, Bill van Esveld, ibid.

> issued in 2003 while the actions attributed to the accused who committed the crime refer to 1982, where the articles 11, 12 ,13 of the court of law provided for Iraqi extermination and crimes against humanity and war crimes.'[3]

The Trial Chamber also noted that

> '[t]he presentations of the attorney defending the accused Awad Hamad Al Bandar and so the attorney defending the accused Abdalah Kazem Roueid on June 7, 2006 where they discussed the crimes included in article 12 of the Iraqi criminal court of law that the crimes stipulated in this article were not included before in the Iraqi criminal law. And the Iraqi criminal court cannot accuse the accused with these crimes because the crimes against humanity weren't considered a crime according to the local law upon committing the acts referred to "although the court had previously discussed these repeated presentations. However, it doesn't suspect the certainty, legality and validity of the High Iraqi criminal court for judging the accused and issuing the judicial judgement.'[4]

Some writers have argued that the IHT Statute borrows the definitions of crimes from the Rome Statute and applies them without laying a basis for their application under Iraqi law,[5] and that it therefore violates the legality principle insofar as these crimes are not covered in the IPL, nor they were issued in a separate legislation in the Official Gazette of Iraq,'Alwaqai Aliraqiya'.[6] It should be noted that Iraq is a dualist State where the treaties must be incorporated into national legislation and published in the Official Gazette before their application.[7] Legal doctrine and practice in Iraq require that, even if a treaty is ratified, it must nevertheless be incorporated in implementation legislation and published in the Gazette of Al Waqai Al Iraqiya before its provisions can be enforced.[8] However, no examples were provided in support of this argument, even though the matter is open to debate. There are judicial practices and legal provisions that offer a different finding, as will be seen in a later section. Those writers and defence lawyers, it seems, classify the relationship between Iraqi law and international law as a dualist one. Therefore, according to such a perspective concerning Iraqi law, international law cannot be a true basis for the domestic legitimacy of the Statute and the trials of the IHT.[9] In particular, according to this view, the IPL did not include crimes of an international character

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[3] Al-Dujail Lawsuit (Trial Judgement) IHT-1/9 First/2005, 35. (Therein after Al-Dujail Trial Judgement).
[4] Ibid, 27. See the same argumen concerning the pleading raised by thedefence attorneys of Saddam Hussein, Barazan Ibrahim, Taha Yassin. ibid, 35.
[5] M. Cherif Bassiouni, 'Post-conflict justice in Iraq: An appraisal of the Iraq Special Tribunal' 38 (2005) *Cornell International Law Journal*, 148-151.
[6] Ibid.
[7] Ibid.
[8] Ibid.
[9] Benjamin E. Brockman-Hawe, 'The Iraqi High Court; A retrospective and prospective view' 14 (2007) *Tilburg Law Review*, See also, Bill van Esveld (n 1) 7. See also, Christian Eckart, 'Saddam Hussein's trial in Iraq: Fairness, legitimacy & alternatives, a legal analysis' (2006) *Cornell Law School Papers Series*, 17.

within its provisions. Thus, it is obvious that the Statute and trials of the IHT that were enacted after 2003 violate the principle of *nullen crimen sine lege* and offend against the principle that no law should be applied retroactively. With regard to the IPL mentioned above, it is true that this Law does not include special provisions on international crimes. However, this Law does prevent or prohibit the application of other laws and regulations that criminalise and punish other criminal acts. This can be inferred from Articles 16 and 19 of the said Law.[10]

The dissenting view in question has found support from certain authors who discussed the general relationship between Iraqi law and international law. For example, one author claims that a treaty ratified by Iraq, even if it has been ratified by local law, should not have domestic legal force if it has not been reissued by a municipal act and published in its entirety in the Iraqi Official Gazette.[11] This author affords an example to explain his view by reference to the ICCPR and ICESCR manifested as Law No. 197 of 1970.[12] Because the latter Law had been adopted as an ordinary municipal law, the author therefore infers that a domestic judge can apply this Law in the same manner as ordinary Iraqi laws.[13] He adds that this is a reasonable view, especially since there is no formal restriction that may prevent such an application.[14] This is debatable, however, because Law No. 197 did not list in full, or even in part, the provisions of the two Covenants, as the author appears to suppose. In addition, this Law is no more than a legislative procedure that had to be taken in order to ratify and bind by treaty, and so is not a subsequent procedure to bring a ratified treaty into internal force. However, as will be demonstrated later, such a legislative procedure followed in order to ratify a treaty is at the same time sufficient to give such a treaty an inner force. Other authors who have put forward the same view base their opinion on Article 34 of the Iraqi Law of Treaties No. 111 of 1979.[15] According to Article 34 of the latter Law, a treaty's provisions and its ratification or accession law should be published in the Official Gazette.[16] These authors conclude that this article sets

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[10] See, arts. (16) and (19) of the IPL.

[11] Haider Ala Hamoudi, 'International law and Iraqi courts.' 115-116. In: Edda Kristjansdottir, Andre Nollkaemper, and Cedric Ryngaert, (ed) *International law in domestic courts: Rule of law reform in post-conflict States* (Intersentia, 2012).

[12] Ibid.

[13] Ibid.

[14] Ibid.

[15] See, Tariq Kazim Ajil, 'The incorporation of international provisions in the internal laws: Comparative study' 4 (2012) *Journal of legislation and judiciary*, 18-20, 29-30.

طارق كاظم عجيل، أدماج النصوص الدولية في القوانين الداخلية (دراسة مقارنة)، 4 (2012) *مجلة التشريع والقضاء*.

See also, Haider Adham Al-Tai, 'The incorporation of international human rights instruments into the domestic legal system' 2 (2007) *Journal of Legal Sciences*, 219-220.

حيدر أدهم الطائي، إدماج الصكوك الدولية لحقوق الإنسان في النظام القانوني المحلي، 2 (2007) *مجلة العلوم القانونية*.

[16] Art. (34) of the Iraqi Treaties Law No. (111) of (1979).

a condition by which a treaty becomes domestically effective and applicable.[17] In addition, some authors believe that by this article a treaty acquires the same status as an ordinary law.[18] This opinion, however, is not accompanied by any explanation of how it deduces its findings with regard to the domestic application and rank of a treaty. Article 34 of the Law of Treaties 1979 is the only argument that is depended upon to support such an opinion. Moreover, this article does not explain the domestic application or indicates to the rank of the provisions of treaty within the Iraqi legal system. It necessitates no more than that a treaty should be published in the Official Gazette. Moreover, not one of the viewpoints above has discussed the other domestic legal provisions and case law, neither have taken into account changes in Iraqi law that can give rise to a different analysis and different findings. These latter will be shown in a later section.

Due to this, some of those who believe that Iraqi law is dualist suggested a solution. They claim that the establishment of an ad hoc tribunal concerning the crimes of the former Ba'ath regime by a resolution of the UNSC under Chapter VII of the UN Charter is the only solution that ensures lack of impunity, maintains the principle of *nullum crimen sine lege*.[19] Conducted in such a way, the trials would be based on customary international law, without the problem of legal challenges, and this was the method chosen to deal with the crimes committed in the former Yugoslavia and in Rwanda.[20] On the other hand, some Iraqi lawyers and judges contend that for an act to constitute a crime it must be included in municipal law at the same time when the acts in question were perpetrated, since such a practice would be consonant with a well-established Iraqi tradition.[21] However, they admit that there is a sole exception by which trials can legally be held. This exception covers the acts and crimes that are firmly forbidden under international rules.[22] This view lacks clarity, as it does not offer any examples in support of it. Furthermore, this view presents the Iraqi legal order as dualist in dealing with international law. However, at the same time this legal order accepts a direct application of some international norms. This means that there are two approaches to integrating international law

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[17] Tariq Kazim Ajil, ibid, 29-30. See also, Haider Adham Al-Tai (n 15) 219-220

[18] Tariq Kazim Ajil, ibid, 29-30. The same finding is suggested by another author, but is based on art. (61)(Fourt) of the PCI. See, Salah Al Bsaesey, 'International treaty and oversight on it under the new Iraqi constitution' 2 (2008) *AlGharee Journal for Economics and Administration Sciences*, 250.
صلاح البصيصي، المعاهدة الدولية والرقابة عليها في ظل الدستور العراقي الجديد، 2 (2008) *مجلة الغري للعلوم الاقتصادية والادارية*.

[19] L. Elizabeth Chamblee, 'Post-war Iraq: Prosecuting Saddam Hussein' 7 (2004) *California Criminal Law Review*, 22-24.

[20] L. Elizabeth Chamblee, ibid.

[21] Michael A. Newton, 'The Iraqi High Criminal Court: Controversy and contributions' 88 (2006) *International Review of Red Cross*, 407.

[22] Ibid.

rules within Iraqi internal law. The first is that, because Iraqi law is of a dualist order, an international rule needs to be reconstituted as an internal law prior to becoming effective domestically. Second, if an international rule strongly prohibits a criminal act, then such a rule will be directly incorporated and take effect within Iraqi law, thus any internal procedure will be unnecessary. In fact, Iraqi law does not involve a clear or specific indication or explanation of underlying crimes which international law 'firmly prohibits'. There are no legal effects that can be raised by such a meaning, either on the level of international law or at the level of Iraqi law. It is well known that international law does distinguish between its norms relating to crimes and other rules. It is true that some international norms, such as *jus cogens,* have a high rank and an effect that is different from others.

2.1.2. A supported opinion for the use of Iraqi domestic law to deal with international crimes

As we have seen, there are those who claim that Iraqi law does not provide a legal basis for the legitimacy of the IHT Statute for the criminalisation and prosecution of members of the former Ba'ath regime for violations under the headings of the three core international crimes. Others, however, have adopted a contrary view. They argue that a treaty needs no more than ratification by Iraq in order to constitute a part of Iraqi law. According to this view Iraq has ratified the conventions that refer to international crimes, and, because the Iraqi legal system has regularly published the ratification or accession laws of these conventions, it is sufficient that the provisions of the conventions are ratified, without the necessity to publish them.[23] The IPL, in particular, included provisions for the criminalisation of many acts that are similar to those acts covered under the heading of crimes against humanity.[24] Thus, the provisions of the IHT Statute on international crimes cannot be challenged by the principle of *nullum crimen sine lege.* Iraq had ratified the Genocide Convention, the Geneva Conventions and the ICCPR. The ICCPR, in particular, addresses the aforesaid principle involving crimes that are stipulated as such by international law and domestic law.[25] This view also finds some support from the juristic opinions that discuss the general status of treaties under Iraqi law. These opinions argue that a treaty becomes internally obligatory through publishing its ratification or accession law in the Official Gazette.[26] Accordingly, there is no need to publish the treaty provisions.

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[23] Mazen Lillo Radi Radi, *Trial of presidents* (Dar Qandil, Amman, 2009), 198.
مازن ليلو راضي الراضي، *محاكمة الرؤساء* (دار قنديل، عمان، 2009).

[24] Ibid.

[25] Ibid.

[26] For the municipal enforcement of the ratified treaty by virtue of law, see Ali Fawzi Al-Mousawi, 'Notes on the enforcement of human rights treaties in Iraq'. Cited in Samia Bourouba, (ed) *Jurisprudence in the application of*

Consequently, there is no challenge concerning the legality of the Statute and trials of IHT, because Iraq ratified the Geneva Conventions in 1956, the Genocide Convention in 1959 and both the ICCPR and ICESCR in 1970.

Some believe that, although the international crimes included in the IHT Statute were not codified in IPL and this leads to the violation of the principle of *nullum crimen sine lege* and prohibition of *post ex facto.* However they state that the violation exists only if these crimes were not part of international law, whether customary or conventional.[27] In other words, the Statute and trials of IHT can be established on the basis of international law, regardless of the position of Iraqi law. These crimes are indisputably recognised by customary international law and/ or treaties, as are most crimes such as crimes against humanity or war crimes or genocide. There is, therefore, no legal problem involved in listing these crimes within the IHT Statute in order to prosecute the misdeeds of the Ba'ath regime.[28] The IHT discussed this issue when addressing both the Al Dujail case and the Al Anfal case. The IHT rejected the allegations and arguments posed by the accused and their attorneys, who had contested the legitimacy of the IHT Statute and its trials. The Chambers of Tribunal, by means of lengthy legal analysis, contended that the arguments and claims of the defendants and their advocates were incorrect.[29] They recognised that the crimes contained in the Statute of the IHT and applied in its trials were based on international rules and did not violate either the principle of legality or the rule of non-retroactive effect.[30] They found that it was immaterial whether or not such crimes were recognised under Iraqi law, because the legitimacy and force of the case against them derived from international law.[31] The IHT argued that its point of view was based on Iraq's obligations under the provisions of customary and treaty international law. The Trial Chamber in the Al Dujail case said that

> '[A]ccordingly, the argument of the defense attorneys defending the accused that the court of law infringes upon the principle of Crimes and Penalties according to legal provisions is not based on valid legal basis. Our court, and despite the fact that it is national, and not international, has the right to consider

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human rights standards in Arab courts: Algeria, Iraq, Jordan, Morocco, Palestine, 42. See also Zuhair Kazem Abboud,*'Legal information seminar'* available at <http://www.tdiraq.com/?p=3178> accessed on January 15, 2015.

زهير كاظم عبود، ندوة المعلومات القانونية.

See also, Zuhair Al-Hassani, *'The legal system of international treaties in constitutional and Iraqi law'* 44 (2012) *Journal of Political Sciences*, 101.

زهير الحسني، النظام القانوني للمعاهدات الدولية في القانون الدستوري والعراقي، 44 (2012) *مجلة العلوم السياسية*.

[27] M. Cherif Bassiouni (n 5) 149-151. See also, L. Elizabeth Chamblee (n 19) 22-23. Christian Eckart (n 9) 17.

[28] M. Cherif Bassiouni, ibid. See also, L. Elizabeth Chamblee, ibid. Christian Eckart, ibid.

[29] Al-Dujail Trial Judgement (n 3) 27.

[30] Ibid. See also, Al-Anfal Lawsuit (Special Verdict) IHT-1/C Second/2006 (24 June 2007) 29-30. (Therein after Al-Anfal Trial Judgement).

[31] Al-Dujail Trial Judgement (n 3) 49.

> the international crimes, not because the court of law, which is an internal law, stipulated so, but also either because Iraq ratified on international treaties included international crimes, as the condition in respect to war crimes stipulated in Geneva convention of 1949 and additional protocols annexed thereto, and the ethnic extermination stipulated in the convention of preventing genocides of 1948, or because the rules of the international criminal law are applied not only in Iraq but in all countries of the world directly., without the need to be stipulated in the national laws of those countries, as it is with respect to crimes against humanity, even with respect to war crimes and ethnic extermination which are already forbidden by virtue of international rules before being convicted by international treaties.'[32]

As one view commented that the above is a clear statement that the domestic legal system in Iraq follows the monist approach in order to integrate the rules of international law within its provisions.[33] If this is correct, it cannot be said that the IHT's Statute and trials which are derived from international law crimes are illegal.[34] Thus, they do not have a retroactive effect or violate the principle of *nullum crimen sine lege*.[35] Particularly in Article 11 of the UNDH, the said effect and principle are broadened to encompass criminality in both international law and the national law of the State concerned.[36] This is as indicated also by the IHT. Accordingly, international crimes tried before the IHT do not need to be codified in any Iraqi law at the time when such crimes were committed. Although this interpretation finds some support through the viewpoint and the arguments of the IHT, it seems that the IHT does not intend to distinguish between the monist and dualist approaches in dealing with international law. It appears that the analysis of the IHT goes beyond these approaches; it offers a broad and absolute interpretation to regularize the relationship between domestic law and international law. This interpretation applies to all internal systems of law in all countries of the world, and not only to Iraq. It indicates that the IHT examined the relationship between international law and internal legal systems of all States through the perspective of international law. Thus, it did not take account of the forms adopted by each legal system of each State, including Iraq, in dealing with international law. It is well known that international law does not justify the violation or disrespect of its rules on the grounds of the various provisions of the internal law of each country. It takes no account of whether a domestic law is constitutional or ordinary legislation, and/or whether such a domestic law prevents international law to entering into force within the

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[32] Ibid, 42. See also, Al-Anfal Trial Judgement (n 30) 29-30.
[33] Bernhard Kuschnik, 'The legal findings of crimes against humanity in the Al-Dujail Judgements of the Iraqi High Tribunal: A forerunner for the ICC?' 7 (2008) *Chinese Journal of International Law*, 464.
[34] Ibid.
[35] Ibid.
[36] Ibid.

state or whether there exists a text inconsistent with the rules of international law. Therefore, it is observed that international law raises the international responsibility of the state that violates its rules without giving weight to that state's domestic laws. This is the correct interpretation of the IHT's perspective. However, the doctrine of the IHT is accepted and finds support under international law and judiciary, as will be demonstrated in the next section. From the standpoint of international law it is arguable that there is no legal challenge that can mounted against the inclusion of international crimes in the IHT Statute and the establishment of trials on that basis. In particular, these crimes are established as a part of the international law rules that are binding on Iraq. However, the rules of international law remain unclear from the perspective of the Iraqi domestic legal system. Thus, the question that should be examined is whether the direct resort to international law is permissible in the Iraqi legal system or whether the latter requires a further internal act or other procedures. It is necessary to determine whether the Iraqi legal system is of a monist or a dualist nature or whether it has a special method for dealing with the rules of international law. It is important to determine whether the principle of *nullum crimen sine lege* has been violated by Articles 11, 12 and 13 of the IHT Statute and the judgements of this Tribunal concerning international crimes.

2.2. The application of international law in the domestic field

Despite the difference in the areas governed by each of the local and international legal orders, they are not completely separate from the other. It is well known that the present time enhances the communion between the two legal systems in order to regularise some fields, such as human rights, the environment and others. Therefore, it does not deny or rule out that international law can effectively influence the national legal construction or interpret the provisions of this latter, especially before the domestic courts. However, the matter is not simple, especially when the provisions governing the common themes between both the international and domestic legal orders are dissimilar and contradictory. It is more difficult when the provisions of national law are silent or ambiguous on the nature and status of international rules within the national legal structure, thus creating a conflict between international and national rules. It then becomes a question of whether it is possible to resort to international rules to address a violation or behaviour when a local rule is missing, or in the case of the presence of a local rule that contradicts an international norm. In such cases, which rule should prevail?

It is worth mentioning that in a conflict between local and international legal norms, the domain of national jurisdiction is ineffective when it is confronted by international law. This is because

the international rule is binding and generally has dominion in all cases, while the local rules are deemed as the facts which must be consistent with the international basis. This has been well established in the jurisprudence of the international judiciary since the arbitration ruling in the case of the Alabama Claims[37] and then in the Montijo Case and others.[38] It is further confirmed in the judgements and advisory opinions which are set forth by both of the Permanent Court of International Justice (PCIJ),[39] and the International Court of Justice (ICJ).[40]

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[37] In this case, United States alleged that the United Kingdom had breached the rules of neutrality during the civil war between the Northern and Southern US States. The United States claimed that the United Kingdom had helped the southern States by allowing them to construct ships, including the Alabama Vessel, in its ports. This ship had inflicted damage on the Northern US States. Thus, the United States called upon the United Kingdom to pay compensations. The United Kingdom rejected the charge on the basis of its domestic law, which does not prohibit ship building. However, the Tribunal of Arbitration that was held in Geneva in 1872 ruled in favour of the United States and refused the protest presented by the United Kingdom. Thus, by the award of this tribunal the international rules and principles relating to neutrality overcame the domestic law. See, Richard Dean Burns, Joseph M. Siracusa, Jason C. Flanagan, *American Foreign Relations Since Independence* (ABC-CLIO, Praeger, California, 2013), 82-86. See also, 'Alabama claims of the United States of America against Great Britain, Award rendered on 14 September 1872 by the tribunal of arbitration established by Article I of the Treaty of Washington of 8 May 1871' UN Reports of International Awards, XXIX (8 May 1871), 131.

[38] This case concerned the violation of the Agreement between the United States and Colombia (1874). The award of the Tribunal of Arbitration of (1875) stated that '[a] treaty is superior to the constitution, which latter must give way. The legislation of the republic must be adapted to the treaty, not the treaty to the laws.' See, John Bassett Moore, *History and digest of international arbitrations to which the United States has been a party* (2) (Government Printing Office, Washington, 1898), 1440. See also, Henri La Fontain, *Pasicrisie internationale 1794-1900: Histoire documentaire des arbitrages internationaux* (Kluwer Law International, Hague, 1997), 209-220.

[39] For example, the PCIJ rejected the plea of Germany, which based its case on its national neutrality order in order to avoid its international responsibility. Germany had violated art. (380) of the Treaty of Versailles when it prevented the Wimbledon Vessel from passing through the Kiel Canal during the Russo-Polish war. The PCIJ laid down that '[a] neutrality order, issued by an individual State, could not prevail over the provisions of the Treaty of Peace. ... Moreover under Article 380 of the Treaty of Versailles, it was her definite duty to allow it. She could not advance her neutrality orders against the obligations which she had accepted under this Article.' *Case of the S.S. 'Wimbledon'* (Judgement) PCIJ-Series A-1 (17 August 1923), 29-30.

'[T]he Court declines to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty.' ibid, 25. In another Case and in more details the PCIJ confirmed that '[a] principle which is self-evident, according to which a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken. The special nature of the Convention for the Exchange of Greek and Turkish Populations, which closely affects matters regulated by national legislation and lays down principles that conflict with certain rights generally recognized as belonging to individuals, sufficiently explains the express inclusion of a clause such as that contained in Article 18. But it does not in the least follow because the contracting Parties are obliged to bring their legislation into harmony with the Convention, that that instrument must be construed as implicitly referring to national legislation in so far as that is not contrary to the Convention.' See, *Case of the Exchange of Greek and Turkish Population* (Advisory Opinion) PCIJ-Series B-10 (21 February 1925), 20-21. In another Case the PCIJ discovered that '[F]rom the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures.' See, Case concerning certain German interests in Polish Upper Silesia (Judgement) PCIJ- Series A-7 (25 May 1926), 19.

[40] For example, the ICJ ruled in the case of 'Guardianship of Infants' that '[t]he measure taken and maintained by the Swedish authorities in respect of Marie Elisabeth Boll, namely the 'skyddsuppfostran' instituted and maintained by the decrees ... is not in conformity with the obligations binding upon Sweden vis-a-vis the Netherlands by virtue of the 1902 Convention governing the guardianship of infants. That Sweden is under an

In each of these cases, it was unacceptable to appeal to local laws as a justification for the violation of the rules of international law. The Vienna Convention on the Law of Treaties of 1969 (Vienna Convention) codified this position. This Convention confirms by Article 27 that it would be unacceptable to evade the provisions or treaty obligations under the pretext of local laws that allow or require a behaviour that is incompatible with the provisions of the Treaty.[41] Otherwise, a State will be internationally liable. However, there are certain exceptions by which, a State can avoid international responsibility, as stipulated in Article 46 of the Vienna Convention.[42]

2.2.1. Classical theories to the interpretation of the relationship between domestic and international law

Traditionally, there has been a division in legal thought between the schools of positivism and those of naturalism, and there are two theoretical explanations concerning the analysis and regulation of the relationship between international and national legal orders. While the scholars of the positivist doctrine believe that this relationship should be dualistic in nature, while supporters of the naturalist school argue that the monist approach should prevail and that the two laws are in reality no more than rules that constitute a single legal system.

2.2.1.1. Dualist theory

Some authors and defendants and their attorneys have postulated that Iraqi law is a dualist legal order and therefore, rejected the resort to international law by the IHT, because such crimes had not been specified by Iraqi law prior to the adoption of the Statute of the IHT.

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obligation to end this measure.' See, Case concerning the Application of the Convention of 1902 governing the guardianship of infants (*Netherlands v. Sweden*) (Judgement) ICJ-33 (28th November 1958), 10. In addition, the ICJ concluded in the case of 'the Obligation to Arbitrate under the UN Headquarters Agreement' that '[a]s the Court has already observed, the United States has declared (letter from the Permanent Representative, 11 March 1988) that its measures against the PL0 Observer Mission were taken 'irrespective of any obligations the United States may have under the [Headquarters] Agreement'. If it were necessary to interpret that statement as being intended to refer not only to the substantive obligations laid down in, for example, sections 11,12 and 13, but also to the obligation to arbitrate provided for in section 21, this conclusion would remain intact. It would be sufficient to recall the fundamental principle of international law that international law prevails over domestic law. This principle was endorsed by judicial decision as long ago as the arbitral award of 14 September 1872 in the Alabama case between Great Britain and the United States ... .' See, Case concerning Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947 (Advisory Opinion) ICJ-77 (26 April 1988), para. 57.

[41] Art. (27) of the Vienna Convention on the Law of Treaties of (1969) stipulates that '[A] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.'

[42] Art. (46) of the Vienna Convention sets forth that '1. [A] State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance. 2. A violation is manifest if it would be objectively evident to any State con ducting itself in the matter in accordance with normal practice and in good faith.'

According to the idea of dualism, international and national law are legal orders separate and completely independent of each other.[43] In addition, each of them has its own sphere of influence, which governs the legal relations within its domain boundaries and which cannot be directly governed or impacted by a rule derived from the other legal system.[44] Therefore, neither the two systems can prevail over or govern the relations with the other.[45] Even when an international norm is applicable to internal rules, this is not because such a norm is international, but rather that it is considered as a municipal one issued by the national legislature.[46] The dualist idea, as supporters of positivism hold it, is a normal result issuing from the sovereignty of State.[47] Consequently, when a country accepts or partakes in the creation of an international rule, whether explicitly, through treaties, or implicitly through international custom it is exercising its sovereignty.[48] Hence, it is logical that this sovereignty, as a main source for the creation of the international rule, determines the role and effectiveness of such a rule and then of international law. Otherwise, it cannot be acceptable that what is perceived as the basis of international law or its field and relations are inherent in ethics, deductions, economic or other structures.[49] In addition, the structure and functions of the local legal system concerned with the legal relations within a State vary greatly from those in the international legal system that regulates relations between States.[50] Thus, the erosion of the internal sovereignty of a State in the exercise of its jurisdiction will be augmented if its domestic legislations and court decisions are impacted or changed due to the priority of international legal norms.[51] It may be assumed that such a consequence would not be readily accepted by national legislators.[52] To be domestically acceptable, an international rule must be turned into a local rule, and then, like any domestic law, it needs to be passed by the parliament

[43] Malcolm N. Shaw, *International Law* (Cambridge University Press, 2008), 131. See also, David Haljan, *Separating Powers: International Law Before National Courts* (T.M.C. Asser Press, Hague, 2013), 93.
[44] Malcolm N. Shaw, ibid. See also, Brindusa Marian, 'The dualist and monist theories. International law's comparison of these theories' 1 (2007) *The Juridical Current*, 2. See also, Emilian Ciongaru, 'The monistic and the dualistic theory in European law' 1 (2012) *Acta Universitatis George Bacovia. Juridica*, 3. See also, Ian Brownlie, *Principles of Public International Law* (Oxford University Press, Oxford 2008), 31.
[45] See, Emilian Ciongaru, ibid, 3.
[46] Tim Hillier, *Sourcebook on Public International Law* (Cavendish Publishing Limited, London, 1998), 33. See also, Brindusa Marian (n 44) 2. See also, Emilian Ciongaru, ibid, 3-4.
[47] Malcolm N. Shaw (n 43) 131. See also, Tim Hillier, ibid, 35. Se also, David Haljan (n 43) 93
[48] Malcolm N. Shaw, ibid. See also, Dinah L. Shelton, (ed). *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford University Press, Oxford, 2011), 3.
[49] Malcolm N. Shaw, ibid
[50] Brindusa Marian (n 44) 2.
[51] Malcolm N. Shaw (n 43) 131.
[52] Ibid.

of the State concerned, provided that the constitution of that State does not specify another means of transformation.[53]

2.2.1.2. Monist theory

In contrast to the dualism approach, natural philosophy scholars reject dualism and the idea that international law and domestic law are a legal system in themselves, separate and independent from one another.[54] They argue that these laws are linked and that they complement each other as a single legal system.[55] Supporters of monism assume that there is a fundamental function or basic legal rule that prevails over all international and domestic legal rules. They believe it to be a related concept that this basic function or rule lies in international law, and that it is therefore logical that the latter legal rules have supremacy over the local rules in application.[56] Consequently, the international rules should govern and affect the municipal legal relations within a State in the case of conflict with the national law.[57] Accordingly, the international rules are automatically integrated into a domestic law and do not need to be enacted or reissued by the legislature in the form of a local law.[58] Therefore, there is no challenge can be mounted to prevent the application of these rules directly in the internal scope. In other words, the practical and theoretical impact of the monist theory is that the base of domestic law will be, or should be, ignored in favour of a contradictory international rule. Thus, all State institutions including the legislative, executive and judiciary must obey what is decided by an international norm. For example, when a national court finds local and international contradictory rules addressing the same subject, the court has only to apply the international norm. The standpoint of the IHT appears to share the grounds and conclusions of monism theory although it does not seem that the IHT intended to discuss the position of Iraqi law in terms of monist or dualist theories.

It is worth mentioning that the supporters of monism differ in their views concerning the basis of their theory. In this regard, Lauterpacht argued that the basis is a moral one and resides in the fundamental function that the legal rule should fulfil.[59] In this respect, he thinks that this

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[53] Tim Hillier (n 46) 33, 35. See also, Emilian Ciongaru (n 44) 3-4.
[54] Emilian Ciongaru, ibid, 4.
[55] See also, Tom Ginsburg, Svitlana Chernykh, and Zachary Elkins, 'Commitment and diffusion: How and why national constitutions incorporate international law' 201 (2008) *University of Illinois Law Review*, 204.
[56] Emilian Ciongaru (n 44) 4. See also, Tom Ginsburg, Svitlana Chernykh, and Zachary Elkins, ibid.
[57] Emilian Ciongaru, ibid, 4. See also, Tom Ginsburg, Svitlana Chernykh, and Zachary Elkins, ibid.
[58] Tim Hillier (n 46) 34. See also, David Sloss, 'Domestic Application of Treaties' (2011) *Santa Clara Law Digital Commons* available at <http://digitalcommons.law.scu.edu/facpubs/635> accessed on June 23, 2016, 7.
[59] See, Anna Meijknecht, *Towards international personality: The position of minorities and indigenous peoples in international law* (Intersentia, 2011), 6-7.

function is to guarantee the human rights and welfare of individuals and that such a task will be better performed in the context of an international legal rule.[60] Hence, such a function grants the sovereignty and priority to international law. The other viewpoint, as stated by Hans Kelsen, is that there are 'formulistic logical grounds' that necessitate the integration of national and international rules into a single legal system.[61] He argues that the rules within such a single system should be ranked as higher rule located in international law, while domestic rules should occupy a lower rank.[62] This is inferred through the presumed function of the law as a system determines the forms of behaviour that should either be followed or be punished.[63] It should be noted, however, that the notion of the basic rule is not absolute, due to factors such as the nature of international law and matters of jurisdiction and sovereignty and equality as they are set out in international law.[64]

2.2.1.3. The third approach

This approach seems not much different from the interpretations of the dualist theory, and has therefore been classified as a modified dualist doctrine.[65] Like those who support the notion of dualism, proponents of the third approach emphasize that international law and domestic law are separate and do not share the same fields of influence.[66] Therefore, it cannot be said that that the nature of their relationship is one of superiority and inferiority.[67] They portray the relationship between the two laws as that of any relationship between the local laws of different States. For example, French law and English law are two separate legal systems and each of them works within the borders of the national jurisdiction of the State concerned.[68] French law cannot be extended to govern or regulate the legal relations within the internal legal system in England, and at the same time English law cannot do likewise in France.[69] Thus, the debate on the superiority or subordination of French law in its relationship to English law or vice versa should not be pursued, and the same evaluation should apply to the relationship between international law and domestic law.[70] Moreover, such a relationship should not be examined in

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[60] Ibid. See also, Alex Conte, *Human Rights in the Prevention and Punishment of Terrorism: Commonwealth Approaches: The United Kingdom, Canada, Australia and New Zealand* (Springer, Berlin, 2010), 91.
[61] See also, Jörg Kammerhofer, Jean D'Aspremont, (ed) *International Legal Positivism in a Post-Modern World* (Cambridge University Press, Cambridge, 2014), 407. See also, James Crawford, *Brownlie's principles of public international law* (Oxford University Press, Oxford, 2012), 49.
[62] Anna Meijknecht, ibid. See also, Malcolm N. Shaw (n 43) 132.
[63] Malcolm N. Shaw, ibid, 131.
[64] Ibid, 132.
[65] Ibid. For more details on this approach see, Tim Hillier (n 46) 35-38.
[66] Martin Dixon, *Textbook on international law* (Oxford University Press, Oxford, 2013), 93.
[67] Ibid.
[68] Ibid.
[69] Malcolm N. Shaw (n 43) 133. See also, Tim Hillier (n 46) 36.
[70] Martin Dixon (n 66) 93. See also, Tim Hillier, ibid.

the context of the conflict between rules or commitments of the two laws when a State exercises its jurisdiction within its internal scope in a way that violates international obligations.[71] Although, such a violation raises the responsibility of the State concerned in the context of international institutions or diplomatic protest, this is a question that is distinct from the relationship between the two laws and does not lead to the conclusion that international law is able to annul or affect the legal nature or effect of the exercise of State law at a local level.[72] This approach attempts to offer a theoretical formula that is consonant with the reality of the practices of each State as well as with the jurisprudence of international judiciary.[73]

Despite the realism and practical value of this analysis, there are some observations that can be made with regard to the relationship between international law and local law on the one hand, and the relationship between the domestic legal systems of two different countries on other, as stated in the example above on French law and English law. According to the approach in question, these two relationships are of a similar nature and give rise to the same effects. Such a conclusion is difficult to accept because it ignores the element of the common work or common will in creating legal rules. For example, France does not have a role in the creation of the English legal system and does not impose an obligation on English legal rule concerning the latter's sovereignty or jurisdiction. The same thing can be observed with regard to the role of the United Kingdom concerning the French domestic legal system. Therefore, the independence of French and English legal systems from each other has a logical status. The situation is different with respect to the making of international law norms. It is well known that these norms are formed through the explicit or implicit participation of States or as the so-called common will of States. In other words, each country undertakes its international obligations and hence willingly and by consent transforms a part of its sovereignty to make it subject to international law. This leads us logically to say that international law must prevail over domestic law with respect to matters regulated under the obligations of each State, regardless of whether the two laws are classified as separate legal orders or as parts of a single legal system. What is certain is that there are themes, such as human rights, that are commonly ruled by the two laws. There is only one option to be taken by a State if it wishes to avoid the invalidity of its practices as being contrary to its international commitments. This option is that the State concerned seeks to modify or terminate its international obligations in accordance with the conditions which are permitted under international law. An example of this would be

[71] Tim Hillier, ibid.
[72] Malcolm N. Shaw (n 43) 133. See also, Ibid, 36-37.
[73] Malcolm N. Shaw, ibid.

when a State withdraws from a binding treaty, or makes a reservation to, or suspends, or modifies a provision of the treaty or modifies a customary international rule by new treaty. In this case, such changes should produce its implications before the State concerned involves in its domestic practices which violate the international law.

2.2.2. The practical reality of the practice of States

It will be observed that the constitutions, laws and practices of States do not display a general and uniform base in dealing with international law.[74] In addition, they do not seem fully and strictly consistent with the aforementioned theoretical doctrines. They reveal that in some States there are dissimilarities in dealing with types of rules of customary international law or treaties,[75] or various topics of international law, such as human rights rules. Moreover, the status of international law within the hierarchy of local rules, as defined by the domestic legal system of each country, may be higher, equal to, or less than the constitutional provisions or ordinary legislation.[76] For example, in the legal system of the United Kingdom, and in countries that follow its legal tradition, there is a distinction between the rules of customary international law and the provisions of treaties.[77] A law issued by Parliament is not necessary to receive or integrate the rules of customary international law at the local scale, but rather these rules are incorporated automatically.[78] However, when these rules are not consistent with United Kingdom laws and judicial precedents, these latter have priority and must prevail.[79] Although this is closer to a monist approach, nevertheless it does not entail that the customary rules have precedence, as the monist theory argues. The status of the treaties is different. As a rule, in the United Kingdom the provisions of the treaties cannot automatically penetrate or directly affect the internal legal structure. To have such an effect, a treaty provision must be received into the internal domestic law of the United Kingdom by an act of Parliament.[80] For this reason, it would seem that the United Kingdom adopts a dualist approach towards the incorporation into domestic law of the provisions of a treaty.

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[74] See, David Sloss (n 58) 5-6. See also, Emilian Ciongaru (n 44) 5.
[75] See also, Tom Ginsburg, Svitlana Chernykh, and Zachary Elkins (n 55) 204.
[76] Ibid, 8.
[77] See, David Sloss, ibid, 3. See also, Nihal Jayawickrama, 'India'. In David Sloss, (ed), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (Cambridge University Press, New York, 2009) 244–45.
[78] See also, Tom Ginsburg, Svitlana Chernykh, and Zachary Elkins (n 55) 205-206.
[79] Ibid, 205-206. This is the position so long as it was not overruled by a subsequent statute or judicial decision.
[80] See for more details, David Sloss (n 58) 4-5. See also, Nihal Jayawickrama (n 77). See also, Davor Jancic, 'Recasting monism and dualism in European parliamentary law: The Lisbon Treaty in Britain and France'. In: Marko Novakovic, (ed) *Basic concepts of public international law: monism and dualism* (University of Belgrade, Institute of Comparative Law and Institute of International Politics and Economics, Belgrade, 2013) 803-829, 8-9.

In the United States, the rules of customary international law do not vary greatly in status from those of the United Kingdom.[81] However, the provisions of treaties have gained a contrastive status in the Constitution of the United States, thus their status differs from that of the United Kingdom. In accordance with Article VI of the Constitution of United States 1787, treaties to which the United States is a party are part of the domestic law and are automatically merged with it, and do not need to be re-issued in the form of a Congressional act.[82] Additionally, this Constitutional article places all municipal laws, except federal laws, in the lowest rank of the provisions of treaties,[83] and judges in all States must not infringe such treaty provisions.[84] One additional point should be taken into account: this is with respect to the internal application of non-self-executing treaties. These treaties cannot be applied unless they are detailed in a municipal Act of Congress.[85] Consequently, it is clear that, with the exception of non-self-executing treaties, the United States follows a modified form of the monist approach. According to the monist perception, treaty rules must be at the top of the legal pyramid, ranking even higher than the constitutional rule, and this is not the situation in the United States.

Other countries have adopted an approach that is closer to monism in dealing with treaty provisions. For example, countries such as France,[86] Portugal,[87] Switzerland,[88] Spain,[89] the

[81] See also, Tom Ginsburg, Svitlana Chernykh, and Zachary Elkins (n 55) 206. Customary international law, or the 'law of nations,' was traditionally viewed as part of federal common law.

[82] Art. (VI) of the Constitution of United States of (1787) lays down that '... [T]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'

[83] Ibid.

[84] Ibid. See also, Tom Ginsburg, Svitlana Chernykh, and Zachary Elkins, ibid, 206.

[85] For more details on non-self-executing treaties see, John C. Yoo, 'Globalism and the constitution: Treaties, non-self-Execution, and the original understanding' 99 (1999) *Columbia Law Review*, 1955. See also, Curtis A. Bradley, 'Intent, presumptions, and non-self-executing treaties' 102 (2008) *The American Journal of International Law*, 540.

[86] Art. (55) of the French Constitution of 1958) provides that '[T]reaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party.' See also, Davor Jancic (n 80) 9. See also, Luzzus Wilhbaber and Stepban Breitenmoser, 'The relationship between customary international law and municipal law in Western European countries' 48 (1988) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 190.

[87] Art. (8)(2) of the Portuguese Constitution sets forth that '[T]he rules set out in duly ratified or passed international agreements shall come into force in Portuguese internal law once they have been officially published, and shall remain so for as long as they are internationally binding on the Portuguese state.' See also, Luzzus Wilhbaber and Stepban Breitenmoser, ibid, 191, 193-194.

[88] See, Arts. (5)(4), (189)(1)(b), (190), (193)(4) of the Federal Constitution of the Swiss Confederation of (1999).

[89] Art. (96)(1) of the of the Spanish Constitution provides that '[V]alidly concluded international treaties, once officially published in Spain, shall be part of the internal legal system. Their provisions may only be repealed, amended or suspended in the manner provided for in the treaties themselves or in accordance with the general rules of international law.'

Netherlands,[90] Bulgaria,[91] Serbia,[92] Albania,[93] Venezuela,[94] and Russia organise constitutionally the relationship with the provisions of treaties[95]. In all of these countries,[96] it is supposed that the provisions of treaties are integrated into the domestic legal systems, and are immediately and directly applicable and binding within the local scale of these countries.[97] Therefore, no internal legislative or executive act or procedure is required in order to bring the treaty provisions into the scope of municipal law.[98] In the constitutions of countries such as the Netherlands, Albania, Spain and Switzerland, treaty provisions need to be published in order to be applied, despite the fact that the treaties are a part of those countries' legal systems and are integrated automatically.[99] Also, in cases of conflict between treaty provisions and the internal laws of these States, the treaty provisions generally predominate over ordinary or federal legislations, thus taking precedence in their application and overruling the statutory laws or regulations.[100] However, it does not seem that there is an acceptance of granting treaty

[90] Art. (93) of the Constitution of the Kingdom of the Netherlands lays down that '[P]rovisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published.'

[91] Art. (5)(4) of the Constitution of The Republic of Bulgaria sets forth that '[A]ny international treaty, which has been ratified according to a procedure established by the Constitution, which has been promulgated, and which has entered into force for the Republic of Bulgaria, shall be part of the domestic law of the land.'

[92] Art. (16) of the Constitution of the Republic of Serbia stipulates that '... [G]enerally accepted rules of international law and ratified international treaties shall be an integral part of the legal system in the Republic of Serbia and applied directly.'

[93] See, arts. (116), (117), (121) and (122) of the Constitution of the Republic of Albania of (1998). Art. (29)(1) provides that '[N]o one may be accused or declared guilty of a criminal offense that was not provided for by law at the time of its commission, with the exception of offenses, which at the time of their commission constituted war crimes or crimes against humanity according to international law.'

[94] See, Constitution of the Bolivarian Republic of Venezuela that includes many provisions on international treaties and agreements.

[95] Art. (15)(4) of the The Constitution of the Russian Federation states that the '[u]niversally recognized principles and norms of international law as well as international agreements of the Russian Federation should be an integral part of its legal system.'

[96] See, Alec Stone Sweet and Helen Keller, 'Assessing the impact of the ECHR on national legal systems' (2008) *Faculty Scholarship Series*, 683-684.

[97] Ibid. See on France which even more gives the treaties higher rank compared with French statutes. See, Davor Jancic (n 80) 9.

[98] In many monist states, even if a treaty has the formal status of law in the absence of implementing legislation, the legislature sometimes enacts legislation to help ensure that courts and executive officers give practical effect to the treaty within the national legal system. Thus, for example, the United States enacted implementing legislation for the New York Convention, and South Africa enacted implementing legislation for the Warsaw Convention. As Professor Nollkaemper observes: '[E]ven if the provisions of a treaty could in principle be applied directly, the Netherlands usually chooses to convert them into national legislation to harmonize Dutch law with the requirements of international law'. See, David Sloss (n 58) 8-9.

[99] See also, David Sloss, ibid, 78. Another significant area of variability relates to publication requirements. In Egypt, France, Chile, Japan, and Russia, a treaty that has entered into force internationally lacks domestic legal force until the executive branch publishes or promulgates the treaty domestically. In other monist states, though, (at least some) treaties enter into force domestically at the same time they enter into force internationally, without the need for any additional steps. See also, E.A. Alkema, 'International law in domestic systems' 14 (2010) *Electronic Journal of Comparative Law*, 6. See also, Luzzus Wilhbaber and Stepban Breitenmoser (n 86) 197.

[100] See, Alec Stone Sweet and Helen Keller (n 96) 683-684. For example, treaties have supremacy over subsequent French legislation, since the French courts suppose that legislators will not interpreted them as being in contrast

provisions ascendancy over the provisions of constitutions:[101] the status of these latter are retained as the highest legal rules within the municipal field. However, in some countries, such as the Netherlands and Albania, treaty provisions rank equally with constitutional rules.[102] These two countries, along with others, such as Japan, Greece and New Zealand, distinguish between two types of treaties, those which are of a self-executing nature and those of a non-self-executing nature, as is the situation in the United States.[103] This classification does not seem to affect the status of a treaty as a part of domestic law.[104]

On the other hand, other constitutions such as those of Germany,[105] Italy, Norway and Sweden, do not recognize the provisions of treaties as being automatically a part of their internal legal system.[106] Therefore, it is essential in such cases that the provisions of a treaty should be incorporated into their internal systems, through legislation or other internal procedures required by the constitution of each State. Otherwise, the provisions of treaties cannot be incorporated into the domestic legal system. Thus, such constitutions follow the dualist

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with international law. See also, Antonio Cassese, *International law* (2d ed. 2005), 228. See, Davor Jancic (n 80) 9. See also, D. P. O'Connell, *International Law* (Stevens & Sons Ltd, London, 1970), 44. Cited in Luzzus Wilhbaber and Stepban Breitenmoser, ibid, 190. See, art. (55) of the French constitution which explicitly confirms such meaning. See also, Raymond Youngs, *English, French & German Comparative Law* (Routledge, New York, 2014), 23-24. See, art. (94) of the Dutch Constitution contends that '[S]tatutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions.' Art. (15)(4) of the Russian Constitution asserts that '[I]f an international agreement of the Russian Federation establishes rules, which differ from those stipulated by law, then the rules of international agreement shall be applied.' Art. (5)(4) of the Bulgarian Constitution says that '... [t]reaty shall take priority over any conflicting standards of domestic legislation.' Under the Greece Constitution and legal order, the treaty and customary international law supersede both subsequent and prior acts of Parliament. Luzzus Wilhbaber and Stepban Breitenmoser, ibid, 178-188. However, in some States where the treaty provisions have the same rank that is enjoyed by federal law or ordinary law, the courts should apply principles of interpretation, particularly the principles of 'lex posterior derogat legi priori and of lex specialis derogat legi general'. Despite these principles, the municipal courts may override the last status and laws in favour of a treaty or international law. The courts conduct such a procedure by using the principles of "friendliness" to international law. For example, the Swiss Federal Tribunal repeatedly confirmed that international law had to be considered as Swiss federal law, 'because its nature requires general municipal applicability, so that it has to be equated with the uniform domestic law.' This meaning may be validly applied to treaties and other sources of international law. In Germany, treaty law has no superiority over municipal law, therefore it may be overruled by a lex posterior. See also, Luzzus Wilhbaber and Stepban Breitenmoser, ibid, 179-180, 196-198.

[101] See for example, art. (16) of the Serbian Constitution: '... [R]atified international treaties must be in accordance with the Constitution.' See also, Luzzus Wilhbaber and Stepban Breitenmoser, ibid, 192, 194.

[102] See, Alec Stone Sweet and Helen Keller (n 96) 683.

[103] See, E.A. Alkema (n 99) 7.

[104] The impact of such distinction, especially in the courts of law, is to determine which treaties are immediately and directly applicable and of a self-executing nature, as opposed to those treaties that need internal procedures, such as an act or a regulation, to be applicable in the municipal domain. The last procedures are important for explaining and specifying the meanings of the provisions of non-self-executing treaties. Thus, it is clear that the nature of treaty provisions is the reason for the differences. Non- self-executing treaties can be vague and this can incorrectly lead to their application in a way that is inconsistent with the intent of the treaty provisions. See, David Sloss (n 58) 9-10. See also, E.A. Alkema, ibid, 7-9.

[105] See, art. (59)(2) of the Basic Law for the Federal Republic of Germany. See also, Luzzus Wilhbaber and Stepban Breitenmoser (n 86) 179-180.

[106] See, Alec Stone Sweet and Helen Keller (n 96) 684-685.

approach in regulating the relationship between national law and treaty obligations. The position of the Iraqi constitutions and law, especially as it stood before 1977, is not clear, because there is no explicit provision that determines the way in which treaties become part of Iraqi law and are applied internally. However, the next section demonstrates that the Iraqi judiciary and law are in a similar position to that of States that incorporate the treaties into their municipal laws and apply them directly.

2.2.2.1. Rules of customary international law and general principles

The generally recognized rules of international law, as understood in constitutions such as those of Germany,[107]Portugal,[108] Austria,[109] Greece,[110] Russia,[111] Italy,[112] Japan,[113] are not only a part of the legal State system; more than that, they overarch the local and federal statutory laws or regulations.[114] However, they do not enjoy supremacy over the provisions of the Constitution.[115] Moreover, even in States that make no constitutional reference to the rules in question, the latter are applied indirectly by courts through the interpretation of domestic laws as being consented or reconciled to international rules.[116]

There is controversy over the status of these rules when they clash with the domestic laws or judicial precedents, particularly in those States that do not explicitly mention these rules within their constitutions or laws. However, it is observed that the courts try to reconcile their laws with such rules according to the principle of the 'friendliness of international law', which is

[107] Art. (25) of the Basic Law for the Federal Republic of Germany confirms that '[T]he general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory.'

[108] Art. (8)(1) of the Portuguese Constitution sets forth that '[T]he rules and principles of general or common international law shall form an integral part of Portuguese law.'

[109] Art. (9)(1) of the Austrian Federal Constitution contends that '[T]he generally recognized principles of International Law are regarded as integral parts of Federal law.'

[110] See, art. (28) (1) of the Greek Constitution of (1975).

[111] See, art. (15)(4) of the Constitution of the Russian Federation of (1993).

[112] Art. (10) of the Constitution of the Italian Republic states that '[T]he Italian legal system conforms to the generally recognised principles of international law.'

[113] Art. (98) of the Constitution of Japan of (1946) provides that '... [e]stablished laws of nations shall be faithfully observed.'

[114] See also, Antonio Cassese (n 100) 225,229-30. See also, Luzzus Wilhbaber and Stepban Breitenmoser (n 86) 184.

[115] See, Luzzus Wilhbaber and Stepban Breitenmoser, ibid, 184.

[116] The legal situation in France appears to be,similar to that in the Netherlands, in Switzerland and in the United States, where the constitutions contain 'no express reference to customary international law, yet that law is applied by their courts.' See, Luzzus Wilhbaber and Stepban Breitenmoser, ibid, 189-190. According to a Legal Opinion prepared at the request of the Liechtenstein Government, the Principality of Liechtenstein quite generally recognizes the principle of direct incorporation of customary international law into municipal law without any legislative or executive transformation. Accordingly, the Constitutional Court applies customary international law unhesitatingly. In the Glatt case, it relied on international criminal law and qualified the positive principle of territoriality as a starting-point. Furthermore, it contended in that decision that international law did not prohibit the extradition of state citizens. See, ibid, 200.

based on an assumption that the legislator aimed not to contravene international law.[117] This interpretation is valid even in the case of a clash between the provisions of local laws and international treaties.[118] Additionally, the municipal courts can reasonably resolve the inconsistency through rules of interpretation that allow a subsequent rule or special law to restrict a general one. In the case of Iraq, although there is no judicial precedent or legal provision that can be used as grounds to apply the customary international law or general principles, there is no a legal obstacle that prevents the application of the aforementioned law and principles. The Iraqi courts can apply the latter law indirectly through the interpretation of domestic legal provisions, especially those that relate to the principle of legality and the prohibition of retroactive laws, in the context of the meaning afforded by the general principles and/or customary international law. Iraqi judges can do this by means of a reconciliation between domestic provisions and international law, or on the basis of the principle of the 'friendliness of international law'. This is especially possible when Iraqi legislators do not explicitly display an opposing attitude. Conversely, there may be an explicit intention which supports a domestic obligation to respect the principles of international law and adhere to the Charter of the UN. This seems clear from the text of Article 15 of the Draft Constitution of the Republic of Iraq of 1991.[119] In particular, this intention with regard to the UN Charter entails implementation of UNSC resolutions issued under Chapter VII of the Charter. Thus, the Iraqi courts can construe the domestic provisions concerning the principle of legality and the prohibition of retroactive laws as principle which cover the criminalization of international crimes. This interpretation of such principles is well established in international law. They can be acceptable even under the IPL, which confirms that its provisions do not prevent the application of other penal provisions and laws. It is notable that such an approach can also be used for the indirect application of international human rights norms.

2.2.2.2. International rules of human rights and peremptory norms

Two points are worthy of note with regard to the international rules of human rights and peremptory norms. Some States grant customary and conventional international rules of human rights a special constitutional status[120] or use them in order to expound and apply their laws or

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[117] See, ibid. See, David Sloss (n 58) 14.

[118] Ibid.

[119] This article states that '[I]raq respects the principles of international law, and is committed to the Charter of the United Nations, and takes care of the principles of good neighborliness, and supports international cooperation and the development of friendly relations among nations, and adheres to non-interference in internal affairs, and solves disputes by peaceful means, on the basis of mutual equality and reciprocity.'

[120] For example, countries such as Venezuela, Czech Republic, Argentina, Serbia and Slovakia afford a constitutional status to the provisions of treaties on human rights, while other provisions are part of rank of the ordinary legislation. Austria and Italy, however, require a parliamentary majority to give human rights treaties the

to uphold judicial conclusions.[121] For instance, the Netherlands' courts commonly employ human rights conventions, of which most of the provisions are self-executing, as in the case of the ICCPR, in order to construe and apply domestic human rights.[122] Moreover, the courts interpret constitutional human rights according to international law.[123] To cite another example, the Canadian courts take international obligations into account when construing the human rights guarantees contained in the Canadian Charter. The Canadian Supreme Court concluded in 1989 that the Canadian Charter

> '[s]hould generally be presumed to provide protection as large that efforts by the corresponding provisions in the documents international Human Rights, which Canada has ratified.'[124]

It is worthy of note that, although Iraqi law does not refer specifically to international human rights provisions during the era of Ba'ath rule, Iraqi judicial opinion endorses the application of the said provisions. This opinion confirms that, even if the Iraqi courts do not invoke international human rights rules, this should not be interpreted as an exclusion of these rules from judicial application.[125] It is not necessary to cite human rights treaties if they are consistent with constitutional provisions, in which case referring to the latter will be sufficient.[126]

Another point relates to peremptory norms. These rules are superior in the hierarchy to all the legal rules.[127] Also, they are different from other international rules due to their special status

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same status as constitutional provisions. See, Tom Ginsburg, Svitlana Chernykh, and Zachary Elkins (n 55) 207. See for example, art. (11) of the Constitution Of The Slovak Republic, which provides that '[I]nternational treaties on human rights and basic liberties that were ratified by the Slovak Republic and promulgated in a manner determined by law take precedence over its own laws, provided that they secure a greater extent of constitutional rights and liberties.' See also, art. (16) of the Constitution of the Portuguese Republic, which states that '1. [T]he fundamental rights enshrined in this Constitution shall not exclude such other rights as may be laid down by law and in the applicable rules of international law. 2. The provisions of this Constitution and of laws concerning fundamental rights shall be interpreted and construed in accordance with the Universal Declaration of Human Rights.'

[121] Countries such as Canada, the Netherlands, Austria, Serbia and Japan have found that international human rights norms are valid for the purpose of interpretation or application of local laws or to uphold judicial conclusions. See also, ibid, 207-28, 209.

[122] See also, E.A. Alkema (n 99) 16.

[123] Ibid.

[124] See, Tom Ginsburg, Svitlana Chernykh, and Zachary Elkins (n 55) 207. See also, art. (20) of the Constitution of Romania, which asserts that '(1) [C]onstitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the convenants and other treaties Romania is a party to. (2) Where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favourable provisions.'

[125] Samia Bourouba (n 26) 48.

[126] Ibid, 48.

[127] For more details on these rules, see Antonio Cassese, *International law* (Oxford University Press, 2005), 198. See also, Christian Tomuschat and Jean Marc Thouvenin, (ed), *The fundamental rules of the international legal order: 'Jus cogens' and obligations 'erga omnes'* (BRILL, The Netherland, 2006).

within the municipal laws systems. It is accepted that these peremptory norms penetrate the domestic legal systems without the need for any internal act, and moreover they are superior to all the legal rules within these systems.[128] This interpretation is clearly expressed in a statement of the ICTY concerning the exercise of universal jurisdiction on acts of torture.[129] The ICTY found that it was beyond doubt that the prohibition of torture has the character of *jus cogens,* and further determined that

> '[O]ne of the consequences of the jus cogens character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute, and punish ... individuals accused of torture.'[130]

The ICTY held that peremptory norms could affect domestic law because they can delegitimize any legislative or administrative act, including amnesty laws pardoning and covering the prohibited conduct.[131] Furthermore, a victim can bring his suit before a national or international court and ask them to rule that a conduct that violates *jus cogens* is internationally unlawful.[132] The same effect of peremptory norms was applicable to State practice. For example, the Spanish and Argentinean courts both rejected the application of amnesty laws, because such laws contradict *jus cogens*.[133] A similar approach is to be found in the attitude of the Swiss Government towards the crime of genocide; the Belgian court in the case of Pinochet; and the Italia Court of Cassation in the Ferrini case (with regard to civil litigation).[134] Furthermore, the Swiss Supreme Court, in the case of Bufano et al., adopted *jus cogens* as *ratio decidendi.* In this case, which was heard in 1982, the Court rejected the extradition of two Argentinean defendants by the Argentinean authorities, because the Court was convinced that such extradition might lead to a violation of a peremptory rule,[135] since the defence claimed that the accused would not receive a fair trial and might be subject to human rights violation, such as torture.[136] The peremptory norms can also raise universal jurisdiction

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[128] Dinah L. Shelton (n 48) 2. See also, E.A. Alkema (n 99) 15-16.
[129] Andreas Zimmermann, 'Violations of fundamental norms of international law and the exercise of universal jurisdiction in criminal matters', 336. In: Christian Tomuschat and Jean Marc Thouvenin, (ed), *The fundamental rules of the international legal order: 'Jus cogens' and obligations 'erga omnes'*(BRILL, The Netherland, 2006)
[130] Prosecutor v. Furundzija (Trial Judgement) ICTY-IT-95-17/1-T (10 December 1998), para. 156.
[131] Ibid, paras, 153-157.
[132] Ibid, para. 155.
[133] Antonio Cassese (n 127) 208.
[134] Ibid.
[135] Ibid.
[136] Moreover, in 1991, because of a popular initiative to reform the Constitution concerning the limitation of the rights of refugees, the Swiss Federal Council found that a popular initiative must accord with the peremptory norms. Consequently, in 1999 both the notion of jus cogens and the restrictions based on them were inserted in the Constitution. ibid, 211-212.

in relation to the prosecution of deeds that are prohibited under *jus cogens* before the national courts. It is noteworthy that the prohibition against the commission of genocide, crimes against humanity and war crimes is one of the peremptory norms, as it amounts to an *erga omens* obligation.[137] In this regard, the ICTY and State practice contend this position. For example, the Hungarian Constitutional Court held that

> '[T]he rules relative to the punishment of war crimes and crimes against humanity are jus cogens norms of international law, because these crimes threaten mankind and international co-existence in their foundations. A State refusing to undertake this obligation may not participate in the international community.'[138]

The IHT's viewpoint can be accepted in the context of the peremptory norms. Definitely, some of the violations committed by the Iraqi former Ba'ath regime clearly constitute international crimes prohibited under international rules that have the rank of *jus cogens*. Thus *jus cogens* penetrates and overrides all local rules, and. consequently, the IHT's Statute and trials can be founded on *jus cogens*. Cherif Bassiouni and others have made this observation. In spite of the belief of the aforementioned that the legal system of Iraq is dualistic, they nonetheless confirm that this cannot affect the nature of *jus cogens*, which should apply in the inner field and is superior to all the domestic rules.[139] Cherif Bassiouni found therefore that Iraqi legislators and the IHT should both rely on the peremptory norms as a sufficient basis for the establishment of the legitimacy of the offences listed in the IHT's Statute and applied through its trials.[140] Although there is no explicit reference in Iraqi judicial precedents and law except the IHT, Iraqi juristic opinion supports the view that the said norms need no internal procedure or law to be applied in the municipal field.[141]

2.3. The status of treaties within Iraqi law

2.3.1. The nature of the political composition of Iraq and its law-making procedures

It is well known that modern democratic regimes are based on the principle of the separation of powers, particularly the legislative, executive and judicial authorities. The independence of

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[137] See, ibid. See also, M. Cherif Bassiouni, 'Accountability for international crimes and serious violations of fundamental rights: International crimes: Jus cogens and obligation erga omens' 59 (1996) *Law and Contemporary Problems*.

[138] Antonio Cassese, ibid.

[139] See, M. Cherif Bassiouni (n 5) 148-151. See also, L. Elizabeth Chamblee (n 19) 24.

[140] M. Cherif Bassiouni, ibid.

[141] See, Haider Adham Al-Tai (n 15) 220. See also, Zuhair Kazem Abboud, *Al-Dujail case and the end of Saddam* (Iaras, Erbil, 2007), 192.

زهير كاظم عبود، *قضية الدجيل ونهاية صدام* (دار ناراس، اربيل، 2007).

each authority from the others, especially the judiciary authority, reduces the opportunities for the emergence of dictatorial regimes that grasp all authority in a single hand and then use their power to violate the rights and freedoms of individuals. It is therefore observable that democratic countries, irrespective of whether they adopt a dualist or a monist approach in dealing with treaties, restrict executive authority and prevent legal rules from being imposed without the consent of the parliament. This is one of the effects of the principle of separation of powers. Therefore, it is necessary to understand the role and practice of the authorities in the process of making law and treaties, and then to determine the status of treaties within Iraqi law and its judiciary. Thus, it should examine the effective laws and practices during the time of the Ba'ath regime. This is particularly necessary since there are different juristic opinions concerning the status of treaties within Iraqi law. According to some of these opinions, the ratification or accession law is sufficient to bring a treaty into domestic force, while others argue that this is insufficient unless a treaty is reissued as municipal law or, as others suggest, is published in the Official Gazette.

2.3.1.1. The status of treaties and law-making under the Iraq Interim Constitution of 1970

The so-called Revolutionary Command Council (RCC) under resolution No. 792 of 1970 set out this constitution after the Ba'ath Party took power in Iraq. This constitution attempted to show that there is a separation and independence of the three main authorities. Other provisions, however, concentrate these authorities so that they are exercised only by the Ba'ath Party. Moreover, political practice reveals this reality. According to the aforesaid Constitution, the RCC is considered to be the supreme body in the State with broad powers, and essentially it exercises the legislative function.[142] Considerable attention has been focussed on the number and affiliation of the members of the Council.[143] The Constitution demanded a simple majority of those members, i.e., seven out of twelve, in order to adopt legislation and resolutions that have legal force.[144] Moreover, the RCC had the right to issue individual resolutions that had the status of law.[145] It is worth mentioning that the Constitution referred to the establishment of

[142] Art. (37) of Iraq Interim Constitution of 1970, laid down that '[T]he Revolutionary Command Council is the supreme institution in the State, which on 17 July 1968, assumed the responsibility to realize the public will of the people, by removing the authority from the reactionary, individual, and corruptive regime, and returning it to the people.'

[143] It is noteworthy that this Council was composed of only twelve persons who had to be at the same time members of the Regional Leadership of the Socialist Arab Ba'ath Party. Moreover, those persons were not elected by the Iraqi people, and were instead appointed by the Revolution Command Council itself. See, art. (38) of the Iraqi Interim Constitution of 1970.

[144] See, art. (41)(c) of the Iraqi Interim Constitution of 1970.

[145] See, art. (41)(a) of the Iraqi Interim Constitution of 1970.

another council, called the National Council.[146] However, this Council did not have an influential role in relation to the RCC.[147] The role of the National Council was mainly limited to discussing legislation proposed by the RCC or the President of the Republic; and it was not able to pass laws unless the RCC gave its final approval to those laws.[148] Even with this limited role, the formation of the National Council was delayed. It held its first session in 1984 after being established in law in 1980. This means that the RCC was the only institution that was able to lay down laws and accept treaties during the period 1970-1984.[149] Even after the formation of the National Council, the Constitution allows the RCC to issue resolutions having legal force in isolation from the National Council. In practice, the RCC took very broad advantage of the authority that it had granted itself. It issued many legislative resolutions that involved flagrant violations and atrocities.[150] This reveals that the RCC dominated the legislative function. Regarding the executive authority, it was also subject to the inclusive power of the RCC, since the head of the RCC was at the same time President of the State, head of the executive authority, Prime Minister and Supreme Commander of the armed forces.[151] He exercised very wide powers, including the appointment of judges and government officials and the issuance of implementing legislation and presidential decrees.[152] The judiciary was not

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[146] See, Chapter Two of the Iraqi Interim Constitution of 1970.

[147] Comment on the Iraqi Interim Constitution of 1970, available at <http://www.iraqja.iq/view.81/> accessed on June 23, 2016.

تعليق على الدستور العراقي المؤقت لعام 1970.

[148] See, The Principle of individual leadership (The Füehrer principle) in the theory and application of the Ba'ath Party available at <http://www.gov.krd/a/print.aspx?l=14&smap=010000&a=12128> accessed on June 23, 2016.
مبدأ القيادة الفردية (مبدأ الفوهرر) في نظرية وتطبيق حزب البعث.

[149] This is an important matter because the ICCPR had included a provision on the principle of legality that was adopted by this time.

[150] See, CCPR on 'Consideration of reports submitted by States parties under article 40 of the Covenant, Fifth periodic reports of States parties due in 2000 Iraq' UN Doc. CCPR/C/IRQ/5 (12 December 2013), para. 8, 11-14, 78, 105, 119, 132, 160. (Thereinafter, fifth periodic reports of States parties due in 2000 Iraq) See also, Presidency of the Council of Ministers, 'Report on the Resolution of Ministers Council No. (358) of 2011, The Committee on the implementation of Article 140 of the Constitution of Republic of Iraq'. See also, Law on the abolition of legal texts that prohibit courts from hearing the suits No. (17) of 2005. See also, Dollah Ahmed Abdullah and Beida Abdel Jawad Mohammed Tawfiq, 'The role of the Federal Court in the protection of human rights in Iraq' 49 (2010) *Rafidain Journal of Rights*.
دولة أحمد عبد الله وبيداء عبد الجواد محمد توفيق، دور المحكمة الاتحادية في حماية حقوق الإنسان في العراق، 49 (2010) *مجلة الرافدين للحقوق*.
See also other RCC Resolutions published by Dictator Regime Abuses Documentation Department, Ministry of Human Rights- Republic of Iraq available at <http://www.humanrights.gov.iq/PageViewer.aspx?id=209> accessed on May 5, 2015. Dictator Regime Abuses Documentation Department, *The prominent of the former dictatorial regime crimes* (Dictator Regime Abuses Documentation Department, Ministry of Human Rights-Republic of Iraq).

[151] See, art. (56) of the Iraqi Interim Constitution of 1970. See also, RCC Res. No. (567) of 1973.

[152] See, art. (57)(d) of the Iraqi Interim Constitution of 1970. Members of the RCC were at the same time officials in the executive branch and working for the deputy prime minister, the deputy president, ministers within the governmental construction, heads of security organs, and/or exercising executive tasks to achieve the objectives of the tyrannical political regime. In particularly, they were the officials directly responsible for the implementation of policies related to the campaigns of violations and atrocities committed against the Iraqi people political opponents and others.

an independent authority. Instead, it was a part of the institution of the Justice Ministry and thus was subject to the executive and government.[153] This reveals that the political composition of the three authorities was non-democratic and that these authorities were managed in a dictatorial manner and subject to the hegemony of the president and of members of the RCC and the Ba'ath Party. Therefore, it was inconceivable that the actions and procedures of the executive branch would not be approved by the legislature and vice versa. This was especially true of those actions that were related to treaties.

2.3.1.2. Judicial Practice by the Iraqi courts

It has been argued that the Iraqi judiciary did not use or refer to conventions that had been ratified by Iraq and it has been assumed therefore that the judiciary could not exercise such a role unless the provisions of conventions were issued as local laws. This view ignores the political situation and its dominion over the judiciary function under the Ba'ath regime. The Iraqi judiciary could not perform its role independently. As an institution of the Justice Ministry, it was subject to executive authority.[154] In practice, the Iraqi judiciary suffered from marginalization and restriction because of interference by executive officials and members of the Ba'ath regime.[155] On the one hand, the dissolved RCC prevented the regular courts from considering many cases, such as those related to its resolutions, some legal provisions and abuses that violated the Constitution or even ordinary laws.[156] In addition, the Ba'ath regime established special courts to exercise a judicial function in place of regular courts.[157] These special or exceptional courts were organs for the implementation of the regime's repressive policies.[158] It should be noted that these courts were not managed by judges.[159]

One of the most famous examples of political interference in judiciary affairs is what is called the case of Judge Dara Nur Al-Din. In a case before the Karkh Court of First Instance, the judge had made a decision to refrain from applying the resolution of the dissolved RCC No. 581 of 1981 because this resolution violated Article 16(b) of the interim Constitution of 1970, which

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[153] Fifth periodic reports of States parties due in 2000 Iraq.

[154] Mazen Lillo Radi, 'Guarantees of the respect for the constitutional bases in Iraq' 57 (2008) *Journal of Comparative Law*, 6.

مازن ليلو راضي، ضمانات احترام القواعد الدستورية في العراق، 57(2008) *مجلة القانون المقارن*.

[155] Zuhair Kazem Abboud (n 141)192.

[156] Ibid.

[157] See also, Zuhair Kazem Abboud, *The exceptional courts in Iraq* (Dar Al Mada, Baghdad, 2011).

زهير كاظم عبود، *المحاكم الاستثنائية في العراق* (دار المدى، بغداد، 2011).

[158] These courts had exercised national, sectarian and political injustice and violated grossly the foundations of justice and human rights and the practical applications of legal and constitutional norms in force. These courts are State security courts, the Revolutionary Court, the Court of public security, Intelligence Court, Private Security Court, the Olympic Committee's Court, the Court of the Ministry of Interior and others. ibid.

[159] Ibid.

was then in force.[160] This judicial decision became final after its ratification by decision No. (507/legal/1991), which was issued by the Court of Appeal in its Cassation capacity.[161] Because of this conduct, the political power imprisoned Judge Dara Nur Al-Din.[162] In another example, the President of the Republic issued a decree to dismiss twenty-seven of the first class judges of the Court of Cassation, which consisted of thirty-three judges and was the highest court in Iraq.[163] The reason for the dismissal was that Qusay Saddam, the second son of the head of the regime, was not satisfied with a sentence of ten years imprisonment passed by those judges on a husband who had killed one of Qusay's guards in order to defend the honour of his wife, who had been assaulted by the murdered guard. Moreover, Qusay killed the husband in prison.[164] Consequently, judicial practice during the rule of Ba'ath regime cannot be a proper basis for interpreting the relationship between Iraqi law and the ratified treaties. When the Iraqi judiciary became independent, there were some decisions of Iraqi courts that applied the conventions on human rights, especially the ICCPR. In such applications, the Iraqi courts signalled the date of the ratification of the laws on such conventions and not the date of publication of the provisions of the conventions in the Official Gazette. In fact, however, the international conventions on human rights and international crimes, including the ICCPR, were published in full in an issue of the Official Gazette 1992. However the Iraqi courts referred to the date of the ratification of the law. For example, in the case before the Personal Status Court of Karrada, the Court referred to the Ratification Law on the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) No. 66 of 1986 and ruled that

> ' ... [T]herefore and whereas the plaintiff's claim is not a legitimate claim pursuant to the response letter of the church and to the inapplicability of the Islamic Sharia provisions on the case of the litigants according to the above mentioned constitutional provisions, hence the law in force and that is applicable to the case of the litigants should be sought. And after examination, the Court concluded that the most relevant provisions dealing with the case are the provisions of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), ratified by Iraq by virtue of the Law No. 66 for year

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[160] Saad Abdul-Jabbar Al-Allush, 'Views on the subject of judicial observance over the constitutionality of laws in Iraq and its future in the protection of rights and public freedoms' 14 (2005) *Journal of the College of Law - Al Nahrain University*, 20.

سعد عبد الجبار العلوش، نظرات في موضوع الرقابة القضائية على دستورية القوانين في العراق ومستقبلها في حماية الحقوق والحريات العامة، 14 (2005) *مجلة كلية الحقوق- جامعة النهرين*.

See also, Mackie Naji, *Federal Supreme Court in Iraq* (Dar Al-Diyaa, Najaf, 2007), 33.

مكي ناجي، *المحكمة الاتحادية العليا في العراق* (دار الضياء، النجف، 2007).

[161] Saad Abdul-Jabbar Al-Allush, ibid, 20.

[162] Ibid.

[163] Razak Alkatb, 'Saddam's trial' *Buratha News Agency* available at <http://burathanews.com/news/3798.html> accessed on June 23, 2016.

رزاق الكيتب، محاكمة صدام، *وكالة أنباء براثا*.

[164] Ibid.

> 1986 published in the Official Gazette of Iraq, Issue No. 3107 dated 7/21/1986, the provisions thereof having become part of the national Iraqi Law after ratification and official publication; therefore the application of the Convention's provisions is required by law, such as the provisions of article 16, paragraphs (a) and (c), which require States Parties to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular to ensure the right to enter into marriage and the same rights and responsibilities during marriage and at its dissolution. The Convention also sought to achieve the elimination of prejudices, customary habits and traditions, and all other practices that are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women (article 5/a of CEDAW). Also, the State is required to "ensure equality of rights and responsibilities of spouses as to marriage, during marriage.'[165]

Moreover, the Court applied the ICCPR and referred to its Ratification law No. 197 of 1970 and decided that

> '[p]ursuant to article 23, paragraph (4) of the International Covenant on Civil and Political Rights, ratified by Iraq by virtue of the Law No. 197 for the year 1970 published in the Official Gazette of Iraq, Issue No. 1927 dated 10/7/1970, and the provisions thereof have become part of the national law. In consideration whereof, and whereas marriage contracts concluded according to the provisions of the Christian law are based on affection, love and respect, and the demand of the plaintiff for his wife to resume their marital life in the way described above does not reflect affection and respect and is therefore contradicting to the provisions of the marriage contract; also, the said demand is based on the principle of the husband's superiority to his wife, which is against the law ensuring equality in marital rights between spouses; and the demand has no legitimate basis according to the church's opinion; in addition to the fact that it contradicts the freedom and dignity of the person ensured by article 37/a of the Constitution. The demand of the plaintiff is hence a coercive measure that falls under the concept of violence against women and uses unfair treatment as a means to meet his ends, ... In consideration whereof, the case of the plaintiff should be dismissed for the above mentioned reasons and therefore the Court decided to rule by the dismissal of the plaintiff's case.'[166]

In addition in another case, heard before the Court of First Instance of Hay Al-Shaab, the Court predicated on several legal and religious provisions, including the provisions of the Convention on the Rights of the Child, to make its decision in relation to a case concerning the custody of a child. The Court stated that

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[165] Decision of the Personal Status Court of Karrada, issued in session on 5/31/2009. Cited in Samia Bourouba (n 26) 203-206. See also a comment on this decision, ibid, 91-94.

[166] Ibid. Art. (23)(4) of the ICCPR provides that '[S]tates Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.'

> '[w]hereas all international treaties and charters, including the Convention on the Rights of the Child, adopted by the UN General Assembly on November 20, 1989 and ratified by Iraq by virtue of Law No. 3 for year 1994, which provides under article 9 thereof that: "States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.'[167]

Moreover, judicial practice showed that the ratified treaty was held to be superior to municipal law. For example, in a lawsuit before the Iraqi Court of Personal Status in Karrada concerning the ratification of a divorce judgement issued by the Sharjah Sharia Court, the former Court decided to dismiss the lawsuit because the judgement had been ratified by the Iraqi Embassy according to Iraqi law, and the Court believed this to be sufficient.[168] However, the judges of the Federal Court of Cassation, which is the highest Court, the decisions of which bind all the other courts, revoked the decision of the Court of Karrada.[169] The decision of the Cassation Court was based on the provisions of the Riyadh Convention for Judicial Cooperation of 1983, which Iraq ratified by virtue of Law No. 110 of 1983. The Cassation Court decided that

> '[A]rticle 30 of the Riyadh Arab Agreement for Judicial Cooperation ratified by Iraq by virtue of Law no. 110 for 1983, gave judgements (which are every decision, or however it is designated, that is issued according to legal or state procedures by courts of any competent body in the country of one of the signatories (article 25) of the aforementioned agreement) issued in personal status cases, as it stipulates that (the recognition of a judgement is rejected in the following situations: if it contradicts the provisions of the Islamic Sharia or the provisions of the Constitution, public order or rules of conduct in the signatory country that is requested to ratify the judgement; b- if pronounced in absentia and the party condemned in the lawsuit or judgement was not duly notified in a way that allows it to defend itself. Hence, the Personal Status Court before which the divorce ratification lawsuit is filed, shall look into the extent to which the legal and Sharia conditions are fulfilled in this fact, verify its occurrence and it shall be entitled to adopt the submitted document as one of the evidences that can be relied on in the validation and the issuance of a judgement that conforms with the ruling of the Sharia." the Court of Personal Status in Karrada'[170]

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[167] Decision of the Court of First Instance of Hay Al-Shaab issued in session on 5/13/2008. Cited in Samia Bourouba (n 26) 201-203.
[168] Samia Bourouba, ibid, 42-44.
[169] Ibid.
[170] Decision of the Iraqi Federal Court of Cassation on Case No. (268) of (11 November 2009). Cited in ibid, 236-237.

Thus, it seems clear that the IHT's reasoning concerning the legality of international crimes contained in its Statute and applied in its trials had been properly established, not only under international law, as the IHT supposed, but also under domestic Iraqi law. In order to justify the legitimacy of its Statute and trials, the IHT referred particularly to the provisions of Article 15 of the ICCPR. These provisions affirm that the principles of legality, *nullum crimen sine lege* and the prohibition of retroactive application must be understood in the context of both international law and domestic law. The text has been in force in Iraq since the publication of the ratification law of the ICCPR in 1970, as shown in the above analysis. It should be noted that the provisions of Article 15 of the ICCPR include all international crimes, irrespective of whether these crimes are codified into an international convention, such as the crime of genocide, or grave breaches of the Geneva Conventions relating to armed conflicts, or are well established in customary international law or the general principles of international law, as are most crimes against humanity and war crimes that are not organized in international conventions.[171] Thus, all provisions relating to international crimes are in force within the Iraqi legal field. In addition, the IHT referred to the Convention for the Prevention, Suppression and Punishment of the Crime of Genocide, ratified by Iraq in 1959, and also the Geneva Convention, ratified by Iraq in 1956. It is notable therefore that the legal grounds cited by the IHT were in force domestically before the Publishing Law of 1977, the Law of Treaties No. 111 of 1979, the National Council Law No. 55 of 1980 and the Interior Regulation of 1980. These latter laws, enacted after the provisions of the aforementioned international instruments, have had domestic force. Therefore, the subsequent laws do not revoke the provisions of those conventions, and also those laws do not have a retroactive effect. This temporal context of the legal changes has been ignored by those who claim that international law and treaties need internal procedures. Thus, they claim that Iraq adopts a dualist approach. As concluded above, this is not the position of Iraqi law. Instead, the latter law is closer to the monistic approach, because it does not require any subsequent internal procedures in order to comply with the provisions of international treaties. In particular, the approval of the legislature is given before the treaty becomes obligatory.

2.3.2. The legal position between 1977 and 2003

Although the laws issued during the period in question do not change the monistic nature of Iraqi law in dealing with treaties, as detailed above, Publishing Law No. 78 of 1977 codified a

[171] Kenneth S. Gallant, *The principle of legality in international and comparative criminal law* (Cambridge University Press, Cambridge, 2009), 160-202.

general rule as to when a treaty comes into domestic force. Article 1 of the latter law provides that all laws published in the Official Gazette should be considered as the official texts, and are therefore to be relied upon, and are effective from the date of publishing, unless the text provides otherwise.[172] Article 2 (b) of the same Law specifies the publication of

> '[t]he provisions of treaties and conventions, and their annexes and what it is supplemented them, with their ratification laws.'[173]

Thus, it is clear from these articles that, since 1977, a treaty came into domestic force when its ratification law, its provisions and its annexes were published in the Official Gazette. However, even with such a requirement, Iraqi law remains of a monist nature, because the condition of publishing the treaty provisions does not have the effect of making a ratified treaty non-part of Iraqi law. Such a condition is not a crucial element in changing the monist nature of the legal system. The case is similar to that of some States that are classified as monist and where the treaty provisions are part of their domestic law, despite the fact that these States require publication of the treaty provisions in their Official Gazette in order to enter into local implementation.[174] Thus, it is not true, as some have maintained, that Iraqi law is dualist because of the requirement that treaty provisions must be published in the Official Gazette.

In another development, the Iraqi legislature passed the Law of Treaties No. 111 of 1979 which regulates the process for concluding treaties. Article 34 of this Law requires the treaty to be published

> '[w]ith the law of ratification or accession in the Official Gazette.'[175]

Some authors have resorted to this text to claim that it is the ground for a treaty to enter into force. Some observations can be made in this respect. It is clear that the text refers to no more than a commitment to publish the treaties, and thus it does not state the implications that follow from this publication. Therefore, this text alone is insufficient to give an effect unless, as explained previously, it is construed in the context of the provisions of Articles 1 and 2(b) of the Publishing Law in the Official Gazette. Moreover, even if it is assumed that the obligation to publish treaties contained in Article 34 of the Law of Treaties of 1979 is related to the entry

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[172] Art. (1)(Second) of the Publishing Law No. (78) of (1977) determines that '[E]verything published in the Official Gazette is considered as the credible official text and it shall enter into force on the date of publication unless it was stipulated otherwise.'

[173] Art. (2)(First)(b) of the Publishing Law in the Official Gazette No. (78) of 1977.

[174] See, footnote 99.

[175] Art. (34) of Law of Treaties Conclusion.

of the treaties into domestic force, it does not mean that Iraqi law is of a dualistic nature, as previously detailed. Another factor to note is that Article 34 of the Law of Treaties of 1979 can offer an effective and practical interpretation, if is read in a way that relates to the cited provisions of the Publishing Law. Such a reading can lead us to assert that Article 34 of the Law of Treaties complements the provisions of the Publishing Law as well as making it a legal obligation to implement them. In other words, the provisions of the Publication Law point to the way by which the provisions of a treaty enter into force and become locally applicable. They do not, however, impose an obligation or duty to publish treaties. Therefore, the text of Article 34 of the Law of Treaties can be understood as a restriction on the provisions of the Publishing Law, and does not offer to local bodies an option either to publish or not to publish the provisions of a treaty. Thus, the text of Article 34 of the Law of Treaties can be understood as a legal stipulation to integrate treaties automatically into domestic law and to enforce and apply them directly. This is precisely the monist approach in dealing with the provisions of international treaties. Relatedly, it can be observed that the Iraqi Judiciary applies the provisions of a ratified treaty even if such provisions have not been published in the Official Gazette. This approach was acceptable as long as a ratification law of the treaty had been published.[176]

The other laws concerning treaties within the period in question were the National Council Law No. 55 of 1980 and the Interior Regulation of National Council of 1980. The former merely indicated, in Article 47, that among the functions of the National Council was the endorsement of international treaties and conventions according to the provisions of the Constitution.[177] Article 105(I) of the Interior Regulation of the National Council reveals that the role of the National Council was ineffective. The latter article shows that the role of the Council did not relate specifically to treaties: instead the Council was authorized only to discuss the ratification laws on treaties prepared by the RCC.[178] Even within this uninfluential role the National Council could only discuss and give general approval or rejection of the drafts of ratification.[179] Thus, it did not have the authority to vote amend the treaties or their provisions. It is worth noting that this role of the National Council was provided within the context of the provisions of Chapter 5 which were related to the enactment of ordinary laws. Consequently, neither the National Council Law nor the Interior Regulation of the National Council add any

[176] See, Samia Bourouba (n 26) 41.
[177] Art. (47) of the National Council Law No. (55) of 1980.
[178] Art. (105)(I) of the Interior Regulation of the National Council of 1980.
[179] Ibid.

new effect in dealing with the provisions of treaties. Consequently, the previous analysis with regard to the entry into force and the application of treaties in the local field is not affected. Nor does it not affect the nature of Iraqi law as being of a monist nature. It is thus confirmed that the doctrine of the IHT, which was properly founded in international law, was entirely consistent with Iraqi law, despite the fact that the IHT did not indicate Iraqi law explicitly in its analysis.

2.3.3. The position of Iraqi law since 2003

It is now necessary to investigate the position of Iraqi law since the time in question. This is because the Statute of IHT was enacted and its trials were held at this time. The situation in Iraq has remained unsettled and many atrocities have been carried out against civilians on sectarian and racial grounds, in particular, the atrocities, including massacres and enforced transportation, committed by ISIS against the Shi'ite, Christian and Kurdish Yazidi populations.

After the Ba'ath regime had been removed and a democratic regime established, based on the principle of the separation of powers, the role of international law has explicitly been promoted through constitutional provisions and ordinary legislations, as well as at the judicial and institutional level.[180] The first of these important developments was the issuance of the IHT Statute listing international crimes. Within the period in question, two constitutions have been adopted. These are the LAT, and the PCI. There are some differences between them, but their general framework and provisions both indicate the status and practical role of international law. This role can be observed through the express and implicit provisions regarding Iraq's obligations under international law in general, obligations of human rights, laws dealing with chemical and biological weapons, international crimes and water distribution policies. In connection with Iraq's obligations under international law, both the Preamble of LAT and Article 8 of the PCI confirmed that Iraq respects its obligations under the international law.[181] This text seems similar to the text contained in the Constitution of Poland, which stipulates that international laws binding on the Polish Republic should be respected.[182] Accordingly, judicial opinion in Poland recognises that such a text imposes not only abidance by customary international law; there is also an obligation to obey the resolutions issued by international

[180] See: Committee on International Covenant on Civil and Political Rights 'Consideration of reports submitted by States parties under article 40 of the Covenant, Fifth periodic reports of States parties due in 2000 Iraq' UN Doc. CCPR/C/IRQ/5 (12 December 2013).
[181] See, Preamble of LAT and art. (8) of the PCI.
[182] See, Dinah L. Shelton (n 48) 13.

bodies.[183] The same interpretation can be applied to the Iraqi constitutional text. That text establishes a general constitutional principle concerning the rules of international law binding on Iraq, regardless of whether these rules come from a treaty, custom and/or general principles of international law. Moreover, through the constitutional text, Iraq's international obligations acquire a constitutional status and have the effect of revoking all provisions that contradict it. This can be inferred through the provisions of Articles 3(a) and (b) of the LAT[184] and Article 13 of the PCI, which impose the supremacy of constitutional rules.[185] The international obligations, however, are not infinitely influential and there are some restrictions. For example, under Article 7(a) of the LAT[186] and Article 2(a) of the PCI[187] the obligations are inoperative if they are contrary to the established provisions of Islam. This is a fundamental principle of both of the Constitutions and governs the process of the enactment of laws and other legal rules.[188] However, the established provisions of Islam do not include all the provisions of Islamic jurisprudence; instead they are limited to the provisions that are not contested. Another restriction is provided in Article 21 of the PCI, which prohibits the handing over of Iraqi citizens to non-Iraqi authorities and bodies.[189] Thus, it can be said that respect for international obligations is a duty of a constitutional nature and cannot be violated unless there is another constitutional provision restricting these commitments or altering their content in accordance with a particular concept. In addition to the general formulation relating to international obligations, both of the above constitutions stress respect for and implementation of certain international obligations. For example, each of the constitutions makes international commitments on the non-proliferation, development, production and use of nuclear, chemical

[183] Ibid.

[184] Art. (3) of of the LAT provides '(A)[T]his Law is the Supreme Law of the land and shall be binding in all parts of Iraq without exception. … . (B) Any legal provision that conflicts with this Law is null and void.'

[185] See, art. (13) of the PCI, which stresses 'First: [T]his Constitution is the preeminent and supreme law in Iraq and shall be binding in all parts of Iraq without exception. Second: No law that contradicts this Constitution shall be enacted. Any text in any regional constitutions or any other legal text that contradicts this Constitution shall be considered void.'

[186]See, art. (7)(A) of the LAT, which states that '[I]slam is the official religion of the State and is to be considered a source of legislation. No law that contradicts the universally agreed tenets of Islam, the principles of democracy, or the rights cited in Chapter Two of this Law may be enacted during the transitional period. ....'

[187] See, art. (2)(First)(A) of the PCI. It affirms that '[I]slam is the official religion of the State and is a foundation source of legislation: A. No law may be enacted that contradicts the established provisions of Islam.'

[188] See, Special Report on 'Iraq's Draft Permanent Constitution (September 2005): Analysis and Recommendations' United States Commission on International Religious Freedom (USCIRF), available at <http://www.uscirf.gov/reports-briefs/special-reports/iraqs-draft-permanent-constitution-september-2005> accessed on June 23, 2016.

[189] See, art. (21)(First) of the PCI, which states that '[N]o Iraqi shall be surrendered to foreign entities and authorities.'

and biological weapons, and imposes on Iraq a constitutional obligation to respect and implement these commitments.[190]

2.3.3.1. Human rights and international criminal law

Each of the two constitutions contains a special section that includes the basic rights and freedoms that are guaranteed to individuals. However, the LAT was more outspoken than the PCI concerning the human rights and freedoms recognized under international law, and especially the international instruments binding on or signed by Iraq. These international human rights and freedoms enjoy an explicit constitutional status in accordance with Article 23 of the LAT.[191] Moreover, because of their constitutional status, these rights and freedoms override and revoke all federal and local laws and legal rules,[192] and they prevail throughout the entire Iraqi territory without exception.[193] Moreover, the constitutional rules on rights and freedoms, including those that are recognized under international law, must not be derogated even through constitutional amendments or any subsequent legislation.[194] Therefore, a constitutional amendment or subsequent legislation would be unconstitutional in full or in the part if it violated these rules. All federal and local governments and administrations must follow these rules when exercising their powers.[195] Thus, from the time the LAT entered into force, international human rights norms became integral and they applied automatically and directly without the need for any internal procedure. These norms cannot be modified and they precede and supersede other local rules that contradict them. This is precisely similar to the ideas of monist theory. A similar text of Article 23 of the LAT does not appear in the PCI of 2005,

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[190] See, art. (27)(E) of the LAT, which states '[T]he Iraqi Transitional Government shall respect and implement Iraq's international obligations regarding the non-proliferation, non-development, non-production, and non-use of nuclear, chemical, and biological weapons, and associated equipment, materiel, technologies, and delivery systems for use in the development, manufacture, production, and use of such weapons.' See also the same meaning in art. (9)(First)(E) of the PCI.

[191] Art. (23) of the LAT states that '[T]he enumeration of the foregoing rights must not be interpreted to mean that they are the only rights enjoyed by the Iraqi people. They enjoy all the rights that befit a free people possessed of their human dignity, including the rights stipulated in international treaties and agreements, other instruments of international law that Iraq has signed and to which it has acceded, and others that are deemed binding upon it, and in the law of nations. Non-Iraqis within Iraq shall enjoy all human rights not inconsistent with their status as non-citizens.'

[192] Art. (3) of the LAT establishes that (A) [T]his Law is the Supreme Law of the land and shall be binding in all parts of Iraq without exception. No amendment to this Law .... Likewise, no amendment may be made that could abridge in any way the rights of the Iraqi people cited in Chapter Two; ... (B) Any legal provision that conflicts with this Law is null and void.'

[193] Ibid.

[194] Ibid. See, arts. (3)(a) and (7)(a) of the LAT.

[195] Art. (10) of the LAT stresses that '[A]s an expression of the free will and sovereignty of the Iraqi people, their representatives shall form the governmental structures of the State of Iraq. The Iraqi Transitional Government and the governments of the regions, governorates, municipalities, and local administrations shall respect the rights of the Iraqi people, including those rights cited in this Chapter.'

which is in force at the present time, although the preparatory work shows that those who framed the PCI had not omitted the listing of such a provision. The draft PCI prepared by the Constitution Drafting Committee had formulated this provision in a draft Article 44. The latter states that

> '[A]ll individuals shall have the right to enjoy all the rights mentioned in the international treaties and agreements concerned with human rights that Iraq has ratified and that do not contradict with the principles and provisions of this constitution.'[196]

This text disappeared from the final draft, due to amendments made by the TNA 'Iraqi Parliament' which reviewed the draft of the Constitution and then ruled out draft Article 44. According to an official justification given by the Vice President of TNA, Hussain al-Shahristani, the exclusion of draft Article 44 should not be understood as a refusal to respect and apply international law on human rights.[197] Instead, the only reason that should be taken into account was the need to avoid an interpretation that could cause it to be said that human rights conventions prevailed over the provisions of the Constitution.[198] This justification, however, seems illogical, because draft Article 44 explicitly states that the application of international rules should not contradict other constitutional principles or provisions, and that principle is sufficient to prove that international laws on human rights do not rank higher than the Constitution when there is a difference between them. However, because the previously mentioned justification is the official one, it should be taken into account in explaining why draft Article 44 was excluded, and also in understanding the relationship between the international law of human rights and Iraqi law in general and with the PCI specifically. The exclusion of draft Article 44 should only be interpreted as non-recognition of the supremacy of international rules over the Constitution, and should not be understood as a non-recognition of international rules as an integral part of Iraqi law and applicable directly. Also, as previously noted, the provision of Article 8 of the PCI confirmed that Iraq should respect its international obligations, and thus such obligations have a constitutional value, as long as they do not conflict with other constitutional provisions. Such reasoning find support in the words of Dr. Safaa al-Din Muhammad Safi, who was Minister of State for Parliamentary Affairs and a member of

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[196] Art. (44) of the first draft of the PCI.

[197] See, statements during a press conference on 14/9/2005 concerning accomplishment of the textual amendments on the permanent constitution articles. Media and Press Office - Iraqi Transitional National Assembly (TNA) available at <http://na-iraq.com/index.php?cmd=view&id=2251> accessed on June 23, 2016.

[198] Ibid. See also, Brown, Nathan J., 'The final draft of the Iraqi Constitution: Analysis and commentary' Carnegie Endowment for International Peace access available at <http://carnegieendowment.org/files/finaldraftsept16.pdf> accessed on June 23, 2016.

the largest coalition influential within the Parliament and the government. He stressed that the exclusion of

> '...[t]his article is redundant with respect to other provisions. Because there are texts which emphasize Iraq's commitment to all international conventions and, inter alia, the convention on human rights. I think that the presence of such article has become an unimportant, and therefore it was deleted in order to return to the original texts by that Iraq is committed to all international conventions and agreements.'[199]

Moreover, such interpretation can be legally established through the Law of High Commission for Human Rights in Iraq No. 53 of 2008, which was issued pursuant to the provisions of Article 102 of the PCI.[200] Article 3of the Commission Law stresses that the protection of human rights and freedoms should not only be based on the provisions of the Iraqi Constitution and laws, and, what it is more, this protection must be exercised in accordance with the provisions of treaties and conventions ratified by Iraq.[201] Consequently, the Iraqi Supreme Judicial Council, the highest judicial authority in Iraq, founded courts competent to hear human rights cases in all of Iraq's provinces. The human rights courts address complaints in accordance with the PCI and other Iraqi laws, in addition to international treaties and norms and standards of human rights.[202] Thus it may be affirmed that the latter treaties do not need to be reissued through a domestic law or procedure, and moreover they do not require to be published in the Official Gazette. Instead, they should be considered as part of Iraqi law and applicable immediately and directly from the moment they are ratified by Iraq. Accordingly and under the Commission Law, human rights treaties that are ratified by Iraq are not subject to the provision of Article 2 of the Publishing Law. The latter law generally requires publication in the Official Gazette as a condition of the entry into force of a treaty. Analysis of the evidence confirms without a doubt that Iraqi law adopts a monist approach when dealing with treaties. Such treaties, however, will

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[199] Saeb Khalil, 'Amendments to the Constitution only add distortion: Deleting the international human rights article' 1321 (2005) *Civilized Dialogue,* available at <http://www.ahewar.org/debat/show.art.asp?aid=45773> accessed on June 23, 2016.

صائب خليل، تعديلات الدستور تزيده اعوجاجاً: الغاء مادة حقوق الانسان الدولية، 1321 (2005) *الحوار المتمدن*.

[200] Art. (102) of the PCI provides '[T]he High Commission for Human Rights, the Independent Electoral Commission, and the Commission on Public Integrity are considered independent commissions subject to monitoring by the Council of Representatives, and their functions shall be regulated by law.'

[201] Art. (3)(Second) of the Law of High Commission for Human Rights in Iraq No. (53) of 2008.

[202] See also, the Iraqi Supreme Judicial Council established an ad hoc committee on human rights within the general prosecutor's office. These courts receive and consider complaints concerning violations of human rights, regardless of whether or not a plaintiff is an Iraqi citizen, civil society organizations, and/or the High Commission for Human Rights in Iraq. See, Ines Jabbar, 'Court of Human Rights: the first Arab judicial bodies in maintaining international standards' available at <http://www.iraqja.iq/view.2311/> accessed on June 23, 2016.

in the case of discrepancy rank lower than the provisions of the Constitution. Domestic judicial interpretations and practice, in particular, endorse such inference.

With regard to international law concerning international crimes, although neither the LAT nor the PCI make special and direct provisions for these crimes, it can be argued that the latter have a special constitutional status and are considered as an integral part of Iraqi law. Such an understanding can be inferred through Iraqi constitutional and legislative provisions concerning respect and implementation of international obligations, as inferred above. Rules concerning international crimes in particular are firmly established as part of international human rights law. Through the latter law, the principles of legality, *nullum crimen sine lege* and prohibition of retroactive effect should be construed in the context of both international and domestic laws. Such principles are well established by Article 15 of the ICCPR since Iraq ratified the ICCPR by the Ratification Law in 1970, and the ICCPR provisions were published in the Official Gazette in 1992. These provisions then, including Article 15, are an integral part of Iraqi law. Such conclusions can also reached by reference to Iraqi case law. Consequently, international law concerning international crimes is incorporated in Iraqi law. This understanding of the matter can be logically derived from the provisions of both of Article 48 of the LAT[203] and Article 134 of the PCI, both of which are related to the IHT and its Statute.[204] These articles emphasize the constitutional ratification relating to the practice, the Statute and the jurisdiction of the IHT, and they also bind the IHT to continue in its trials. It is well known that the Statute and jurisdiction of the IHT have relied mainly on international law, and this constitutional ratification should be construed as a constitutional endorsement of the application of the rules of international law relating to international crimes in Iraqi courts and at the local level. It should be understood that the IHT does not try the officials of the former Ba'ath regime for personal reasons; rather it reveals the respective viewpoints of the Iraqi constitutional legislator, the legislature and the judiciary in criminalising and prosecuting violations of the kind committed by the Ba'ath regime. These violations, which include the crime of genocide, crimes against humanity and war crimes, are international crimes. This concept constitutes one of the fundamental legal principles for the formation of the new democratic regime and the rule of law in Iraq after the Ba'ath dictatorship. Thus, it is difficult

[203] Art. (48)(A) of the LAT provides that '[T]he statute establishing the Iraqi Special Tribunal issued on 10 December 2003 is confirmed. That statute exclusively defines its jurisdiction and procedures, notwithstanding the provisions of this Law.'

[204] Art. (134) of the PCI provides that '[T]he Iraqi High Tribunal shall continue its duties as an independent judicial body, in examining the crimes of the defunct dictatorial regime and its symbols. The Council of Representatives shall have the right to dissolve it by law after the completion of its work.'

to argue that these principles are not part of the legal doctrine of the new regime in Iraq. Legal and judicial facts reinforce such an interpretation. For example, Article 73 of the PCI prohibits the issuance of amnesty in respect of persons who are convicted for committing international crimes.[205] This is an absolute rule and is not solely related to the trials of the IHT, and it is to be applied in future with regard to all cases involving international crimes. The Federal Supreme Court, in interpreting the provisions of Article 73, did not mention that this provision was restricted,[206] and there is no doubt that the provision of Article 73 are applicable to persons convicted by the IHT as well as to any convictions in the future. The judiciary authority accepted that the IHT had become a part of the ordinary judiciary institutions, and this is a tacit and clear acknowledgment by the highest judicial institution in Iraq that the rules of international law relating to international crimes should be automatically and directly applied, regardless of whether this application is related to violations committed before 2003 by the Ba'ath regime or to any case in the future. Moreover, Iraq has officially confirmed its position with regard to international crimes through the comments made on Article 15 of the ICCPR. In its Report to the Committee of the International Covenant on Civil and Political Rights (CCPR), Iraq affirmed that the meaning of the principle of legality, as included in Article 19(Second) of the PCI is identical with what is intended by the same principle as stated by Article 15 of the ICCPR.[207] It is well known according to the latter article that an act is a crime, whether it is criminalized under domestic law or under international law.

2.4. The principle of *'nullum crimen sine lege'* and international crimes under the IHT Statute

Although the ideas of the Social Contract influenced considerably influenced the formulation of the legality principle, there is no disagreement that the principle of legality is historically attributable to the Roman tradition, which summarizes the principle in the phrase *'nullum crimen, nulla poena sine lege'*.[208] Thus the behaviour of an individual cannot be classified as

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[205] See, art (73) of the PCI.

[206] See, Opinion on the judgements of IHT (Advisory Opinion) SFC-38/federal/2007 (8 January 2008).

[207] CCPR on 'Consideration of reports submitted by States parties under article 40 of the Covenant, Fifth periodic reports of States parties due in 2000 Iraq' UN Doc. CCPR/C/IRQ/5 (12 December 2013), Para. 146.

[208] David Luban, 'Fairness to rightness: Jurisdiction, legality, and the legitimacy of international criminal Law' (2008) *Georgetown Law - Faculty Working Papers*, 15-16. See also, Guillaume Endo, 'Nullum crimen nulla poena sine lege principle and the ICTY and ICTR' 15 (2005) *Revue quebecoise de droit international*, 4. See also, Claus Kress, 'Nulla poena nullum crimen sine lege' (2010) *Max Planck Encyclopedia of Public International Law (MPEPIL), Heidelberg and Oxford University Press*, 2-3, available at <http://www.uni-koeln.de/jur-fak/kress/NullumCrimen24082010.pdf> accessed on June 23, 2016. For more details see, Machteld Boot, *Nullum crimen sine lege and the subject matter jurisdiction of the international criminal court: Genocide, crimes against humanity, war crimes* (Intersentia, New York, 2002), 83-85.

criminal as long as there is no provision to criminalize it. Furthermore, the legal text should explain the elements and definition of culpable behaviour.[209] This means that the public should be able to obtain the text defining criminality.[210] Since the appearance of social contract ideas, there has been severe criticism of the fact that an act can be arbitrarily criminalized and punished without the invocation of a criminal text that was in effect at the time of the commission that act.[211] The supporters of the social contract sought to limit the judiciary through their perception of the principle of separation of powers, and this was the beginning of the codification of the principle of legality.[212] Accordingly, some theoretical explanations find that the aim of the principle of legality is to ensure the protection of individual freedoms against the abusive practices of State authorities.[213] Such a perception was also expressed by the PICJ.[214] The practice of individual freedoms would be threatened if the principle of legality was not recognized, because a State authority could at any moment allege that a particular practice was an offence, although there was no corresponding provision in criminal law.[215] If the principle of legality governs the criminal law, however, criminalization and punishment of the practice of an action will be arbitrary and illegal unless a criminal text exists at the time when such an action occurred.[216] Therefore, to avoid arbitrary laws and to ensure the exercise of freedoms, individuals must be informed in advance of those acts or practices that give rise to criminal guilt.[217] This is especially important when individuals are governed by a totalitarian or dictatorial regime.[218] The principle of legality is a criterion for the imposition of the rule of law in the face of the State authorities and is meant to prevent the abuses of the latter.[219] At the same time, it ensures justice through the prosecution of individuals whose conduct violates the existing legal prohibitions. Respect for the legality principle requires that all criminal laws and rules be available to the public and that the behaviours that create criminal liability are clearly

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[209] David Luban, ibid.
[210] Ibid.
[211] Guillaume Endo (n 208) 207. See also, Claus Kress (n 208) 3.
[212] Claus Kress, ibid.
[213] Machteld Boot (n 208) 83-85. See also, Antonio Cassese and Paola Gaeta, *Cassese's International Criminal Law* (Oxford University Express, Oxford, 2013), 23-24.
[214] Case concerning Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City (Advisory Opinion) PICJ-A/B65(4 December 1935), 56-57.
[215] See, Claus Kress (n 208) 2.
[216] Ibid.
[217] Ibid.
[218] Ibid. See also, Adam Przeworski and Jose Maria Maravall, (ed), *Democracy and the Rule of Law* (Cambridge University Press, Cambridge, 2003), 188-191.
[219] This is normal because of the correlation between the rule of law and basic freedoms of individuals. See, A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (Roger E. Michener, 1982), 110, 114, 124. See also, Eric M. Adams, 'Building a law of human rights: Roncarelli v. Duplessis in Canadian Constitutional culture' 55 (2010) *McGill Law Journal*, 441. See also, Adam Przeworski and Jose Maria Maravall, ibid.

defined. Only in this way is it possible to reject the arguments of defendants before the courts that their actions are not crimes.[220] This is a strict form of the principle of legality,[221] and prevails in countries that have adopted civil law systems. The elements of legality in these systems are almost fully implemented, since judges do not have widely embracing power due to the full codification of crimes and their elements.[222] In contrast, the legal tradition in countries with a common law system is rooted in unwritten rules, and particularly in judicial precedents, so that judges have a broad discretion, particularly in the context of social changes.[223] This will ensure that the rights of an accused are less protected compared with the civil law systems, because legal elements, such as accessibility, predictability and accuracy are more effectively guaranteed in the latter systems.[224] However, systems of civil law do not ensure non-impunity as the common law systems do.[225] This non-impunity, however, seems to begin receded in the common law systems because of the evolution of the principle of legality, which penetrated these systems, increasing their reliance on written criminal rules.[226] For example, in the United State there are no common law crimes, whereas these crimes are present, although there are few in number, in the United Kingdom.[227] In fact, in both systems there remains a degree of flexibility in the establishment of criminal convictions, due to the presence of the elements of legal fiction, as will be seen later.

It is well known that Iraq is one of the countries with a civil law system. Any lawsuit brought before the Iraqi courts must therefore be considered according to pre-existing provisions; and if not, such courts will violate the legality principle and the non-retroactivity of the law.[228] In

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[220] Ibid. See also, Dov Jacobs, 'Positivism and international criminal Law: The principle of legality as a rule of conflict of theories' In: Kammerhofer J. and D'Aspremont J. (eds), *International legal positivism in a post-modern world* (Cambridge University Press, 2014), available at <https://ssrn.com/abstract=2046311> accessed on December 7, 2016.

[221] On this interpretation see, Kai Ambos, 'General principles of criminal law in the Rome Statute' 10 (1999) *Criminal Law Forum*, 4.

[222] See also, Antonio Cassese and Paola Gaeta (n 213) 23-24. Noora Arajärvi, 'Between Lex Lata and Lex Ferenda? Customary International (Criminal) Law and the Principle of Legality' 15 (2011) *Tilburg Law Review: Journal of International and European Law*, 14.

[223] See also, Antonio Cassese and Paola Gaeta, ibid. See also, Noora Arajärvi, ibid. See also, Claus Kress (n 208) 6.

[224] Noora Arajärvi, ibid, 14-15. See also, Kenneth S. Gallant (n 171).

[225] Noora Arajärvi, ibid.

[226] Theodor Meron, 'Revival of customary humanitarian law' 99 (2005) *The American Journal of International Law*, 821.

[227] Ibid.

[228] Art. (21)(b) of the Iraq Interim Constitution of (1970) provided that '[T]here can be no crime, nor punishment, except in conformity with the law. No penalty shall be imposed, except for acts punishable by the law, while they are committed. A severer penalty than that prescribed by the law, when the act was committed, cannot be inflicted.' A similar provision is found in art. (19)(Second) of the PCI. Art. (1) of the IPL sets forth 'There is only punishment of an act or omission based on a law which stipulates that it is a criminal offence at the time it is committed. No penalty or precautionary measure that is not prescribed by law may be imposed.'

particular, the Iraqi constitutions and the IPL corroborate these principles. One exception should be taken into account: this is when a new provision or law favours the accused.[229] Consequently, the IHT needs to prove that international crimes that are listed in its Statute, which was enacted in 2003 and amended in 2005, were previously established as legal provisions, especially at the time when the crimes being considered by the Tribunal were carried out. In addition, the IHT needs to confirm that the elements of the principle of legality were clearly founded. Therefore, these points should be investigated.

2.4.1. A legal foundation to establish the legality of the IHT with regard to international crimes

As previously mentioned, the basic challenge facing the IHT is the claim of defence attorneys that the Statute and trials of the IHT contravene the *nullum crimen sine lege* and of non-retroactivity of law.[230] This is due to the fact that international crimes were not part of Iraqi law during the time when the defendants had governed the country and engaged in the crimes with which they were charged.[231] Thus, the IHT could not depend on a Statute enacted in 2003 and amended in 2005 in order to adjudicate the atrocities which were carried out between 1968 and 2003. In its argumentation, the IHT dismissed the claims of the defence representatives.[232] Some attention should be paid to the reasoning of the IHT. The latter chose to comprehend the principle of legality in the context of international law as laid down by both the Universal Declaration of Human Rights (UDHR) and the ICCPR. Through these two instruments, the IHT concluded that the incrimination of an act should not be limited to domestic law, including that of Iraq. Instead it should originate from customary rules and treaties, or other rules of international law.[233] In this respect Article 11(2) of the UDHR professes that

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[229] Art. (64)(b) of the Iraq Interim Constitution of (1970) determined 'Laws have no retroactive effect, unless otherwise stipulated. This exception does not include penal laws, tax laws, and fiscal fees.' Similar provision appears in the Art. (19)(Ninth) and (Tenth) of the PCI. In greater detail, Art. (2) of the IPL lays down '(1)[T]he occurrence and consequences of an offence are determined in accordance with the law in force-at the time of its commission and the time of commission is determined by reference to the time at which the criminal act occurs and not by reference to the time when the consequence of the offence is realized: (2) However, if one or more laws are enacted after an offence has been committed and before final judgement is given, then the law that is most favorable to the convicted person is applied. (3) If a law is enacted after final judgement is given and that law decriminalizes the act or omission for which the defendant has been convicted, the sentence shall be quashed and the penal consequences of the sentence shall become void. This does not under any circumstances prejudice any sentence previously served as long as the new law does not stipulate to the contrary. The court that originally imposed the sentence must order that the sentence be quashed at the request of the convicted person or the public prosecutor.'

[230] Al-Dujail Trial Judgement (n 3) 35, 48.

[231] Ibid, 49.

[232] Ibid, 42.

[233] Ibid, 36-37.

> '[N]o one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.'[234]

Later this was enhanced by Article 15 of the ICCPR, which affirms that

> '1 . [N]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.
> 2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.'[235]

Despite the international nature of these provisions, the IHT ruled that such provisions need not be stipulated by an interior law and thus could be imposed directly at the national level.[236] This was because, as the IHT saw it, Iraq is a Member State of the UN, and what was obligatory according to the UDHR and the ICCPR was adopted by the UN, to which Iraq was party.[237] It seems that the IHT expanded its understanding of the binding nature of international instruments. With regard to the Charter of the UN, there is no legal basis by which a member State of the UN is bound by treaties to which that member is not a party, regardless of whether or not such treaties were adopted by the UN. It is firmly established that a treaty cannot impose an obligation on a State without the consent of that State. This is a significant effect of the principle of the sovereignty of the State as a basic principle in international law. Therefore, an interpretation by the IHT that disagrees with these legal facts is not properly grounded.
In more exact terms, the IHT ruled that

> '[T]he larger explanation for the principle of crimes and penalties in the criminal international law permits to say that the one who commits international crimes may be questioned and then punished, even if those crimes are not stated in addition to not publishing them as international crimes in the internal law, which

[234] Art. (11)(2) of the UDHR of 1948.
[235] Art. (15) of the ICCPR of 1966.
[236] Al-Dujail Trial Judgement (n 3) 37.
[237] Ibid. The IHT said '[O]ur court believes that what is stated in this international proclamation is at least obligatory for the member countries of the U.N. and Iraq is a constituent member in this international organization and therefore it is obligatory according to the principles stated in this proclamation without the need to stipulate it in the interior law.' As well as, it added that '[I]t goes without saying, that the international proclamation ad of human rights and the special international treaty of civil and political rights have an international nature and Iraq is committed to the provisions stated therein for the aforementioned reasons.' ibid.

> is an interpretation that may be valid for implementation concerning the war crimes and ethnic extermination crimes committed in Iraq, and the punishment for these crimes, especially the crimes against humanity, find its legal source in the international custom which promotes to the commanding rule level, and is applied in various countries of the world without the need to stipulate it in its national laws.'[238]

Thus the IHT determined that, on the basis of international obligations, the inclusion of international crimes in the customary, conventional or peremptory rules of international law was a sufficient foundation to respect and fulfil the requirements of *nullum crimen sine lege* and the prohibition of the retroactive effect of law. This is regardless of the fact that these are crimes in Iraqi law. This interpretation of the IHT, as concluded in a previous section, reflects and concurs with the view of international law and judiciary. In other words, such an interpretation is proper only when based on international law. However, this does not necessarily mean that such an interpretation agrees with the views of internal legal systems, including those of Iraq, unless such systems afford a legal basis for reliance on international law directly. As analysed previously, such a legal basis can be established regarding national legal systems that follow a monist doctrine in dealing with international law. The Iraqi legal system follows the monist approach. As was demonstrated through Iraqi laws and judicial practice, treaties need no subsequent law of implementation in order to be effective in the internal field. Such effectivity can be established on the basis of the same law that was enacted in order to ratify a treaty. Additionally -and especially before the adoption of the Publishing Law of 1977- the domestic effectivity of a ratified treaty did not require the publication of the treaty provisions, either in full or in part; instead it necessitates the publication of the ratification law of a treaty in the Official Gazette. Moreover, even after 1977 the courts tended to refer to the ratification laws on the ratified treaties, regardless of whether the treaty provisions had been published. Consequently, it can be said that the Genocide Convention, the Geneva Conventions and the ICCPR at least are part of Iraqi law, because the ratification laws on these instruments were adopted and published before 1977. Therefore, the provisions of these instruments, including the said Article 15 of the ICCPR, have the same municipal effectivity as any other domestic law. The latter article extends to the coverage of genocide, war crimes and crimes against humanity, regardless whether such crimes exist as conventional, customary rules or general principles. Thus, the domestic legality of the Statute and trials of the IHT can be based on such an analysis without challenge. In addition to what was stated in the previous section, such

[238] Ibid, 40.

domestic legality can be established on the basis of peremptory norms. Consequently, it can be said that the legality of the Statute and trials of the IHT are well established in international law and Iraqi law.

Moreover, the reasoning of the IHT showed further grounds with regard to respect for the aforesaid principle when it said that these principles are necessary for the realisation of justice. The IHT stated that

> '[T]he principle of non-retroactivity of criminal law is respected for the purpose preventing injustice and protecting the innocent. However, objecting or taking exception to it without a sound legal basis for the purpose of absolving individuals accused of committing international crimes from criminal responsibility means that justice is denied and injustice is dedicated...
> This court believes that despite the fact that the international law is originally a customary law and despite the fact that the principle of the Crimes and Penalties according to legal provisions is related firmly to legislation, however, the requirements of justice and prevention of injustice and guarantee of individual freedom all require the applying of said principle in the scope of international crimes.'[239]

The above statement is similar to the interpretation of the notion of the principle of justice given on the occasion of the Nuremberg trials, where the International Military Tribunal of Nuremberg (IMT) predicated that

> '[I]n the first place, it is to be observed that the maxim nullum crimen sine lege is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished.'[240]

Both the American Military Tribunal and the judgement of the International Military Tribunal for the Far East reiterated the Nuremberg reasoning without further interpretation or new arguments.[241] It seems that the Nuremberg Tribunal was satisfied by the establishment of convictions based on the assumption that, even if the defendants had no idea that their behaviour was illegal, nonetheless they could at least, have been aware that their behaviour

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[239] Ibid, 39, 48.
[240] Trial of the Major War Criminals before the International Military Tribunal: Nuremberg 14 November 1945-1 October 1946, Vol I (Nuremberg, 1947), 219.
[241] Theodor Meron (n 226) 830. See also, Machteld Boot (n 208) 199. See also, Claus Kress (n 208) 4. See also, Jordan J. Paust, 'Nullum crimen and related claims' 25 (1997) *Denver Journal of International Law and Policy*, 322-323.

was 'wrong'. Therefore, the convictions at the Nuremberg trials were based more on moral rather than on legal grounds.[242] Thus, the principle of *nullum crimen sine lege* was not conceived as a strict matter of law;[243] instead it is nothing more than a flexible principle of substantive justice that is to be balanced against a group of competing imperatives.[244] This logic was more acceptable in its application to the massive atrocities and heinous behaviour that, for whatever reason, fell outside the range of the existing statutory law.[245] What it is worth mentioning is that this concept of the principle of legality, based on the principle of substantive justice or morality, has altered gradually since World War II in favour of the adoption of a strict understanding of the principle of legality.[246] Because of the criticism levelled at the principle of legality as established by the post-World War II trials, international efforts to codify the strict meaning of the principle of legality increased, resulting in the UDHR and then the ICCPR and the regional conventions on human rights.[247] These instruments, in addition to the Genocide Convention, recognized and codified international crimes for the first time. Consequently, according to these instruments, the principle of legality was to be understood as including not only crimes descended from the written provisions of treaties and municipal laws. Crimes emerging from unwritten rules of international custom or by general principles of law were also to be understood as consistent with the principle of legality. It should be noted that the crimes that were included in the Charter and Judgement of Nuremberg and the Tokyo Tribunals were considered as a settled part of international criminal law at the time of the drafting of the UDHR and ICCPR, irrespective of whether these crimes are described as part of customary international law or treaty or as general principles of international law. This

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[242] Dov Jacobs (n 220) 12.

[243] Kai Ambos (n 221) 4-5.

[244] See also, Antonio Cassese (n 213) 24. There were dissenting opinions that rejected the notion that the principle of nullum sine lege was a principle of justice, viewing it instead as a rule of policy. See, ibid, 26. See also, Beth Van Schaack, 'Crimen sine lege: Judicial law-making at the intersection of law and morals' 97 (2008) *The Georgetown Law Journal*, 131. The principle of substantive justice presents an effective solution for settling a contradiction between achieving fairness for the accused and conviction for atrocities, ensuring individual responsibility, satisfaction and rehabilitation for victims, the preservation of world order and deterrence. See, Beth Van Schaack, 'The principle of legality in international criminal law' 103 (2009) *Proceedings of the Annual Meeting - American Society of International Law*, 102.

[245] Such reasoning was much favoured and endorsed not only by supporters of natural law but, surprisingly, among the founders of the doctrine of positive law as well. Relatedly, Hans Kelsen, who criticized the judgements of the Nuremberg Tribunal, did not conceal his support for the imposition of criminal liability based on morality, when the acts are as morally hateful as the acts of those who had been charged before the Nuremberg tribunal. See, Beth Van Schaack, 'The principle of legality in international criminal law', ibid.

[246] Antonio Cassese, *International Criminal Law* (Oxford University Press, New York, 2008), 40.

[247] See, art. (7) of the ECHR, art. (9) of the American Convention on Human Rights, art. (7)(2) of the African Charter on Human and Peoples Rights, Art. (99) of the Third Geneva Convention relative to the treatment of prisoners of war, Arts. (65) and (67) of the Geneva Convention IV relative to the protection of civilian persons in time of war.

appears clear through the debate of States, including Iraq, during the drafting of the text on the principle of legality within the ICCPR. This text confirms not only the customary nature of international crimes: more than this, it codifies and reflects the written nature of international crimes, especially crimes against humanity, genocide and war crimes. This is apparent through the explicit reference to, and debate on, crimes listed in the Charter and the Judgement of Nuremberg and the Tokyo Tribunals during the formulation of the UDHR and the ICCPR. Moreover, the principle of legality, and specifically respect for the principle of *nullum crimen sine lege* as a strict concept, appears in the first international trials after the World War II trials. This seems to have been through the trials and Statute of the ICTY and then the ICTR.[248] Also, the Rome Statute referred to the principles of legality in its Article 24.[249] Thus, it cannot be acceptable to establish the legality of the IHT's Statute and its trials in relation to international crimes based on the concept of substantive justice adopted by the Nuremberg Tribunal and other military tribunals formed after World War II, particularly since this principle of legality was developed in the UDHR and the ICCPR, to which Iraq is a party and is bound by its provisions. Therefore, the doctrine of the IHT concerning the interpretation of its legality based on substantive justice is invalid.

2.4.2. Customary status of Crimes against humanity and principle of *nullum crimen sine lege*

It was mentioned previously that customary international law should be based on two elements, the material practice of a state and the 'opinio juris' which is the belief of the state that such a practice is binding as law. In addition, it was noted that some conditions should be fulfilled by a state practice in order for it to qualify as an element of custom. State practice, as was shown in chapter one, can appear in many forms: UN General Assembly resolutions, the work of the ILC, the practice of international organs, statements and views given in the context of treaties, domestic laws, executive action and judicial jurisprudence, and diplomatic statements.

References to crimes against humanity date back to the era of the First World War. However, their creation is attributed to the Charter of Nuremberg for the International Military Tribunal

[248] With respect to the establishment of the ICTY, the Report of UN Secretary-General stated that '[I]n the view of the Secretary-General, the application of the principle nullum crimen sine lege requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise.' See, UNSC 'Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 of (1993)' UN Doc S/25704 (3 May 1993), para. 34.

[249] Art. (24)(1) of the Rome Statute provides that '[N]o person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.'

of 1945.[250] Both the Charter of Tokyo of 1946[251] and the Control Council Law No. 10 of 1946 replicated provisions against such crimes.[252] Subsequently, the status of these crimes was enhanced in international law through UN resolutions, work of the ILC, and some international instruments and conventions. For example, the UNGA unanimously adopted Resolution 96(I) on 'Affirmation of the Principles of International Law recognized by the Charter of the Nuremberg Tribunal'.[253] Moreover, the UNGA adopted Resolution 3(I) of 1946,[254] Resolution 170(II) of 1947,[255] and a Resolution of the principles of international co-operation 3074(XXVIII) 1973.[256] These resolutions asserted the necessity for the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity. Therefore, it was argued that this appears to be adequate support for the view that crimes against humanity had obtained the status of customary law.[257] Moreover, the Trial Chamber in the case of *Tadic* asserted that crimes against humanity had already gained a customary character through its inclusion in the Nuremberg Charter.[258] Moreover, the ILC had adopted the Principles of International Law recognized by the Charter and Judgment of the Nuremberg Tribunal in 1950.[259] In its Report of 1954, the ILC reaffirmed crimes against humanity as one of categories of international crimes which threaten the peace and security of mankind.[260] What was more important was the adoption of both the UDHR of 1948 and the ICCPR of 1966, since these two instruments show, at an early stage of their drafting, the discussions and belief of States supporting the status of the core international crimes, including crimes against humanity, in international law. Within the context of drafting the principle of *nullum crimen sine lege*, either as it appeared in Article 11 of the UDHR of 1948 or in Article 15 of the ICCPR of 1966, a conclusion can be inferred from the discussions of states. Such a conclusion can show that a

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[250] Art. 6(c) of the Charter of Nuremberg for the International Military Tribunal of 1945.
[251] Art. 5(c) of the Tokyo Charter of 1946.
[252] Art. II(c) of the Control Council Law No. 10 of 1946.
[253] UNGA Res. 95(1) on 'Affirmation of the principles of international law recognized by the Charter of the Nurnberg Tribunal', UN Doc A/RES/95(I), (11 December 1946).
[254] UNGA Res. 3(I) on 'Extradition and punishment of war criminals' UN Doc. A/RES/3(I) (13 February 1946).
[255] UNGA Res. 170(II) on 'Surrender of war criminals and traitors' UN Doc. A/RES/170(II), (31 October1947).
[256] UNGA Res. 3074(XXVIII) on 'Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity' UN Doc. A/RES/3074(XXVIII), (3 December 1973).
[257] Birgit Schlütter, *Developments in customary international law: Theory and the practice of the International Court of Justice and the International Ad Hoc Criminal Tribunals for Rwanda and Yugoslavia* (Martinus Nijhoff Publishers, 2010), 202-203.
[258] Cited in: Birgit Schlütter, ibid, 202-203.
[259] Noora Arajärvi, *The changing nature of customary international law: methods of interpreting the concept of custom in international criminal tribunals* (Routledge, 2014), 41.
[260] ILC Report on 'Work of its 6th Session (3 June-28 July 1954) Official Records of the UNGA (9th Session), Supplement No. 9 (A/2693), UN Doc. A/CN.4/88 (1954), and UN Doc. A/CN.4/SER.A/1954/Add.1 (1954), Yearbook of the ILC Vol. II.

line was maintained in supporting and confirming the validity and legality of the status of international crimes derived from the trials and judgments of the post-Second World War era. For example, within the Third Committee drafting the UDHR, the discussions asserted a view that the final text of the said principle should not give rise doubts as to the validity of the trials and judgments of Nuremberg and Tokyo. In this respect, France asserted clearly that a rejection was confirmed during the discussions against those

> '[a]mendments which have been interpreted as questioning the judgments at Nuremberg'.[261]

It is noteworthy that the majority of States adopted the UDHR, with 48 out of 58 states voting in favour of it. Interestingly, Iraq was among this majority.[262]

The same finding can be deduced from the discussions within the context of drafting Article 15 of the ICCPR. Remarkably, Article 15 of the ICCPR uses the word 'criminal' offence, while Article 11 of the UDHR had utilized the word 'penal' offense. This significant change was made by the discussions of States within the Human Rights Commission. The majority view

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[261] See meeting records on Draft International Declaration of Human Rights (E/800), UN Doc. A/C.3/SR116, (29 October 1948), 275. , It appears from the discussions of States that both supporters and non-supporters of the inclusion of the Tokyo and Nuremberg judgments sought the best way to secure the validity and legality of these judgments. For example, the Representative of Belgium remarked, with respect to drafting the principle of non-retroactivity of laws, that '[h]e feared that its adoption might be used as a basis for the argument that such trials as the Nurnberg Trials had been illegal. He agreed with those who had held that those trials had been based on the laws of the human conscience which were higher than any national laws. He hoped that view would be upheld by the Committee and recorded by the Rapporteur in the report to be submitted to the General Assembly, in order to refute any future misinterpretation of the paragraph.' See, Meeting on Draft International Declaration of Human Rights (E/800), UN Doc. A/C.3/SR115, (28 October 1948), 266. The same fears were apparent in the comments of the delegates of Yugoslavia. See Meeting records on Draft International Declaration of Human Rights (E/800), UN Doc. A/C.3/SR116, (29 October 1948), 270, 273. On the other hand, delegates of the USSR, Australia, Uruguay, France and Egypt noted, as Philippines confirmed, that 'the fears of the Belgian representative with respect to any questioning of the legality of the Nürnberg Trials or the Tokyo Trials appeared unwarranted.' See, Meeting on Draft International Declaration of Human Rights (E/800), UN Doc. A/C.3/SR115, (28 October 1948), 266-267. See also, Meeting records on Draft International Declaration of Human Rights (E/800), UN Doc. A/C.3/SR116, (29 October 1948), 268, 270-271, 273. Later, Representative of Belgium come back to state that '[T]he legality of the Nürnberg judgments could not be challenged; it was securely founded on General Assembly resolution 95 (1), which was adopted on 11 December 1946. By that resolution, the General Assembly not only affirmed the 'principles of international law recognized by the Charter of the Nürnberg Tribunal,' and the judgment of the Tribunal, but also directed the 'Committee on the codification of international law ... to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal' There was consequently no cause for apprehension regarding the retroactive application of those principles. It seemed advisable, however, that, notwithstanding the guarantees given by the General Assembly resolution, the text of the declaration of human rights should include an article on that matter. It was for that reason that the Belgian delegation had lent its support to the text worked out at Lake Success during the third session of the Commission on Human Rights.' See, Meeting records on Draft International Declaration of Human Rights (E/800), UN Doc. A/C.3/SR116, (29 October 1948), 269-270.

[262] UDHR was adopted by the UNAG Resolution A/RES/217(III)[A], (10 December 1948). Voting of States is available at <http://unbisnet.un.org:8080/ipac20/ipac.jsp?&profile=voting&uri=full=3100023~%21909326~%210&ri=1&aspect=power&menu=search&source=~%21horizon> accessed on May 4, 2017.

was that such a change ensured that both punishable and unpunishable crimes were subject to the principle of *nullum crimen sine lege,* and consequently the affirmation of the legality of crimes derived from the Charter and Judgment of Nuremberg would not be disputed.[263] Another observation appears from the position of India, the United Kingdom, Pakistan, the Netherlands, Afghanistan, the Philippines and Uruguay, who all opposed the replacement of the term 'international law' by 'applicable law', a suggestion that was made by Argentina and Yemen but ultimately rejected.[264] The former states put forward the position that, although the notion of 'international criminal law' was at a developing phase, nevertheless its existence could not be denied, and both customary international law and treaties condemned certain acts as 'crimes against humanity' or crimes 'against the peace and security of mankind'.[265] Moreover, similar attitudes supporting the criminal status of crimes against humanity appeared in the arguments of Egypt, India, Guatemala, Poland, Uruguay and Chile during their discussions on the drafting of the ICCPR within the Commission of Human Rights in 1949-1950. In this respect, these states were not in favour of adding the following text, proposed as a second paragraph of draft Article (15) of the ICCPR. The text is as follows:

> '[n]othing in this article shall prejudice the trial and punishment of any person for the commission of any act which, at the time it was committed, was criminal according to the general principles of law recognized by civilized nations.'[266]

These States were worried that such an addition might weaken the confirmation of the principles applied by the post-Second World War trials and might make their legality and validity questionable.[267] In particular, these States argued that the general principles of law recognized by civilized nations are already included in the term 'international law' mentioned in the first paragraph. And that this should be sufficient.[268] In 1960, however, other States insisted on the retention of the proposed text and set aside the aforementioned worries. For example, the Soviet Union, the United Kingdom, Romania, The Netherlands, Poland, Yugoslavia, Ceylon and Bulgaria emphasized that the proposed text would precisely eliminate any doubts concerning the validity and legality of the judgments of the post-World War trials, and in addition, would ensure the criminality of any future acts similar to those punished at the

[263] Machteld Boot (n 208) 134.
[264] Argentina and Yemen found that an explicit reference to international law was undesirable, since the notion of 'international criminal law' was still at a developing stage. Ibid, 136.
[265] Ibid, 136, 139.
[266] Cited in: ibid.
[267] Ibid, 137-138.
[268] Ibid.

trials of Nuremberg.[269] Interestingly, Iraq and United States were among other states that supported the retention of the proposed text and voted in favour of it and against its elimination.[270] In the end, the proposed text was adopted. Although there were considerable differences between these two groups of States regarding the proposed text, it was nonetheless clear that both groups shared the same purpose: that the validity and legality of the principles of the post-World War trials and judgments should be ensured and unquestionable.[271] Moreover, crimes against humanity were viewed as derived from the general principle of civilized nations. This is interesting, since it is noteworthy that the general principles of law serve, among other functions, as means of developing new norms and interpretations of conventional and customary international law.[272] Consequently, the UNGA resolutions, the work of the ILC, international instruments, general principles of law and the statements and views of states, as cited above, show there was a line of consistent and general State practice for more than three decades in supporting the criminality element of international crimes, including crimes against humanity, derived from the trials and judgments of the post-Second World War tribunals.. Moreover, the views of states, within the material mentioned above, emphasized the legality and validity of such crimes, whether in cases of past crimes or in cases of the future commission of atrocities. This reveals a legal element. i.e., that the states regarded the prohibition of crimes against humanity as binding as a law. Thus, the two elements and conditions required to establish the customary status of crimes against humanity were fulfilled.

Regarding the customary status of crimes against humanity within the Iraqi view and practice, some observations can be noted. It is well known that when a customary rule exists, such a rule should be legally obligatory upon all states, and especially for those states that accepted the rule in question. One exception to such a general legal obligation is a state that constantly insists in opposing the establishment of the customary rule. Thus it could be argued that, since Iraq had not opposed the prohibition of crimes against humanity, Iraq is not subject to the aforementioned exception and is not excluded from the legal obligation of the prohibition of crimes against humanity. Moreover, Iraqi State practice confirms such findings. It was previously mentioned that Iraq was among other States that voted in favour of the retention and

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[269] Ibid, 138-139.
[270] Among other States that supported the proposed text were the common law countries and Morocco, Somalia, Sudan, United Arab Republic, Yemen, Afghanistan, Indonesia, Iran, Jordan, and Libya. See, Kenneth S. Gallant (n 171) 191.
[271] Machteld Boot (n 208).
[272] Ciara Damgaard, *Individual criminal responsibility for core international crimes: Selected pertinent issues* (Springer, 2008), 34.

against the elimination of the provision of the second paragraph of Article 15 of the ICCPR, which affirmed the criminality of international crimes, including crimes against humanity. In addition, Iraq voted in favour of the UDHR in 1948. Moreover, Iraq had reproduced and integrated the ICCPR into Iraqi law by virtue of Domestic Law No.197 of 1970.[273] Accordingly, the ICCPR, including its provision on the principle of *nullum crimen sine lege,* had become effective within the domestic field since the time mentioned, and the case law of Iraqi courts confirms such a finding.[274] Moreover, Iraq re-published the ICCPR among other conventions in the Official Gazette in 1992, and this was a reaffirmation of Iraq's obligations pursuant to the ICCPR.[275] Furthermore, principle of *nullum crimen sine lege* has been articulated in the Iraqi constitution within the chapter of human rights. According to the opinion of the Iraqi judiciary, a finding can be made that constitutional human rights should be interpreted as having the same meanings as those given by the international instruments.[276] In addition, Iraq confirmed before the CCPR that the meaning of the principle of *nullum crimen sine lege* within Iraqi law is the same as that given by the ICCPR.[277] Thus, these examples of the behaviour of the Iraqi State prove that the practice and belief of Iraq supported the criminality of the core international crimes, including crimes against humanity.

As shown previously, state practice does not always participate in the formation of a custom; it may arise instead as a breach of already existent customary rules. Thus it can be argued that if crimes against humanity were committed but went unpunished, as was the case in Iraq under Saddam's regime, this should not be interpreted as a denial of the criminality of crimes against humanity. It is difficult to imagine the offender offering himself voluntarily for prosecution and punishment. Notably, it is not only customary law but also all legal rules that face challenge and violation, regardless of whether these rules are written or unwritten and whether they are derived from treaties, general principles of law, a constitution or other domestic law. It cannot be said therefore that these rules did not exist at the time they were violated. For example, Iraq is party to and bound internationally and domestically by the Genocide Convention, the Geneva Conventions and a number of international human rights instruments, including the ICCPR. In addition, Iraq is bound by the prohibition against aggressive war, which is stable in customary law and treaty law, including the UN Charter of 1945. Despite these facts, Iraq under the regime

[273] Ratification law on the ICCPR and ICESCR No. 197 of 1970.
[274] See the present chapter at, 78-81.
[275] Ibid, 78, 88.
[276] Samia Bourouba, (n 26) 48.
[277] See the present chapter at, 90.

of Saddam had offended against a range of prohibitions and had breached obligations derived from the aforementioned instruments. However, prosecutions, criminal convictions and punishments had not been held prior to the ousting of Saddam from power. In particular, as mentioned in chapter one, there had been an attempt to bring Saddam and other high-ranking officials of the Baath regime responsible for commission of international crimes before an international tribunal. However, this had not been achieved because those responsible had been in the power and this had given them the ability to escape prosecution for a long period of time prior to them being brought before the IHT. Their violations had not been limited to breaches of international law but extended to Iraqi domestic laws as well.[278] It cannot be argued therefore that the prohibitions and obligations violated by Iraq had not existed or were not binding upon Iraq as laws. The same conclusion applies to the violation of the customary prohibition against crimes against humanity that were committed under Saddam regime but went unpunished. As demonstrated previously, these crimes are not binding upon Iraq according to the customary law alone, but according to treaty law as derived from Article 15 of the ICCPR and domestic law. Indeed, the matter in question is related to respect or disrespect for the law and not to the existence or non-existence of the law.

2.4.3. Clarity and notification of international crimes

It has been mentioned that individuals cannot distinguish whether their conduct is permissible unless prohibited conduct is defined by a clear legal provision and is sufficiently know. However, this is a presumptive matter, because an element of legal fiction has always existed in order to fulfil the principle of legality. Certainly, not all individuals have read or understood all criminal provisions that are detailed in thousands of pages in specialised language.[279] Furthermore, individuals are not only subject to criminal law but to a large number of other rules governing various areas, such as taxes, insurance, finance and so on.[280] It is not possible for a law to provide a comprehensive and precise definition of each crime or case, and thus the courts cannot strictly and absolutely apply the principle of legality, particularly with regard to international crimes.[281] Also it cannot be ascertained whether all people have received notice of when and where changes to criminal law have occurred.[282] Therefore, the fulfilment of the clarity and notice requirements is an abstraction without which the modern regulatory State

[278] See the present chapter at, 76-78.
[279] Theodor Meron (n 226) 821.
[280] Ibid.
[281] Noora Arajärvi (n 222) 16.
[282] David Luban (n 208) 21.

could not continue to perform its functions.[283] Consequently, it is realistic to assume that the perpetrator knows the principles of criminal law, including international law.[284]

It is noteworthy that the requirements of clarity and notice consist of two elements that must be satisfied in order to achieve the principle of legality. These elements are accessibility and foreseeability. Accessibility entails that people should be capable of acquiring knowledge of criminal laws. The realisation of this element will be adequate if the criminal laws are issued and published for the attention of the populace.[285] The basic aim is that the public may know which forms of conduct are criminal.[286] It is reasonable, as Gallant says, that people cannot be allowed to claim that they have no access to knowledge of what types of action are classified as international crimes, since

> '[t]he heart of the core international crimes of genocide, crimes against humanity, and war crimes (i.e., the forbidding of killing, maiming, torturing, and other inhumane mistreatment) is well known to be criminal everywhere, whether or not all individuals understand the substance, or even the existence, of international criminal law.'[287]

As another requirement of the clarity element, criminality of certain conduct should be assumed by an offender. The basic point of the principle of legality, as the Appeals Chamber of the ICTY recognizes, is that it is a protection against subsequent prosecution when individuals believe that their actions were not contrary to law.[288] There must be reasonable grounds for such belief on the part of individuals, since if the actions are clearly prohibited under national law, then an allegation of unpredictability cannot be acceptable as a means of avoiding responsibility.[289] Therefore, an offender who commits large scale criminal acts can be convicted of international crimes without the possibility of a challenge on the grounds of unpredictability if the same acts are criminalized in his or her own national law.[290] The ICTY illustrated that

> '[I]t is undeniable that acts such as murder, torture, rape and inhuman treatment are criminal according to "general principles of law" recognised by all legal systems. Hence the caveat contained in Article 15, paragraph 2, of the ICCPR should be taken into account when considering the application of the principle of nullum crimen sine lege in the present case. The purpose of this principle is

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[283] Theodor Meron (n 226) 821.
[284] Ibid.
[285] Gabriel Hallevy, *A modern treatise on the principle of legality in criminal law* (Springer, Berlin, 2010), 26-27. See also, Kenneth S. Gallant (n 171) 363-364.
[286] Gabriel Hallevy, ibid.
[287] Kenneth S. Gallant (n 171) 364.
[288] Theodor Meron (n 226) 822.
[289] Ibid.
[290] Ibid.

> to prevent the prosecution and punishment of an individual for acts which he reasonably believed to be lawful at the time of their commission. It strains credibility to contend that the accused would not recognise the criminal nature of the acts alleged in the Indictment. The fact that they could not foresee the creation of an International Tribunal which would be the forum for prosecution is of no consequence.'[291]

International crimes have been described as umbrella crimes which find their counterpart in local laws, the work of the ILC and the prohibited practices described in human rights treaties, as well as those that are well-established as part of existing international law.[292] All these sources allow no pretexts for claiming that liability or prosecution and criminalization for international crimes was unanticipated.[293] For example, not one of the perpetrators of abuses in Rwanda, Sierra Leone or the former Yugoslavia argued that he or she was unable to distinguish whether or not his or her actions were consistent with the law or with criminal prohibitions.[294] In this respect, the Canadian Court held that

> '[w]ar crimes or crimes against humanity are so repulsive, so reprehensible, and so well understood that it simply cannot be argued that the definition of crimes against humanity and war crimes is vague or uncertain.'[295]

Therefore, an injustice will only occur when criminalization or prosecution were unanticipated under normal conditions.[296] In this respect, the anticipatory element as a prerequisite for the establishment of the principle of legality would be satisfactory even if the law were developed and affected by changes in social conditions, regardless of whether these changes had been gradual or sudden.[297] For example, in one of its opinions, the European Court of Human Rights

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[291] Prosecutor v. Delalic et al. (Appeals Judgement) ICTY-IT-96-21-A (20 February 2001), para. 179.
[292] Beth Van Schaack (n 244).
[293] Ibid.
[294] Ibid.
[295] R. v. Finta [1994] 1 S.C.R. 701 Charter of Rights -- War crimes and crimes against humanity -- Nature and proof of offences -- Defence of police officer following lawful orders -- Whether infringement of principles of fundamental justice available at <http://www.hrcr.org/safrica/arrested_rights/finta.html> accessed on June 24, 2016.
[296] Beth Van Schaack, 'The principle of legality in international criminal law' (n 244) 103.
[297] See, Case of *S.W. v. the United Kingdom* (Judgement) ECtHR-Application no. 20166/92 (22 November 1995), paras. 39-43. (Therein after ECtHR Judgement on the case of *S.W. v. the United Kingdom*). The ECtHR observed that '[H]owever clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in the United Kingdom, as in the other Convention States, the progressive development of the criminal law through judicial law-making is a well entrenched and necessary part of legal tradition. Article (7) of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.' See, ibid, para. 36. See also, Theodor Meron (n 226) 825-826. For more discussion see, Stephanie Palmer, 'Rape in marriage and the European convention on human rights C.R. v. U.K. and S.W. v. U.K.' 5 (1997) *Feminist Legal Studies*, 91. See also, Leila Nadya Sadat and Jarrod M. Jolley 'Seven canons of ICC treaty interpretation: Making sense of article 25's Rorschach Blot' (2013) *Legal Studies Research Paper - Washington University School of Law*, 117.

(ECtHR) indicated that the components of predictability and changes of law are not separate issues.[298] The European Court therefore ruled that what had happened in a British court, concerning the development of the original scope of the crime of rape to ensure the prosecution of marital rape did not violate the provisions of the legal principle listed in Article 7 of the European Convention on Human rights (ECHR).[299] This is because the ECtHR found that the conduct of a British court was valid as long as the criminalization of marital rape had not been impossible to be foreseen by an offender in the context of logical thinking.[300] The ECtHR concluded that

> '[T]here was no doubt under the law as it stood on 12 November 1989 that a husband who forcibly had sexual intercourse with his wife could, in various circumstances, be found guilty of rape. Moreover, there was an evident evolution, which was consistent with the very essence of the offence, of the criminal law through judicial interpretation towards treating such conduct generally as within the scope of the offence of rape. This evolution had reached a stage where judicial recognition of the absence of immunity had become a reasonably foreseeable development of the law.'[301]

In another decision, the ECtHR confirmed that subsequent legal changes which retroactively led to the prosecution of those responsible for past violations complied with the legality principle.[302] The ECtHR approved the decision of the Federal German courts to prosecute those accused in the so-called 'border crossing' case.[303] The ECtHR endorsed the view that such a position conforms to the legal principle stated in Article 7 of the ECHR, although the actions

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[298] Theodor Meron, ibid.

[299] See, Cian C. Murphy, 'The principle of legality in criminal law under the European Convention on Human Rights' 2 (2010), *European Human Rights Law Review*, 3.

[300] Ibid, 9-11. Art. (7) of Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of (1950) provides that '1. [N]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. 2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.'

[301] ECtHR Judgement on the case of *S.W. v. the United Kingdom* (n 297) para.43.

[302] See, Case of *K.-H. W. v. Germany* (Judgement) ECtHR- Application no. 37201/97 (22 March 2001). (Therein after ECtHR Judgement on Case of *K.-H. W. v. Germany*). See also, Case of *Streletz, Kessler and Krenz v Germany* (Judgement) ECtHR- Applications nos. 34044/96, 35532/97 and 44801/98 (22 March 2001). (Therein after ECtHR Judgement on Case of *Streletz, Kessler and Krenz v Germany*).

[303] Before the unification between the German Democratic Republic (GDR) and the Federal Republic of Germany (FRG), the officials of the GDR had set a strict security system to control on the borders between the two States. Many of the GDR's citizens escaped or attempted to flee across these borders to the FRG. More than two millions had escaped during the time between 1949 and 1961 and before the Berlin Wall was constructed. The anti-personnel mines, shot by East-German border guards or automatic-fire systems, killed many of other citizens. After the two States have unified those officials of the GDR were prosecuted and convicted before the FRG courts. Although and according to the GDR's provisions on the border-policing regime those officials had not been criminals. See, ECtHR Judgement on Case of *K.-H. W. v. Germany*, ibid, para. 11.

of the defendants had been permissible in the law and policy of the GDR at the time the acts were committed.[304] However, the ECtHR stressed that these acts are offences which had been sufficiently defined to satisfy the principle of both accessibility and foreseeability at the time of their commission.[305] This inference here is that the leaders and border guards of the former regime were aware, or should have been aware, that they had blatantly infringed both human rights protected by international law and the GDR Constitution and Criminal Code, which did not justify the acts in question, even under the pretext of ignorance of the law.[306] In particular, those perpetrators had knowledge of the restrictive policy of the GDR in relation to the desire of the majority of people to leave their country, and they also knew that their acts were culpable and violated the proportionality principle and the right to life and freedom of movement.[307] Moreover, the ECtHR distinguished between two types of GDR laws and found that only the laws which were consistent with the rule of law and the meaning of Article 7 of the ECHR should be taken into account.[308]

With respect to such inferences on the accessibility and foreseeability, it can be deduced that the officials of the Ba'ath regime had acknowledged that their acts gave rise to criminal liability because such acts had been well established as prohibited acts according to Iraqi laws. In addition to, those officials had occupied the highest-ranking positions within the ruling Ba'ath Party and the Iraqi authorities, especially the legislative and executive authorities, such as those who served the regime in a security or military capacity. Consequently, it is beyond doubt that those officials had known that international law criminalized their misdeeds and atrocities. Similarly culpable were those officials who had planned and carried out Iraqi international and foreign policies. Iraq's international obligations, particularly those derived from treaties, could not be binding on Iraq unless such obligations were approved by those officials who had the right to ratify the treaties. On this basis, it is reasonable to suppose that the principle of legality and *nullum crimen sine lege* had been well understood by those officials to have include crimes under both national and international law. This latter understanding was incorporated in Article 15 of the ICCPR, which had had been approved and ratified by those officials and had become part of domestic law. This fact confirms that both foreseeability and accessibility, as essential elements of the principle of legality, were well established in relation to the international crimes included in the IHT's Statute and applied in its trials. Indeed, one of the main defendants

[304] Ibid, para. 90.
[305] Ibid, para.91.
[306] Ibid, paras. 72-79.
[307] Ibid, paras. 74, 80.
[308] Ibid, paras. 84, 90.

disclosed this fact through the words he used during the chemical campaign against the Kurdish population. He said in a meeting with Northern Bureau members and directors of the Ba'ath Party headquarters in the northern governorate that

> '[I] will kill them all with chemical weapons! Who is going to say anything? The international community? F**k them! The international community and those who listen to them.'[309]

Moreover, it can be observed that the IHT drew attention to such reasoning concerning accessibility and foreseeability in its argumentation in the Al-Dujail case. The Trial Chamber elucidated that misdeeds attributed to the defendants, such as murder, rape, seizure or vandalism of estates and properties, torture, kidnap, unlawful confinement and others were not only felonies at the level of international law on genocide, war crimes and crimes against humanity:[310] such misdeeds had been criminalized domestically in 1918 when the Baghdadi Penal Law was enacted, and again by IPL and Military Penal Law No. 13 of 1940.[311] This is in addition to the fact that the aforementioned misdeeds are crimes under municipal laws in most, if not all, countries.[312] It is incontrovertible therefore that the accused before the IHT would have been aware that their atrocities gave rise to liability. Bassiouni has discussed such a conclusion, stating that the inclusion in the IPL of the Ba'ath regime's actions is sufficient in itself to fulfil the predictability element.[313] Consequently, it can be affirmed that the foreseeability and clarity as elements of the principle of legality and *nullum crimen sine lege* are well fulfilled by the Statute and trials of the IHT.

2.4.4. Non- retroactivity of the IHT Statute on international crimes

It is clear that this principle means that the laws of criminality cannot be extended to the past to govern and convict behaviours that preceded the entry into force of such laws.[314] In other words, it is of critical importance to determine whether or not a particular form of behaviour is a crime, and such behaviour should be examined in the context of the criminal rules that were in force at the time when the conduct occurred. Blackstone reveals this understanding in one

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[309] Report of Human Rights Watch on 'Genocide in Iraq: The Anfal Campaign Against the Kurds (1993), Appendix (1)' available at <http://www.hrw.org/reports/1993/iraqanfal/APPENDIXA.htm> accessed on June 23, 2016.
[310] Al-Dujail Trial Judgement (n 3) 41.
[311] Ibid.
[312] Ibid.
[313] M. Cherif Bassiouni (n 5) 148-152.
[314] Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (Oxford University Press, Oxford, 2013), 57.

sentence: '[a]ll laws should be made to commence in future.'[315] The principle addresses the temporal implications of *nullum crimen sine lege* and reinforces certainty as a requirement of the principle of legality.[316] The basic purpose here is to ensure that individuals have had opportunity or reasonable time to know the new legal requirements, in which case part of their conduct may not have been innocent.[317] It should be noted that this principle governs both civil and common law systems, as well as international law.[318] Moreover, the prohibition of retroactivity is not limited to the legislation or rules made by the legislature: it also prohibits the creation of new crimes to punish or prosecute previous acts through judicial interpretations, unless those interpretations were in relation to the scope of crime or criminal liability at the time when the acts were carried out.[319] However, such developed interpretations should be characterised by a reasonable predictability and do not extend to the essence or nature of the crime or its legal formulation.[320] For example, the ECtHR considered that the interpretation of a British court was valid in relation to the rejection of the appeal against indictment and conviction for the crime of marital rape. The ECtHR found such an interpretation did not contradict the principle of legality, because such an interpretation had been predictable and had not changed the origin and essence of the rape crime. A similar situation exists when the courts in a new democratic regime face a conflict between respect for the rule of law and human rights against legal challenges in relation to the prosecution of criminal violations committed by a former repressive regime, especially when those responsible for the violations of such a regime cite the principle of *nullum crimen sine lege* and prohibition of the retroactive effect of law in order to avoid prosecution and impunity. The ECtHR found, in the 'border crossing' case brought before the FRG courts, that these principle cannot be explained or understood in an absolute and literal manner,[321] because such a manner of interpretation will allow perpetrators from non-democratic regimes to employ the law in order to cover their oppressive practices

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[315] Lee W. Potts, 'Criminal liability, public policy, and the principle of legality in the Republic of South Africa' 73 (1982) *Journal of Criminal Law and Criminology*, 1098.
[316] Flavia Lattanzi and William A. Schabas, (ed) *Essays on the Rome Statute of the International Criminal Court* (Volume 2) (il Sirente, Italy, 2003), 99.
[317] Ibid, 1099.
[318] Ibid.
[319] See, Geranne Lautenbach, *The concept of the rule of law and the European Court of Human Rights* (Oxford University Press, Oxford, 2013). 107. See also, Andrew Ashworth and Jeremy Horder (n 314) 57-61. See also, Roelof Haveman, Olga Kavran and Julian Nicholls, (ed), *Supranational criminal law: A system sui generis* (Intersentia, 2003), 44-45.
[320] Ibid.
[321] Beate Rudolf, 'Streletz, Kessler and Krenz v. Germany. App. Nos. 34044/96, 35532/97 & 44801/98.49 ILM 811(2001), and K.-H. W. v. Germany. App. No. 37201/97. 49 ILM 773 (2001)' 95 (2001) *American Journal of International Law*. See also, Sonja C. Grover, *The European Court of Human Rights as a Pathway to Impunity for International Crimes* (Springer, Heidelberg, 2010), 210.

and enjoy impunity.[322] Thus, these practices and laws deviate from the ordinary meaning of the rule of law and fundamental human rights according to domestic and international law.[323] Consequently, they cannot be a pretext for an objection to the legality of the subsequent criminalization and prosecution afforded by the new democratic regime.[324] The courts of the new democratic regime should consider the function of the principle of *nullum crimen sine lege* and interpret the laws of former GDR according to the nature and spirit of the rule of law and of the new democratic regime,[325] disregarding the legal, judicial and political practices that were followed by the non- democratic regime to justify its atrocities against individuals.[326] The ECtHR ruled that such an approach in dealing with past crimes is acceptable, since a number of other States which have gone through a transition to a democratic regime have criminalized and prosecuted those who committed crimes during the era of the previous regime.[327] This is an interesting analysis that supports the approach that the new democratic regime in Iraq employed in order to prosecute the criminals of the previous Ba'ath regime. However, it is noteworthy that the prohibition of the retroactive application of law does not include crimes which are derived from the recognised general principles of civilized nations. The latter category of crimes was intended to apply to the crimes and sentences of the Nuremberg and Tokyo Charters. This is well established by the UDHR and Article 15(2) of the ICCPR.[328] Additionally, this position adopted by both instruments is further confirmation of the valid status of the aforementioned crimes, because these crimes were already listed by the same instruments in recognising that crimes of both international and national law should be taken into account when the principle of *nullum crimen sine lege* is examined.[329] It is well known that this interpretation refers to every crime within the scope of treaties, customary international law and general principles. These latter are basic resources of international law as provided by

[322] See, ECtHR Judgement on Case of *K.-H. W. v. Germany* (n 302) paras. 82, 90.
[323] Ibid, para. 85-86.
[324] Ibid, paras. 84-85, 88, 90.
[325] Geranne Lautenbach (n 319) 108-110. The ECtHR confirmed that 'The Court considers that it is legitimate for a State governed by the rule of law to bring criminal proceedings against persons who have committed crimes under a former regime; similarly, the courts of such a State, having taken the place of those which existed previously, cannot be criticised for applying and interpreting the legal provisions in force at the material time in the light of the principles governing a State subject to the rule of law.' See, ECtHR Judgement on Case of *K.-H. W. v. Germany* (n 302) para. 84.
[326] The ECtHR asserted that '[F]urthermore, the fact that the applicant had not been prosecuted in the GDR, and was not prosecuted and convicted by the German courts until after the reunification, on the basis of the legal provisions applicable in the GDR at the material time, does not in any way mean that his act was not an offence according to the law of the GDR.' See, ibid, para. 82.
[327] See, ibid, para. 83.
[328] Kenneth S. Gallant (n 171) 160-202.
[329] Ibid.

Article 38 of the Statute of the ICJ.[330] Consequently, there are sufficient grounds to say that the Statute of the IHT and the prosecution of the previous Ba'ath regime criminals do not infringe the prohibition of the retroactive application of law. This conclusion is based not only on international law, it is also based on Iraqi law, because, as was shown in the previous section, the ICCPR was incorporated into Iraqi law by virtue of the ratification law of the ICCPR No. 197 of 1970. This confirms that the acts of genocide, crimes against humanity and war crimes were foreseeably and accessibly known to be criminal at the time when these Ba'ath regime atrocities were carried out. Moreover, unlike some other civil law States, which declined to list a proposal on the provision of Article 15(2) of the ICCPR, Iraq supported and voted in favour of the proposal.[331]

Conclusion

This chapter investigated whether the Statute and trials of the IHT were based on legitimate legal grounds when applied to international crimes, and, further, whether the Statute and the trials violated the principle of *nullum crimen sine lege* and the prohibition of the retroactive effect of laws. The reason for this enquiry is that Iraqi law did not list genocide, crimes against humanity and war crimes prior to the enactment of the IHT Statute. For that reason a debate arose over the status of international law, and especially treaties, within Iraqi law. There were those who argued that Iraqi law is of a dualist nature and requires a further municipal law as a condition of the integration and enforcement of international law in the domestic field. This interpretation seemed obviously in the claims of the defendants and their attorneys before the IHT. Other opinions held that the provisions of international treaties became incorporated and applied within domestic law only if they were published in the Official Gazette. Such opinions gave rise to the claim that the Statute and trials of the IHT violated the principle of *nullum crimen sine lege* and the prohibition of the retroactive application of law. International crimes, as listed in the IHT Statute, were enacted in 2003 to criminalize and prosecute atrocities that had been carried out between 1968 and 2003, although the laws with regard to these crimes were not enacted or published during the time in question.

On the other hand, other views asserted that international treaties could be applied in the domestic field as part of Iraqi law from the date of the ratification or accession law on each treaty, on the grounds that the latter law was an ordinary law which must be enforced as any

[330] Ibid. Art. (38) of the Statute of ICJ.
[331] Kenneth S. Gallant, ibid, 191.

other ordinary law. Accordingly, the incorporation and application of a treaty need not involve the publication of the provisions either of the treaty or other international norms included in such a treaty. Thus, the Statute and trials of the IHT were based on legal grounds that respected the principles of *nullum crimen sine lege* and the non-retroactivity of laws, since Iraq had ratified the Genocide Convention in 1958, the Geneva Conventions of 1956 and also the ICCPR of 1970, which refers in its Article 15 to the scope of the principle of legality and the non-retroactivity of law. Therefore, international crimes had been a part of Iraqi law since the latterly mentioned dates.

The IHT in its response asserted that international law does not need a further internal act or procedure and is applicable within the domestic field of all States. This notion of the IHT seems clearly to be based on the perception of an international legal order and international institutions and not on the municipal law of States, including the municipal law of Iraq. Although the arguments of the IHT are well founded from the viewpoint of international law as it appears in juristic and international judicial opinions, it cannot be wholly acceptable in the context of the legal order of each State. This investigation with regard to the testing of jurisprudential theories and the constitutional and jurisdictional practices of States leads to the conclusion that the viewpoint of the IHT is neither completely consistent nor completely inconsistent with these theories or practices. It appears that the viewpoint of the IHT cannot be explained in terms of the dualist theory, but neither is it entirely consistent with the monist theory. With regard to the testing of the IHT view in the context of the practice of States, it can be observed that it depends whether such practices are related to treaty provisions, rules of customary international law, international human rights norms and/ or peremptory norms. It is difficult to accept the IHT viewpoint in the context of State practices concerning treaties because there appear to be two models for dealing with such treaties. Some countries refuse to integrate or to apply directly and automatically treaty provisions within the boundaries of national jurisdiction unless such provisions are passed by the local legislature by an act or other internal procedures, as is the case when a local law is issued. On the other hand, other countries acknowledge and enforce treaty provisions as local rules without the need for them to be reissued by a domestic enactment or some other action.

Thus, the IHT's viewpoint seems acceptable in the context of the practices of those latterly mentioned countries. It is necessary, however, to examine Iraqi laws in order to determine whether or not the IHT's viewpoint is legitimate. It is worth mentioning that this relates to the direct incorporation and application of the treaty provisions. If an indirect application is

intended, however, then the practice of States appears compatible with the adoption of the interpretation of the provisions of the treaty, as long as there is no express intention on the part of the legislator that contradicts such provisions. In respect of the direct incorporation and application, it appears that a distinction should be made between the situation of Iraqi law before and after the enactment of the Publishing Law of 1977 and other laws. Before this 1977 law there was no requirement to publish the provisions of a ratified treaty. A ratified treaty became a part of Iraqi law and was domestically applicable after its issuance and the publication of its ratification or accession law in the Official Gazette. It is noteworthy that the ratification or accession law is an ordinary law, and therefore domestically enforceable, like any other ordinary law after publication. This is consistent with the constitutional provisions and the Publishing Laws of 1926, which were in force during the time in question. It was considered that laws became enforceable and applicable from the time of their publishing, and Iraqi juristic and judicial opinion and the practice of Iraqi domestic courts supported this conclusion.

Iraq ratified the Genocide Convention, the Geneva Conventions and the ICCPR prior to the enactment of the Publishing Law of 1977, and therefore these conventions are part of Iraqi law and are applicable in the domestic Iraqi field. There is no need to reissue these conventions by a further domestic law and no need to publish its provisions in the Official Gazette. Consequently, it can be affirmed that international crimes are covered by Iraqi law and have internal force. Article 10 of the IPL confirms that this law is not the only one to deal with criminal acts: these acts may instead be determined by other laws, which should also be taken into account. Accordingly, the criminal acts and principles of *nullum crimen sine lege* and non-retroactivity of laws included in the aforementioned conventions can be legitimately applied in the domestic field, since they were ratified or accessed by virtue of law. Consequently, the domestic legality of the Statute and trials of the IHT in criminalizing and prosecuting the past violations of the Ba'ath regime as international crimes can be legitimated on the basis of such an analysis.

After the enactment of the Publishing Law of 1977 a change occurred. On the basis of this law the provisions of a ratified treaty came into force after their publication. In other words, if the ratification or accession law did not include the provisions of a treaty, then it would not be sufficient to grant such provisions a domestic force. To have such force the provisions of a ratified treaty had to be published in the Official Gazette. However, this requirement does not affect the above analysis in relation to the domestic enforcement of international crimes. This is because the provisions of the Publishing Law of 1977 have no retroactive effect on treaties

ratified prior to this Law. Moreover, even with the requirement stipulated by the said law, judicial opinion and practice tend to apply the provisions of a ratified treaty regardless of whether or not such provisions were published.

The LASPT of 2003 and the PCI of 2005, together with the laws based on them, reinforced the status of international law, especially international human rights norms and international crimes. This can be inferred from the explicit and implicit meanings of the legal provisions of these Constitutions and the laws based on them. Thus, it is established that international crimes can be tried by Iraqi courts, including the IHT, without a domestic or international legal challenge in respect of the principles of *nullum crimen sine lege* and non-retroactivity of law. It appears that these principles can be based on the element of legal fiction in order to fulfil the requirements of noticeability and essential clarity, and, it should be confirmed that the requirements both of accessibility and foreseeability are met with regard to international crimes. It was apparent that the defendants were in a position to allow them to access and foresee that their actions were criminal, since they occupied high-ranking positions as officials within the ruling of Ba'ath regime. They were members of the legislative authority (RCC) which had the power to discuss and ratify the treaties. In addition, they were either members of the executive authority or they exercised executive and military functions, especially in relation to policies involving human rights violations. Also, Iraq was one of the states that voted in favour of a proposition to list an exception to the legality and non-retroactivity principles concerning international crimes derived from the Nuremberg and Tokyo Charters and Judgements. This exception became a provision of Article 15(2) of the ICCPR. Although Iraq is a civil law State, it nonetheless adopted a different attitude from that of most other civil law States. Moreover, both the accessibility and foreseeability requirements can be fulfilled because the acts that constitute international crimes are established in the criminal laws of all States, including Iraq.

It appears from the judgements of the ECtHR that even if there were a domestic law or legal provision that made the violations of human rights legal, or prevented the prosecution of such violations, that law or provision should be ignored. This is because any such law or provision is inconsistent with the principle of the rule of law. The ECtHR held that subsequent prosecution because of changes of social or political circumstances is compatible with the rule of law and respects the principle of *nullum crimen sine lege* and the non-retroactivity law. Therefore, the ECtHR found that there was no legal challenge to the criminalization and prosecution of the violations committed by a former regime before the courts of the new

democratic regime. This is legal as long as the criminalization and prosecution of these violations were foreseeable.

With regard to the rules of customary international law and general principles, state practice shows that there is a near-consensus that these rules can be applied directly or indirectly through the interpretative process of municipal laws. This is observable, irrespective of whether a State regulates these rules constitutionally or whether it belongs to the tradition of common law or civil law. This could provide an effective argument in support of the interpretation of the IHT. The IHT found that customary international law could be directly applicable in Iraq, because these rules are binding on Iraq and are therefore automatically considered to have a local basis. Even if it is assumed that direct application is not possible in Iraq, Iraqi courts have the opportunity to apply customary international law indirectly through the interpretation of the provisions of the Iraqi laws in accordance with the concepts of customary international rules, particularly with regard to the principle of *nullum crimen sine lege* and the non-retroactivity law. As mentioned in the IPL and the Iraqi constitutions, including the Ba'ath regime's constitution, the latter principle is unrestricted. Thus, they can be interpreted in accordance with customary international law and general principles so as to cover international crimes. This seems logical, especially since there is no local text that prevents such an interpretation. Furthermore, validation of this interpretation is confirmed by State practice, as previously explained. Local courts tend to reconcile domestic law with international law, or to apply the principle of the 'friendliness of international law' based on an assumption that the legislator aimed to respect his international obligations. This was possible as long as there is no express intention to breach international obligations. In Iraqi law there exists no rule that contradicts the application of customary international law or general principles, regardless of whether such an application is through reconciliation, the principle of the 'friendliness of international law,' and/or the assumption that the Iraqi legislator does not intend to disregard international obligations. This leads to the inference that the criminalization of the former regime's violations under the IHT's Statute and trials can legally be established on a domestic and international basis.

Regarding international human rights norms, it was affirmed that State practice adheres to such norms directly as constitutional or ordinary legal bases. Even if local courts do not have constitutional provisions to deal with the aforesaid norms, they at least take into consideration the connotations of such norms in construing municipal rules. This can logically established, and supports the IHT's findings. It is clear that the IHT's Statute and trials were established to

criminalize and prosecute the egregious violations committed by the former Ba'ath regime. As will be seen later, these violations, including forced internal displacement, amount under certain conditions to international crimes. The key point in such a context is that the IHT has resorted to international provisions related to the principle of legality set out in each of the UDHR and the ICCPR in order to interpret and understand the principle of legality laid down by Iraqi law. Thus by this method the IHT has shaped its argument to prove the legitimacy of including international crimes in its Statute and the prosecution of these crimes.

The legal validity of listing international crimes in the IHT Statute can also be established by reference to peremptory norms. They appear as an acceptable doctrine in domestic and international practice, and they penetrate and dominate domestic rules without the need for any further internal procedure. The prohibition against genocide crime, war crimes and crimes against humanity constitutes *jus cogens*, and is applicable to domestic law, including that of Iraq. As stated previously, this interpretation finds support in juristic opinions. It is notable that the IHT accepted peremptory norms as a ground for the establishment of its legality.

Finally, the legality of listing international crimes in the IHT Statute can be based directly on international law, treaties ratified by virtue of the municipal Iraqi laws and/or on peremptory norms. It can also indirectly be based on the customary and general principles of international law, particularly in relation to the interpretation of the principles of *nullum crimen sine lege* and the non-retroactivity law.

CHAPTER THREE

THE LEGACY OF FORCED INTERNAL DISPLACEMENT IN IRAQ AND THE INSUFFICIENCY OF INTERNATIONAL LAW

Introduction

This chapter will investigate whether forcible transfer as a crime *per se* in international law applies to past situations of internal displacement in Iraq. This chapter will be divided into four sections: the definition of forced internal displacement, the inapplicability of the Rome Statute including the forcible transfer as a crime *per se* in relation to the temporal jurisdiction of the IHT; customary international law, international criminal tribunals and forcible transfer; and then other, more questionable rules dealing with forcible transfer as crime *per se*. The first section will explore the definition of forced internal displacement, the second and third sections will focus on forcible transfer as a crime against humanity, because this kind of crime presents significant challenges, while forcible transfer as a war crime, as a form of genocide and as a form of apartheid will be discussed in section four.

It is clear at first glance that the IHT Statute which promulgated in 2003 and replaced by another in 2005, had come into existence after the adoption and entry into force of the Rome Statute, although the IHT was designed to deal with the legacy of Ba'ath violations and atrocities that had occurred approximately 35 years prior the enforcement of the Rome Statute. The temporal jurisdiction of the IHT covers the period from 17 July 1968 to 1 May 2003,[1] i.e. from the Ba'athist coup of 17 July 1968 to the demise of the regime in April 2003 when Iraq came under U.S. occupation. In its reply on matters of its legitimacy and legality, the IHT gave a detailed analysis to show that its Law and Statute did not conflict with the legality principle.[2] However, when the IHT established several legal points to prove its legality, it did this in general form, and for its Statute in total as one legal bloc. In other words, it did not analyse and verify every criminal act separately under each category, either as crimes against humanity, or genocide, or war crimes. These distinctions are significant to the discovery of whether there are differences between one form of conduct and another, and then to determine a criminal status of each conduct with regard to principles of legality. As shown in previous chapters, the IHT reviewed and tested the general headings of genocide, crimes against humanity and war

[1] Art. (1)(2) of the Law of the IHT.
[2] Al-Dujail Lawsuit (Trial Judgement) IHT-1/9 First/2005 (Thereinafter Al-Dujail Trial Judgement).

crimes, and found that these crimes are established in international law. However, this analysis is deficient because it does not lead to a proof that each sub-criminal act listed under the heading of each of the three crimes was recognized by the international law during the era of the Ba'ath regime. Therefore, an investigation should be carried out to determine when each act of the three crimes became as offence *per se* for the first time, and especially, the three categories of crime that been developed to encompass other new sub-crimes, and these appear mainly in the Rome Statute. On this basis, the viewpoint of the Iraqi legislature and the IHT raises a number of challenges and a state of legal uncertainty, particularly with regard to the temporal context of some of the international crimes laid down in the IHT Statute, such as forcible transfer. The term of forcible transfer, if we suppose it is synonymous with forced internal displacement of the population, was described as criminal behaviour *per se* for the first time in the Rome Statute, as stated above. Thus, significant challenges arise with regard to the principles of *nullum crimen sine lege* and temporal context in assessing the applicability of criminality and the effect on the behaviour of the perpetrator in the past.

3.1. Definition of internal displacement

3.1.1. The definition of internal displacement in the context of human rights law

3.1.1.1. Definition of forced internal displacement in UN Reports

A first opportunity to define the internal displacement derives from the analytical report of the United Nations Secretary-General (UNSG) in 1992. However, the report did not provide a direct definition, instead it illustrated who internally displaced persons are. Those persons as stated in the report are

> '[p]ersons who have been forced to flee their homes suddenly or unexpectedly in large numbers; as a result of armed conflict, internal strife, systematic violations of human rights or natural or man-made disasters; and who are within the territory of their own country.'[3]

This formulation was criticized by both jurists and humanitarian organizations, because of the strict and narrow criteria of time and quantity, which deprive a huge number of people from being classified as displaced.[4] The first criterion renders the absence of the prediction or

[3] UNCHR Report on 'Analytical report of the Secretary-General on internally displaced persons' UN Doc. E/CN.4/1992/23 (14 February 1992), 5. (Therein after UNCHR Analytical Report).

[4] UNCHR Report of the Representative of the UNSG for internally displaced persons (Mr. Francis Deng) on 'Human rights, Mass Exoduses and Displaced Persons: Internally displaced persons' UN Doc. E/CN.4/1995/50 (2 February 1995), 229. (Therein after UNCHR Report on Mass Exoduses of 1992). Also see, Carlyn M. Carey, 'Comments: Internal displacement: Is prevention through accountability possible? A Kosovo case study' (1999)

knowledge in the moment of displacement as a critical element, and this rules out displacements of greater gravity, such as discriminatory ones, which are mostly based on pre-prepared policies and which are of long duration.[5] For example, the displacement policy in relation to the Kurdish population lasted for two decades after 1970, and it was a pre-designed governmental enterprise based on ethnicity.[6] On the other hand, the second criterion excludes displacements on a smaller scale because, according to the formulation above, such displacement will not be of concern to the international community.[7] This means that those who are displaced individually or gradually will not merit protection. The displacements in Colombia, for example, was worthy of consideration, but it was carried out gradually with one small group at a time.[8]

The requirement for 'large numbers' is derived from the words of the resolution of the UN Economic and Social Council (UNESC) (No. 1990/78). This resolution used the phrase 'mass population movements' to mean that the displaced should involve tens of thousands, and this is a helpful criterion to specify which one of internal displacements requires a special and urgent response to deal with it.[9]

In addition to the two criticisms above, the analytical report does not broaden to accommodate in its definition of displaced persons different types of cases or situations involving displacement that may occur in the future.[10] Moreover, the phrase 'the territory of their own country' has some difficulties in its explication, especially on the occasion of the conflicts which aim to change the State borders, such as the displacements during internal wars in which one party seeks to separate a part of the territory and declare a new State.[11] In such a situation, the status of the displaced could be regarded as internal or external or as both at the same time, and such challenge becomes greater due to the lack of a legal criterion which can be used to fix the borders clearly.[12] Regarding the use of the phrase 'one's own country', the intention

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43 *American University Law Review*, 244, 245. See also, Simon Bagshaw, *Developing a normative framework for the protection of internally displaced persons* (Transnational Publishers, New York, 2005), 14.

[5] Erin Mooney, 'The concept of internal displacement and the case for internally displaced persons as a category of concern' (2005) 24 *Refugee Survey Quarterly* (Issue 3), 11.

[6] Simon Bagshaw (n 4) 14.

[7] UNCHR Report on Mass Exoduses of 1992 (n 4) 229.

[8] Ibid. See also, Catherine Phuong, *The international protection of internally displaced persons* (Cambridge University press, 2004).

[9] UNESC Res. No. (1990/78) on 'Refugees, displaced persons and returnees' UN Doc. E/RES/1990/78 (27 July 1990). See also, UNCHR Analytical Report (n 3), para. 5.

[10] Erin Mooney (n 5) 11.

[11] Ibid.

[12] Ibid. See also, Luke T. Lee, 'Protection of internally displaced persons in internal conflicts' (1997) 3 *Journal of International & Comparative Law*, 533. Expressly, It does not seem that the authors of the analytical report

was to avoid uncertain situations of nationality, such as those displaced who are divested of their nationality for discriminatory reasons; in these situations, this wording is used as an alternative that covers both nationality and habitual residence status.[13]

To deal with the above criticism above, some proposals charted an intermediate methodology which is neither broad nor narrow in order to hold a balance between the practical difficulties and the relief of wider categories of displaced people. For example, some modifications of the aforesaid definition were added by the 'Legal Round Table', viz:

> '[P]ersons or groups of persons who have been forced to flee their homes or places of habitual residence suddenly or unexpectedly as a result of armed conflict, internal strife, systematic violations of human rights or natural or man-made disasters, and who have not crossed an internationally recognized State border.'[14]

This formulation can cover the categories of displaced persons regardless of their number or the location from which they displaced, whether their homes or their habitual dwelling. Furthermore, it depends on internationally recognized borders to distinguish between internal and non-internal displacement.

The London declaration suggested that the displaced are

> '[p]ersons or groups of persons who have been forced to leave or flee their homes or places of habitual residence as a result of armed conflict, internal strife, systematic violations of human rights or natural or man-made disasters, and who have not crossed an internationally recognized State border.'[15]

This definition evaded the temporal factor by deleting the words 'suddenly or unexpected'. However, this intermediate approach does not give an entirely satisfactory description of forced internal displacement and retains some of the unfavourable aspects. On the other hand, the Friends World Committee for Consultation gave a definition that depends on two factors, coercion and the non-crossing of international borders, as in the following:

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gave express attention in their definition to the fluctuations in the international community, since those authors were afforded an understanding of the phrase 'the territory of their own country' to be restricted to the member States in the UN.

[13] UNCHR Analytical Report (n 3) para.4.

[14] Luke T. Lee, 'Internally displaced persons and refugees: Toward a legal synthesis?' (1996) 9 *Journal of Refugee Studies* (No. 1) 29.

[15] Mentioned in: Luke T. Lee (n 12) 530.

> '[P]ersons who have been forced to flee their homes and have not crossed an international frontier.'[16]

It is difficult to endorse such a doctrine practically because it is very broad and could extend to involve displacement produced by domestic violence or individual threats.[17] To avoid the shortcomings in previous approaches, the definition of displaced persons was reworded again, with some amendments, so that it read as follow:

> '[P]ersons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.'[18]

This wording eliminates the factors of time and number, and takes into account the future by using the word 'especially' by which reasons other than those listed in the definition can be added.[19] Moreover, this wording covers both of actual victims and those threatened.[20] This wording has received wide endorsement and was repeated in a number of national legislations.[21] However, it is noteworthy that this definition is descriptive and not legal, and accordingly the internally displaced do not enjoy a legal status, and internally displaced persons in their entirety do not constitute a separate category in the international legal system, then the rights of internally displaced persons are given for both citizenship and usual or habitual residence in a particular country.[22]

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[16] Cited in: Richard Plender, 'The legal basis of international jurisdiction to act with regard to the internally displaced' (1994) 6 *International Journal of Refugee Law* (No. 3) 13.
[17] Ibid, 13.
[18] UNCHR Report of the Representative of the UNSG for internally displaced persons (Mr. Francis Deng) on ' Further promotion and encouragement of human rights and fundamental freedoms, including the programme and methods of work of the Commission: Human rights, Mass Exoduses and Displaced Persons: Internally displaced persons, internally displaced persons' UN Doc. E/ CN.4/1998/53 (11 February 1998), 6.
[19] Simon Bagshaw (n 4) 14.
[20] Erin Mooney (n 5) 11.
[21] See, <http://www.brookings.edu/search.aspx?doQuery=1&q=National%20Laws%20and%20Policies>. It is noteworthy that it was adopted as a binding international text under the Great Lakes Protocol on Internally Displaced Persons (2006) with slightly additional expressions, which mentioned development projects as a variable which tends towards displacement. See, Art. 4(5) of the Protocol on the protection of and assistance to internally displaced persons (adopted 30 November 2006) International Conference on the Great Lakes Region. The displacement caused of the development projects are implicitly understood in the scope of the report of the Secretary-General Representative and Principle 6 of the Guidelines on internally displaced person indicates such projects explicitly. See, Principle 6 of the guiding principles for internally displaced persons of 1998. A binding nature of the provisions of the definition of the UN Guiding Principles was afforded in the African convention on protection and assistance of internally displaced persons. See, Art. (1)(k) of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) of 2009.
[22] Walter Kälin, 'Guiding Principles on Internal Displacement: Annotations' (2008) *The Occasional Paper series No. (38): Studies in Transnational Legal Policy- the American Society of International Law,* 5.

3.1.1.2. Definition of forced internal displacement and approach towards defining a 'refugee'

In order to define internal displaced persons, this jurisprudential opinion conducts a similar approach by which refugees are identified, but with the stipulation that they should not go outside the borders of the country concerned. As an appropriate definition in this respect, this view focuses on a definition of refugees contained in both the African Convention and the Declaration of Cartagena.[23] In the same context, both the Permanent Consultation for Displaced Persons in the Americas (CPDIA)[24] and the International Conference on Central American Refugees (CIREFCA) constructed their opinion on displaced persons. For example, the latter provides a definition of displaced persons as those

> '[w]ho have been obliged to abandon their homes or habitual economic activities because their lives, security or liberty have been threatened by generalized violence or prevailing conflict but who have not left their country.'[25]

By this approach it is notable that internal displacement can be caused by fear of persecution, human rights violations, internal strife, armed conflict or due to the disruption of public order. Other causes, such as natural or man-made disasters are ignored. Thus, this is more close to the refuge causes and definition.[26] Then, the common reason is not the suffering, rather it is the action of the state that reveals whether this state has the will and ability to provide protection and assistance and whether or not it will allow to deliver international support for victims.[27] It is well known that there is no difficulty in the provision or acceptance of protection or assistance in the case of disasters. However, in situations of persecution, conflict or/ and human rights violations are, on the contrary, mainly committed to target their victims.[28] This is the case when a disaster is accompanied by serious and widespread human rights encroachments under the title of forced internal displacement.[29]

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[23] UNCHR Report on Mass Exoduses of 1992 (n 4) 228.
[24] Roberta Cohen and Francis M. Deng, *Mass in flight, the global crisis of international displacement* (R.R. Donnelley& sons Co., Harrisonburg, Virginia, 1998) 16.
[25] Luke T. Lee (n 12) 28.
[26] UNCHR Report on Mass Exoduses of 1992 (n 4) 229.
[27] Ibid.
[28] Ibid.
[29] Roberta Cohen and Francis M. Deng (n 24) 16.

3.1.2. The definition of forced internal displacement in the context of international criminal jurisprudence

Population transfer is given different meanings in international law. Some legal commentaries consider that it is an embodiment of the removals and resettlement arrangements. This position defines forcible transfer as

> '[t]he movement of large numbers of people, either into or away from a certain territory, with state involvement or acquiescence of government and without the free and informed consent of the people being moved or the people into whose territory they are being moved.'[30]

Forcible transfer as a term should involve a reluctance and rejection on the part of the population, regardless of the motive behind the transfer, and is carried out by means inconsistent with the international law.[31] It can also be extended to cover two types of targeted population, that is, the transferred population and the population who receive other people into their territory. This interpretation clearly goes beyond the notion of internal displacement.

With regard to international criminal jurisprudence, it is notable that internal displacement is not mentioned within the statutes and charters of international tribunals prior to the Rome Statute. All the statutes and charters, except the Rome Statute, refer only to the crime of deportation.[32] The Rome Statute addresses both situations under the heading of 'deportation or forcible transfer of population'.[33] Article 7(2)(d) of the Rome Statute defines the terms as follows: the phrase

> '[D]eportation or forcible transfer of population 'means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.'[34]

The Statute of the IHT uses the same definition in its Article 12(d).[35]

Although the Rome Statute is the first to give an express definition and to describe the elements of forcible transfer, the jurisprudence of both the ILC and the ICTY preceded the Rome Statute in this respect. In the context of the ICTY jurisprudence it is clear through many cases that

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[30] Christopher M. Goebel, 'A unified concept of population transfer' (1993) 22 *Denver Journal of International Law and Policy* (No 1) 3.
[31] Bohdan Nahajlo, 'Forcible population transfer, deportation and ethnic cleansing in the CIS: Problems in search of responses' (1997) 16 *Refugee Survey Quarterly* (No. 3) 28.
[32] See, Art. 6(c) of the Nuremberg Charter, Art. II(c) of the CCL No. 10, Art. 5 of the ICTY, Art. 3 of the ICTR, as well as Principle VI of the Nurnberg Principles and Art. (2)(11) of the 1954 Draft Code.
[33] Art. 7(1)(d) of the Rome Statute.
[34] Art. 7(2)(d) of the Rome Statute.
[35] See, art. 12(d) of the Statute of IHT of 2005.

deportation is well defined in customary international law as the inhumane act of displacing targeted people across the border of a State. Then forcible transfer is an act of forced displacement that does not extend beyond of the frontiers of a State. For example, in the case of *Prosecutor v. Blagojevic* in the ICTY, it was asserted that

> '[T]he crime of forcible transfer has been defined in the jurisprudence of this Tribunal as the forced displacement of individuals from the area in which they are lawfully present without grounds permitted under international law.'[36]

It was added that

> '[T]raditionally, the distinction between forcible transfer and deportation is that the first one consists of forced displacements of individuals within state borders, while the second one consists of forced displacement beyond internationally recognised state borders'[37]

In the Trial Chamber in the case of *Prosecutor v. Blaskic* it was stated that deportation or forcible transfer refers to

> '[f]orced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.'[38]

The ILC decreed similar definition in its work between 1991 and of 1996 that the forcible transfer of populations, as distinct from deportation, happens entirely within the borders of a single State.[39] This distinction will be investigated and demonstrated in detailed analysis in section three.

3.2. Inapplicability of forcible transfer as a crime *per se* under the Rome Statute

3.2.1. Forcible transfer as a crime against humanity under Article 7 of the Rome Statute

The Rome Statute was the first of the international criminal tribunals to designate the forcible transfer of populations as a crime against humanity. Article 7(1)(d) of the Rome Statute

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[36] *Prosecutor v. Blagojevic* (Trial Judgement) ICTY-IT-02-60-T (17 January 2005), para. 595.
[37] Ibid.
[38] *Prosecutor v. Blaskic* (Trial Judgement), ICTY-IT-95-14-T (3 March 2000), para. 234. (Therein after *Blaskic* Trial Judgement).
[39] The ILC considered that the objective plays a significant part in defining this crime. For example, the intention may be to change the demographic composition for political, religious, racial or other reasons; or it could be intended to extirpate a people from their ancestral lands. See, ILC Report on 'Work of its 43rd Session (29 April-19 July 1991)' Official Records of the UNGA (46th Session), Supplement No. 10, UN Doc. A/46/10 (1991), and UN Doc. A/CN.4/SER.A/1991/Add.1 (1991), Yearbook of the ILC Vol. II(2), 104. (Therein after Report of the ILC of 1991). See also, See, ILC Report on 'Work of its 48th Session (6 May-26 July 1996)' Official Records of the UNGA (51st Session), Supplement No. 10, UN Doc. A/51/10 (1996), and UN Doc. A/CN.4/SER.A/1996/Add.1 (1996), Yearbook of the ILC Vol. II(2), 47, 49. (Thereinafter Report of the ILC of (1996)).

describes the deportation or forcible transfer of populations as criminal conduct amounting to a crime against humanity, as long as it is located within the definition of crimes indicated in Article 7(1). According to Article 7(2)(d), forcible transfer or deportation means

> '[f]orced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.'[40]

Moreover, elements of this crime are detailed in the Elements of Crimes, in addition to the requirement that the conduct in question must fall within, and must be a part of, the meaning of "attack" contained in Article 7(1), that is, 'a widespread or systematic attack directed against any civilian population, with knowledge of the attack'.[41] It must also consist of a group of elements, as set forth in Article 7(1)(d) of the Elements of Crimes: otherwise forcible transfer or deportation cannot constitute a crime against humanity under Article 7(1)(d) of the Rome Statute.

The first chapter of this study suggested that the formulation of international crimes as set out by the IHT Statute in order to try Saddam and his collaborators was based on international law. Articles 12(1)(d) and 12(2)(d) of the IHT Statute located forcible transfer and deportation within the context of crimes against humanity and affirmed that 'deportation or forcible transfer of population means:

> '[f]orced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.'[42]

It is clear beyond any doubt that these provisions are nothing more than a restatement of the provisions contained in Article 7(1)(d) and Article 7(2)(d) of the Rome Statute mentioned above. On this basis, the IHT convicted those who had committed acts of forced displacement and relocation against groups of the Iraqi population on more than one occasion, as for example, in the events of Al-Dujail in 1982, Al-Anfal in 1987-88 and the Marshlands in 1989.[43] According to the standpoint of the IHT on general treaties, it can be said that the Rome Statute, as a general and multilateral treaty, is binding on Iraq and thus provides a legal basis for the legitimacy of the IHT's Statute and judgements, regardless of the non-ratification by Iraq of

[40] Art. (7)(2)(d) of the Rome Statute.
[41] Art. (7)(1) of the Rome Statute.
[42] Art. (12)(2)(d) of the IHT Statute.
[43] Al-Dujail Trial Judgement (n 2) 35-44.

these kinds of treaties.[44] Even given the validity of this approach, other legal obstacles will arise in the form of the critical "time element" in the context of the criminalization of certain behaviour, such as forcible transfer. The time when the treaty came into force would render it effective if it was consistent with the IHT's temporal jurisdiction -1968 to 2003 - particularly with regard to the forced internal displacement of populations.

3.2.2. Temporal Jurisdiction of the ICC Statute

According to Article 28 of the Vienna Convention, unless there is an opposite intention the treaty will not bind a party before its entry into force.[45] Article 126 of the Rome Statute reveals that the date of entry into force of this Statute was the first day of the month following the 60th ratification, and the same standard will also be applied when a new State Party accedes to the Statute after its entry into force.[46] Therefore, the Rome Statute became operative on 1 July 2002, after the required number of ratifications had been completed in April 2002. However, the application of the provisions contained in the Rome Statute might have a different date of entry into force, since these provisions may precede or be subsequent to the effective date of the Rome Statute. In principle, the application of the provisions of a treaty retroactively to events that occurred at a date earlier than the date of the treaty is permitted in some circumstances, as stipulated in Article 28 of the Vienna Convention. However, such circumstances are unlikely to apply to the Rome Statute, which does not admit any case that allows a retroactive impact to be given to the treaty provisions. Moreover, it seems clear from Articles 11 and 24 of the Rome Statute that the application of the Statute should start on the date of entry into force and that the Statute gives no indication of having any retroactive application. Article 11(1) of the Rome Statute defines the temporal scope for the exercise of the competence of the ICC. It provides that

> '[T]he Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.'[47]

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[44] Ibid.

[45] Art. (28) of the Vienna Convention states under the heading of the 'Non-retroactivity of treaties' that '[U]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.'

[46] Art. (126) of the Rome Statute provides 'Entry into force 1. This Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations. 2. For each State ratifying, accepting, approving or acceding to this Statute after the deposit of the 60th instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the first day of the month after the 60th day following the deposit by such State of its instrument of ratification, acceptance, approval or accession'.

[47] Art. (11)(1) of the Rome Statute.

It is clear from this provision that the ICC is unable and cannot be allowed to exercise jurisdiction over any criminal violations committed before its entry into force, which was 1st July 2002. This point is important because the temporal jurisdiction has an effect on the substantive aspect of the 'crimes' in the Statute as well the personal aspect of 'individual criminal responsibility'. Therefore, it is a crucial issue in determining whether certain behaviour was criminalized at a certain time and whether the perpetrator was responsible at the time when the behaviour occurred.

Before Article 11 crystallized into its final form, as now contained in the Statute, it was linked to and accompanied by a current Article 24 of the Rome Statute, which embraces the provision on non-retroactivity.[48] At a later stage, the text contained in Article 11 was moved to its current place, while the provision on the non-retroactive effect of the applicability of the substantive aspect of the Statute related to individual criminal responsibility of persons who committed an action in the past remained in its place. Article 24(1) of the Rome Statute stipulates

> '[N]o person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute'.[49]

This provision is stated in an absolute form, and therefore prevents individuals from being held responsible retroactively within the Rome Statute.

Although the Rome Statute refers to international law as part of the applicable law in a way that is not inconsistent with the provisions of this Statute,[50] this should not be interpreted beyond Articles 11 and 24 in manner that renders individuals responsible for their actions prior this Statute. If those who drafted the Rome Statute had intended this outcome, they would had made an explicit reference to it, in a manner similar to that which had been followed by the ILC. Such a stipulation was found in the draft of the 'Draft Code of Crimes against the Peace and Security of Mankind' made by the ILC. Its report on the said Draft Code includes confirmation on the non-retroactivity of law in the first paragraph of draft Article 13, however it stresses in the second paragraph that it does not prevent the prosecution on another legal basis apart from the Code.[51] Draft Article 13(2) states that

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[48] UNGA, Report of Ad Hoc Committee on 'Establishment of an International Criminal Court' UNGA, 50th Session, Supplement No. 22 UN Doc. A/50/22 (1995).
[49] Art. (24)(1) of the Rome Statute.
[50] Art. (21)(2)(3) of the Rome Statute
[51] See, Report of the ILC of 1996 (n 39) 38-39.

> '[N]othing in this article precludes the trial of anyone for any act which, at the time when it was committed, was criminal in accordance with international law or national law'.[52]

The commentary on this draft article explained that

> '[P]aragraph 1 applies only to criminal proceedings instituted against an individual for an act as a crime 'under the present Code'. It does not preclude the institution of such proceedings against an individual for an act committed before the entry into force of the Code on a different legal basis. For example, ... an individual could be tried and punished for the crime of genocide under international law (Convention on the Prevention and Punishment of the Crime of Genocide, customary law or national law) or the crime of murder under national law'.[53]

Many of the crimes listed in the Rome Statute have been established in other sources, whether as a stable part of the international customary and/ or treaty law or as domestic laws that had existed before the adoption of the Rome Statute. However, if a trial should be held to prosecute crimes committed prior to the Rome Statute, then that trial must be directly based on these sources and not on the Rome Statute. In the latter case, it would be possible to bring those who perpetrated past crimes and atrocities for prosecution before courts that emerged later; this was the case with the international criminal tribunals before the ICC. The ICC is designed as a step forward in the evolution of international law. It is intended as a permanent means of dealing with atrocities committed in the future, after the date of entry into force of its own Statute. The establishment of the ICC would be undermined if the temporal jurisdiction of its Statute has not been restricted to cases that occur only in the future,[54] since, it is not expected that the States will give consent and approbation to being bound by a Statute that gives retroactive jurisdiction for the prosecution of acts committed on their territories or by their nationals.

However, there is one exception could lead to the applicability of the ICC's jurisdiction and Statute retroactively on the events of the past. However, this case is subject to the express will of the State, which must announce its desire to expand the temporal jurisdiction to cover crimes that occurred on its territory or were committed by one of its nationals in the period prior to such an announcement. This exception is the meaning to be drawn from Articles 11(2) and 12(3) of the Rome Statute.[55] Furthermore, Article 12(3) is sufficiently wide to include not only

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[52] Ibid.
[53] Ibid.
[54] Markus Wagner, 'The ICC and its jurisdiction –myths, misperceptions and realities' 7 (2003) *Max Planck Yearbook of United Nation Law UNYB*, 497.
[55] Art. (11)(2) of the Rome Statute provides '[I]f a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this

States that are parties to the Rome Statute, but non-States parties as well. Thus it raises the question of whether such a declaration could be re-drawn to address criminal behaviour that occurred before 1 July 2002. Neither this sense nor its opposite appears in Article 12(3). The logical answer to this question can be derived from reading Article 12(3) in the light of Articles 11, 22 and 24, and then it can be said that Article 12(3) is governed by the temporal jurisdiction of these articles. The Practice of the States and of the UNSC supports such a result. On more than one occasion, it has been noted that the announcement in Article 12(3) does not confer jurisdiction to deal with criminal behaviour unless such conduct occurred on or after 1 July 2002.[56] Thus a State that has become a party after 1 July 2002 or is still non-party to the Rome Statute is subject to the stipulation of Article 12(3). Any State that declares its acceptance of the ICC or requests the ICC to exercise its jurisdiction and to apply its Statute over conduct that happened before the date of this declaration should be informed that the declaration does not extend to events prior 1 July 2002.

One type of case is controversial and may or not affect the extension of the temporal range and enable the Rome Statute to be applied retroactively. This is the so-called 'continuing crime'.

3.2.3. Continuing crimes and the level of impact on the time scale of the implementation of the Rome Statute

Some crimes extend over a period of time until their outcome is completed or the violation ceases.[57] The continuing nature of this kind of crimes may have an impact on the expansion of the jurisdiction of the ICC on the application of the personal and substantive provisions, as well as in relation to the non-retroactive principle. Such crimes therefore constitute a challenge to the temporal requirement stipulated in Articles 11 and 24 of the Rome Statute. Neither the

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Statute for that State, unless that State has made a declaration under article 12, paragraph 3'. And Art. (12)(3) of the Rome Statute provides '[I]f the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9'.

[56] See, Warrant of arrest for Joseph Kony issued on 8 July 2005 and amended on 27 September 2005) ICC-02/04-01/05 (27 September 2005), para. 32-34. See also, UNSC Res. No. (1593/2005) on 'Sudan' UN Doc. S/RES/1593 (31 March 2005), which states in paragraph (1) that the UNSC 'Decides to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court'.

[57] One of the classifications of crimes, in criminal law, is pursuant to their nature and is instantaneous (completed) or continuing. An instantaneous crimes is 'a "discrete act" that occurs at a single, immediate period of time. The harm which it causes occurs in that moment and does not continue beyond it. On the other hand, the continuing crime is a term of art which embodies a special legal meaning. It is a course of conduct spanning an extended period of time, and the harm it generates continues uninterrupted until the course of conduct ceases.' See Jeffrey R. Boles, 'Easing the tension between statutes of limitations and the continuing offense doctrine' 7 (2012) *North western Journal of Law & Social Policy*, 227.

Rome Statute nor its Supplement on the Elements of Crimes contains a reference to the ongoing nature of the criminal conduct. The consequent confusion and ambiguity raises the problem of legal uncertainty in terms of criminality and individual criminal responsibility in relation to conduct that occurred before 1 July 2002, and has not stopped by this date, especially when the actions were not criminal at the time when they were begun.

References to continuing crimes were made by some of the proposals on temporal jurisdiction during the debates at the Rome conference. The representative of Lebanon had proposed the insertion of the phrase 'unless the crimes continue after that date.'[58] Despite this clear formulation, which sought to ensure that the perpetrators of continuing crimes will not enjoy impunity, the proposal was not included in the draft[59] that was finally adopted. Disregarding the view of the representative of Lebanon may have reflected an unwillingness of States to include continuing crimes within the scope of the statute. However, some believe that the literal reading after the change in the draft of Article 24 of the Rome on retroactivity at the last stage, by removing the word "committed" and keeping the word "conduct" renders the continuing crimes as crimes that fall within the ICC's jurisdiction.[60] Raul believes that the verb 'committed' had been omitted from the text is natural because criminal conduct can consist either of acts or omissions.[61] This view, however, seems illogical because it may have a negative effect on the interpretation of Article 11, which keeps the word 'committed', and thus will limit the limited temporal jurisdiction of the ICC to conduct that is an act and not an omission.[62]

On the other hand, Leila Sadat argues that the structural interpretation of Articles 11 and 24 of the Rome Statute reveals that former article puts aside those crimes 'committed' outside the jurisdiction of the ICC, while the second article excludes 'conduct' from the ICC's jurisdiction and makes the temporal jurisdiction more narrow, thus excluding not only 'committed crimes'

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[58] The representative of Lebanon had noted that 'temporal jurisdiction' did not cover acts that began before but continued after the entry into force of the Statute. Care should be taken not to bar prosecution for such acts, and the words 'unless the crimes continue after that date' should be added at the end of paragraph 1'. Report on '9th Meeting of the Committee of the Whole' UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, UN Doc. A/CONF.183/C.1/SR.9 (1998), para. 73.

[59] William A. Schabas, *The international criminal court: a commentary on the Rome statute* (Oxford University Press, Oxford, 2010), 418.

[60] Jutta Bertram-Nothnagel, 'General principles of criminal law' (November 1998) 10 *The ICC MONITOR, The Newspaper of the NGO Coalition for an International Criminal Court*, 5, available at <http://www.coalitionfortheicc.org/documents/monitor10.199811.pdf> accessed on March 28, 2013.

[61] William A. Schabas (n 59).

[62] See, Art.(11)(1) of Rome Statute.

but 'continuing crimes' as well.[63] William Schabas noted that while some verbs in the English version would probably resolve the issue of continuing crimes, such verbs face a problem in determining their meanings when they are interpreted into six different official languages in order to determine their meanings.[64] For that reason, the Coordinator of the principles working committee proposed exclusion of the troublesome verb in the English version.[65] This reveals the reason behind the deleted verb 'committed' of the draft provision, and therefore it cannot be argued that the question of continuing crime had been resolved.[66] Therefore, part of the jurisprudence believes that it should be left to the ICC to decide whether or not continuing crimes enter within the temporal scale as set forth in the Articles 11 and 24 of the Rome Statute.[67] To determine the jurisdiction of the ICC over continuing crimes, Leila Sadat, in her conclusion, based on the Elements of Crimes, noted that the continuous conduct of a crime, such as the forced disappearance of persons cited in Article 7(1)(i) of the Rome Statute, is outside the ICC's jurisdiction.[68] Such a conclusion can be drawn from the description of the crime involved in the forced disappearance of persons, which stated that

> '[T]his crime falls under the jurisdiction of the Court only if the attack . . . occurs after the entry into force of the Statute.'[69]

This is so even the attack began at an earlier time to the operative date of the Rome Statute; nevertheless, this is not enough to constitute criminal liability. It is necessary that the attack should be continuous for a period subsequent to the entry into force of the Rome Statute.[70] This result was not palatable to some, who evaluated continuing crimes according to their perception on the responsibility of the State that violates continuing international obligations, irrespective whether such obligations are mutual between States or human rights obligations.[71] The Draft Articles on State responsibility discussed the nature of continuing violation in the following paragraphs of Articles 14 and 30. The former stated that

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[63] Leila Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millenium* (Martinus Nijhoff, 2002). Cited in: Alan Nissel, 'Continuing crimes in the Rome Statute' 25 (2004) Michigan *Journal of International Law*, 656.
[64] William A. Schabas (n 59).
[65] Ibid
[66] Ibid
[67] Ibid
[68] Alan Nissel (n 63) 670.
[69] Ibid.
[70] Ibid
[71] Ibid. See also the same opinion was made by the Working Group on Enforced or Involuntary Disappearances (WGEID) in its General Comment. WGEID General Comment No. (9) on 'Enforced Disappearance as a Continuous Crime' UN Doc. A/HRC/16/48, para. 39. (Therein after WGEID General Comment on enforced disappearance).

> '2. [T]he breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.
>
> 3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.'[72]

In addition, Article 30 states that

> '[T]he State responsible for the internationally wrongful act is under an obligation: (a) to cease that act, if it is continuing; (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.'[73]

This opinion considers that the State will remain responsible for violations of a continuing nature for as long as the violation continues.[74] This opinion therefore argues that the term 'attack', referred to in the Elements of Crime, does not limit the ICC's jurisdiction.[75] In other words, it recognizes criminal liability because this liability is a legal effect posed by the nature of the continuing commitment that is violated, i.e. enforced disappearances in this example. Thus, regardless of whether or not the attack had stopped, the violation of the enforced disappearance prohibition remains constant as a result of the continuing nature of commitment of the prohibition.[76] Therefore, individual criminal responsibility and State responsibility can be established as long as the act of enforced disappearance exists at a date later than the entry into force of the Rome Statute, and this result applies even if the conduct was not criminal prior to the effective date.[77] This interpretation is stressed in the commentary of the Work Group on Enforced Disappearance (WGEID), which confirms that:

> '[o]ne consequence of the continuing character of enforced disappearance is that it is possible to convict someone for enforced disappearance on the basis of a legal instrument that was enacted after the enforced disappearance began, notwithstanding the fundamental principle of non-retroactivity. The crime cannot be separated and the conviction should cover the enforced disappearance as a whole.'[78]

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[72] Art. (30) of the Draft Articles on Responsibility of States for Internationally Wrongful Acts of (2001).
[73] Ibid.
[74] Alan Nissel (n 63) 670. See also, WGEID General Comment on enforced disappearance (n 71).
[75] Alan Nissel, ibid.
[76] Ibid.
[77] Ibid.
[78] See WGEID General Comment on enforced disappearance (n 71) para. 5. The commentary also considers that the fact that the '3. … enforced disappearance began before the entry into force of an instrument ... gives the institution the competence and jurisdiction to consider the act of enforced disappearance as a whole, and not only acts or omissions imputable to the State that followed the entry into force of the relevant legal instrument or the acceptance of the jurisdiction. 4. … an enforced disappearance ... which continued after its entry into force the State should be held responsible for all violations that result from the enforced disappearance, and not only for violations that occurred after the entry into force of the instrument.'

This view maintains that 'continuing to withhold information' on the whereabouts of the victims after the entry into force of the Rome Statute, does not represent the attack otherwise the continuing crime of forced disappearance of persons will be outside the jurisdiction of the ICC and the Rome Statute.[79] According to the standard of 'a continuing nature of obligation', all continuing crimes will be subject to the Rome Statute and the jurisdiction of the ICC. What it is important in this context is that the continuing conduct incurs criminal responsibility only from the moment when it became a crime; therefore, the part of conduct that precedes criminalization will be exempt from responsibility.[80] In fact, this view confuses the legal consequences arising from a violation of the commitments that bind States in their mutual relations or commitments to human rights, and the violation of the substantive provisions of international criminal law. These two types of consequence are of a different nature. International criminal law is genuinely related to individual criminal responsibility stemming from the most serious violations. Therefore, it should be interpreted in a manner more restrictive than other regular obligations in the field of international law that involve the responsibility of the State.

3.2.3.1. The Jurisprudence of the ICC

In the case of the *Prosecutor v. Lubanga*, the ICC found that the accused and his colleagues were involved in the commission of the crime of the recruitment and military use of children.[81] The Trial Chamber found that this conduct had occurred in the period prior to the entry into force of the Rome Statute on 1 July 2002. Then the Chamber, decided that this conduct fell outside the scope of the temporal jurisdiction of the ICC.[82] However, the Chamber found that it was important to take into consideration events that predated the enforcement the Rome Statute and that this would be helpful in understanding subsequent events that were subject to the ICC's jurisdiction. Regarding the case cited above, the Chamber examined the previous events to reveal whether the previous and subsequent events could constitute one common plan, before and during the period of the indictment, because such a common plan would provide critical background evidence on the activities of the group to which the accused belonged.[83]

Another case dealt with the situation in Colombia. This State ratified the Rome Statute on 5 August 2002, and the Statute entered into force on 1 November 2002, in accordance with

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[79] Ibid

[80] A broader scope of responsibility was adopted by the WGEID, see footnote 78.

[81] The Prosecutor v. Thomas Lubanqa Dyilo (Judgement pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012), para. 1352.

[82] Ibid

[83] Ibid

Articles 126(2)[84] and 11(2) of the Rome Statute.[85] However, the latter date is only applicable to genocide and crimes against humanity. Columbia announced, in accordance with Article 124,[86] a postponement of the entry into force of the Rome Statute and the exercise of ICC's jurisdiction over war crimes, for a period of seven years, i.e., until 1 November 2009.[87] The ICC exercised its jurisdiction over crimes against humanity committed in the territory of Colombia, or by its nationals, from 1 November 2002 onwards.[88] Although the non-international conflict in Colombia was continuous throughout the period before and after 2009, and war crimes were committed over this period, the ICC restricted its jurisdiction to crimes committed after 1 November 2009.[89] Moreover, the report of the Office of the Prosecutor (OTP) excluded the paramilitary armed groups from the scope of the ICC's jurisdiction, as a result of the demobilization of these groups by 2006 and because this date was earlier than the beginning of the jurisdiction period for war crimes, 1 November 2009.[90] Thus the ICC did not exercise its jurisdiction over war crimes throughout the period from 2002 until November 2009, although this period falls within the temporal framework of the first date of entry into force of the Rome Statute, i.e., 1 July 2002. Moreover, the report of the OTP pointed out that the crimes committed by armed groups in the period prior to this effective date should be prosecuted by domestic institutions, because such institutions have temporal jurisdiction wider than the ICC and because some of the said crimes date back to an earlier stage, i.e., to 1990.[91]

In the case of Côte d'Ivoire, the latter accepted the jurisdiction of the ICC under the declaration submitted pursuant to Article 12(3) on 1 October of 2003. The declaration adopted 19

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[84] Art. (126)(2) of the Rome Statute states '[F]or each State ratifying, accepting, approving or acceding to this Statute after the deposit of the 60th instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the first day of the month after the 60th day following the deposit by such State of its instrument of ratification, acceptance, approval or accession'.

[85] Art. (11)(2) of the Rome Statute states '[I]f a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3'.

[86] Art. (124) of the Rome Statute provides that '[N]otwithstanding article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time. The provisions of this article shall be reviewed at the Review Conference convened in accordance with article 123, paragraph 1'.

[87] Report of ICC Prosecutor on 'Situation in Colombia: Interim Report' the Office of the Prosecutor (14 November 2012). (Thereinafter, Interim Report on Situation in Colombia).

[88] Ibid, 3-4.

[89] Ibid, 39, 52.

[90] Ibid, 3, 40, 52.

[91] Ibid, 52.

September 2002 as the date of the beginning of the exercise of the ICC's jurisdiction.[92] Then on 23 June 2011, an application concerning the situation in Côte d'Ivoire was filed at the ICC, requesting it to exercise its jurisdiction over crimes committed after the presidential election period.[93] The Chamber found that the post-election situation in Cote d'Ivoire was not separate from the political and military crisis that had prevailed in the country throughout the period since 19 September 2002 when the coup attempt occurred.[94] The Chamber noted that a series ongoing crimes had been committed before and after the application was referred to the court. All these events came within the context of one ongoing situation which is linked to the political and military crisis in Cote d'Ivoire.[95] The Chamber said that

> '181. ... [W]hile the context of violence reached a critical point in late 2010, it appears that this was a continuation of the ongoing political crisis and the culmination of a long power struggle in Côte d'Ivoire.'[96]

The view of the Pre-Chamber was that the context of the continuing situation authorized the Court to exercise its jurisdiction over the continuing crimes for the length of time that the situation had endured, irrespective of whether these crimes had been committed before or after the period specified in the prosecution's request, and that this period was the period following the presidential election.[97] Therefore, the court decided to exercise its jurisdiction retroactively from 19 September 2002. The Chamber held that:

> '[T]herefore if the authorisation is granted, it will include the investigation of any ongoing and continuing crimes that may be committed after 23 June 2011 as part of the ongoing situation.
>
> ..... The Chamber considers that a similar analysis should apply to any crimes that may have been committed before the commencement date requested by the Prosecutor for the authorisation, provided they are part of the same situation'.[98]

In other words, the ICC could exercise its jurisdiction over past crimes as long as these crimes fell within the period between the date that the ICC had jurisdiction for the first time, i.e., 19

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[92] Corrigendum of Pre-Trial Chamber III to (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire) ICC-02/11 (15 November 2011). (Thereinafter, Decision on an Investigation).
[93] Ibid.
[94] Ibid, para. 179, 181. This meaning was also confirmed by the Decision of the Pre-Trial Chamber III on the 'Prosecution's provision of further information regarding potentially relevant crimes committed between 2002 and 2010' (Situation in the Republic of Cote d'Ivoire) ICC-02/11 (22 February 2012), para. 10- 14, (thereinafter Decision on Prosecution's provision).
[95] Ibid.
[96] Decision on an Investigation, ibid, para. 181.
[97] Decision on an Investigation, ibid, para. 179- 180. Also see, Decision on Prosecution's provision, ibid, para. 36-37.
[98] Decision on an Investigation, ibid, para. 179, 180.

September 2002, and the date of the period of the events that followed the presidential election, i.e., October 2010- January 2011. In addition, the past crimes had to constitute a part of the one continuing situation. Moreover, they must have the same contextual elements either of attack in the case of crimes against humanity or armed conflict in the case of war crimes. The Chamber decided that:

> '[t]he crimes referred to in the Prosecutor's Request must have occurred in the context of the ongoing situation of crisis that triggered the jurisdiction of the Court" through the original referral in 2004. It was only within the context of this "original" situation that subsequent prosecutions could be initiated. The Chamber explicitly set out that a single situation "can include not only crimes that had already been or were being committed at the time of the referral, but also crimes committed after that time, insofar as they are sufficiently linked to the situation of crisis referred to the Court as ongoing at the time of the referral'... .
>
> insofar as the contextual elements of the continuing crimes are the same as for those committed prior to 23 June 2011. They must, at least in a broad sense, involve the same actors and have been committed within the context of either the same attacks (crimes against humanity) or the same conflict (war crimes). ...'.[99]

It can be concluded, in any case, that the ICC does not exercise or expand its jurisdiction or apply the Rome Statute on past crimes unless these crimes are part of one ongoing situation that continued after the Rome Statute came into force. However, this does not mean that all continuing crimes within the context of one continuing situation are subject to the ICC's jurisdiction and the Statute. Crimes will be subject to criminal responsibility only if they are committed as part of the continuing situation and at a time subsequent to the effective date of the Rome Statute. Moreover, contextual elements of the continuing situation should be available for subjection to the jurisdiction of the ICC, otherwise these crimes will be excluded from the scope of the jurisdiction. For example, the contextual elements of crimes against humanity are laid forth in Article 7(1) of the Rome Statute. This article indicates in its chapeau that an attack must meet the followed requirements; it must be an 'a widespread or systematic attack directed against any civilian population, with knowledge of the attack.'[100]

It is worth mentioning; that the effective date of the Rome Statute is not the same for all States, and it may also be different for each of the categories of crimes, as was observed in the case of Colombia. The ICC, therefore, should exercise its jurisdiction and apply its Statute according

[99] Ibid, para. 178, 179.
[100] For more details on contextual elements of crimes see, Interim Report on Situation in Colombia (n 87) 10-14, 39.

to each case. Another relevant factor is that the ICC did not distinguish between continuing and non-continuing crimes based on the nature of crime in itself; instead, it did so based on the context of situation in which the crime was committed. For example, in the case of Côte d'Ivoire, the Court indicated that previous crimes of murder and rape are by their nature completed crimes. However, the court considered these crimes to fall within its jurisdiction because it considered them as a part of the ongoing situation in the country after 19 September 2002. This has led to the claim that crimes committed before the entry into force of the Rome Statute, whether they are in themselves of a continuing or a completed nature, will not be subject to the provisions of this Statute.

The analysis above shows that the temporal jurisdiction of the Rome Statute is inconsistent with the same jurisdiction of the IHT Statute. Thus, it is beyond any doubt that the latter violated the principle of *nullum crimen sine lege* in relation to the criminalisation and prosecutions of the legacy of Ba'athist crimes. It is notable that these crimes were carried out prior to the entry into force of the Rome Statute. In particular, this applies to the criminal framework of the forcible transfer as a crime *per se* against humanity contained in the Articles 12(1)(d) and 12(2)(d) of the IHT Statute and derived from Article 7(1)(d) and 7(2)(d) of the Rome Statute. On this basis, this confirms that the IHT applied this criminal framework retroactively when convicted the acts of forced internal displacement as crime *per se* against humanity. For example, such retroactive application can be showed in relation to the situations of Al-Dujail, the Marshlands and Al-Anfal. These situations had begun and ended prior to the entry into force of the Rome Statute. Thus, the judgements of the IHT violated the principle of *nullum crimen sine lege* in the relation to the acts of forced internal displacement committed during these situations. Therefore, a further investigation is needed to show whether this stance of the IHT can be based on the customary international law as existed prior to the Rome Statute.

3.3. Customary international law, the work of the international ad hoc tribunals and the crime of forcible transfer

It was stated above that forcible transfer is a crime against humanity, which makes forced internal displacement a criminal framework *per se* according to Articles 7(1)(d) and 7(2)(d) of the Rome Statute. This crime cannot be applied retroactively, before the effective date of this Statute, regardless of whether the crime of forcible transfer is considered incomplete or continuous in its nature. Therefore, it should be investigated as involving acts of forced internal displacement (forcible transfer), in the light of the other norms of international criminal law to determine whether the behaviour in question constitutes a crime *per se* before the Rome Statute,

especially with respect to the time of events that occurred in Iraq. The investigation should test whether forcible transfer, as crime *per se*, is an established part of customary international law. Only in this way, if it is proved, can the perpetrators responsible for the internal displacements in Iraq be held criminally responsible. Otherwise, there will be legal error and the principle of *nullum crimen sine lege* will have been violated. Investigation and analysis is required of the crimes contained in the instruments of the international criminal tribunals, which are mainly established on the basis of customary international law. This section will therefore review and analysis the jurisprudence opinions and judgements of international criminal tribunals with respect to the crime of forcible transfer.

3.3.1. Statutes of international criminal tribunals

Statutes of international criminal tribunals reflect in the main part the firmly substantive rules on crimes under customary international law, especially after the establishment of the principles of Nuremberg. They also reflect the provisions contained in international instruments, such as international humanitarian law and the law dealing with the crime of genocide. These sources provided the legal basis for newly established tribunals, particularly the ICTY and the ICTR. Concerning the Charter of the Nuremberg Tribunal, it is observed that the Charter involved three categories of crimes, one of them being crimes against humanity. According to Article 6(c) of the Nuremberg Charter, acts which constitute crimes against humanity are:

> '(c) [C]rimes against humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecution on political, racial or religious grounds in execution of or in connexion with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.'[101]

It is clear that the provision is merely an enumeration of the criminal acts without a specific definition for each one of them. The provision inserts 'deportation' as one of the acts that are considered criminal conduct against humanity, however the provision does not reveal what is the exact meaning of deportation. Other Statutes of international criminal tribunals that borrowed crimes against humanity, including deportation, from the Nuremberg Charter, followed the same approach in that they did not provide definitions of these crimes.[102] A legal question that then arises is whether the meaning of deportation is limited only to cases where

[101] Art. (6)(c) of the Nuremberg Charter.

[102] Deportation was included as a crime against humanity in Art. (6)(c) of the Charter of the Nurnberg Tribunal, Art. (II)(c) of the CCL No. 10, Art. (5) of the ICTY Statute and Art. (3) of the ICTR Statute.

the targeted population was removed beyond the border of the State concerned, and whether this the only type of removal that can be considered as the crime of deportation *per se*. If the term deportation is applied broadly, it refers not only to the forcible removal of people across the borders of the State concerned, but also to mass removals of people within the borders of the state. Thus, the definition of deportation as a crime will expand to involve acts of external and internal displacement, and then the term deportation will be used in the same sense as the term forcible transfer.

Statutes of international tribunals are silent in respect to the requirement of the crossing of state borders. They do not indicate if such a requirement is necessary in order for the removal of a population to be considered as the crime of deportation. This question will therefore be addressed in the light of the jurisprudence of international criminal tribunals and opinion of jurists.

3.3.2. Interpretation of deportation and forcible transfer in the context of the judgements of international criminal tribunals

The problem of determining the definition of 'deportation' had been raised by the ICTY. The Prosecutor in the *Krstic* case took the view that the crossing of state borders by displaced people is not a prerequisite to establish the crime of deportation.[103] On the other hand, the Trial Chamber in the same case found that this estimation contrasts with customary international law. The viewpoint of the Trial Chamber was that:

> '[B]oth deportation and forcible transfer relate to the involuntary and unlawful evacuation of individuals from the territory in which they reside. Yet, the two are not synonymous in customary international law. Deportation presumes transfer beyond State borders, whereas forcible transfer relates to displacements within a State.'[104]

The Trial Chamber II in the case of *Prosecutor v. Krnojelac* adopted a similar viewpoint. This Chamber emphasized that deportation differs from forcible transfer. Whereas the former requires that displaced persons cross national borders and only this is prohibited by international law, the latter involves removal within the national boundaries and is not criminalized under international law.[105] Moreover, the Trial Chamber confirmed that it was not

[103] Prosecutor v. Krstic (Trial Judgement) ICTY-IT-98-33-T (02 August 2001), para. 20.
[104] Ibid, para. 521.
[105] Prosecutor v. Krnojelac (Trial Judgement) ICTY-IT-97-25-T (15 March 2002), para. 474. (Therein after *Krnojelac* Trial Judement).

convinced with a contrary interpretation as set out in a previous decision by this Tribunal. Thus, the Chamber rejected the count of deportation because it had been established by the Prosecutor on the basis of the fact of forcible transfer.[106]

On the other hand, in the case of the *Prosecutor v. Stakic*, the Trial Chamber II found that jurisprudence of this tribunal distinguished between deportation, which is the subject of the provision of Article 5(d)[107] of the ICTY Statute, and forcible transfer, which is one of the other inhumane acts according to Article 5(i) of the ICTY Statute.[108] However, the Trial Chamber adopted a contrary view. It was considered that the distinction between the two terms is unacceptable, and that what is contained in the Rome Statute infers that both deportation and forcible transfer are in fact one crime.[109] The Trial Chamber instituted its opinion according to the considerations of the meaning of deportation in the context of Roman law and the interests protected by the ban on deportation. The Trial Chamber analysed its point of view in the following way:

> '[T]he English version of the Statute uses the term 'deportation'. "Deportation" according to Black's Law Dictionary is "the act or an instance of removing a person to another country; esp., the expulsion or transfer of an alien from a country." Moreover, the Trial Chamber notes that Black's Law Dictionary also refers to the Roman law term 'deportatio' as the act "of carrying away" a person from the area where he had lived under safe conditions in the past. 'Deportatio' is further described as "[p]erpetual banishment of a person condemned for a crime. It was the severest form of banishment since it included additional penalties, such as seizure of the whole property, loss of Roman citizenship, confinement to a definite place. Places of 'deportatio' were islands (in insulam) near the Italian shore." Thus, under Roman Law, the term 'deportatio' referred to instances where persons were dislocated from one area to another area also under the control of the Roman Empire. A cross-border requirement was consequently not envisaged. Expressed in these terms, the concept of deportation seems to mean the removal of someone from the territory over which the person removing exercises (sovereign) authority, or to remove someone from the territory where the person could receive the "protection" of that authority. The core aspect of deportation is twofold: (1) to take someone out of the place where he or she was lawfully staying, and (2) to remove that person from the protection of the authority concerned'.[110]

The Chamber added that

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[106] Ibid.
[107] Prosecutor v. Stakic (Trial Judgement) ICTY-IT-97-24-T 931 July 2003), para. 671.
[108] Ibid.
[109] Ibid, para. 680.
[110] Ibid, para. 674. Footnote omitted.

> '[T]he French version of the Statute uses the term "expulsion", i.e. ejectment by forcibly evicting a person.'[111]

In the view of this Chamber,

> '[T]he protected interests behind the prohibition of deportation are the right and expectation of individuals to be able to remain in their homes and communities without interference by an aggressor, whether from the same or another State. The Trial Chamber is therefore of the view that it is the actus reus of forcibly removing, essentially uprooting, individuals from the territory and the environment in which they have been lawfully present, in many cases for decades and generations, which is the rationale for imposing criminal responsibility and not the destination resulting from such a removal.'[112]

Some notes can be made with regard to this view. The Trial Chamber referred that the Rome Statute criminalises both types of displacement, however this Statute is a subsequent and progressive instrument in the comparison with the customary international law as should be applied by the ICTY. In addition, according to the Black's Law Dictionary, the deportation is an especial procedure taken by State against an alien, and is a legal punishment against an offender under the Roman law. While the deportation intended in question is a violation against the humane laws. In addition, the deportation in the Roman law aims to expel an offender from the territory where the sovereign power can be exercised and can protect the people including this offender. This reveals that the criterion is expulsion of the offender to another territory where the mentioned sovereign authority and its protection cannot be exercised. It is notable at the present that the modern State can extend its sovereign authority and protection over all its territories, and this stops where the borders of another State begin. Thus, if the Roman Law were to be applied today, then the deportation of the victim should be beyond the borders of State concerned, irrespective of whether these borders were *de facto* or internationally recognised. This is consistent with modern meaning of deportation as showed above by Black's Law Dictionary, and this is precisely what the Trial Chamber attempted to define the deportation in its finding when faced the problem of the change of borders. The Trial Chamber defined deportation as follows:

> '[F]or the purposes of the present case, the Trial Chamber finds that Article 5(d) of the Statute must be read to encompass forced population displacements both across internationally recognised borders and de facto boundaries, such as constantly changing frontlines, which are not internationally recognised. The crime of deportation in this context is therefore to be defined as the forced displacement of persons by expulsion or other coercive acts for reasons not

[111] Ibid, para. 675. Footnote omitted.
[112] Ibid, para. 677.

> permitted under international law from an area in which they are lawfully present to an area under the control of another party.'[113]

Thus, the Trial Chamber attempted to prosecute all the displacement acts and to avoid the challenge arising from the change of borders. The latter challenge was the reason of the differences in relation to the definition of deportation. It can note, for example, the Appeals Chamber in the case of *Krnojelac* avoided providing a definition of both deportation and forcible transfer, and the decision as to whether there was a difference between them. The Appeals Chamber justified this omission on the grounds that the question which should be answered, in respect to the Trial Chamber's judgement, is whether deportation and forcible transfer constituted the crime of persecution as a crime against humanity. It is notable that the Appeals Chamber did not use either terms, instead it used the words 'forced displacement' to mean both acts of displacement, whether those had occurred within or beyond the State borders.[114] This reveals that there was uncertainty with regard to the claim that the terms are synonymous. Thus, in the customary international law the deportation happens when the forced displacement extends beyond the borders of State. A confirmation of this finding can be derived from the post-World War II trials. In this respect, the Trial Chamber in the case of *Prosecutor v. Krnojelac* referred to the case of Von Schirach and cases of United States of America v. Erhard Milch, Alfried Krupp et al and Friedrich Flick et al.[115] For example, the Nuremberg Judgment clarified that

> '[n]ot only in defiance of well-established rules of international law, but in complete disregard of the elementary dictates of humanity ... [w]hole populations were deported to Germany for the purposes of slave labour upon defense works, armament production and similar tasks connected with the war effort'.[116]

In the case of *United States of America v. Alfried Krupp et al*, the Military Tribunal made clear that the deportation is

> '[D]isplacement of groups of persons from one country to another is the proper concern of international law in as far as it affects the community of nations. International law has enunciated certain conditions under which the fact of deportation of civilians from one nation to another during times of war becomes a crime. ... as in the case where people are deported from a country occupied by an invader while the occupied enemy still has an army in the field and is still

[113] Ibid, 679.
[114] Prosecutor v. Krnojelac (Appeals Judgement) ICTY-IT-97-25-A (17 September 2003)
[115] *Krnojelac* Trial Judgement (n 105) at footnote 1429.
[116] Trial of the Major War Criminals before the International Military Tribunal: Nuremberg 14 November 1945-1 October 1946, Vol I (Nuremberg, 1947), 227.

> resisting, the deportation is contrary to international law. The rationale of this rule lies in the supposition that the occupying power has temporarily prevented the rightful sovereign from exercising its power over its citizens.'[117]

A support of this finding can also be established by the following juristic opinions, the ILC work and State practice.

3.3.3. Opinion of jurists in the interpretation of deportation and forcible transfer

Some jurisprudence and some scholars in the field of international law have discussed the concepts of deportation and forcible transfer. For example, Cherif Bassiouni has defined deportation in the following words:

> '[d]eportation is the forced removal of people from one country to another, while population transfer applies to compulsory movement of people from one area to another within the same State.'[118]

He added that the protection from deportation afforded by international law is greater than the protection from population transfer.[119] Moreover, he referred to 'internally displaced persons' as

> '...[p]ersons moved by a State from one part of the country to another, but in circumstances that do not fall within the meaning of deportation, though de facto, such persons are deprived of their right of choice as to their habitat.'[120]

In his comment on the provision of Articles 7(1)(d) and 7(2)(d) of the Rome Statute, William Schabas said that 'this provision reflects an important expansion in its coverage not only of actual deportation beyond a State's borders but also 'forcible transfer' within those borders.'[121] Through these words, William Schabas confirms the difference between the two terms, and moreover he implicitly confirms that forcible transfer as internal displacement had not been included as a crime under previous statutes of international criminal tribunals, neither *per se*

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[117] Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No 10: The Krupp Case, Nuremberg October 1946-April 1949, Vol. IX (United State Government Printing Office, Washington, 1950), 1432. See also, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No 10: The Medical Case and The Milch Case, Nurenberg October 1946-April 1949, Vol. II (United State Government Printing Office, Washington), 865.

[118] M. Cherif Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* (Cambridge University Press, Cambridge, 2011), 381.

[119] Ibid.

[120] Ibid, 395.

[121] William A. Schabas (n 59) 163-164.

nor under the name of deportation. Hall, who explains both terms used in Article 7 of the Rome Statute, expressed the same idea:

> '[U]nfortunately, the Statute does not expressly distinguish between deportation and transfer. However, given the common distinction between deportation as forcing persons to cross a national frontier and transfer as forcing them to move from one part of the country to another without crossing a national frontier, and given the basic presumption that no words in a treaty should be seen as surplus, it is likely that the common distinction was intended'.[122]

In the same view, Henckaerts interpreted Article 49 of the Geneva Convention IV as following

> '[a]ll types of forcible 'relocation[s]' of civilians are prohibited. Presumably, a transfer is a relocation within the occupied territory, and a deportation is a relocation outside the occupied territory.'[123]

In addition, it is worth noting that the ILC, which consists of thirty-four experts in international law, had adopted the same distinction between deportation and forcible transfer. In its comment on draft Article 18(g) of the draft code of crimes against the peace and security of mankind it is stated that:

> '[T]he seventh prohibited act is arbitrary deportation or forcible transfer of population under subparagraph (g). Whereas deportation implies expulsion from the national territory, the forcible transfer of population could occur wholly within the frontiers of one and the same State.'[124]

Other writings in international law display a similar approach. One author confirms that both the Nuremberg Charter and the Tokyo Charter criminalized deportation as a crime against humanity; however, they omitted transfer of populations and forced relocation.[125] Thus it is clear that the existing international law during the World War II did not prohibit the exercise of these practices as long as are remained inside national borders. In the same context, forcible transfer or internal displacement was within the internal jurisdiction of the State and in this case international law had no power over the State.[126] In addition, forcible transfer within the

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[122] Hall, 'Article 7: Crimes against humanity.' In: Otto Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article (BadenBaden: Nomos Verlagsgesellschaft, 1999).* 136. See also, footnote1429 in the *Krnojelac* Trial Judgement (n 105).

[123] Jean-Marie Henckaerts, 'Deportation and transfer of civilians in time of war' 26 (1993) *Vanderbilt Journal of Transnational Law*, 472.

[124] Report of the ILC of (1996) (n 39) 47, 49. See also, Report of the ILC of 1991 (n 39) 104.

[125] Marco Simon, 'The emergence of a norm against arbitrary forced relocation' (2002-2003) 34 *Columbia Human Rights Law Review*, 119-120.

[126] Carolyn Carey, 'Comment: Internal displacement: Is prevention through accountability possible? A Kosovo case study' (1999-2000) 49 *American University Law Review*, 258-259.

state had been practiced during World War II.[127] A famous example in this context is forcible transfer of Japanese-Americans in the United States, Canada, Peru and some Latin American countries.[128] These acts were not condemned at the time. There were convictions three decades later, but even this condemnation was based on the violation of the human rights commitments and not on international criminal law.[129]

Consequently, the evidence provided by the provisions and predominating opinions of international criminal tribunals, the opinions of scholars of international law, the ILC comments and state practice supports the claim that deportation does not involve acts of internal displacement or forcible transfer. It cannot therefore be considered that forcible transfer that takes place within state borders is a crime according to the norms of customary international law with respect to deportation. Moreover, the view by which a Trial Chamber of the ICTY attempted to expand the concept of deportation reflected, and were derived from, the nature of the conflict in the former Yugoslavia and related to the acquisition of territory as a result of the disintegration of the State and the emergence of new States. Such judgements focused also on the non-discrimination between the de jure and de facto State border. These judgements took the view that the deportation occurs when it is the intention is to relocate the deportees so that they are under the power and control of a party other than the perpetrator. Thus, the same finding in the previous section can be invoked here. Herein also, the Statute and judgements of the IHT in relation to the cases of the forced internal displacement committed during the events of Al-Dujail, Marshlands and Al-Anfal violates the principle of *nullum crimen sine lege*. These judgements were established on the basis of the criminal framework of forcible transfer as crime *per se* and the international criminal framework of deportation. It was demonstrated above that these criminal frameworks were not as such in the existing customary international law during the time when the events in question were carried out, since the forcible transfer was not recognized as a crime *per se* and was not covered by the definition of deportation. It clear then that the IHT applied the law retroactively as derived from Articles 7(1)(d) and 7(2)(d) of the Rome Statute. In addition, this establishes that this violation of the principle of *nullum crimen sine lege* by the IHT extends to all cases of forced internal displacement which occurred prior to the entry into force of the Rome Statute.

[127] M. Cherif Bassiouni (n 118). See also, Marco Simon (n 125) 117, 133-135.
[128] Marco Simon, ibid, 117, 133-135.
[129] Ibid.

3.4. Other questionable rules categorising forcible transfer as a crime *per se*

3.4.1. Forced internal displacement in times of armed conflict

The debate in the previous two sections was on the topic of internal displacement as a crime of forcible transfer against humanity *per se*. It was concluded that this type of crime was formulated for the first time in the Rome Statute and then cannot be applied to the Iraqi examples of the forced internal displacements. The current section discusses the crime of forcible transfer or internal displacement as a war crime committed during armed conflict. It is well known that most internal displacements have been committed in the context of armed conflicts, especially conflicts of an ethnic character and/or involving the acquisition or seizure of territory.[130] Iraq is an example of a state that has seen acts of internal displacements during a conflict. From 1980 to 1988 when Iraq was engaged in a war with Iran, there was at the same time conflict between the central government under the rule of the former Ba'ath' regime and opposition groups of Kurdish 'Peshmerga' forces in northern Iraq. During this dual conflict, the former regime had used the regular army and interior security forces to commit bloody violations amounting to genocide against the Kurds, who were Iraqi citizens living in northern Iraq.[131] Forced internal displacement was one of the most prominent abuses practiced by the Ba'ath regime against Iraqi Kurdish people.[132] Although the conflict between the central government forces and the Kurdish Peshmerga forces was an internal armed conflict, it was considered by the regime as an extension and a key part of the armed conflict with Iran.[133] In other words, the former regime had classified armed conflict with the Peshmerga forces as an international armed conflict. In respect to such a case, it needs to be shown whether the forced internal displacement constitutes a crime of forcible transfer or forced displacement in the light of the provisions of war crimes.

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[130] UNSC Res. No. (827/1993) on 'International Criminal Tribunal for the former Yugoslavia (ICTY)' UN Doc. S/RES/827 (25 May 1993). See also, UNSC Res. No. (808/1993) on 'International Criminal Tribunal for the former Yugoslavia (ICTY)' UN Doc. S/RES/808 (22 February 1993).

[131] A Middle East Watch Report on 'Bureaucracy of repression: The Iraqi government in its own words' Human Rights Watch (1994), February 1994, available at <http://www.hrw.org/reports/1994/iraq/> accessed on July 6, 2012. See also, A Middle East Watch Report on 'Genocide in Iraq: The Anfal campaign against the Kurds' Human Rights Watch (1993). Appendix (1)' available at <http://www.hrw.org/reports/1993/iraqanfal/APPENDIXA.htm> accessed on June 23, 2016.

[132] Ibid.

[133] Ibid.

3.4.1.1. Forcible transfer as a war crime

The crime of forcible transfer is included in the Rome Statute. The latter received the crime of forcible transfer in three cases as a war crime as follows:

> '2. For the purpose of this Statute, 'war crimes' means:
>
> (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention: ... (vii) Unlawful deportation or transfer or unlawful confinement;
>
> (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: ... (viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
>
> (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts: ... (viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;'.[134]

As has been noted, the second category of forcible transfer falls outside the scope of the current research because such a forcible transfer embodies one of the practices of an occupation authority in an occupied territory and against the population of that occupied territory. This category of forcible transfer covers both transfers of occupied populations and resettlement of the nationals of the occupation power. This text, in fact, repeats what is stated in Article 49 of the Geneva Convention IV.[135] The first and third category of forcible transfer, according to the Rome Statute, refers to events involving forms of internal displacement of the kind that had happened in Iraq. However, these texts are inoperative in relation to events in the period referred to by the Statute of the IHT. In particular, it is notable that Article 13(Fourth)(h) of the IHT Statute provides the forced displacement as a war crime *per se* in internal armed conflict. This article states the following act as war crime:

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[134] Art. (8) of Rome Statute.

[135] Art. (49) of the Geneva Convention IV provides '[I]ndividual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive. ... The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies'. This prohibition is as a result of practices of World War II. See, Theodor Meron, 'The Geneva conventions as customary law'- *Essay in war crimes: law comes of age* (Oxford University Press, Oxford, 1998). See also, Karen Humla, 'Armed conflict and the displaced' (2005) 17 *International Journal of Refugee Law*, 101. Alfred-Maurice de Zayas, *A terrible revenge: The ethnic cleansing of the East European Germans, 1944-1950* (St. Martin's Press, New York, 1993) 28-32.

> '[O]rdering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand.'[136]

Accordingly, the IHT convicted a number of accused in Al-Anfal case under this provision. It is obvious that this article is repetition of the provision of Article 8(2)(e)(viii) of the Rome Statute. This is the same case of the repetition of Articles 7(1)(d) and 7(2)(d) of the Rome Statute by Articles 12(1)(d) and 12(2)(d) of the IHT Statute in relation to the criminal framework of forcible transfer as crime *per se* against humanity. Consequently, the adoption of the Rome Statute as a legal basis by the IHT faces again the same temporal constraints as were discussed in the first section of this chapter, and the same analysis and findings apply here. Thus, the IHT violated the principle of *nullum crimen sine lege* again when provides to the forced displacement as war crime *per se* during internal armed conflict by the provision above and applied it in its judgements. Therefore, it remains to be shown whether the aforesaid war crimes categories on the forcible transfer reflected the treaty and customary international law that existing prior to the Rome Statute.

3.4.1.2. Forcible transfer in the context of the laws of armed conflict

The rules governing armed conflicts date back to the Hague Conventions, especially the Hague Convention IV. However, none of this material included a text on the forced displacement of the population. These instruments intend to confine the freedom of the warring parties in relation to the use of certain means and methods of warfare, and they aim to regulate the management and duties of the occupied power with regard to the occupied territory and its inhabitants. Thus, these instruments do not allocate a portion on the protection of civilians.[137] This remained the case until the adoption in 1949 of the Geneva Convention IV. This Convention refers to forcible transfer in Article 49, which relates to the practices of the occupying power. Forcible transfer is also mentioned in Article 147, and refers to deportation and forcible transfer as grave violations.[138] Despite these express references, both cases fall outside the scope of the current study, which, as mentioned above, does not deal with the occurrence of occupation. Likewise, the Protocol I does not provide a new provision but instead re-emphasizes what is stated in Article 147 and Article 49 of the Geneva Convention IV. What

[136] Art. (13)(Fourth)(h) of the IHT Statute.
[137] See, Provisions of the Hague Convention IV.
[138] Art.(147) of the Geneva Convention IV, states '[G]rave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: ... unlawful deportation or transfer'.

may be a new in the scope of this Protocol is the reference to re-settlement cases as one of the serious violations.[139]

These texts obviously cannot be employed in the context of the forced internal displacement that took place in Iraq. These texts are exclusively related to situations of international armed conflict and occupation and are thus at odds with the reality of forced displacements in Iraq in the period within the jurisdiction of the IHT.[140] Not all Iraqi cases of forced displacement occurred in the context of a war between government forces and targeted groups of Iraqi people, with the exception of some of the forced displacements of Iraqi Kurdish people in northern Iraq.[141] In particular, in cases of international armed conflict, Article 4 of the Geneva Convention IV confirms that the provisions contained in the Convention applied to protected persons who are

> '[i]n the hands of a Party to the conflict or Occupying Power of which they are not nationals'.[142]

This means that the victims, and indeed all civilian Iraqi Kurds within the area of armed conflict fall outside the framework of this convention, because they are not considered a protected category under Article 4, which stipulates that a protected person should not be a national of the State party to the conflict.

3.4.1.3. Forced internal displacement as an illegal act during non-international armed conflict

Two categories of provision can be applied to non-international armed conflicts, namely; provisions contained in common Article 3 of the Geneva Conventions and those contained in the Protocol II. However, the scope of application of each of them is different. Whereas Common Article 3 applies to all kinds of non-international armed conflicts, regardless of any specific restrictions or conditions, and has a broad range of application,[143] the provisions of the Protocol II are limited to a specific type of internal armed conflict that meet specific conditions,

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[139] Art. (85) of the Protocol I.

[140] Whereas most of the events occurred in the period 1984-1989. See, Joost Hiltermann (n 131).

[141] Ibid.

[142] Art. (4) of the Geneva Convention IV sets forth that '[P]ersons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.' However, this article excepts the provisions of Part II of the convention, which have broad application according to Art. (13) of the same convention. Nonetheless, provisions of Part II of convention do not refer to any kind of forced displacement.

[143] Common Art. (3) of the Geneva Convention IV refers to '[a]rmed conflict not of an international character occurring in the territory of one of the High Contracting Parties.'

according to that which is indicated in Article 1 of this Protocol. This last article confirms that internal armed conflict, as understood in this Protocol II, is that

> '[w]hich take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.'[144]

Despite the broad application of Common Article 3, the provisions contained therein are brief, and therefore this article reflects only a minimum standard of humanitarian considerations that should be respected. Common Article 3 states:

> ' ... [e]ach Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (b) taking of hostages;
>
> (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
>
> (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.'[145]

It is clear that forced displacement does not appear in any of these provisions.

Additional Protocol II

It was stated above that the application of Protocol II is limited to a specific type of internal armed conflict. Thus, the provisions of Protocol II, whether relating to the protection of civilians in general, or dealing with the forced displacement of individuals, only apply when

[144] Art. (1)(1) of the Protocol II.
[145] Common Art. (3) of the four Geneva Conventions.

there is this type of conflict. There is an explicit prohibition of forced displacement in Article 17 of Protocol II, which states that:

> '1. [T]he displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.
>
> 2. Civilians shall not be compelled to leave their own territory for reasons connected with the conflict.'[146]

Although there is reference here to the forced displacement of the civilian population protected under the Protocol II during internal armed conflicts, it is not sufficient to establish criminal liability against the perpetrators of these acts, for two reasons: first, because Iraq was non-Party to the Protocol II, therefore it would be difficult to argue that the provisions of Protocol II, including Article 17 thereof, are binding on Iraq. Secondly, the "grave violations" recognized within the framework of the Geneva Conventions, especially in Articles 146 and 147 of the Geneva Convention IV, which are repeated in Protocol I, are limited to violations that occur on the occasion of international armed conflicts and groups protected under the provisions relating to this type of conflicts.[147] Neither the Geneva Conventions nor their Protocols, including the provisions of Common Article 3 and the provisions of Protocol II, classify violations of the provisions relating to internal armed conflict as grave breaches. They do not impose any kind of liability on individuals who commit such violations.[148] The special nature of the internal armed conflicts with respect to the sovereignty of States and non-interference in their affairs, requires that accountability for such violations is left to the domestic jurisdiction of states.[149] Iraq, unfortunately, did not ratify on Protocol II, and furthermore, did not deal with violations of Protocol II in any of the provisions of its domestic laws before 2003. Thus, it will be difficult to talk about the criminal responsibility of individuals who violate provisions governing internal conflicts, including Article 17 of Protocol II on forced displacement of

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[146] Art. (17) of the Protocol II.

[147] Art. (146) and (147) of the Geneva Convention IV s and Art. (85) of the Protocol I.

[148] Michael Bothe, et al., *New rules for victims of armed conflict: Commentary on the two 1977 Protocols Additional to the Geneva Conventions of 1949* (Martinus Nijhoff Publishers, The Hague, 1982) 608. See also, Steven R. Ratner and Jason S. Abrams, *Accountability for human rights atrocities in international law: Beyond the Nuremberg legacy* (Oxford University Press, Oxford, 2001) 94-95. See also, Theodor Meron, 'International Criminalisation of Internal Atrocities' (1995) 89 *The American Journal of International Law,* No (3), *559.*

[149] Yves Sandos, Cristophe Swinarski and Bruno Zimmermann, (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff Publishers, Geneva/Dordrecht, 1987) 1361, 1395, 1397. See also, Theodor Meron, ibid, 554. See also, Prosecutor v. Kayishema and Ruzindana (Judgement) ICTR-95-1-T (21 May 1999) para. 163.

populations, unless these provisions had first reached the level of customary rule, and criminal responsibility then arises to constitute a category of war crimes.

3.4.1.4. Customary nature and criminal liability for the violations of rules of internal armed conflict

It is unarguable that in modern times, most of the provisions of internal armed conflicts have become part of customary international humanitarian law[150] although this case was not the case until the mid-nineties of the past century.[151] There is no doubt that Common Article 3 formed a customary rule at an earlier stage to the provisions of Protocol II, nonetheless, as has been shown above, the provisions of this article do not explicitly refer to the forced displacement or transfer of populations. Forced displacement of civilian populations, which is prohibited under Article 17 of Protocol II, is firmly embodied in customary international law and, in addition, violation of this rule will cause the perpetrator to be criminally responsible for internal displacement as a war crime. This interpretation is confirmed by practice at the local level of individual states or through international bodies.[152] This customary rule applies regardless of whether or not the perpetrators are nationals of the State which is a party to Protocol II.

On the other hand, it should be noted that a customary prohibition of forced displacement of civilians and then the imposition of criminal liability on the perpetrators of acts of displacement, apply from the moment they became a part of the rules of customary international law. Thus they are not concerned to apply to events that occurred prior to their crystallisation as customary rules. In this context, it should be recognised that most of the practices relevant to the provisions governing internal armed conflicts occurred in the nineties of the last century, particularly through the evolving jurisprudence of both the ICTR and the ICTY, whereas before this date violations and criminal responsibility for the provisions of internal armed conflicts were not easily accepted.[153] However, it is not clear exactly when forced displacement of civilians came to be considered a violation of the customary rule which causes criminal liability. The first explicit reference to the displacement of civilians as a war crime under customary international law was made in Article 8(2)(e)(viii) of the Rome

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[150] See for more details, Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law: Volume I Rules* (Cambridge University Press, New York, 2005) 552-554, 568, 590, 593.
[151] Ibid.
[152] Ibid, 459-460.
[153] Ibid. See also, Roman Boed, 'Individual criminal responsibility for violations of Article 3 Common to the Geneva Conventions of 1949 and of Additional Protocol II thereto in the case law of the international criminal tribunal for Rwanda' (2003) 13 *Criminal Law Forum*, 297.

Statute.[154] Before that Statute, the Statute of the ICTR had been the jurisdiction that imposed criminal liability on the perpetrators of violations of the provisions of Common Article 3 of the four Geneva Conventions and the provisions of Protocol II,[155] as affirmed in Article 4 of the Statute of ICTR. The latter article has enumerated acts that raise criminal responsibility but.the forced displacement of civilians is not mentioned in these acts. However, Article 4 of the Statute of the ICTR stressed that acts contained therein are not subject to limitation, or, as the Statute stated:

> '[T]hese violations shall include, but shall not be limited to...'[156]

However, this last phrase cannot be considered sufficient to deduce that displaced populations imply a violation of international customary rule and at the same time criminal responsibility. There are two reasons behind this opinion: firstly, the provisions concerning non-international conflicts are not in the same class in terms of development in the direction of customary rule. Secondly, the principle of *nullum crimen sine lege* within the scope of ICTR's jurisdiction is not based on customary international humanitarian law only. It is also based on the treaty obligations contained in the Protocol II, since Rwanda ratified the Protocol II in 19 November 1984.[157] Moreover, the violations of Protocol II were punishable under Rwandan law before the outbreak of the conflict in Rwanda.[158]

In addition, UN reports and the judgements of the ICTR reveal that the provisions of Protocol II did not fully reach the level of customary international law, unlike the case of the provisions of the Geneva Conventions, which were unquestionably a fixed part of customary international law. In the Report of the Experts Commission on grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia, the Commission stated:

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[154] Art. (8)(2)(e)(viii) of the Rome Statute states '[O]rdering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand.'
[155] Art. (4) of Statute of ICTR of (1994).
[156] These acts are enumerated in art. (4). They include '(a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; (b) Collective punishments; (c) Taking of hostages; (d) Acts of terrorism; (e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; (f) Pillage; (g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilised peoples; (h) Threats to commit any of the foregoing acts.'
[157] *Prosecutor v. Akayesu* (Trial Judgement) ICTR-96-4-T (2 September 1998) para. 617. (Thereinafter *Akayesu* Trial Judgement).
[158] Ibid.

'52. [I]t is necessary to distinguish between customary international law applicable to international armed conflict and to internal armed conflict. The treaty-based law applicable to internal armed conflicts is relatively recent and is contained in common article 3 of the Geneva Conventions, Additional Protocol II, and article 19 of the 1954 Hague Convention on Cultural Property. It is unlikely that there is any body of customary international law applicable to internal armed conflict which does not find its root in these treaty provisions. It is probable that common article 3 would be viewed as a statement of customary international law, but unlikely that the other instruments would be so viewed. In particular, there does not appear to be a customary international law applicable to internal armed conflicts which includes the concept of war crimes. ...

54. It must be observed that the violations of the laws or customs of war referred to in article 3 of the statute of the International Tribunal are offences when committed in international, but not in internal armed conflicts.'[159]

The same essence is included in words of UNSC which confirms that:

'[G]iven the nature of the conflict as non-international in character, the Council has incorporated within the subject-matter jurisdiction of the Tribunal violations of international humanitarian law which ... may be committed only in internal armed conflicts, such as violations of article 3 common to the four Geneva Conventions, as more fully elaborated in article 4 of Additional Protocol II.

'[I]n that latter respect, the Security Council has elected to take a more expansive approach to the choice of the applicable law than the one underlying the Statute of the Yugoslav Tribunal, and included within the subject-matter jurisdiction of the Rwanda Tribunal international instruments regardless of whether they were considered part of customary international law or whether they have customarily entailed the individual criminal responsibility of the perpetrator of the crime. Article 4 of the Statute, accordingly, includes violations of Additional Protocol II, which, as a whole, has not yet been universally recognized as part of customary international law, for the first time criminalizes common article 3 of the four Geneva Conventions.'[160]

One judgement of the ICTR may help to solve this dilemma. In the case of *Prosecutor v. Akayesu*, Trial Chamber I held that not all the provisions of Protocol II reflect customary international law. However, it is certain that the provisions of Article 4(2) of Protocol II concerning 'Fundamental Guarantees' and Common Article 3 of the Geneva Conventions are part of customary international law. Trial Chamber I stated:

'[W]hilst the Chamber is very much of the same view as pertains to Additional Protocol II as a whole, it should be recalled that the relevant Article in the context of the ICTR is Article 4(2) (Fundamental Guarantees) of Additional Protocol II 158. All of the guarantees, as enumerated in Article 4 reaffirm and supplement

[159] UNSG Letter dated 24 May 1994 to the President of the UNSC to transmit 'Final Report of the Commission of Experts established pursuant to UNSC Res. 780 (1992)' UN Doc. S/1994/674 (27 May 1994), para. 52, 54.
[160] UNSG Report pursuant to Paragraph 5 of UNSC Res. 955 (1994), UN Doc. S/1995/134 (13 February 1995), para. 11-12.

> Common Article 3159 and, as discussed above, Common Article 3 being customary in nature, the Chamber is of the opinion that these guarantees did also at the time of the events alleged in the Indictment form part of existing international customary law.'[161]

In other words, at the time this judgement was made, the provisions on internal armed conflict fixed in customary international law were those of Article 3 Common to the four Geneva Conventions and Article 4 of Protocol II. However, neither of these articles provide for the forced displacement of civilian populations. It is worth mentioning that the Statute of ICTR, which was adopted in 1994, was the first Statute to set forth criminal responsibility for violations of the provisions of internal armed conflict. The judgement mentioned above was also made by the ICTR in 1994. This means that at least until this date the forced displacement of the civilian population in an internal armed conflict was not recognized as part of customary international law concerning war crimes that could raise individual criminal responsibility. Given that the forced displacements that occurred during the armed conflict in Iraq, and especially the Al-Anfal campaign, took place in the eighties of the last century, it can be said that these events occurred during the early stage of forming a customary rule in respect of the forced displacement of populations. Therefore, these events cannot be subject to individual criminal responsibility for war crimes committed during an internal armed conflict, according to what is established under customary rules. Consequently, the IHT stance was invalid when it criminalised the acts of forced internal displacement as war crime *per se* in internal armed conflict especially number of accused were convicted and others were charged under this crime in the case of Al-Anfal. This is evident violation of the principle of *nullum crimen sine lege* by the IHT, since it is well known that Al-Anfal occurrences had been committed in 1987-1988. Thus, neither the Rome Statute nor the existing customary and treaty international law prior to the Rome Statute establishes a valid criminalisation to the forced displacements practiced during Al-Anfal campaigns.

3.4.2. Forcible transfer as a special and limited crime of genocide

Forcible transfer has been classified as a criminal act constituting the crime of genocide since the adoption of the Convention relating to the prevention and punishment of the crime of genocide, the Genocide Convention of 1948. However, the definition of forcible transfer is

[161] *Akayesu* Trial Judgement (n 157) para. 620.

insufficiently broad since it is limited to a specific category of person. Article (II) (e) of the Genocide Convention states:

> '[I]n the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: ... (e) Forcibly transferring children of the group to another group'.[162]

Inclusion of this provision was a result of a proposal made by Greece. It had been adopted despite some opposition.[163]

Differences had surfaced during the preparation of the draft Convention with regard to the question of whether the forcible transfer of children from one group to another is a form of cultural genocide, since all the offences established under Article II are crimes of genocide involving either physical or biological destruction of members of a protected group. Thus, the drafters of the Convention had explicitly excluded cultural genocide.[164] Although the draft of the Report on the Convention presented by the UNSG classified the forcible transfer of children as cultural genocide;[165] some of the delegations adopted a different point of view.[166] The ILC found that this kind of forcible transfer of children involves the same effects as the physical and biological destruction of protected groups, and thus is not different from the other acts enumerated in Article II of the Convention.[167] The ICTR found this forcible transfer in the case of *Prosecutor v. Akayesu* when it held that:

> '[a]s in the case of measures intended to prevent births, the objective is not only to sanction a direct act of forcible physical transfer, but also to sanction acts of threats or trauma which would lead to the forcible transfer of children from one group to another'.[168]

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[162] Art. (II)(e) of Genocide Convention.

[163] Summary record of UN Sixth Committee for its 82nd Meeting on 'Continuation of the consideration of the draft Convention on Genocide [E/794]' UN Doc A/C.6/SR.82 (23 October 1948), 186- 191. (Therein after Summary record of UN Sixth Committee for its 82nd Meeting on Genocide Convention) See also Machteld Boot, *Nullum crimen sine lege and the subject matter jurisdiction of the International Criminal Court: Genocide, crimes against humanity, war crimes* (Intersentia, Antwerp/BE, 2002) 450.

[164] Summary record of UN Sixth Committee for its 82nd Meeting on Genocide Convention, ibid. See further: Kurt Mundorff, 'Other peoples' children: A textual and contextual interpretation of the Genocide Convention, Article 2(e)' (2009) 50 *Harvard International Law Journal*, No.1, 75-77.

[165] Summary record of UN Sixth Committee for its 82nd Meeting on Genocide Convention, ibid, 186. See also, Report on 'Draft Convention on the Crime of Genocide, prepared by the Secretary- General of United Nation in pursuance of the resolution of UNESC dated 28 March 1947' UN Doc. E/447 (26 June 1947), 27.

[166] Summary record of UN Sixth Committee for its 82nd Meeting on Genocide Convention, ibid.

[167] Ibid, 186-187. See also, William A. Schabas, *Genocide in international law* (Cambridge University Press, Cambridge, 2000), 175.

[168] *Akayesu* Trial Judgement (n 157) para. 505. See also Summary record of UN Sixth Committee for its 82nd Meeting on Genocide Convention, ibid, 186-187.

However, what is established in existing international law is that the forced transfer of children from their own group to another reflects one of acts of the genocide, regardless of the nature of this forcible transfer, whether biological, physical or cultural. It is not enough merely to displace or forcibly transfer children through uprooting them from the groups to which they belong or from places where they live to constitute an underlying act of genocide under Article II(e) of the Genocide Convention – they must be transferred to another group.

Moreover, for the purpose of the application of Article II(e), the forcible transfer of children must be designed to achieve the objective of genocide as expressed in the Article II by the words 'intent to destroy, in whole or in part'[169] a protected group. Thus the genocide crime requires a high threshold of criminal intent. Such as a high threshold of intent, as in the case of Article II(e), means a specific intent to destroy the children's group in itself and/or the larger group from whence the children come, or knowledge that this will be the consequence

> '[w]here destroy means either the elimination of the targeted group in part or in whole through extermination or destruction of the group as a viable entity through infliction of mental suffering related to the transfer, disruption of family and of community bonds etc'.[170]

The ILC disclosed the purpose of the criminalisation this type of transfer in its comment on Draft Article 17(e) of the Draft Code of crimes against the peace and security of mankind:

> '[T]he forcible transfer of children would have particularly serious consequences for the future viability of a group as such'.[171]

The provision of Article II(e) raises another issue, that of determining the specific age that distinguishes a child from adult, and then determining the scope of the application of the provision. There are some who consider that the omission of a text identifying a particular age was normal matter at the time of the adoption of the Convention.[172] This opinion presumes that the convention had chosen to leave the task of deciding the age at which a child becomes an adult to the jurisdiction of the domestic laws of each State, because it is the latter is that applies and implements the provisions of the Convention,[173] and therefore that determines who will be the subject of the protection stipulated in Article II(e) of the Convention. International practice,

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[169] Art. (II) of Genocide Convention.
[170] Sonja C. Grover, *Child soldier victims of genocidal forcible transfer: Exonerating child soldiers charged with grave conflict-related international crimes* (Springer, Verlag Berlin Heidelberg, 2012) 193.
[171] Report of the ILC of 1996 (n 39) 46, para. 17. See also Kurt Mundorff (n 164) 84-87.
[172] Machteld Boot (n 163).
[173] Ibid.

as expressed in the draft prepared by Working Group on Elements of Crimes for the ICC[174] and in the Convention on the Rights of the Child, had confirmed that a child is anyone who has not attained the age of 18 years.[175] In general, Iraqi law considers that an adult is a person who attained 18 years of age.[176]

Therefore, the transfer of adults from one group to another falls outside Article II(e) of the Convention, although some states have found that this is a loophole in the Convention.[177] For example, the ILC received a proposal from Paraguay with regard to the provisions of genocide within the framework of the draft crimes against the peace and security of mankind that included the forcible transfer of adults in addition to the forced transfer of children.[178] However, the ILC disclosed in its report that:

> '[A]lthough the article does not extend to the transfer of adults, this type of conduct in certain circumstances could constitute a crime against humanity under article 18, subparagraph (g) or a war crime under article 20, subparagraph (a) (vii). Moreover, the forcible transfer of members of a group, particularly when it involves the separation of family members, could also constitute genocide under subparagraph (c)'.[179]

In conclusion, it can be said that this type of the crime of forcible transfer relates to a limited category of persons, that is, children. Therefore it cannot be applied to adults even if they are transferred to a second group. Moreover, not all forcible transfers of children involve a violation of Article II(e) of the Genocide Convention, since the latter only applies to transfers for a specific purpose. In other words, it excludes forcible transfers of children that do not involve the transfer to another group with a view to the total or partial elimination of the group. Reference to children was made only because this category can be subject to the procedures of linguistic, religious and other traditions and customs, thereby losing the inherent features of a children's group. Such an outcome is more difficult to achieve with adults.[180]

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[174] Mentioned in William A. Schabas, *Genocide in international law* (n 167) 176. See also, Machteld Boot (n 163) 451. See also Kurt Mundorff (n 164) 92-93.

[175] Art.1 of the **Convention on the Rights of the Child** (1989) provides 'For the purposes of the present Convention, a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier'. See also, Anne-Marie L. M. De Brouwer, *Supranational criminal prosecution of sexual violence: The ICC and the practice of the ICTY and the ICTR* (Intersentia, 2005) 59-60.

[176] Art. (2)(d) of Iraqi Nationality Law No. 26 of 2006.

[177] William A. Schabas, *Genocide in international law* (n 167) 177. See also, Report of the Draft Convention on Genocide (n 163).

[178] William A. Schabas, ibid.

[179] Report of the ILC of 1996 (n 39) 46, para. 17.

[180] Ibid.

3.4.3. Forced internal displacement as part of the crime of apartheid

Forced displacement, which frequently reflects racial segregationist policies, was one of the forms of the crime of apartheid that had been practised in South Africa since the end of the fifth decade of the last century.[181] Apartheid was perpetrated against black and coloured Africans, and also Asians and Indians.[182]

Among the worst policies and strategies of the apartheid regime were the creation of so-called Bantustans, which were segregated territories of the African nation individually (racial ghettos) or so-called 'etho-national" states.[183] The Bantustans were intended disperse black African people and to sow conflict by making some tribes states as a prelude to announcing them as independent states, although in a form that was unreal.[184] The Former Secretary General of the UN, Boutros Boutros-Ghali, commented on the Bantustan policy, saying that: 'one of the major goals adopted by the policy of White Race Minority Government in South Africa is to deprive the African majority who compose four fifths of the population, from their national identity by dividing it into ten racial countries'.[185] For example, in 1951, the government cut off some parts of the barren counties in scattered poor areas, and in addition millions of members of the 'coloured' population were dispossessed of their properties and nationality, and almost five million people were forcibly displaced from their homes in order to establish the white racial domination.[186] The UN, as represented by the General Assembly and the UNSC condemned the establishment of these Bantustans, denying their legality and calling upon other States to refuse any recognition of such entities.[187]

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[181] For more on the policy of apartheid in South Africa, see Robert C. Cottrell, *South Africa: a State of Apartheid* (Chelsea House Publisher, Philadelphia, 2005) 83, 87, 89-90. See also, Federico Andreu-Guzmán, 'Criminal justice and forced displacement: International and national perspectives'. In: Roger Duthie, (ed), *Transitional justice and displacement* (Social Science Research Council, New York, 2012) 242.

[182] Robert C. Cottrell, ibid.

[183] Ibid, 92-94. See also Anthony A. D'amato, 'The Bantustan proposals for South- West Africa' (1966) 4, 2 *The Journal of Modern African Studies*, 177- 192. See also Bertil Egero, 'South Africa's Bantustans: from dumping grounds to battlefronts' (1991) *Series of Discussion Paper-Nordiska Afrikainstitutet.*

[184] Boutros Boutros-Ghali, 'The UN and anti-racism in South Africa' (1995) *Journal of International Politics* available at <http://digital.ahram.org.eg/articles.aspx?Serial=218200&eid=1638> accessed on April 17, 2013, translated by the author.

بطرس بطرس غالي، الأمم المتحدة ومكافحة العنصرية في جنوب أفريقيا (1995) *مجلة السياسة الدولية*.

[185] Ibid.

[186] Ibid. See also, Robert C. Cottrell (n 181). See also Anthony A. D'amato (n 183). See also, Bertil Egero (n 183).

[187] Boutros Boutros -Ghali, ibid. See also, Deon Geldenhuys, 'International attitudes on the recognition of Transkei' (Paper presented at a conference of the Committee for the Restatement of Transkeian Law, Umtata, 20 September 1979) *The South African Institute of International Affairs*.

When the Apartheid Convention was adopted, it referred in its Article II that:

> '[t]he term 'the crime of apartheid', which shall include similar policies and practices of racial segregation and discrimination as practised in southern Africa, shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them: ... d) Any measures including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, ...'.[188]

Paragraph (d) indicates clearly that measures that aim to "divide the population" refer to displacement or forcible transfer, that is, uprooting members of the victimised group and transferring them from their places of origin to places established for the purpose of racially segregating one group from other groups, as was the case in South Africa. Therefore, forced displacement falls within the scope of the crime of apartheid and is covered by the provisions of Articles I and II as long as it conforms to the definition of

> '[e]stablishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them'.[189]

The above provides the standard that distinguishes the crime of apartheid from other crimes of a discriminatory nature. This standard is established in international law as a result of the crime of apartheid, which reflects a part of customary international law.[190] Article 7(2)(h) of the Rome Statute supplies the same definition when it refers to

> [i]nhumane acts ... committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime'.[191]

However, if this definition is not met the crime of perpetrating apartheid has not been committed, even if an act is committed on the basis of discrimination.

Although the practice of apartheid can cover acts of forced displacement, it cannot apply to situations of forced displacement in Iraq. It is true that forced displacement in Iraq were committed on the basis of discrimination, particularly against the Kurds and Shiites. However these displacements were not implemented for the purpose of the domination of one group over

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[188] Art. (II) of International Convention on the Suppression and Punishment of the Crime of Apartheid (1973).
[189] Art. (II) of the Apartheid Convention.
[190] See, John Dugard, 'Convention on the Suppression and Punishment of the Crime of Apartheid' *United Nations Audiovisual Library of International Law,* available at <http://untreaty.un.org/cod/avl/pdf/ha/cspca/cspca_e.pdf> accessed on April 12, 2013. See also, Report of the ILC of 1991 (n 39) 102.
[191] Art. (7)(2)(h) of the Rome Statute.

another group or groups. The purpose of the displacements was to maintain and strengthen the ruling regime, a tyrannical dictatorship which sought to stay in power by any means, including the commission of atrocities and the elimination of all opposition.

Conclusion

This chapter discussed and examined the crime of forcible transfer as it exists today within international criminal law, taking into consideration the context of the crime of forcible transfer under each one of the three categories of international crime (genocide, crimes against humanity and war crimes). There is no doubt today that forcible transfer could fall within these three categories of international crime, although the conditions of each one are different. The situation of forcible transfer as a crime *per se* within these three categories crimes obstruct, or at best greatly narrow the application of this crime to past acts of forced internal displacement as they occurred in Iraq. It appears from the discussion in this chapter that forcible transfer as a crime in itself was not included in the acts which constitute crimes against humanity prior to the Rome Statute. In addition to the temporal terms that limit the provisions of the Rome Statute to crimes committed after its date of entry into force and in accordance with each individual case. Such a result is in strict conformity with the express provisions contained in Articles 11 and 24 of the Rome Statute, and is also consistent with the general provisions governing the operation of treaties, which prevent the application of the provisions of the treaty retroactively, as long as the treaty does not show that the intention of the contracting parties had been to bring about such an outcome.[192] Moreover, the preparatory work of the Rome Statute has revealed this intention when it did not adopt the proposal of the representative of Lebanon or the proposal of the ILC on the capacity to prosecute past crimes under the international laws existing at the time when the last crimes were committed.[193] On the other hand, the Rome Statute does not permit the provisions to be applied retroactively even if they are well-established in international custom. Particularly, it is particularly difficult to assume a different perspective because the acts and comments of the ILC on the draft definition of crimes against the peace and security of mankind was one of the resources for the drafting of the Rome Statute. It cannot be said that the drafters of the Rome Statute did not take notice of the issue of past violations.

These provisions apply even if the State has announced the acceptance of the ICC's jurisdiction on the events preceding the date of this announcement. The same rule would apply to cases referred by the UNSC, since in both cases it did not extend the ICC's jurisdiction to the time before the Rome Statute became effective on 1 July 2002. The only cases in the past that do not appear to be explicitly resolved in the Rome Statute are the so-called continuing crimes.

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[192] Art. (28) of the Vienna Convention.
[193] Report of the ILC of 1996 (n 39) 38-39.

These could not be subject to the provisions of the Rome Statute if they continue for a period subsequent to 1 July 2002. Despite its silence on continuing crimes, however the jurisprudence of the ICC as seems to have settled on the exclusion of crimes committed before the entry into force of its own Statute, regardless of the nature of these crimes and whether continuing or non-continuing. On the other hand the jurisprudence of the ICC had taken into consideration the continuation of the situation in which the crimes are committed. However, even in this latter case, what is relevant from the point of view of the ICC is the existence of a single common plan to commit violations in the context of an attack against the civilian population or in the context of armed conflict, without extending to crimes that occurred before the effective date. The ICC's jurisprudence on this point is in full accordance with the general provisions for the operation of treaties contained in the Vienna Convention, which confirmed in Article 28 that:

> '[U]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party'.[194]

This article distinguishes between an action or fact on the one hand, and on the other hand a situation, and it excludes the former from inclusion in a new treaty as long as the action or fact took place before this treaty came into force, while the provision above considers that a situation that commences prior to, and continues after, the coming into effect of a new treaty will be subject to that treaty.[195] Also, the point of view of the Court is compatible with the principle in criminal law. Therefore, acts of forcible transfer committed before 1 July 2002 fall outside the legal framework of the Rome Statute.

On the other hand, the rules of customary international law and international criminal tribunal statutes contain no indication that forcible transfer *per se* constitutes a crime against humanity. Despite the controversy as to whether the term "deportation" contained in these rules and statutes involves acts of forcible transfer, the prevailing jurisprudential view and practice exclude such an interpretation from the scope of customary international law. Ultimately, forcible transfer *per se* is not a crime within the category of crimes against humanity in international law, and therefore acts of forcible transfer *per se* cannot be prosecuted under any provision of international criminal law existing before the entry into force of the Rome Statute.

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[194] Art. (28) of the Vienna Convention.

[195] For further details on Art. (28) of the Vienna Convention, see Report on 'UN Conference on the Law of Treaties (26 March-24 May 1968)' UN Doc. A/CONF.39/11, 161-162, 428.

This means that actions of internal forced displacement committed in Iraq during the eighties and early nineties of the last century cannot be subject to criminalisation as the crime of forcible transfer in the category of crimes against humanity. The attacks against the civilian population in Dujail,[196] the Southern Marshes[197] and Kurdish areas[198] had been carried out before the entry into force of the Rome Statute, and at a time when forcible transfer had not yet become a crime in itself. Thus, the Iraqi legislature and the IHT should give their attention to these legal points, rather than focussing only on the analysis of the general titles of the three categories of international crimes to prove their presence in conventional and customary international law, and so avoid conflict with the principles of legality in criminal law. The Iraqi legislature and the IHT could rely on other means of establishing criminal liability for the acts of forcible transfer, as will be shown in the next chapter.

Similar conclusions can be drawn with regard to acts of forced internal displacement perpetrated against the Kurds in northern Iraq in the context of armed conflict between the forces of the former Ba'athist regime and Kurdish forces. It is not contested that forcible transfer is recognised a war crime in the context of international armed conflicts, especially in the case of an occupation. However, forced displacement or transfer in the context of internal armed conflict was not prohibited prior to the Protocol II. Also, forced displacement within the context of Protocol II is not recognised as a crime, as was the case with all the provisions of internal armed conflicts until the establishment of the ad hoc criminal tribunals, and in particular the ICTR. Moreover, even after the establishment of these tribunals, the provisions of Article 3, which are common to the Geneva Conventions and Article 4 of Protocol II were the subject to the criminalisation. It is notable that these articles do not explicitly refer forcible transfer or displacement. The criminalisation and criminal responsibility for acts of forced displacement committed in the context of the internal armed conflict in Northern Iraq therefore cannot be attributed under these provisions. The conflict was not an international conflict and it did not result from a situation of occupation. It was rather an internal armed conflict that occurred in a period when forcible transfer was not a crime in the context of the internal armed conflict. At the same time, the Rome Statute is not applicable for the reasons mentioned above.

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[196] Al-Dujail Trial Judgement (n 2).

[197] The Iraqi government assault on the Marsh Arabs (2003) *Briefing Paper*: Human Rights Watch available at <http://www.hrw.org/legacy/backgrounder/mena/marsharabs1.htm> accessed on March 27, 2013.

[198] Joost Hiltermann (n 131). See also Al-Anfal Lawsuit (Special Verdict) IHT-1/ C Second/2006). It is noteworthy that the Kurdistan region came in fact outside the control of the central government, as an effect of the application of UNSC Res. No. (688/1991) on 'Iraq' UN Doc. S/RES/688 (5 April 1991).

In addition the conflict had ended before the entry into force of the Rome Statute. It is notable that Iraq was not party to Protocol II at the time when the conflict occurred.

Two types of provisions that criminalise forcible transfer were effective at the time of the commission of acts of internal displacement in Iraq, namely Article II(e) of the Genocide Convention, and the provisions of Article II(d) of the Convention of Apartheid relating to the isolation and the separation of the population. However these provisions are not free from challenges when applied to the events in Iraq. The provisions of the Apartheid Convention cannot be applied because of the absence of a key element of this crime, which is the nature of the former political regime in Iraq. The Ba'athist regime, although dictatorial and a criminal, was not seeking to impose the hegemony of a certain group on other group or groups. Most of its crimes were based on sectarian or ethnic discrimination and it was concerned with retaining the power and dominance of one particular individual. The categorisation of forcible transfer as a crime of genocide is restricted to the transfer of children from their own group to another; and therefore the scope of application is very limited and covers only a few cases or victims of internal displacement, particularly since genocide requires a high threshold of proof to establish criminal intent.

From all of the above, it is clear that the provisions on criminalisation and criminal liability for forcible transfer *per se* into the scope of international law, which forms the basis of the provisions of the IHT Statute, was inadequate or non-existent at the time when forced internal displacements were carried out in Iraq. Therefore, alternative criminal forms of criminality or forms within the scope of international law must be found in order to prosecute acts of forced internal displacement, and these will be explored in the next chapters.

CHAPTER FOUR

OTHER OFFENCES IN INTERNATIONAL CRIMINAL LAW THAT WOULD ALLOW IRAQI COURTS TO ESTABLISH ACCOUNTABILITY IN DISPLACEMENT CASES

Introduction

This chapter will discuss and investigate whether acts of forced internal displacement, especially those committed in Iraq, can amount to crimes against humanity, under the headings of both crimes of persecution and crimes of other inhumane acts. It was shown in the previous chapter that the forced internal displacement –forcible transfer- was not *per se* a crime against humanity under international law at the time when the internal displacements in Iraq had taken place. This chapter will therefore address the question posed in its title. It will discuss whether both crimes of persecution and other inhumane acts are well established in customary international law, and so whether their definitions and requirements can cover acts of forced internal displacement, including internal displacements in Iraq. The chapter will demonstrate that such acts of internal displacement, including those in Iraq, can be classified as crimes of persecution as well as crimes of other inhumane acts when such actions fulfil the definition of each crime according to customary international law.

This chapter will be structured in the form of three sections to address the questions above. The first two sections will discuss the definition and requirements of both crimes of persecution and crimes of other inhumane acts, as established in customary international law, to prove that the underlying acts of these crimes can encompass acts of internal displacement of a kind similar to those that have been committed in Iraq. The third section will analyse in detail the cases of forced internal displacement in Iraq, and will then investigate whether these cases can amount to crimes against humanity, and particularly crimes of other inhuman acts and crimes of persecution.

4.1. The crime of persecution and acts of forced internal displacement

This section will examine whether the crime of persecution is well established in customary international law, and will discuss the meaning and requirements of this crime in order to determine the nature of acts that constitute the *actus reus* of persecution crime. The section will then investigate whether the nature of underlying acts of the crime of persecution can

encompass acts of forced internal displacement, including cases of forced internal displacement that have happened in Iraq. It will appear that the victims of internal displacement in Iraq belonged to a certain religious sect or a minority racial group, and that their religious or racial identity was the main reason for displacing them. It will appear that the discriminatory basis must be religious or racial or political in order for it to be defined as a crime of persecution. Consequently this section will demonstrate that acts of forced internal displacement, particularly those that took place in Iraq can amount to crimes of persecution, if such displacement took place on a discriminatory basis in addition to other requirements.

The Iraqi situation will be discussed in detail in the third section.

4.1.1. Legal conception and limitations of the crime of persecution

Persecution as a crime against humanity involves an act, or series of acts, against persons, on the basis of discrimination and persecution, leading to a serious violation of the fundamental rights of individuals. However, the definition of persecution in international criminal law needs to be analysed in some detail.

The instruments and jurisprudence of the criminal tribunals founded after World War II failed to provide a clear concept of the term 'crime against humanity'.[1] The tribunals did not define accurate limitations and parameters which determine when or how an act becomes a crime of persecution.[2] The provisions that criminalize persecution did not present a clear example or include specific acts which, if committed, would constitute the crime of persecution. It is merely stipulated that the crime of persecution must be a discriminatory crime. However even the discriminatory basis that distinguishes this crime from other crime is insufficiently clear. The charters of the tribunals established after the World War II refer to the foundations of political, religious and racial grounds. The same trend was adopted in the statutes of the ad hoc tribunals which were established after the Cold War era to prosecute crimes committed in both the former Yugoslavia and Rwanda. The problem that arises within the concept and features of this crime is that its ambiguity threatens the principle of legality. This leads to the imposition of criminal liability on acts which may be not eligible.

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[1] Prosecutor v. Kordic and Cerkez (Trial Judgement) ICTY-IT-95-14/2-T (26 February 2001), para.192. (Hereinafter, '*Kordic and Cerkez* Trial Judgement').

[2] Ibid. See also: Prosecutor v. Blaskic (Trial Judgement) ICTY- IT-95-14-T (3 March 2000), para. 218- 219. (Hereinafter, '*Blaskic* Trial Judgement').

The Nuremberg Charter laid down that:

> '(c) Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; *or persecution on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal*, whether or not in violation of domestic law of the country where perpetrated.'[3]

The CCL No. 10 laid down in Article II(1)(c) that crimes against humanity are:

> '[a]trocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.'[4]

Generally, with some differences, the same meaning is listed in Article 5(c) of the Tokyo Charter, Article 5(h) of ICTY Statute and Article 3(g) of the ICTR Statute. It is clear that these provisions pointed to the crime of persecution, without further elaboration or clarification. However, the jurisprudence that resulted from cases heard before the various Chambers of ICTY have contributed significantly to clarify the nature of this crime and to determine its features and requirements, especially in customary international law. The jurisprudence of these Chambers has been extended to provide explanations and analysis of judicial precedents in the trials that took place after World War II, insofar as precedents form part of customary international law. Therefore, it is crucial to study the jurisprudence of the ICTY as an essential means of clarifying this crime and identifying its acts or omissions and the conditions and elements that are required to establish this crime.

4.1.1.1. Definition of the crime of persecution

The term "persecution" is given a general meaning in the dictionaries of the languages used by the world's major justice systems. However, the world's major criminal justice systems do not mention this crime, thus much uncertainty surrounds its features and elements and deeds.[5] The case of, *Prosecutor v. Tadic*, heard before the ICTY, was the first occasion that the crime of persecution was subject to a detailed analysis and testing to determine its content and features. In this case, the Trial Chamber made it clear that the crime of persecution is every act or

[3] Art. (6)(c) of the Nuremberg Charter. See also, Art. (II)(1)(c) of the CCL No. 10.
[4] Art. (II)(1)(c) of the CCL No. 10.
[5] M. Cherif Bassiouni, *Crimes against humanity: Historical evolution and contemporary application* (Cambridge University Press, Camridge, 2011), 396.

omission whether or not of an inhumane nature, and whether or not criminal in origin, that embodies a discriminatory denial and violation of the enjoyment of individuals of their fundamental rights, as long as such rights are well established in both customary and conventional international law.[6] The Trial Chamber clarified that the persecution involves:

> '[s]ome form of discrimination that is intended to be and results in an infringement of an individual's fundamental rights. Additionally, this discrimination must be on specific grounds, namely race, religion or politics.'[7]

The Trial Chamber also stated that:

> '[I]t is the violation of the right to equality in some serious fashion that infringes on the enjoyment of a basic or fundamental right that constitutes persecution, although the discrimination must be on one of the listed grounds to constitute persecution under the Statute.'[8]

This was a valid attempt by the Trial Chamber to clarify the meaning of the term persecution as a crime against humanity. However, this definition gave rise to a legal problem: Is every denial of fundamental rights a persecution crime if it is committed on the basis of discrimination? If this is true, it follows that there will be a tremendous amount of cases as a result of the widespread violations of human rights, especially those based on discrimination. To fulfil the above definition, the crime would only require the commission of an act of violation or denial of human rights, in addition to a discriminatory intention of the part of the perpetrator, against a victim who is affiliated to one of the groups protected by the criminalization of persecution. Therefore, it is necessary that there should be specific legal standard to determine the clear limitations of this crime and to determine which violation or denial of human rights should be described as a crime of persecution.

In the *Prosecutor v.Kupreskic* case there was another opportunity for the ICTY to examine the contents and limitations of the crime of persecution. In this case, the Trial Chamber II rejected the above broad definition without clear and explicit legal criteria which would confine the crime of persecution to major deeds or omissions.[9] This Trial Chamber rightly believed that not every discriminatory denial or assault which deprives persons of their enjoyment of basic human rights should be considered to be of a gross or blatant nature in itself, so as to

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[6] Prosecutor v. Tadic (Opinion and Judgement) ICTY-IT-94-1-T (7 May 1997), para. 697. (Therein after *Tadic* Trial Judgement 1997).
[7] Ibid.
[8] Ibid.
[9] Prosecutor v. Kupreskic (Trial Judgement) ICTY- IT-95-16-T (14 January 2000), para. 618. (Therein after *Kupreskic* Trial Judgement).

automatically become a crime of persecution.[10] It should not be assumed that every act that constitutes a discriminatory denial of human rights within the context of the international law of human rights or international humanitarian law should categorised as a crime of persecution. Rather, the deprivation involved should be 'serious'.[11]

This conforms with both the mentioned laws and also with international criminal law, since the latter law does not widen to cover all violations of human rights, instead it confines itself to other certain violations as a result of their gravity.[12] This is evidenced by the exclusion from the ILC of the text which had encompassed the criminalization of violations of human rights and fundamental freedoms of the scope of the Code of Crimes against the Peace and Security of Mankind.[13] In addition, this jurisprudence includes certain criminal situations without specifying their acts, rather than depending on the consequences of such situations in terms of their seriousness and the motivations behind their commission.[14] Moreover, the ILC has ruled out other crimes which are serious and grave, on the grounds that they had not been considered of the same level of seriousness and are thus are not considered crimes of concern to the international community as a whole.[15]

The Trial Chamber in *Kupreskic* found that it should respect the principle of legality and only certain types of denial or violation of basic human rights could amount to the crime of persecution according to the special concept of this crime.[16] This type of analysis led the Trial Chamber in the case of *Kupreskic* to conclude that the standard that ensures respect for the principle of legality and contributes to solving the current problem should take into account the degree of seriousness in order to distinguish between acts that could fall under the crime of

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[10] Ibid, para. 610. See also, Prosecutor v. Krnojelac (Trial Judgement) ICTY- IT-97-25-T (15 March 2002), para. 433-434. (Therein after *Krnojelac* Trial Judgement). See also, Prosecutor v. Martic (Trial Judgement) ICTY- IT-95-11-T (12 June 2007) para. 116.

[11] Ibid.

[12] For this meaning, see Margaret M. deGuzman, 'Gravity and the legitimacy of the International Criminal Court' (2008) 32 *Fordham International Law Journal* (5).

[13] Such violations on a discriminatory basis were listed in the work of the ILC, but were not however adopted by any tribunal statutes. See ILC Report on 'Work of its 48th Session (6 May-26 July 1996)' Official Records of the UNGA (51st Session), Supplement No. 10, UN Doc. A/51/10 (1996), and UN Doc. A/CN.4/SER.A/1996/Add.l (1996), Yearbook of the ILC Vol. II(2), 47, 49. (Therein after Report of the ILC of 1996).

[14] For example, Art. (2) of the Genocide Convention '(b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part', and also crimes against humanity such as 'other inhuman acts and persecution'.

[15] Margaret M. deGuzman (n 12) 1417-1420. See also, Susana SaCouto and Katherine Cleary, 'The gravity threshold of the International Criminal Court' (2007) 23 *American University International Law Review* (5), 819.

[16] *Kupreskic* Trial Judgememt (n 9) para. 622. See also, *Krnojelac* Trial Judgement (n 10) para. 433-434. See also, Prosecutor v. Vasiljevic (Trial Judgement) ICTY- IT-98-32-T (29 November 2002), para. 246. (Therein after *Vasiljevic* Trial Judgement). See also, *Kordic and Cerkes* Trial Judgement (n 1) para. 195.

persecution, and those that should be excluded from the scope of criminalization.[17] The Trial Chamber also found that the gravity of these acts must be of the same degree of gravity as the inhumane acts of other crimes against humanity. In this way, it could identify which act of denial or violation of basic human rights could constitute the crime of persecution.[18] The Trial Chamber said that:

> '[i]t can be said that at a minimum, acts of persecution must be of an equal gravity or severity to the other acts enumerated under Article 5. ... The ejusdem generis criterion can be used as a supplementary tool, to establish whether certain acts which generally speaking fall under the proscriptions of Article 5(h), reach the level of gravity required by this provision. The only conclusion to be drawn from its application is that only gross or blatant denials of fundamental human rights can constitute crimes against humanity.'[19]

Therefore, the definition of persecution by this Trial Chamber was:

> '[t]he gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited in Article 5.'[20]

Such an approach also provided guidance to the ICTR, which followed the above definition in the case of *Prosecutor v. Ruggiu,*[21] and then in the case of *Prosecutor v. Nahimana*[22] However, this definition seems to focus more on the *actus reus* of the crime of persecution more than on the *mens rea*.[23] According to the ICTY the crime:

> '1. [d]iscriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law (the *actus reus*); and
>
> 2. [w]as carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*).'[24]

Moreover, there is a consensus within the jurisprudence of the ICTY's Chambers that it is not necessary for the gravity of the offence to be present in each separate act: it is enough if this

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[17] *Kupreskic* Trial Judgement, ibid, para. 620. See also, *Krnojelac* Trial Judgement, ibid, para. 433-434.
[18] *Kupreskic* Trial Judgement, ibid, para. 620. See also, *Vasiljevic* Trial Judgement (n 16) para. 247.
[19] *Kupreskic* Trial Judgement, ibid, para. 619-620.
[20] Ibid, para. 621.
[21] Prosecutor v. Ruggiu (Trial Judgement) ICTR-97-32-I (1 June 2000), para. 21.
[22] Prosecutor v. Nahimana et al. (Trial Judgement) ICTR-99-52-T (3 December 2003), para.1072.
[23] Ken Roberts, 'The law of persecution before the international criminal tribunal for the Former Yugoslavia' (2002) 15 *Leiden Journal of International Law,*
[24] *Krnojelac* Trial Judgement (n 10) para. 431. For more details about these definitions, see Ken Roberts, ibid.

gravity is the collective result of all the acts.[25] This does not prevent however, that a single act that has the same gravity as other crimes against humanity can constitute the crime of persecution.[26]

4.1.1.2. Acts which constitute the crime of persecution

In the jurisprudence of all international criminal courts that deal with acts that constitute international crimes, including the crime against humanity of persecution, there is a clear and explicit consensus that the core of persecution can take multiple forms.[27] These acts are also not limited to those acts mentioned within the Charters and Statutes essential for the international criminal tribunals, whether of the type of war crimes or genocide or crimes against humanity: they went beyond these to include various acts or omissions that could constitute blatant or gross denial or violation of basic human rights and freedoms.[28] Such violations deny the enjoyment of these rights on the basis of discrimination, despite the fact that these acts are not included in any of the categories of acts that constitute the core crimes. Moreover, these acts may not be inhumane or criminal in themselves, but lead to a serious deprivation of fundamental rights. Thus, the acts under which the crime of persecution is located could be of three categories: as either one of inhumane acts, which are criminalized as crimes against humanity or war crimes; or another kind, regardless of whether or not the actions are criminal and inhuman, provided that there is infringement of the rights of the individual for discriminatory reasons.

4.1.1.2.1. Underlying acts enumerated in the definitions of crimes against humanity

It is clear that the acts of the category of crimes against humanity are almost the same in all the instruments of international criminal courts, with the exception of the Rome Statute. These acts

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[25] *Krnojelac* Trial Judgement, ibid, para. 622, 624. See also, Prosecutor v. Naletilic and Martinovic (Appeal Judgement) ICTY- IT-98-34-A (3 May 2006), para. 574. (Thereinafter *Naletilic* and Martinovic Appeal Judgement). See also, Prosecutor v. Kvocka (Appeal Judgement) ICTY-IT-98-30/1-A (28 February 2005), para. 321-323.

[26] *Naletilic* and Martinovic Appeal Judgement, ibid. See also, Prosecutor v. Blaskic (Appeal Judgement) ICTY-IT-95-14-A (29 July 2004), para. 135, 138. (Therein after *Blaskic* Appeal Judgement). See also, *Kordic and Cerkes* Trial Judgement (n 1) para. 199.

[27] *Kordic and Cerkes* Trial Judgement, ibid, para. 198. See also, *Blaskic* Tribunal Judgement (n 2) 218. See also Alexander Zahar and Goran Sluiter, *International criminal law: A critical introduction* (Oxford University Press, Oxford, 2008), 212-215.

[28] *Vasiljevic* Trial Judgement (n 16) para.246. See also Prosecutor v. Brdanin (Trial Judgement) ICTY IT-99-36-A (3 April 2007), para.196-197. (Therein after *Brdanin* Trial Judgement).

are 'murder, extermination, enslavement, deportation, torture, rape, imprisonment and other inhumane acts.'[29]

The question now is whether inhumane acts that are already criminalized under the category of crimes against humanity are eligible to form an underlying act of the crime of persecution. The Trial Chamber in the *Tadic* case, in regard to its Statute, answered in the negative.[30] This response was based on the consideration that discriminatory intent, which is the essential requirement for distinguishing the crime of persecution from other crimes against humanity, is a common condition required for all crimes against humanity.[31] Crimes against humanity are good examples of persecutory crime in the light of customary international law, because the latter does not require discriminatory intent for all crimes against humanity, except for the crime of persecution. The opinion of the Trial Chamber in the *Tadic case* was limited to the jurisdiction of the ICTY. However, subsequent opinions of ICTY's Chambers took a view other than that of the Trial Chamber in the *Tadic case*, by recognizing that, even if all crimes against humanity are discriminatory, this does not mean that the criminal acts of these crimes are excluded from being persecutory *actus reus* and then crimes of persecution.

Crimes against humanity other than persecution do not require discriminatory intent. The Trial Chamber in *Tadic* decided that the crime of persecution could be comprised of the main acts of crimes against humanity under customary international law, and that discriminatory intent as a condition of all crimes against humanity was not required, nor had it been required at Nuremberg and other jurisdictions.[32] The Trial Chamber affirmed that, in the Nuremberg Charter, crimes against humanity were divided into two types, namely the 'murder type' and the 'persecution type', and only the second of these needed to be committed on the basis of discrimination as a condition for the applicability of the Tribunal's jurisdiction.[33] In the practice of the trials that followed World War II, there were a number of convictions for the crime of persecution that had been committed through acts which were classified as crimes against humanity *per se*.[34] For example, the IMT, in these convictions had convicted several individuals in the '*Einsatzgruppen* trial for persecution, by committing, *inter alia,* crimes against humanity

[29] See, Art. (6)(c) of the Nuremberg Charter. Art. (II)(1)(c) of Council Control Law NO. 10. Art. (5) of ICTY Statute. Art. (3).
[30] *Tadic* Trial Judgement (n 6) para. 702
[31] Ibid.
[32] Ibid.
[33] Ibid, para. 694, 697, 702
[34] *Kupreskic* Trial Judgement (n 9) para. 594.

against Jews in the_concentration camps.[35] Also, in accordance with CCL No. 10, there had been judgements for the persecution of Jews and other groups, and this persecution had taken place through inhumane acts of murder, extermination, enslavement, deportation, imprisonment and torture.[36] In the context of crimes against humanity, only the persecution crime demands the condition of the discriminatory intent. This was enhanced by each of the Charter of the Military Tribunal for the Far East, and CCL No. 10, the cases of which were based on the latter law.[37] All these materials did not involve the interpretation that other crimes must be discriminatory, as is the case with the crime of persecution.[38]

Even in the works of the UN, which were launched soon after the end of the Nuremberg trials, there was no indication that all crimes against humanity were necessarily crimes of discrimination.[39] The English and French formulations that are related to an analysis of the principles of Nuremberg, did not call for a discriminatory basis as one of legal qualifications for crimes against humanity other than the crime of persecution.[40] The work of the ILC is also devoid of any reference to the discriminatory intent when it codified crimes against humanity as such.[41]

Thus any one of these acts if committed on the basis of intent for discrimination against victims on certain impermissible grounds and in the context of a widespread or systematic attack can be described as an act of underlying and criminal of the crime of persecution without regard to the description of the criminal origin of the act and without extra requirements.

4.1.1.2.2. Underlying acts enumerated in the definitions of war crimes and genocide

Underlying acts such as murder, rape or deportation are, as mentioned, the basic criminal deeds of war, genocide or crimes of aggression. In this context, the Trial Chamber had revealed that these acts could also be criminalized as crimes of persecution when special requirements existed relating to the latter crime and, in addition, to the general conditions required for all crimes against humanity exist.[42] As previously expressed, the ICTY's Chambers fully relied

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[35] Ibid.
[36] Ibid.
[37] Olivia Swaak-Goldman, 'Case analysis: The crime of persecution in international criminal law' (1998) 11 *Leiden Journal of International Law* 150-151.
[38] *Kupreskic* Trial Judgement (n 9) para. 594.
[39] Ibid.
[40] Ibid.
[41] Ibid.
[42] *Tadic* Trial Judgement of 1997 (n 6) para. 699-702.

on case law to clarify and identify this crime. In trying the case, the ICTY's Chambers reviewed the jurisprudence of the various international and national criminal tribunals before formulating its advanced view. In the *Tadic* case, The Trial Chamber concluded that these jurisprudences conflated war crimes and crimes against humanity within the same acts.[43] Nuremberg indicated this latter meaning in a statement included in its indictment Number 1:

> '[t]he prosecution will rely upon the facts pleaded under Count Three [war crimes] as also constituting Crimes Against Humanity'.[44]

An act can thus at the same time constitute an international crime, such as another crime against humanity, as well as persecution. Subsequent rulings of this tribunal took the same view.[45] and so, for example, the conviction in '*Rosenberg*' was for these two types of crimes as a resulting from the commission of organised deeds of pillage.[46]

A similar reasoning exists in relation to other acts that could constitute more than one crime. A similar doctrine was followed in a number of cases, such as the '*Pohl*' and '*Einsatzgruppe*' cases, where the trials took place on the basis of CCL No. 10. [47] For example, in the case of '*Pohl*' where the defendant had been the responsible head of management in detention camps, the conviction was for his direct role in the commission of war crimes and crimes against humanity.[48] In other cases the tribunal found that criminal acts such as forced labour or slavery were culpable as war crimes and crimes against humanity.[49] With regard to crimes against humanity as defined by the CCL No. 10, the U.S. Military Tribunal established in the '*Justice*' case that war crimes were not only acts criminalized under the title of crimes against humanity, but that the latter crimes can cover acts which are not of the genus of war crimes.[50] In other words, basic acts of war crime are part of the criminal acts of crimes against humanity while at the same time taking into consideration the requirements and elements of each of the two categories of crimes. Other judicial decisions in national cases, such as the cases of '*Quinn v. Robinson*', '*Eichmann*' and '*Barbie*', the above views were also adopted.[51] Therefore it is beyond doubt that the criminal acts under other categories of core crimes, except crimes against

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[43] Ibid, para. 701.
[44] Ibid.
[45] Ibid.
[46] *Blaskic* Trial Judgement (n 2) para. 228.
[47] *Tadic* Trial Judgement of 1997 (n 6) para. 699-702.
[48] Ibid.
[49] Ibid.
[50] Ibid.
[51] Ibid.

humanity, could be described as crimes against humanity when they satisfy the conditions of latter crimes including persecution crime.

4.1.1.2.3. Acts which are not explicitly listed as an underlying act of another core crime

Those types of acts that can be involved in the category of crimes of persecution are those acts that do not fall within any of the headings of international core crime as included in the Charters and Statutes of international criminal tribunals or established in customary international law.[52] The nature of such acts or omissions may or may not be inhumane, particularly when they reflect gross or blatant violations of human rights. The definition of persecution, as stated above, refers to every a blatant or gross denial of the enjoyment of fundamental human rights and freedoms, as long as such blatant infringement is discriminatory. It is clear that the definition refers to basic human rights without mentioning them in a specific list. The only requirement is that these rights are recognized, or their violations prohibited, in customary international and conventional law alike. Could it be said then, that the definition includes all fundamental human rights, whether civil or political, economic or social, cultural; or is related to specific groups, such as minorities and indigenous peoples, or to certain categories of persons such as children and women? Does every gross violation or blatant denial of any of these rights amount to the crime of persecution as long as discriminatory intent is present?

These basic rights of individuals are protected under customary or conventional international law; however their violation or denial does not constitute an offence and will not give rise to any consequences involving criminal responsibility.

The instruments of criminal tribunals likewise do not include a reference in this regard, with the exception of a reference made by the ILC with regard to human rights violations.[53] The ILC stated in its comment on the crime of persecution, that this crime

> '[m]ay take many forms with its common characteristic being the denial of the human rights and fundamental freedoms to which every individual is entitled without distinction as recognized in the Charter of the United Nations (Articles 1 and 55) and the International Covenant on Civil and Political Rights (article 2)'[54]

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[52] *Kordic and Cerkes* Trial Judgement (n 1) para. 194-195. See also *Vasiljevic* Trial Judgement (n 16) para. 246. See also, *Brdanin* Appeal Judgement (n 28) para. 196-197.
[53] Report of the ILC of (1996) (n 13) 49.
[54] Ibid.

However, denial of basic human rights could be equivalent to crimes against humanity,[55] if the denial is gross or blatant and of the same level of gravity as in these crimes.[56] Such a form of violation can only constitute the *actus reus* of the crime of persecution when it is combined with one of the foundations of political, racial or religious discrimination which must be the motivation behind the commission of an act of denial or violation of individual rights.[57] This analysis led the Trial Chambers to find that there are acts which, although not subject to criminalization under the headings of any core crimes, could be classified as crimes of persecution, as long as these acts are committed with the discriminatory intent of persecution crime and in the context of the common elements of crimes against humanity.[58] In *Tadic*, the Trial Chamber stated that the seriousness of these acts varies: the act could be murder or merely the restriction of the right of members of a target group to practice their professions.[59] The tribunal again established its opinions on the basis of the jurisprudence of trials that followed World War II, especially the Nuremberg precedents and cases adjudicated according to Control law No.10. In addition, the work of the ILC in connection with the Draft Code established that persecution can take multiple forms and include a range of acts.[60] For example, in the '*Justice*' case, conducted by the U.S. Military Tribunal, the convicted persons were judges, prosecutors and staff in the Ministry of Justice in the government of the German Reich, and were convicted for committing persecutory crimes against humanity by the application and implementation of discriminatory laws against Jews and Poles.[61] The acts committed included

> '[t]he passing of a decree by which Jews were excluded from the legal profession; the prohibition of intermarriage between Jews and persons of German blood and the severe punishment of sexual intercourse between these groups; and decrees expelling Jews from public services, educational institutions, and from many business enterprises. Furthermore, upon the death of a Jew his property was confiscated, and under an amendment to the German Citizenship Law, the Security Police and the SD could also confiscate property of Jews who were alive. Jews were subject to more severe punishments than Germans; the rights of defendants in court were severely circumscribed; courts were empowered to impose death sentences on Poles and Jews even if not prescribed by law; and the police were given carte blanche in the punishment of Jews without resort to the judicial process. In summary, what was considered to

[55] See case-law from trials after World War II which presented by ICTY Chambers, *Tadic* Trial Judgement of 1997 (n 6) para. 703- 710. See also, *Kupreskic* Trial Judgement (n 9) para. 610, 613- 616, 619- 621.
[56] *Kupreskic* Trial Judgement, ibid. For further on gravity of the core crimes see, Margaret M. deGuzman (n 12) 1407-1408, 1417-1420. See also, Susana SaCouto and Katherine Cleary (n 15).
[57] *Kupreskic* Trial Judgement, ibid. See also, *Kordic and Cerkes* Trial Judgement (n 1) para. 195.
[58] *Vasiljevic* Trial Judgement (n 16) para. 246. See Also, *Brdanin* Appeal Judgement (n 28) para. 196-197.
[59] *Tadic* Trial Judgement of 1997 (n 6) para. 704.
[60] Ibid.
[61] Ibid, para.709. See also, Alexander Zahar and Goran Sluiter (n 27) 214.

be persecution in the Justice case was the use of a legal system to implement a discriminatory policy.'[62]

Moreover, as shown in the judgement delivered by the Nuremberg Tribunal, the crime of persecution consisted of acts such as the denial of participation in political, social, economic life and citizenship rights, the obligation to wear a yellow star, restriction of movement, isolation from other residents, the imposition of large collective fines and practices of economic discrimination. It was for these offences that the defendants were convicted.[63] Other examples and evidence through the cases addressed by national tribunals demonstrate that acts or omissions different from those located within the core crimes in the instruments of international criminal tribunals can also form the basis for conviction for the crime of persecution.[64] Thus the crime of persecution includes an open and wide list of acts and variety in terms of their nature. However, it does not suffice to leave the assessment of acts that could constitute the *actus reus* of the crime of persecution without the clear legal limitations necessary in order to avoid violation of the principle of legality. Therefore, the above judicial precedents and jurisprudence established that, in order to be considered as a crimes of persecution, acts that are not covered under the headings of international core crimes must be equivalent in terms of gravity to crimes against humanity.[65]

4.1.1.3. Nexus with other crimes

A review of the provisions of the instruments of the criminal tribunals relating to the crime of persecution shows clearly that this crime must be linked with another crime listed in the same instruments, irrespective of whether the other crime was a war crime, a crime against peace, genocide or any other crime against humanity. Article (6) of the Nuremberg Charter stipulates '... [p]ersecution on political, racial or religious grounds *in execution of or in connection with any crime*'.[66] The Rome Statute also requires such a nexus with other crimes to establish the crime of persecution. Article 7(1)(h) refers to:

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[62] *Kupreskic* Trial Judgement (n 9) para. 612, (footnote omitted). See also, Alexander Zahar and Goran Sluiter, ibid.
[63] *Kupreskic* Trial Judgement, ibid, para. 610. See also, *Tadic* Trial Judgement 1997 (n 6) para. 705, 710.
[64] *Kupreskic* Trial Judgement, ibid, para. 613.
[65] For the gravity of core crimes, see Margaret M. deGuzman (n 12). See also Susana SaCouto and Katherine Cleary (n 15).
[66] Art. (6)(c) of the Nuremberg Charter. See also, Art. (5)(c) of the Tokyo Charter.

> '[P]ersecution against any identifiable group or collectivity ... in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court'.[67]

Only CCL No. 10 did not consider that nexus with another crime is a necessary and a legal requirement for the crime of persecution, as it is provides in its Article II(1)(c) that:

> '[A]trocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.' [68]

The defence in the case of *Kupreskic* had formulated its objection on the grounds of this nexus with respect to the rejection of the approach of Trial Chamber in the *Tadic case,* which found that an application of the provision of persecution crime is not necessarily linked to any other crime.[69]

Outside the context of the Rome Statute, there is no nexus requirement for the crime of persecution. Persecution can arise irrespective of whether the underlying act is committed in connection with another international crime. The nexus with another crime, as is clear from the plain provisions and as noted by the Trial Chamber, was not only related to the crime of persecution, but is also a prerequisite for all crimes against humanity without exception. The Trial Chamber explained that such nexus between the crimes against humanity and a war crime or a crime against peace was for the purpose of non-violation of the terms of jurisdiction, since jurisdiction over crimes against humanity had not crystallized in international law at that time.[70] More than that, the Trial Chamber confirmed that the nexus prerequisite had disappeared in the context of the customary international law that began to take shape with regard to crimes against humanity after 1945.[71] Furthermore, in 1954, the nexus requirement had disappeared from the work of the ILC on the Draft Code of Offences against the Peace and Security of Mankind. The ILC had commented on draft Article 2(II), which is related to the crimes against humanity of the Draft Code, that:

> '[T]he Commission decided to enlarge the scope of the paragraph so as to make the punishment of the acts enumerated in the paragraph independent of whether

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[67] Art. (7)(1)(h) of the Rome Statute.
[68] Art. (II)(1)(c) of the CCL No. 10.
[69] *Kupreskic* Trial Judgement (n 9) para. 573. See also, *Kordic and Cerkes* Trial Judgement (n 1) para. 197.
[70] Ibid. See also, Fausto Pocar, 'Persecution as a crime under international criminal law' (2008) 2 *Journal of National Security Law & Policy*, 357. See also *Kordic and Cerkes* Trial Judgement (n 1) para. 191.
[71] *Kupreskic* Trial Judgement (n 9) para. 577.

> or not they are committed in connexion with other offences defined in the draft Code.'[72]

In regard to a provision that is contained in the Rome Statute, it does not reflect the existing customary international law,[73] and also the latter is not restricted by this Statute. Moreover, Article 10 of the Rome Statute emphasizes that:

> '[N]othing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.'[74]

Thus the ICTY Trial Chamber concluded with certainty that the crime of persecution can occur without the need for a link to any of the other core international crimes.[75] This opinion was adopted in all subsequent cases.

4.1.1.4. Discriminatory Grounds: What are the grounds on which discrimination can lead to a conviction for persecution?

Grounds that could be a basis for discrimination or discriminatory intent of the crime of persecution according to the Nuremberg Charter and CCL No. 10 were confined to three bases namely, '...[p]olitical, racial or religious grounds'.[76]

Similarly, the Charter of the Military Tribunal for the Far East referred to the same grounds. The latter, however, ruled out the religious factor as a basis of discrimination, while retaining both the ethnic and political grounds.[77] This exclusion or omission of the basis of religion by the Military Tribunal of the Far East did not mean denial of the founding crimes of persecution on this basis. The reason for the omission was, that the violations which led to the establishment of the Tokyo Tribunal had a racial and political, but not religious, basis and so did not take account of any religious factor.[78] However, the three grounds, religious, racial and political, were adopted in the Statutes of ad hoc criminal tribunals for both Rwanda and the Former Yugoslavia.[79]

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[72] ILC Report on 'Work of its 6th Session (3 June-28 July 1954) Official Records of the UNGA (9th Session), Supplement No. 9 (A/2693), UN Doc. A/CN.4/88 (1954), and UN Doc. A/CN.4/SER.A/1954/Add.1 (1954), Yearbook of the ILC Vol. II, 150. (Therein after Report of the ILC of 1954).
[73] *Kupreskic* Trial Judgement (n 9) para. 580. See also *Kordic and Cerkes* Trial Judgement (n 1) para. 191.
[74] Art. (10) of the Rome Statute.
[75] *Kupreskic* Trial Judgement (n 9) para. 581.
[76] Art. (6)(c) of the Nuremberg Charter. See also, Art. (II)(1)(c) of the CCL No. 10.
[77] Art. (5)(c) of the Tokyo Charter.
[78] *Tadic* Trial Judgement of 1997 (n 6) para. 711.
[79] Art. (5)(h) of the ICTY Statute. See also, Art. (3)(g) of the ICTR Statute.

It cannot be said for sure which discriminatory grounds for the crime of persecution already existed in the customary international law, because there was no specific basis in this law.[80] The ILC, in its reports on the Draft Code since 1954, has expanded the list of bases to include a cultural basis.[81] However, this addition does not appear in the Statutes of the ICTY and the ICTR and as a result to determine their jurisdiction over the crime of persecution was based on of the three grounds listed in the Nuremberg Charter. This raises further doubt on the status of discriminatory grounds in customary international law. The Rome Statute gives a broad list of discriminatory bases for the crime of persecution. Article 7 of the Rome Statute refers to:

> '[P]ersecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law,... etc.' [82]

It is also notable that this provision is not confined to the grounds that are listed, but remains open to include all existing or future grounds in international law. These grounds enumerated in the Rome Statute seem similar to formulations concerning provisions of discrimination in international law of dealing with human rights. However, the current study is will depend on the religious, racial and political grounds which are frequently found in all international documents and instruments, because these grounds are well established in customary international law and criminalize some acts as crimes of persecution. Moreover, in the case of Iraq, it will appear that these grounds are sufficient to deal with violations that took place in the past. Hence, it must be that any act and intention of the perpetrator who commits the *actus reus* of persecution will aim to harm the victim on the ground of his/ her membership of a particular political, religious or racial group.

Another question that arises with respect to the discriminatory grounds of the crime of persecution is: are all three of these grounds together required in the *actus reus* and *mens rea* in order for it to be considered that the crime of persecution has been committed? Or is it enough if one of them is present without the presence of other discriminatory grounds? This question arises because the Statutes of the ICTY and the ICTR had used a formulation different than that which had been adopted in previous Charters for Nuremberg, Tokyo, the CCL No. 10

[80] *Tadic* Trial Judgement of 1997 (n 6) para. 711.
[81] Report of the ILC of (1954) (n 72) 150.
[82] Art. (7)(1)(h) of the Rome Statute.

and recently in the Rome Statute. The Statute of the ICTY provides the following wording: '...[p]ersecutions on political, racial and religious grounds'.[83]

This provision uses the word 'and'. This raises the former question, since other instruments and the ILC reports on the Draft Code use different wording, by linking the grounds contained therein by the connective "or". The wording in the ICTY's Statute seems at first glance to indicate the requirement for all discriminatory grounds to be present in order to constitute the crime of persecution. However, the jurisprudence of the ICTY stressed that the availability of one of these bases even in the absence of any other is enough to establish the crime of persecution.[84] The Trial Chamber also confirmed that this latter sense is what is stable in customary international law; therefore it seems logical that the wording in Article 5 of the ICTY's Statute should be interpreted within this context.[85] The report of the UNSG and the discussions of the member states of the UNSC during the formulation of the ICTY Statute do not refer to the adoption of all the three discriminatory grounds.[86] If there was desire to adopt another interpretation it should be clear and explicit because of such an interpretation would deviate from what is stable in customary international law.[87] The *Tadic* Trial Chamber explained that the ICTY would make it explicit whenever the ICTY Statute differs from customary international law.[88]

4.1.2. Forced internal displacement as an underlying act of the crime of persecution

This section will attempt to answer the question as to whether acts of forced internal displacement are inhuman, or a violation or denial of fundamental human rights, and whether such internal displacement can constitute the crime of persecution if it has the same degree of gravity as crimes against humanity, particularly when the act of the forced internal displacement is committed on the basis of religious, racial or political discrimination.

The answer to this question requires the examination of acts of internal displacement in terms of the categories of that constitute the crime of persecution, then to investigate whether all or some of these categories are involved in the act of forced internal displacement. Then it must be decided whether the forced internal displacement qualifies in terms of gravity to constitute

[83] Art. (5)(h) of the ICTY Statute. See also, art. (3)(g) of the ICTR Statute.
[84] *Tadic* Trial Judgement of 1997 (n 6) para. 713.
[85] Ibid.
[86] Ibid.
[87] Ibid.
[88] Ibid.

a crime against humanity, so that the perpetrator may be convicted of the crime of persecution. This section will demonstrate that the act of internal displacement qualifies to comprise an underlying act of the crime of persecution, and that its gravity is sufficient to equal the inhumane acts of crimes against humanity. In addition it qualifies on the basis of the involvement of discrimination. It has been mentioned that the *actus reus* of the crime of persecution can belong to one or possibly all three groups of acts that comprise the crime of persecution. This is what is stable in customary international law and in the jurisprudence of international criminal tribunals.

4.1.2.1. Does forced internal displacement involve under underlying acts enumerated in the definitions of crimes against humanity which can constitute persecution if the additional discriminatory intent exists?

Acts or omissions of this category, if committed with the special intent of racial, religious or political discrimination, undoubtedly amount to the crime against humanity of persecution, without additional requirements other than those relating to crimes against humanity in general. Moreover, the necessary condition of gravity condition is already present in these kinds of inhumane acts. Furthermore, the gravity of these acts forms a criterion by which crime of persecution can be attributed to the actions which has not mentioned under crimes against humanity. These acts, with the exception of the Rome Statute, are similar in all the Charters of criminal tribunals, namely Nuremberg, Tokyo and the CCL No. 10. However there is some difference with the ICTY and ICTR Statutes. Acts which constitute crimes against humanity, according to the instruments of these tribunals, are 'murder, extermination, enslavement, deportation, imprisonment, torture, rape and other inhumane acts.[89]

Except for the crime of "other inhumane acts", it is clear the category of underlying acts enumerated in the definitions of crimes against humanity does not involve an act of forced internal displacement as a crime against humanity *per se*. It was shown in the previous chapter that the crime of forcible transfer which reflects an act of internal displacement was listed for the first time in the Rome Statute. However, the Rome Statute does not apply to events that took place prior to July 2002. It also appeared that the crime of deportation does not involve

[89] See, Art. (6)(c) of the Nuremberg Charter, Art. (II)(1)(c) of the CCL No. 10, Art. (5)(c) of the Tokyo Charter, Art. (5)(h) of the ICTY Statute and Art. (3)(g) of the ICTR Statute.

internal displacement (forcible transfer), because the deportation involves the requirement of crossing a national border.

It needs to be decided whether acts of displacement can be included among the crimes against humanity. This crime is named 'other inhumane acts', known as residual clauses'. This crime will be examined in the next section. If it proves that this crime could be encompassed as an act of internal displacement, it means that the latter act will be eligible to amount to a crime of persecution, if is combined with the special discriminatory intent of the latter crime.

4.1.2.2. Does forced internal displacement involve under underlying acts enumerated in the definitions of war crimes and the crime of genocide, which can constitute persecution if additional discriminatory intent exists

This category of acts and omissions were originally either war crimes or the crime of genocide.

It has become clear that these acts, if committed with the intent of discrimination on a religious, racial or political basis, will be eligible to fall within the category of the underlying *actus reus* of the crime of persecution. It is noteworthy that these acts only need the discriminatory intent of persecution, in addition to the general terms of crimes against humanity, to warrant conviction for the crime of persecution. In addition, the requirement of gravity of the same degree as in crimes against humanity should be taken into consideration with this type of act. The crime of genocide does not include a provision on internal displacement. There is only one explicit provision, and this is the forcible transfer of children.[90] This was discussed in the previous chapter: however this forcible transfer of children could constitute the crime of persecution if the special intent of genocide is absent, but at the same time all the general and special requirements of the crime of persecution were available.[91] However, there are some acts classified under the crime of genocide that may involve acts of internal displacement and thus could fall under persecution crime. These will require further examination in a subsequent chapter. Such acts of genocide are included in Article 2 as follows:

> '(b) Causing serious bodily or mental harm to members of the group;

[90] Art. (2)(e) of Genocide Convention.

[91] For this interpretation, see Report of the ILC of (1996) (n 13). See also, Laurence Carrier-Desjardins, 'The crime of persecution and the situation in Darfur: A comment on the Al Bashir arrest warrant decision' *The Hague Justice Portal* available at <http://www.haguejusticeportal.net/Docs/Commentaries%20PDF/Carrier-Desjardins_Persecution_EN.pdf> accessed on December 7, 2016.

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part'.[92]

The last type of act within this category is the type that constitutes commission of one of the war crimes. In the context of these crimes it was found, in the previous chapter, that acts of internal displacement are criminalized as war crimes explicitly. Although it is doubtful whether internal displacement constitutes a war crime in itself in the context of internal armed conflicts at the time when violations and acts of internal displacement were committed in Iraq, it is a criminal now,[93] although this criminalization does not extend to the past. The Appeal Chamber in the case of *Prosecutor v. Krnojelac* referred to the fact that the Geneva Conventions are part of customary international law,[94] and so acts of displacement, whether inside or across a border, constitutes a violation of the Provisions of the Geneva Convention IV, which states in Article 49:

'[i]ndividual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.'[95]

Article 147 of Geneva Convention IV, which listed the grave breaches considered that 'unlawful deportation or transfer' is one of these breaches.[96] The ICTY Statute quoted this provision in Article 2(g) of the Statute.[97]

However, the situation of occupation has no relevance here; it is enough that an act of internal displacement is classified as a war crime to test its relationship with the crime of persecution without regard to the nature of the armed conflict. Therefore, the Appeals Chamber above held that it is established in customary international law that an act of internal displacement is a war crime.[98] Therefore, it is sufficient that the act of internal displacement is criminalized either as a war crime in the context of international armed conflicts or in the context of a situation of occupation in order to qualify as one of the examples of acts of the crime of persecution. Thus, if internal displacement takes place with the intention of discrimination based on racial, religious or political grounds in the context of an attack against the civilian population, then it

[92] Art. (2)(b) and (c) of the Genocide Convention.
[93] See Arts. (8)(2)(a)(vii), (8)(2)(b)(viii) and (8)(2)(e)(viii) of the Rome Statute.
[94] Prosecutor v. Krnojelac (Appeal Judgement) ICTY-IT-97-25-A (17 September 2003), para. 220. (Therein after *Krnojelac* Appeal Judgement).
[95] Art. (49) of the Geneva Convention IV.
[96] Art. (147) of the Geneva Convention IV.
[97] Art. (2)(g) of ICTY Statute.
[98] *Krnojelac* Appeal Judgement (n 94) para. 222-223.

can be said that the act of internal displacement contained in the original war crime becomes a crime of persecution. However, these special intentions and attacks are not enough, unless the acts of internal displacement have the same general conditions and same degree of gravity as crimes against humanity. The Appeal Chamber found that the gravity of the act of forced displacement act, whether internal or across a border, is sufficient for it to be considered as the crime against humanity of persecution.[99] This is clear through the findings of Trial Chambers of the ICTY in several cases when criminalised the displacement as crime of persecution, and also the gravity of displacement seemed clear in the UNSG's report and the UNSC, which stated that:

> '[c]rimes against humanity refer to inhumane acts of a very serious nature, such as wilful killing, torture or rape" and that "[i]n the conflict in the territory of the former Yugoslavia, such inhumane acts have taken the form of so-called 'ethnic cleansing' and widespread and systematic rape." The Security Council was therefore particularly concerned about acts of ethnic cleansing and wished to confer jurisdiction on the Tribunal to judge such crimes, regardless of whether they had been committed in an internal or an international armed conflict.'[100]

The Appeal Chamber in the case of the *Prosecutor v. Blaskic* confirmed this interpretation of gravity in forced internal displacement. It held that:

> '[I]n the light of the foregoing analysis and jurisprudence, the Appeals Chamber considers that at the time relevant to the Indictment in this case, deportation, forcible transfer, and forcible displacement constituted crimes of equal gravity to other crimes listed in Article 5 of the Statute and therefore could amount to persecutions as a crime against humanity.'[101]

In conclusion it could be said that the cases of forced internal displacement in Iraq can be categorised according to the definition and requirements of persecution crime, especially those cases which had been committed with either a religious or racial foundation. This conclusion will appear in more detail in the third section, after discussion and analysis of the facts of forced internal displacement in Iraq.

4.2. Other inhumane acts and internal forced displacement

The category of other inhumane acts operates as a 'residual category' or as a 'catch all' provision. The crime of 'other inhumane acts' could be useful as a criminal category to cover acts of internal forced displacement, especially the cases of displacement that took place in

[99] *Krnojelac* Appeal Judgement, ibid, para. 221.
[100] Ibid, (footnote omitted).
[101] *Blaskic* Appeal Judgement (n 26) para. 153.

Iraq. Therefore, it should first be demonstrated that other inhumane acts had been part of customary international law, and then it should be investigated whether forced internal displacement could fall under this heading of these inhumane acts at the time when the Ba'ath regime in Iraq had carried out extensive forced displacement operations against the Iraqi civilian population of Kurds from Kurdistan regions and Shiites from the southern Iraqi Marshlans and Al-Dujail town. It will appear that the situation in Iraq provides good examples of the crime of 'other inhumane acts' as crimes against humanity, because all requirements of this crime are available in Iraqi situations.

4.2.1. Definition and parameters of the crime of 'other inhuman acts'

Though the category of other inhumane acts is not new and had appeared at the conclusion of all the statutes and charters of international criminal tribunals since the Charter of Nuremberg,[102] it remained vague and unclear.[103] This is what raises the concerns about violation of the principle of legality. This lack of clarity and may lead to the criminalization of acts or criminal accountability of persons for acts that were not intended to constitute a crime against humanity.[104] It is clear that the other inhumane acts are not specific acts such as murder; therefore, thus they are raise doubts and require precise investigation by criminal tribunals in order to consider precisely which acts are covered under this category of offence.

4.2.1.1. Other inhuman acts that have appeared in the statutes or charters of international criminal tribunals

The Rome Statute was the first to provide clarity to the features and parameters of 'other inhumane acts'. Article 7(1)(k) of the Rome Statute specifies that the meaning of this crime is

> '[O]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health'.[105]

In the view of the Trial Chamber in the case of *Prosecutor v. Kupreskic*, this definition was not enough to satisfy requirements the principle of legality and the principle of specificity, because it does not disclose a precise legal standard that could define whether or not one of the other

[102] See Art. (6)(c) of the London Agreement, Art. (II)(1)(c) of the CCL No. 10, art. (5)(c) of the Tokyo Charter, Art. (5)(i) of the ICTY Statute and Art. (3)(i) of the ICTR Statute.
[103] Bert Swart, Alexander Zahar, and Göran Sluiter, (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford University Press, New York, 2011), 223-227.
[104] Ibid. See also, Prosecutor v. Stakic (Trial Judgement) ICTY-IT-97-24-T (31 July 2003), para. 719. (Therein after *Stakic* Trial Judgement).
[105] Art (7)(1)(k) of the Rome Statute.

inhumane acts is a crime against humanity.[106] However, the Elements of Crimes which States adopted at the later time of 2002 avoided this criticism. They added more detail concerning other inhumane acts and in a footnote to the second element a legal yardstick is given. The special elements of the crime of other inhumane acts are:

> '1. [T]he perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.
>
> 2. Such act was of a character similar to any other act referred to in article 7, paragraph 1, of the Statute. 30
>
> 3. The perpetrator was aware of the factual circumstances that established the character of the act'.[107]

A similar character means to be of the same nature and gravity of inhumane acts that are explicitly enumerated as crimes against humanity, i.e. the acts mentioned in Article 7 (1) a-j of the Rome Statute.[108]

This definition or category of crime does not necessarily apply to what happened in the Iraq of cases of the internal forced displacement, unless they already existed and were stable in customary international law. The Rome Statute, as shown in the previous chapter, cannot be applied to the case of Iraq because this Statute came into force after what happened in Iraq. Thus it is necessary to investigate and prove whether the meaning of other inhuman acts cited above is part of customary international law in existence at the time when the events and abuses in Iraq were committed.

What is notable about the above definition is that this crime is not limited to a specific act, but depends on the nature of the effects that result from the act or acts which were committed.[109] Thus this category of crime leaves a scope of criminalization open to a broad category of acts[110] which may not deemed in themselves to be an international crime against humanity, or acts which may emerge in the future and were not present in the minds of the authors of the statutes of criminal tribunals. Such a manner of criminalization will avoid shortcomings or lacunae in

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[106] See *Kupreskic* Trial Judgement (n 9) para. 565.
[107] See, ICC Elements of Crimes (adopted at the 2010 Review Conference on the Rome Statute of the International Criminal Court of 1998). See further Machteld Boot, 'Article 7'. In: Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Verlag C.H. Beck oHG, Germany, 2008), 231.
[108] See footnote 30 of the Elements of Crimes for the ICC, ibid.
[109] Machteld Boot, *Nullum crimen sine lege and the subject matter jurisdiction of the International Criminal Court: Genocide, crimes against humanity and war crimes* (Intersentia, New York, 2002), 530.
[110] Machteld Boot (n 107) 231. See also, M. Cherif Bassiouni (n 5) 406.

the existing law concerning acts that were not specifically addressed within the crimes enumerated.

This meaning has been established in the content of both the ICTY and the ICTR. These tribunals indicated the purpose of the residual category they had reviewed in the comment of the International Committee of the Red Cross (ICRC) on the 'humane treatment' which is set out in Article (3) of the Four Geneva Conventions.[111] In regard to dealing the abuse of the duty of 'humane treatment', the ICRC had explained why it is vital to keep such a residual category. It stated that:

> '[I]t is always dangerous to try to go into too much detail – especially in this domain. However great the care taken in drawing up a list of all the various forms of infliction, it would never be possible to catch up with the imagination of future torturers who wished to satisfy their bestial instincts; and the more specific and complete a list tries to be, the more restrictive it becomes. The form of wording adopted is flexible and, at the same time, precise'.[112]

The *Kupreskic* Trial Chamber found that this category of crimes was

> '[d]eliberately designed as a residual category, as it was felt undesirable for this category to be exhaustively enumerated. An exhaustive categorization would merely create opportunities for evasion of the letter of the prohibition'.[113]

In contrast to the Rome Statute, the statutes of other tribunals since the Nuremberg Charter of 1945 merely refer to 'other inhumane acts' as crimes against humanity, without further details.[114] Such a method leaves to the tribunals concerned the determination of the nature and type of acts according to each case individually,[115] and which of them could involve other inhumane acts so as to constitute international crimes. This method does not seem desirable because it threatens the principle of legality that assumes that the perpetrator knows in advance any acts that are considered crimes and whether any of the crimes may be considered as a crime

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[111] See, Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, New York, 2010), 265. See also, Prosecutor v. Kayishema (Trial Judgement) ICTR-95-1-T (21 May 1999), para. 149. (Therein after *Kayishema* Trial Judgement). See also, *Kupreskic* Trial Judgement (n 9) para. 563.

[112] Jean S. Pictet, (ed), *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in time of War* (ICRC, Geneva, 1958), 39.

[113] *Kupreskic* Trial Judgement (n 9) para.563.

[114] See Art. (6)(c) of the Nuremberg Charter, Art. (II)(1)(c) of the CCL No. 10, Art. (5)(c) of the Tokyo Charter, Art. (5)(i) of the ICTY Statute and Art. (3)(i) of ICTR Statute.

[115] Machteld Boot (n 109) 532. See also, Prosecutor v. Katanga and Chui (Decision on the confirmation of charges) ICC-01/04-01/07 (30 September 2008), para. 450-453, 455. (Therein after *Katanga* Decision on the confirmation of charges)

against humanity.[116] In addition, such a category of crime is vaguely defined not only on the level of international criminal law but even in the majority national laws in the world, since these had no knowledge of this type of crime.[117]

The ambiguity and indeterminacy and fear of violation of the principle of legality were the reasons behind a difference in the views of the delegations that met for the drafting of the Rome Statute.[118] Some of the delegations had supported the view of Mexico's representative, who had opposed the inclusion of 'other inhumane acts' under the category of crimes against humanity.[119] The delegation of (Mexico) said that the Mexican representatives

> '[h]ave difficulties with subparagraph (j) ('other inhumane acts'). An exhaustive list was required to satisfy the principle *nullum crimen sine lege*'.[120]

Mr. Perez Otermin, who was Uruguay's representative, stated that:

'[f]or the reasons given by Mexico, subparagraph (j) should either be deleted or made clearer'.[121]

However, as we know, the crime of other inhumane acts was adopted as one of the crimes against humanity listed in the Rome Statute. A closer look reveals that there is considerable case law on the elements of the crime, and the crime is considered to be part of customary international law.

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[116] See within this meaning, *Prosecutor v. Blagojevic* (Trial Judgement) ICTY-IT-02-60-T (17 January 2005), para.625. (Therein after *Blagojevic* Trial Judgement). See also, *Stakic* Trial Judgement (n 104). See also comments of the delegations of State on 'principle of nullum crimen sine lege' during the establishment of the ICC, Report on '4th Meeting of the Committee of the Whole' UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court during (15 June - 17 July 1998), UN DOC A/CONF.183/C.1/SR.4, para. 22, 23. (Thereinafter Report on '4th Meeting of the Committee of the Whole on the establishment of the ICC'). For example, USA's delegation emphasized 'the importance of the principle of nullum crimen sine lege. There must be a clear understanding of what conduct was prohibited.... where the conduct itself might not be obviously unlawful. The crimes subject to the jurisdiction of the Court should be those clearly recognized as crimes under customary international law and should be precisely defined so as to protect the rights of the accused... In an environment of legal vagueness, individuals had no clear guide to behaviour and the rights of the accused would be jeopardized'. See also, ibid, paras. 17, 20, 23, 49, 70.

[117] M. Cherif Bassiouni (n 5) 406.

[118] Machteld Boot (n 109) 530.

[119] See the comments of the delegations of Mexico, Colombia and Sri Lanka, Report on '3rd Meeting of the Committee of the Whole' UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court during (15 June - 17 July 1998), UN DOC A/CONF.183/C.1/SR.3, para. 125, 133,155. (Thereinafter Report on '3rd Meeting of the Committee of the Whole on the establishment of the ICC'). See also, comments of the delegations of Uruguay and Sierra Leone, Report on '4th Meeting of the Committee of the Whole on the establishment of the ICC' (n 116) para. 22, 23.

[120] Report on '3rd Meeting of the Committee of the Whole on the establishment of the ICC', ibid, para. 125.

[121] Report on '4th Meeting of the Committee of the Whole on the establishment of the ICC' (n 116) para. 22.

4.2.1.2. Other inhumane acts as is existing in customary international law and case law

Crime of other inhumane acts was recognised under customary international law at the relevant time when the Ba'ath regime committed the displacements in Iraq. This crime was stipulated in each of Article (6)(c) of the Nuremberg Charter of 1945, Article (II)(1)(c) of the CCL No. 10 of 1946, Article (5)(c) of the Tokyo Charter of 1946, Article (5)(i) of the ICTY Statute and Article (3)(i) of ICTR Statute. Clarifying and defining the attributes of this crime have occupied considerable space in the jurisprudence and analysis of the Chambers of both the ICTY and the ICTR. These tribunals as a result of their statutes which mention only the term of 'other inhumane acts'[122] without specifying a clear definition, resorted to the existing international jurisprudence and case law to analyse and detailing what is related to other inhumane acts.[123] In the case of *Prosecutor v. Tadic*, the Trial Chamber considered that 'other inhumane acts' must be involve acts which inflict effects of a serious nature on a human being.[124] The Trial Chamber resorted to the acts of the ILC concerning Draft Code of Crimes to demystify and define the parameters of this crime. This Chamber concluded that this crime, as it was included in the Article 18(k) of Draft Code of 1996, means

> '[o]ther inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm'.[125]

In more detail the ILC commented that

> '[t]he notion of other inhumane acts ... the act must in fact cause injury to a human being in terms of physical or mental integrity, health or human dignity'.[126]

As it is notable that the Chamber defined this crime according to the effects on the victim, and its implications, resulting from the commission or omission of acts, but without a description of what these acts or omissions are. The same approach was followed in subsequent cases by other Chambers of the ICTY.[127] This approach thus reveals what is well established in customary international law: that this crime does not involve a specific inhumane act, but it is

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[122] See Art. (5)(i) of the ICTY Statute and Art. (3)(i) of ICTR Statute.

[123] *Blagojevic* Trial Judgement (n 116) para. 624. See also, Prosecutor v. Stakic (Appeal Judgement) ICTY-IT-97-24-A (22 March 2006), para. 315.

[124] *Tadic* Trial Judgements 1997 (n 6) para. 728.

[125] Report of the ILC of (1996) (n 13) 47.

[126] Ibid, 50.

[127] Prosecutor v. Krstic (Trial Judgement) ICTY-IT-98-33-T (02 August 2001), para. 676. (Therein after *Krstic* Trial Judgement). See also, *Blaskic* Trial Judgement (n 2) para. 239- 243. See also *Kordic and Cerkes* Trial Judgement (n 1) para. 269-272. See also, *Krnojelac* Trial Judgement (n 10) para. 130. See also *Prosecutor v. Bagilishema* (Trial Judgement) ICTR-95-1A-T (7 June 2001), para. 91-92. (Therein after *Bagilishema* Trial Judgement). See also, *Kayishema* Trial Judgement (n 111) para. 150-151.

based on the nature of the effects resulting from an act of commission or omission.[128] Nevertheless, the infliction of the mentioned effects mentioned is not in itself sufficient for this crime to exist, and then to found on it criminal responsibility for committing a crime against humanity. Such effects can be produced by countless deeds and thus it may criminalize an act as a crime against humanity even though the authors of the tribunal's statutes might not have intended to criminalize such act.[129] In this case, there will inevitably be a clear and explicit violation of the principle of legality. With regard to this point, the Chambers of the ICTY's found that there must be a specific and clear legal yardstick. Such a criterion will create balance between the lack of impunity for perpetrators of other inhumane acts and guaranteeing within the scope of the principle of legality that those perpetrators will not be vulnerable to punishment for acts which do not deserve to be punished as crimes against humanity.

4.2.1.3. A legal criterion to assess which act or omission could amount to an actus reus of other inhumane acts

As in the case of the crime of persecution, ICTY's Chambers found that the appropriate legal standard to ensure the above goals is a standard of gravity or seriousness. Other inhumane acts must be equal in gravity to what is ascribed to which is appointed in the other crimes against humanity in order for it to classified as one of the latter crimes.[130] The Trial Chamber in the *Tadic* case, through the ILC's commentary, stated that the idea of 'other inhumane acts' requires firstly to be

> '[i]ntended to include only additional acts that are similar in gravity to those listed in the preceding subparagraphs'.[131]

This requirement was confirmed later by the Trial Chamber in the case of *Kupreskic* when it characterised the *actus reus* of the crime of other inhumane acts which

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[128] '[W]ithin the context of the discussion of 'other inhumane acts', the *Blaskic* Trial Chamber defined the elements of serious bodily or mental harm thus:
- the victim must have suffered serious bodily or mental harm; the degree of severity must be assessed on a case-by-case basis with due regard for the individual circumstances;
- the suffering must be the result of an act of the accused or his subordinate;
- when the offence was committed, the accused or his subordinate must have been motivated by the intent to inflict serious bodily or mental harm upon the victim'. *Blaskic* Trial Judgement, ibid, para. 243.

[129] See also in this regard Machteld Boot (n 109) 532.

[130] *Krnojelac* Trial Judgement (n 10) para. 130. See also, *Kupreskic* Trial Judgement (n 9) para. 566. See also, *Kordic and Cerkes* Trial Judgement (n 1) para. 269. See also, *Kayishema* Trial Judgement (n 111) para. 150. See also, *Bagilishema* Trial Judgement (n 127) para. 91.

[131] Report of the ILC of (1996) (n 13) 50. See also, *Tadic* Trial Judgements 1997 (n 6) para. 729.

> '[m]ust be carried out in a systematic manner and on a large scale. In other words, they must be as serious as the other classes of crimes provided for in the other provisions of Article 5'.[132]

To assess whether an act or omission is equal in gravity to other crimes against humanity will be relative issue. All realistic conditions should be borne in mind, for example

> '[t]he nature of the act or omission, the context in which it occurs, its duration and/or repetition, the physical, mental and moral effects of the act on the victim and the personal circumstances of the victim, including age, sex and health'.[133]

However, it is not important in the assessment of gravity if the factual and serious suffering of victim is not permanent.[134]

This type of measurement of the degree of gravity is firmly under the explanatory rule of *ejusdem generis*. According to this rule the other inhumane acts could extend to all acts similar to others specifically enumerated.[135] Undisputedly, various courts have followed this rule in interpreting Article 6(c) of the Nuremberg Charter. One example was provided by the Trial Chamber in the *Kupreskic* case:

> '[i]n the Tarnek case, the District Court of Tel- Aviv held in a decision of 14 December 1951 that the definition of "other inhumane acts" laid down in the Israeli Law on Nazi and Nazi Collaborators (Punishment) of 1950, which reproduced the definition of Article 6(c), was to apply only to such other inhumane acts as resembled in their nature and their gravity those specified in the definition'.[136]

However, in the opinion of the Trial Chamber in the case of *Prosecutor v. Kupreskic*, the standard of gravity alone is not convincing enough to determine which actions that are not enumerated in the statute could be classified within 'other inhumane acts' as a crime against humanity.[137] The Chamber considered that the gravity standard according to the '*ejusdem generis* rule' will not provide considerable support unless this explicatory rule is supported by a precise yardstick, because this rule is too general to provide a secure criterion to guide the Tribunal.[138] Therefore, the Chamber held that there should be another form of guidance which secures the principle of precision. Such guidance entails taking into consideration that 'other

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[132] *Kupreskic* Trial Judgement (n 9) para. 566.
[133] Prosecutor v. Vasiljevic (Appeals Judgement) ICTY-1T-98-32-A (25 February 2004), para. 165. See also, *Krnojelac* Trial Judgement (n 10) para. 131. See also, *Blagojevic* Trial Judgement (n 116) para. 627. See also, *Blaskic* Trial Judgement (n 2) para. 243.
[134] *Krnojelac* Trial Judgement, ibid, para. 10. *Blagojevic* Trial Judgement, ibid, para. 627.
[135] M. Cherif Bassiouni (n 5) 405-406. See also, *Kupreskic* Trial Judgement (n 9) para. 564.
[136] See, *Kupreskic* Trial Judgement, ibid, para. 564.
[137] Ibid.
[138] Ibid, para. 566.

inhumane acts' are any acts or omissions that constitute a violation of human rights and freedoms as they are well established in customary international law and conventions, in particular UDHR and the ICCPR and the ICESCR. The Chamber stated that:

> '[L]ess broad parameters for the interpretation of "other inhumane acts" can instead be identified in international standards on human rights ... Drawing upon the various provisions of these texts, it is possible to identify a set of basic rights appertaining to human beings, the infringement of which may amount, depending on the accompanying circumstances, to a crime against humanity'.[139]

Some scholars, for example, William Schabas have criticized the doctrine of the Chamber. Schabas argues that the human rights standards extend to encompass a wide range of norms.[140] Such a range includes some of the rights such as imprisonment because of debt and protection of the owners' rights for copyright, which cannot be criminalized on the level of international law.[141] However, there is no obstruction to using a financial obligation as an attack on the civilian population, for example, what had been occurred when the Reich government imposed a total fine on the Jews and applied unjust laws and procedures in the context of the justice system. In addition acts or omissions that constitute a violation of human rights and freedoms are not regarded absolutely and directly as crimes against humanity without specific criterion. The latter crime includes general terms which presupposes that there is a systematic or widespread attack on the civilian population, and on the other hand as crime of 'other inhumane acts' it must be a criminal act or omission which has caused ' severely damage physical or mental integrity, health or human dignity' and equal to gravity of the other crimes against humanity.

Although the human rights standard is an important and useful guidance to secure the principles of criminal law, such as legality and certainty, this viewpoint probably will limit of the purpose for the inclusion of crime as a 'residual category' or 'catch all'. There could be forms of abuses which are not addressed either in the international law of human rights nor by the international criminal law. However, in the words of the Pre-Trial Chamber in the case of *Prosecutor v. Katanga*, it was stated that

> '[I]n the view of the Chamber, in accordance with article 7(l)(k) of the Statute and the principle of *nullum crimen sine lege* pursuant to article 22 of the Statute, inhumane acts are to be considered as serious violations of international

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[139] Ibid.
[140] William A. Schabas, *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press, New York, 2006), 225.
[141] Ibid.

> customary law and the basic rights pertaining to human beings, drawn from the norms of international human rights law, which are of a similar nature and gravity to the acts referred to in article 7(1) of the Statute'.[142]

In other words, every abuse of fundamental human rights and freedoms will expose a perpetrator to criminal responsibility under crimes against humanity, if his/her abuse meets the essential requirements of the crime of other inhumane acts in addition to generic conditions of the crimes against humanity. The Trial and Appeal Chambers of both the ICTY and the ICTR have disclosed the fundamental requirements and elements that an act or omission must fulfil in order to live up to the *actus reus* of the crime of other inhumane acts as existing in the customary international law. These requirements, as identified by Cherif Bassiouni, are based on judgements of the ICTY and the ICTR, are[143]:

1. The conduct must cause serious mental or physical suffering to the victim or constitute a serious attack upon human dignity;
2. The conduct must be of equal gravity to the conduct enumerated respectively in ICTY Article 5 and ICTR Article 3;[144]
3. The perpetrator must have performed the act or omission deliberately; and
4. with the intent to inflict serious physical or mental harm upon the victim or commit a serious attack upon human dignity or with the knowledge that his/her act or omission would probably cause serious physical or mental harm to the victim or constitute a serious attack upon human dignity.

The discussion and analysis above prove that the other inhumane acts are well established in customary international law as crime against humanity.[145] Moreover, there is no significant difference in its special meaning under the customary international law from what it is laid down in the Rome Statute. The difference is not with the meaning, but with the words which are used to define and describe the special nature and requirements of such a crime.[146] The same difference exists between 'other inhumane acts' and 'cruel treatment' and 'inhuman treatment', both of which are grave breaches of the Geneva Conventions and war crimes. The Rome Statute in particular has borrowed the words used in these grave breaches to define 'other

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[142] *Katanga* Decision on the confirmation of charges (n 115) para. 448. (footnote omitted)
[143] M. Cherif Bassiouni (n 5) 406-407.
[144] These articles are concerned with crimes against humanity.
[145] *Blagojevic* Trial Judgement (n 116) para. 624. See also, *Stakic* Appeal Judgement (n 123) para. 315.
[146] See further, Machteld Boot (n 109) 531-532. See also Prosecutor v. Delalic (Trial Judgement) ICTY-IT-96-21-T (16 November 1998), para. 533-534. (Therein after *Delalic* Trial Judgement). See also, *Kupreskic* Trial Judgement (n 9) para. 565.

inhumane acts' and then the latter meaning is similar to that which exists in customary international law.[147]

In conclusion, the crime of other inhumane acts is well established in international criminal law. We must now examine whether the events and violations in Iraq could be criminalized as falling under this category of crimes against humanity at the time when such violations occurred. In relation to the forced internal displacement situations that happened in Iraq, it is required firstly to investigate and prove that the forced internal displacement act could be encompassed by the *actus reus* of the crime of other inhumane acts. This will be discussed below.

4.2.2. Forced internal displacement –forcible transfer- as *actus reus* of the crime of other inhumane acts

In the context of forced internal displacement -forcible transfer- it must be noted that it is considered a violation of a range of fundamental human rights and freedoms, especially its direct link which embodies an explicit and glaring violation of the 'right to freedom of movement and right of residence' and the 'right to adequate housing'. The nature of such a relation with these two rights will be discussed below. It will then be demonstrated that forcible transfer could fall within the meaning of the crime of other inhumane acts and could amount to the same level of the gravity as other crimes against humanity. Thus it will be demonstrated that the legacy of internal forced displacements in Iraq qualifies for the criminal category of other inhumane acts.

4.2.2.1. Forced internal displacement as a blatant violation of human rights

The essential human rights and freedoms are set forth in the international law of human rights, especially the UDHR, and both the ICCPR and the ICESCR. Although internal forced displacement does not figure explicitly in this part of international law, the right of individuals or groups not to be forcibly displaced is a reasonable and clear result of respect for certain rights. This will be confirmed by interpretation of the meaning of the rights of movement and residence and the right to housing.

[147] Machteld Boot (n 109) 531-532. See also *Delalic* Trial Judgement, ibid, para. 533-534. See also *Krnojelac* Trial Judgement (n 10) para. 130. *Kupreskic* Trial Judgement, ibid, para. 565.

4.2.2.1.1. Forced internal displacement as a flagrant violation of the freedom of movement and the choice of place of residence

This freedom has legal aspects other than merely normal movement or locomotion. One of them is free movement that is confined to the internal territorial scope of a State.[148] This right is principle aimed at meeting the requirements of human life,[149] and it is necessary therefore that there should not be deprivation or coercion against an individual's will to go or to stay anywhere in his/ her country,[150] regardless of the purpose, which may be in order to live or work or any other objective.[151] This also means the freedom to change the place of residence from one locus to another.[152] Therefore it will be negative to restrict this freedom by preventing a person from living in or leaving a certain place as long as there are no legitimate and reasonable justifications for such prevention.[153] However, even if there are justifications, the restriction on the freedom should not be lasting unless the justifications are unending.[154]

Whether a state is federal or non-federal, or whether the residence is permanent or temporary is irrelevant to the right of freedom of movement and residence.[155] Moreover, it should not be required from the individuals to provide the motivations or reasons why they choose a particular dwelling place.[156] The practice of the freedom in this case requires the individual not to be subject to a binding procedure, such as authentication by authorities, and in situations where there is such a procedure it should be free of any barriers or obstacles that may deny or delay the enjoy of this freedom.[157] Such procedures or obstacles adopted in the laws of some States were condemned by the CCPR.[158] The effectiveness of the right to freedom of movement and choice of residence binds the authorities in each State to guarantee this right against every intervention, governmental or non-governmental alike.[159] However, this right is not absolute

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[148] UNHCR-Global Protection Cluster Working Group, *Handbook for the Protection of Internally Displaced Persons* (UNHCR-Global Protection Cluster Working Group, 2007) 224, 229.
[149] Ibid.
[150] Sarah Gees, 'Freedom of Movement' available at <http://www.hrea.org/index.php?doc_id=409> accessed on August14, 2011. See also, Pia-Johanna Fallström Mujkic, 'Right to freedom of movement and choice of residence: -Also an IDP's right?: Case study on IDP returns in Bosnia and Herzegovina' (Master thesis, University of Padua 2003) 14-15.
[151] Sarah Gees, ibid.
[152] Ibid.
[153] Ibid. See also, *Handbook for the Protection of Internally Displaced Persons* (n 148) 229.
[154] J. Oloka-Onyango, 'Movement-Related rights in the context of internal displacemen' (2010) *Studies in Transnational Legal Policy* (No. 41) 28. See also Pia-Johanna Fallström Mujkic (n 150).
[155] CCPR General Comment No. (27) on 'Freedom of Movement (Art. 12) of ICCPR' UN Doc. CCPR/C/21/Rev.1/Add.9 (1 November 1999), para, 5. (Therein after CCPR General Comment No. (27)).
[156] Ibid.
[157] Ibid, para. 17. See also, *Handbook for the Protection of Internally Displaced Persons* (n 148) 225.
[158] CCPR General Comment No. (27), ibid.
[159] Ibid, para. 6.

when the high legitimate interest of a State is threatened or when there needs to be a balance between individual and public interests.[160]

This fundamental human liberty to travel within their country and the freedom to choose a place of residence within the borders of their own homeland comes to the forefront in relation to forced internal displacement.[161] It is clear that forced internal displacement takes away the capacity of people to practice or to enjoy choosing the place where they wish to stay by coercing them to abandon their homes arbitrarily.[162] It is not disputed that the nature of such displacement contrasts with free will to move from one to other areas, or to dwell in a certain site inside a single State.[163] According to an elucidation by the CCPR, in the seventh paragraph of its commentary (No. 27), the attempts of forced internal displacement of any nature, will find always that the freedom to opt a spot of abode forms a barrier and legal impediment against every act which prevents free movement or to take an abode in one part of the territory of a State. [164] This is not limited to forced internal displacement but covers all forms of forced removal of populations within national boundaries as long as they are reflected directly and negative in relation to the effective enjoyment of the freedom of movement and choice of abode.[165]

Both the UDHR and the ICCPR have devoted a specific provision to emphasising the need to respect and to protect the will and desire of individuals to relocation and selection of abode place within the borders of a State. Article 13 of UDHR states that:

> '[E]veryone has the right to freedom of movement and residence within the borders of each State. 2. Everyone has the right to leave any country, including his own, and to return to his country'[166]

The right then became broad international commitment under Article 12 of ICCPR, which provides that:

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[160] J. Oloka-Onyango (n 154) 28.

[161] Jack Mangala Munuma, 'Le deplacement force de population comme nouvelle dimension de securite: Role et responsabilites de l'OTAN', Rapport de recherche soumis à l'OTAN, Lauréat 1999-2001, 13.

[162] The Brookings Institution Project on Internal Displacement, ***Handbook for applying the guiding principles on internal displacement*** **(The Brookings Institution Project on Internal Displacement, 1999), 16.**

[163] Päivi Koskinen, 'Internally displaced persons and the right to housing and property restitution' (2005) *Institute for Human Rights Åbo Akademi*, 62.

[164] CCPR, General Comment No. (27) (n 155).

[165] UNCHR (Sub-Commission) Report on 'Freedom of Movement: Human rights and population transfer, Final Report of Special Rapporteur (Mr. Al –Khasawneh)' UN Doc E/CN.4/Sub/1997/23 (27 June 1997).

[166] Art. (13) of the UDHR.

> '[E]veryone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. 2. Everyone shall be free to leave any country, including his own'[167]

The negative effects of population displacement on human rights has been condemned in a number of deeds and practice of international law and jurisprudence. For example, the UNCHR (Sub-Commission on Prevention of Discrimination and Protection of Minorities) (UNCHR Sub-Commission) issued a resolution (No. 1990/17) on 'Human rights dimensions of population transfer, including the implantation of settlers and settlements.'[168] The UNCHR (Sub-Commission) by this resolution reveals the terrible overall ramifications of the effect on the rights of populations, especially on the right to freedom of movement and choice of residence. In more legal detail, the Committee revealed and confirmed in its resolution (No. 1994/24) on 'The right to freedom of movement' the legal implications which violate this right when it stressed that:

> '[t]hat practices of forcible exile, mass expulsions and deportations, population transfer, "ethnic cleansing" and other forms of forcible displacement of populations within a country or across borders deprive the affected populations of their right to freedom of movement'[169]

Furthermore, the Committee alerted governments and actors to make efforts to put an end to such practices and to ensure the return of those affected.[170] The Committee considered that the displacement of the population deserves to be instituted as a branch of the original item on the freedom of movement within the Committee's agenda.[171] The CCPR found, in the case of the BIOT Order, which is related to the exile of the population of the Chagos Islands, that the United Kingdom had ignored its international commitments, which derive from Article 12 of the ICCPR.[172] The recommendation of the Committee has a clear denotation of prohibition of forced displacement. In other words, the Committee definitively and absolutely endorsed the

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[167] Art. (12) of the ICCPR.

[168] UNCHR (Sub-Commission) Res. No. (17/1990) on 'Human rights dimensions of population transfer, including the implantation of settlers and settlements' UN Doc. E/CN.4/1991/2, E/CN.4/Sub.2/1990/59 (15 October 1990), preamble, para. (1, 2), 41.

[169] UNCHR (Sub-Commission) Res. No. (24/1994) on 'The right to freedom of movement' UN Doc E/CN.4/1995/2, E/CN.4/Sub.2/1994/56 (28 October 1994), para. 2 of preamble.

[170] Ibid, para. 3 of preamble.

[171] Ibid, para.4.

[172] See, CCPR Report on 'Concluding Observations of the CCPR in (73rd Session) on considerations of Reports submitted by States Parties under article 40 of the Covenant-United Kingdom of Great Britain and Northern Ireland and UK Overseas Territories UN Doc CCPR/CO/73/UK; CCPR/CO/73/UKOT (6 December 2001), para 38.

provisions on the movement and residence as the general and valid basis for a prohibition of all acts of forced displacement.

4.2.2.1.2. Forced internal displacement as a flagrant violation of the right to adequate housing

The right to adequate housing is widely recognized and well established at the level of international law.[173] It is mentioned in a number of jurisprudential interpretations of international provisions. Article 25(1) of the UDHR is the first text on the right to adequate housing.

> '[E]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, ... or other lack of livelihood in circumstances beyond his control.'[174]

This right then turned into an international commitment under the ICESCR, which stated in its Article 11(1) that:

> '[T]he States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.'[175]

According to the Committee of International Covenant on Economic, Social and Cultural Rights (CESCR) in its General Comment (No. 4 of 1990) on the Article 11(1) of the ICESCR, the right to adequate housing should not be understood as the right to a building as an abstract idea, and should include intuitive meanings such as security and safety and human dignity.[176] 'Housing' should be understood as an absolute privilege which bestows on an individual the right to enjoy unconditionally an amount income or economic resources.[177] Thus it reflects 'the inherent dignity of the human person', which is the basis of the rights contained in the

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[173] Forced evictions and human rights *Fact Sheet* 25 (UN, Geneva, May 1996), 8.
[174] Art. 25(1) of the UDHR.
[175] Art. 11(1) of the ICESCR.
[176] CESCR General Comment No. (4) on the 'Right to Adequate Housing (Art. 11(1) of ICESCR)' UN Doc E/1992/23 (13 December 1991), para. 7. (Thereinafter CESCR General Comment No. (4)).
[177] Ibid.

Covenant.[178] Moreover, there is a consideration that housing should be appropriate or adequate. According to the Commission on Human Settlements:

> '[A]dequate shelter means more than a roof over one's head: It means adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities - all at a reasonable cost.'[179]

The most important of the adequate housing principles related to forced displacement is security of tenure. The latter is a legal principle which is comprehensive and enforceable, thus forced displacement contradicts with the principle.[180] This meaning was emphasized by the UN Commission on Human Rights (UNCHR) in para. (3) of its resolution No. 1993/77, which:

> '[A]lso urges Governments to confer legal security of tenure on all persons currently threatened with forced eviction and to adopt all necessary measures giving full protection against forced eviction, based upon effective participation, consultation and negotiation with affected persons or groups.'[181]

In the same context, the CESCR stated in para. (8)(A) of its General Comment No. (4) on the legal security of tenure:

> '[N]otwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. States parties should consequently take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection, in genuine consultation with affected persons and groups.'[182]

This trend towards drafting policies and enacting legislation in order to protection of legal tenure was endorsed by the UN Sub-Commission in its Resolution No. (12/1991).[183] Therefore, all forms of infringement of possession are contravention of the right to housing and thus they are breaches of an unshakeable international legal rule.

It is made clear in international reports and resolutions that the most prominent of infringement situations are forced evictions, thus the right to housing requires that there is no an negative act

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[178] Ibid.

[179] UN Centre for Human Settlement, *The global strategy for shelter to the year 2000* (UN Centre for Human Settlement (HABITAT), 2006), 13.

[180] UNCHR Sub-Commission Report on 'Forced Evictions, analytical report compiled by the UNSG pursuant to Commission Res. 1993/77' UN Doc E/CN.4/1994/20 (7 December 1993), para. 153, 43. (Therein after Report of UNCHR Sub-Commission on Forced Eviction).

[181] UNCHR Res. No. (77/1993) on 'Forced evictions' UN Doc. E/CN.4/RES/1993/77 (10 March 1993), para 3.

[182] CESCR General Comment No. (4) (n 176).

[183] UNCHR (Sub-Commission) Res. (12/1991) on 'Forced evictions' UN Doc E/CN.4/1992/2, E/CN.4/Sub.2/1991/65 (24 October 1991), para 2, 239-40.

by a State or its agents and other actors, especially the act of non-voluntary evacuation or displacement.[184] The UNCHR Sub-Commission and the UNCHR defined forced evictions as follows:

> '.... the practice of forced eviction involves the involuntary removal of persons, families and groups from their homes and communities, resulting in the destruction of the lives and identities of people throughout the world, as well as increasing homelessness. ... resulting in increased levels of homelessness and in inadequate housing and living conditions.'[185]

The CESCR stated in para. (3) of its General Comment that the term of forced evictions:

> '[a]s used throughout this general comment is defined as the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.'[186]

This broad meaning of forced evictions can embrace all the movements of populations executed under duress, including forced internal displacement, relocation and plans of demographic change, regardless of whether or not they occur in the context of armed or ethnic conflict, and whether or not as a result of the development projects.[187] Thus all the prototypes of forcible population movements represent a clear and momentous violation of the right to appropriate housing, and whether the perpetrator is a governmental actor or non-governmental actor, the act will be subject to Article 11(1) of the ICESCR.[188] Thus the UNCHR (Sub-Commission) found that the forced evictions should be treated as serious and grave violations as long as there is no legal justification, and such evictions are not only a flagrant threat to the right of housing but also of other human rights.[189] The UNESC (Sub-Commission on the Promotion and Protection of Human Rights) Res. (17/2003) stressed the importance of eliminating such violations when prohibiting the practices of forced eviction in its resolutions No. (12/1991) and (17/2003).[190] It stated

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[184] Forced evictions and human rights (n 173) 7-8.
[185] UNCHR Res. (77/1993) (n 181) preamble.
[186] CESCR General Comment No. (7) on the (Right to Adequate Housing: Forced evictions (Art.11 (1) of ICESCR) UN Doc E/1998/22 (20 May 1997), para. 3. (Therein after CESCR General Comment No. (7)).
[187] Ibid, para 5-7.
[188] Ibid, para. 8.
[189] UNCHR (Sub-Commission) Res. (12/1991) (n 183) 6.
[190] Ibid. See also, UNESC (Sub-Commission on the Promotion and Protection of Human Rights) Res. (17/2003) on 'Prohibition of forced evictions' UN Doc E/CN.4/2004/2, E/CN.4/Sub.2/2003/43 (20 October 2003).

> '[t]hat every woman, man and child has the right to a secure place to live in peace and dignity, which includes the right not to be evicted unlawfully, arbitrarily or on a discriminatory basis :from one's home, land or community.'[191]
>
> '[t]hat the practice of forced eviction constitutes a gross violation of a broad range of human rights, in particular the right to adequate housing, the right to remain, the right to freedom of movement, the right to privacy, the right to property, the right to an adequate standard of living, the right to security of the home, the right to security of the person, the right to security of tenure and the right to equality of treatment.'[192]

In this context, the High Commissioner for Human Rights, Mary Robinson, considered that the compulsory eviction is a serious violation which should be denounced strongly.[193] The first condemnation by the CESCR was against the State of Dominica, which had dislocated thousands of families in order to implement a plan concerning the modernization of Santo Domingo city.[194] In the light of what happened in Nigeria under military reign, which had deactivated the constitution and the rule and weakened judicial institutions, the CESCR noted there are forced evictions which require governments to take urgent action to prevent the evictions.[195] Nevertheless one of these evictions had been implemented in the context of achievement of a sewerage project in accordance with an agreement between the Nigerian government and the World Bank.[196] Also, the representative of the UNSG on Displaced Persons considered that what had happened in Sudan regarding internal displacements was an affront to the inherent value of human dignity, because they had treated the displaced people as similar to garbage.[197]

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[191] UNESC (Sub-Commission on the Promotion and Protection of Human Rights) Res. (17/2003), ibid. See also, UNCHR Res. (28/2004) on 'Prohibition of forced evictions' UN Doc E/2004/23 – E/CN.4/2004/127 (2004), para. 1-2. Also see, Forced evictions and human rights (n 173) 16.

[192] Ibid.

[193] David Hulchanski and Scott Leckie, The *human right to adequate housing: 1945- 1999 Chronology of United Nations Activity* (Centre on Housing Rights and Evictions (cohre.), 2000), 5. 'Mr. Philippe Texier was Committee member, a French High Court Justice and former UN Special Rapporteur on Haiti, 56.

[194] Felix Morka, 'The right to adequate housing, using module 13 in training program' 9-10, available on website <http://www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module13.htm> accessed on May 10, 2011. See also, CESCR Report on 'Its 5th Session (26 November-14 December 1990)' UN Doc. E/1991/23, E/C.12/1990/8, para. 243, 61. See also, Scott Leckie, 'Speech about the founding of COHRE in the Netherland' (COHRE) Expert Group Meeting on Housing Rights, Geneva, Switzerland, 26 November 2010, 3-4, available at http://www.cohre.org/sites/default/files/scott_leckie_speech_to_cohre_seminar_101126_.pdf> accessed on May 10, 2011.

[195] CESCR Report on 'Consideration of reports submitted by states parties under article 16 and 17 of the covenant: Concluding observations of the CESCR: Nigeria' UN Doc. E/C.12/1/Add.23 (16 June 1998), paras. 3-5, 5.

[196] Felix Morka (n 194) 8.

[197] UNCHR Report of the Representative of the UNSG for internally displaced persons (Mr. Francis Deng) on 'Specific groups and individuals: Mass exoduses and displaced persons,' Addendum: 'Report on the mission to the Sudan' UN Doc E/CN.4/ 2002/ 95/ Add.1 (5 February 2002), para 1-2, 5, 13.

4.2.2.2. Internal displacement as a blatant violation of fundamental human rights is qualified to fall under the crime of 'other inhumane acts'

In order to affirm that forcible transfer could be encompassed by the crime of other inhumane acts, it must be proved that the forcible transfer involves the same conditions considered in the *actus reus* of the crime of other inhumane acts. It was noted above that such an *actus reus* must 'cause serious mental or physical suffering to the victim or constitute a serious attack upon human dignity'.[198] In addition, it concluded through the jurisprudence of the ICTY that the *actus reus* must be a flagrant violation of human rights and fundamental freedoms, in particular the rights and freedoms that are defined by the UDHR, the ICCPR and the ICESCR. The discussion above showed that forcible transfer blatantly violates the rights and freedoms contained in the UDHR, ICCPR and ICESCR, especially the freedom of movement and choice of residence and the right to adequate housing. The question is whether the forcible transfer meets the requirements of suffering and the injury which are considered as crimes of other inhumane acts and the gravity which is observed in crimes against humanity. The jurisprudence of the ICTY concluded that these conditions can be satisfied through violations of human rights and fundamental freedoms, and then by forcible transfer.[199] The Trial Chamber in the case of *Prosecutor v. Kupreskic* confirmed that:

> '[I]nhumane acts ... are intentional acts or omissions which infringe fundamental human rights causing serious mental or physical suffering or injury of a gravity comparable to that of other crimes covered by Article 5.'[200]

The ICTY concluded that the suffering and the injury can be the consequence of committing violations such as forcible transfer. With regard to the discussion of the relationship between essential human rights violations and the suffering required in order to be classified as the crime of other inhumane acts, the ICTY established in the same case that

> '[T]he accused, ... has fulfilled the actus reus of murder .... The same applies for the suffering caused to the family by ... being expelled from their family home and having their home destroyed. These acts clearly constitute the actus reus of other inhumane acts.'[201]

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[198] As described by the trial Chamber in the case of *Blagojevic*, the actus reus of the crime of other inhumane acts must be described by the followed features: 'a) there was an act or omission of similar seriousness to the other acts enumerated in Article 5;
b) the act or omission caused serious mental or physical suffering or injury or constituted a serious attack on human dignity; and
c) the act or omission was performed intentionally by the accused, or by a person or person for whose acts and omissions the accused bears criminal responsibility.' See *Blagojevic* Trial judgement (n 116) para. 626.

[199] Ibid, para. 629. *Kupreskic* Trial Judgement (n 9) 626.

[200] *Kupreskic* Trial Judgement, ibid, para. 817.

[201] Ibid, para. 819.

This conclusion on forced transfer seems to be the clear opinion of the ICTY Chambers, which on a number of occasions has convicted the acts of forcible transfer under the crime of other inhumane acts.[202]

4.3. Do cases of forced internal displacement in Iraq qualify to be considered as international crimes?

Iraq under the former Ba'athist regime gives many clear examples of forced internal displacement. The regime had dislocated many Iraqi ethnic and religious groups, Kurdish, Shiite, Fayli Kurds, Turkmen and others. There were different grounds for such forcible transfers, including attempts to bring about a change of demography, revenge for particular events or against populations that appeared to oppose or threaten the Ba'ath regime, or for political and ethnic or religious motives.

This section will focus on Iraqi cases of forced internal displacements perpetrated against the population of Marshes, Al-Dujail and the Kurds, and will then discuss and investigate whether these cases could constitute international crimes of persecution or other inhumane acts. The section will go on to prove that situations of internal displacement in Iraq are eligible to be encompassed under these headings of international crimes because they meet all the requirements.

4.3.1. The Marshlands case

The Marshlands are swamps and bodies of water located in the south of Iraq. These areas and their residents had been exposed to campaigns and attacks by the government. The forced internal displacement of the population of the Marshes was a main objective of these campaigns, which had been carried out by different means: by direct orders to leave the Marshes, by military attacks and by changing its ecosystem. The government committed gross violations against the population. Using these different means to force the population to leave the Marshlands and go to other areas inside Iraq or to Iran.

4.3.1.1. The facts of Marshlands case

The Iraqi government implemented a series of military plans against the civilian population in the Marsh areas. The military actions were carried out using helicopters and aerial

[202] Ibid. See also, *Blagojevic* Trial Judgement (n 116) para. 629. See also, *Kordic and Cerkes* Trial Judgement (n 1) para. 270. See also, *Krstic* Trial Judgement (n 127) para. 672.

bombardments of villages and existing homes in the Marshes.[203] The military forces used chemical weapons, artillery and bombs and fired indiscriminately on the civilian population.[204] People were detained, tortured, disappeared, and killed and executed for political and religious reasons.[205] In addition, there were mass executions, widespread imprisonment and forced migration.[206] Men, women and children were shelled, poisoned.[207] Pressure and threats were exerted against heads of tribes and families in order to help the armed forces to round up people under generic charges.[208] In addition, there were humiliations. For example, the complainants in the case of the transfer of the Marshes' population considered by the IHT said that the forces had tied some people to tractors while they were completely naked and that they were then driven around the villages and publicly displayed.[209] Moreover, the evidence and witness emphasized that there had been children among those killed during the attacks. Another method practiced by the government's armed forces against the population of the marshes was a policy

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[203] See, Human Rights Watch, 'The Iraqi government assault on the Marsh Arabs' (2003) *Briefing Paper*: Human Rights Watch available at <http://www.hrw.org/legacy/backgrounder/mena/marsharabs1.htm> accessed on March 27, 2013. See also, Sam Beer, *The United States' program for agriculture in post-invasion Iraq* (Sam Beer, New York, 2016) 243.

[204] John Fawcett and Victor Tanner, 'The Internally Displaced People of Iraq' Occasional Paper (2002) *The Brookings Institution–SAIS Project on Internal Displacement*, 31. See also, Meredith Vinez and Sarah Leonard, 'The Iraq Marshlands: the Loss of the Garden of Eden and its People' (2010) available at <http://pol.illinoisstate.edu/downloads/conferences/2011/LeonardIraqMarshes.pdf> accessed March 27, 2013. See also, Philip Lewis, Ali Nasser Al-Muthanna, Preeti Patel and Nicholson, 'Effect of armed conflict on health of Marsh Arabs in southern Iraq' (2013) *AMAR International Charitable Foundation*, 1, <http://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736(13)60282-2.pdf> accessed on December 7, 2016.

[205] Robyn Eckersley, 'Ecological intervention: Prospects and limits.' In: Joel H. Rosenthal and Christian Barry, (eds). *Ethics & International Affairs: A Reader* (Georgetown Unversity Press, Washington, 2009), 138. See also, Sayyed Nadeem Kazmi and Stuart Leiderman, 'Twilight People: Iraq's Marsh Inhabitants' *Human Rights Dialogue: 'Environmental Rights'* (Spring 2004) available at <https://www.carnegiecouncil.org/publications/archive/dialogue/2_11/section_3/4458.html/:pf_printable> accessed on November 3, 2016. See also, Meredith Vinez and Sarah Leonard, ibid, 11-13. See also, The Iraqi Government Assault on the Marsh Arabs (n 203) 1-2.

[206] Thomas Cushman, 'The Human rights case for the war in Iraq: A consequentialist view'. In: Richard Wilson (ed). *Human rights in the 'War on Terror'* (Cambridge Unversity Press, 2005), 88.

[207] Michael J. Kelly, *Nowhere to hide: Defeat of the sovereign immunity defense for crimes of genocide and the trials of Slobodan Milosevic and Saddam Hussein* (Peter Lang Publishing, New York, 2005), 132-133, 262.See also, John Fawcett and Victor Tanner (n 204). See also, Lewis, Philip and others (n 204) 1. See also, Michael Wood, 'Saddam drains the life of the Marsh Arabs: The Arabs of southern Iraq cannot endure their villages being bombed and their land being poisoned, and are seeking refuge in Iran' *Independent* (27 August 1993) available at <http://www.independent.co.uk/news/world/saddam-drains-the-life-of-the-marsh-arabs-the-arabs-of-southern-iraq-cannot-endure-their-villages-1463823.html> accessed on November 3, 2016.

[208] See the Trial before the IHT in the Case of the Marshlands drying and displacing their population, available at <http://www.youtube.com/watch?v=TWKGu8_xHYM> and <http://www.youtube.com/watch?v=VlDiU9AddVA> accessed on March 27, 2013.
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[209] See the Trial before the IHT in the Case of the Marshlands drying and displacing their population, available at <http://www.youtube.com/watch?v=OB85MZQ5Wzo> and <http://www.youtube.com/watch?v=fom8Nxj9DFQ> accessed on March 27, 2013.
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of blockade and starvation.[210] Essential food items and medicaments were prevented from reaching the people living in the marshes,[211] and all the food items were confiscated at checkpoints placed around the Marsh areas.[212] Witnesses, complainants and other sources confirmed that military and associated forces had used land and naval mines to blow up the swamps, killing fish and destroying homes and means of livelihood, such as the boats, since the population of the Marshes lived mainly from fishing and raising buffalo.[213] The campaign also used internationally prohibited weapons and methods, such as napalm and poisoning the water supply.[214]

A very effective method for expelling the population of the Marshes was agricultural and irrigation engineering programmes. There was widespread environmental destruction of swampland by the incision of canals for drainage.[215] This dried up the marshes, where the fishing and buffalo breeding took place and where the people lived their relatively primitive lives where the main source.[216] The Iraqi Ministry of Agriculture and Irrigation as well as military engineers had overseen this task.[217] All military and engineering were used to starve

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[210] The Iraqi Government Assault on the Marsh Arabs (n 203) 7.

[211] Ibid. Report of Special Rapporteur on Iraq, Mr. Max van der Stoel, 'Human rights questions: Human rights situation and Reports of Special Rapporteurs and Representatives, Situation of human rights in Iraq' UN Doc. A/47/367 (10 August 1992), para. 14. See also, Norwegian Refugee Council, 'Iraq: Sectarian violence, military operations spark new displacement, as humanitarian access deteriorate: A profile of the internal displacement situation' *Internal Displacement Monitoring Centre (IDMC)* (Norwegian Refugee Council, 2006).

[212] See the Trial before the IHT in the Case of the Marshlands drying and displacing their population, available at <http://www.youtube.com/watch?v=fom8Nxj9DFQ> accessed on March 27, 2013.
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[213] G. Broadbent, 'Ecology of the mudhif'. In: Geoffrey Broadbent and C. A. Brebbia, (eds) Eco-architecture II: Harmonisation Between Architecture and Nature (WIT Press, Boston, 2008), 21. See also, John Fawcett and Victor Tanner (n 204) 31. See also, Hanne Kirstine Adriansen, 'What happened to the Iraqi Marshes Arabs and their lands? The myth about the Garden of Eden and the noble savage' 26 (2004) *Danish Institute for International Studies* (DIIS), 8. See also, Aaron Schwabach, 'Ecocide and Genocide in Iraq: International Law, the Marsh Arabs, and Environmental Damage in Non-International Conflicts' 27 (2003) *Colorado Journal of International Environmental Law & Policy*, 11.

[214] Michael J. Kelly (n 207) 132-133, 262.See also, John Fawcett and Victor Tanner, ibid. See also, Lewis, Philip and others (n 204) 1.

[215] See, G. Broadbent (n 213). See also, Cyprus Nicosia, 'Iraqis Are Said to Wage War on Marsh Arabs' The New York Times (19 October 1993) available at <http://www.nytimes.com/1993/10/19/world/iraqis-are-said-to-wage-war-on-marsh-arabs.html> accessed on November 3, 2016.

[216] Meredith Vinez and Sarah Leonard (n 204) 2-7. See also, John Fawcett and Victor Tanner, ibid, 28-30. See also, Hanne Kirstine Adriansen (n 213) 6-7. See also, Aaron Schwabach (n 213) 9. See also, The Iraqi Government Assault on the Marsh Arabs (n 203) 4.

[217] See the Trial before the IHT in the Case of the Marshlands drying and displacing their population, available at <http://www.youtube.com/watch?v=fom8Nxj9DFQ> and <http://www.youtube.com/watch?v=0mo6sWqzN18> accessed on March 27, 2013.
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the population, and various inhumane methods were employed to expel the inhabitants of the marshes.[218]

4.3.1.2. Governmental attempts to justify the campaign against the Marshes and their inhabitants

The Iraqi government presented a set of arguments to justify its plans and programmes in the campaign against the Marsh Arabs. Among these justifications is that the campaign had been designed as a plan to develop the areas of marshes and agricultural lands reforms and to increase State financial resources through the expansion of agricultural production.[219] This required treatment of the saline water in the swamps and marshes and in this way agricultural production would be enhanced and thereby achieving self-sufficiency,[220] especially after the economic blockade which was imposed under UNSC resolutions. According to government statements, what it called the 'Plan of action for the Marshes' was designed to improve the social situation of the underdeveloped Marsh people.[221] Another pretext provided by the government was that these plans and programmes were necessary to preserve a strategic security for Iraq in the aftermath of the Iran-Iraq war, and to cleanse the Marshlands of inimical people and organizations.[222]

A comparison between government justifications and what happened on the ground reveal the falsity of these justifications. With respect to reclaiming the marshlands and the establishment of agricultural projects and economic development, it is clear that until the demise of the former regime in 2003 there was no reference to the completion of such projects on the ground. The Marshlands were left to become salt crusted and arid, and all kinds of life there were

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[218] Sayyed Nadeem Kazmi and Stuart Leiderman (n 205). See also, John Fawcett and Victor Tanner (n 204) 28. See also, Canadian International Development Agency, 'Managing for Change: The present and future State of the Marshes of Southern Iraq' Canda- Iraq Marshlands Inititive *Candian International Development Agency*, 4-5. See also Aaron Schwabach (n 213) 33. See also Meredith Vinez and Sarah Leonard (n 204) 2, 12-13. See also, The Iraqi Government Assault on the Marsh Arabs (n 203) 9. See also, Report of Special Rapporteur on Iraq, Mr. Max van der Stoel, on 'Situation of human rights in Iraq' (n 211) para. 9-16. See also, See also, Cyprus Nicosia (n 215).

[219] Sayyed Nadeem Kazmi and Stuart Leiderman, ibid. See also, Hanne Kirstine Adriansen (n 213) 6-7. See also, Meredith Vinez and Sarah Leonard, ibid, 2. See also, See also, Report of Special Rapporteur on Iraq, Mr. Max van der Stoel, on 'Situation of human rights in Iraq', ibid, para. 15.

[220] Hanne Kirstine Adriansen, ibid, 9.

[221] Ibid.

[222] Ibid, 6-7. See also, Norwegian Refugee Council, 'Iraq: A displacement crisis: A profile of the internal displacement situation' *Internal Displacement Monitoring Centre (IDMC)* (Norwegian Refugee Council, 2007), 4-5. See also, The Iraqi Government Assault on the Marsh Arabs (n 203) 7. See also, Iraq: Sectarian violence, military operations spark new displacement, as humanitarian access deteriorate (n 211) 10. See also Trial before the IHT in the Case of the Marshlands drying and displacing their population, available at <http://www.youtube.com/watch?v=arNSmrR74R8> accessed on March 27, 2013.
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destroyed.[223] In this respect, Special Rapporteur on Iraq, Mr. Max van der Stoel, firmly expressed that

> '[t]here's not the slightest indication that [the government is] working on such a program. Every indication points in the same direction: they do this purely for military purposes, they want to subdue these people.'[224]

In addition, the government's argument relating to improving the status of the population of Marshlands clearly contradicts what happened to these people, who were exposed to the worst and most blatant abuses. To a large degree there seems to have been only deliberate destruction of lives.[225] Moreover, the government plans to attacks and expel the inhabitants had not included alternative arrangements for suitable housing or ensuring the livelihood of those forcibly displaced,[226] and in particular some of families who had been displaced more than once.[227] Therefore, those displaced were in a serious situation, without housing and without money. Some of them lived in houses made of tin cans in neighbouring cities.[228] The Ba'athist regime up to its demise never gave them any compensation.[229] After the fall of the regime, it was disclosed that eighty-seven percent of the Marshes population were illiterate and there was a high rate of mortality among their children.[230] Thus these facts belie the government's claim that the campaign in the Marshlands was in order to improve the situation of their inhabitants. The other government argument, concerning the protection of Iraq's national security, did not appear as a strong strategic plan, nor was it, according to the views of military experts, commensurate with the amount of violations committed.[231] Moreover, the Iraq- Iran war had ended before the implementation of the campaign against the marsh areas and its residents; and

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[223] Hanne Kirstine Adriansen (n 213) 5. See also, Aaron Schwabach (n 213) 5, 24. See also, Meredith Vinez and Sarah Leonard (n 204) 15. See also, Iraq: Sectarian violence, military operations spark new displacement, as humanitarian access deteriorate (n 211) 30. See also, G. Broadbent (n 213) 21.

[224] Sayyed Nadeem Kazmi and Stuart Leiderman (n 205).

[225] United States Institute of Peace, 'The Marsh Arabs of Iraq: Hussein's lesser known victims' available at <http://www.usip.org/publications/the-marsh-arabs-iraq-husseins-lesser-known-victims> accessed on November 3, 2016.

[226] Aaron Schwabach (n 213) 29, 33-34.

[227] The Iraqi Government Assault on the Marsh Arabs (n 203).

[228] Juan Cole, 'Marsh Arab Rebellion: Grievance, Mafias and Militias in Iraq' (2008) available at <http://www-personal.umich.edu/~jrcole/iraq/iraqtribes4.pdf> accessed on March 27, 2013, 7.

[229] Peter Van der Auweraert, 'Policy challenges for property restitution in transition - the example of Iraq'. In: Carla Ferstman, Mariana Goetz, Alan Stephens, *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity: Systems in place and Systems in the making* (Martinus Nijhoff Publishers, Boston, 2009), 461-462.

[230] Juan Cole (n 228).

[231] See, Report of Special Rapporteur on Iraq, Mr. Max van der Stoel, on 'Situation of human rights in Iraq', (n 211) para. 9-12. See, Aaron Schwabach (n 213) 20-22. See also, See Trial before the IHT in the Case of the Marshlands drying and displacing their population, available at <http://www.youtube.com/watch?v=arNSmrR74R8> accessed on March 27, 2013.
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many of the marshlands and villages that had been targeted do not have a border with Iran.[232] The last justification announced by the government is that the marsh areas and villages had been a centre for groups of hostile people and organizations, especially after the failure of the Al-Shabanih Uprising of 1991, and that some of the marsh residents had been involved in such organizations. To discuss this argument, there are some of points that need to be raised. First, inhabitants of the marshes had been part of the Iraqi army and had been involved along with other Iraqi soldiers in defending Iraq during the Iran-Iraq war. For example, the second complainant in the case of the forcible transfer from the marshes stressed before the IHT that he had been an Iraqi soldier and that there was not a day when he failed to perform military duty.[233] He introduced before the Tribunal a military service document which proved the validity of his statements.[234] However, he and his family had been subjected to forced displacement and the destruction of their dwelling, land and livelihood.[235] He added that he personally had been subjected to torture and detention for years, even after he and his family had been displaced.[236] Secondly, according to a novel argument by the government, many opponents who participated in the popular uprising of 1991 fled or sought refuge in the marshes.[237] Even so, this cannot justify or be the main reason behind the campaign against the marshes and its people, because the government had planned their campaign in 1987 and 1989, in addition to the attacks had been begun before this date.[238] This means that attacks and planning for the campaign against the Marsh Arabs and villages had started very early with respect to the events of the popular uprising that began in 1991. Third, the campaign and the attacks had not targeted armed opponents or organizations, as claimed by the government: rather they had been aimed at the civilian population, including women and children and the

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[232] See the comment by the judge of Iraqi Tribunal, available at <http://www.youtube.com/watch?v=zvazVkkkybU> accessed on March 27, 2013.

[233] See the testimony on websites <http://www.youtube.com/watch?v=zvazVkkkybU> and <http://www.youtube.com/watch?v=zvazVkkkybU> accessed on March 27, 2013.
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[234] Ibid.

[235] Ibid. See also, the Trial before the IHT in the Case of the Marshlands drying and displacing their population, available at <http://www.youtube.com/watch?v=fom8Nxj9DFQ>; <http://www.youtube.com/watch?v=9vhHk8hUxD4>; <http://www.youtube.com/watch?v=TWKGu8_xHYM> accessed on March 27, 2013.
محاكمة أمام المحكمة الجنائية العراقية العليا في قضية تجفيف الاهوار وتهجير سكانها.

[236] Ibid. See also the Trial before the IHT in the Case of the Marshlands drying and displacing their population, available at <http://www.youtube.com/watch?v=VlDiU9AddVA> accessed on March 27, 2013.
محاكمة أمام المحكمة الجنائية العراقية العليا في قضية تجفيف الاهوار وتهجير سكانها.

[237] G. Broadbent (n 213) 21. See also, The Iraqi Government Assault on the Marsh Arabs (n 203).

[238] The Iraqi Government Assault on the Marsh Arabs, ibid. See also, Report of Special Rapporteur on Iraq, Mr. Max van der Stoel, on 'Situation of human rights in Iraq' (n 211) para. 9-12.

elderly.[239] Even with an assumption that there had been armed opposition or that a state of war with Iran had continued, there was insufficient justification for the amount of destruction and the abuses committed. What happened cannot be satisfactorily explained as military necessity,[240] and stipulations for the protection of civilians in cases of displacement were ignored.[241]

4.3.1.3. Forced internal displacement of the marsh inhabitants amount to the crime of 'other inhumane acts'

The question that should be answered is whether or not there was an intention throughout the campaign to displace the marshland population. The documents and facts and testimonies of the complainants and witnesses clearly show that the campaign had been well thought out and deliberately designed for the purpose of the destruction of marshes and forcible displacement of the inhabitants. The facts indicate the nature and gravity of the attacks and the participation of military units, security agencies, members of the Ba'ath Party and the Ministry of Agriculture and Irrigation and local officials. The plan had been prepared with knowledge and intent. Moreover, the attacks had been supported by a media campaign against the marshland inhabitants, and this reveals the true intentions of the plan for the marshes. The media statements had included insults to the human dignity of the marshland population, for example, by claiming that they were retarded and resembled monkeys and buffalo, and also that they were not of Iraqi nationality.[242] A government spokesperson stated in Parliament that the

> '[A]merica wiped the Red Indians off the face of the earth and nobody raised an eyebrow'.[243]

Further evidence of the existence of the element of knowledge and intent is the fact that the supervisor of the campaign was Abdul Baqi Saadoun.[244] The latter was a member of the Regional Command Council, which is the highest organisations in the Socialist Arabic Ba'ath Party. He was a member of the RCC, which is the highest authority in the Iraqi Ba'ath regime and both councils had been under the command of Saddam Hussein, who was then President. Complainants confirmed that the attacking forces had been issued direct orders to leave their

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[239] See also, Report of Special Rapporteur on Iraq, Mr. Max van der Stoel, on 'Situation of human rights in Iraq', ibid.
[240] See, Aaron Schwabach (n 213) 22-23, 33-34.
[241] Ibid.
[242] See John Fawcett and Victor Tanner (n 204) 29. See also Hanne Kirstine Adriansen (n 213) 10. See also, Aaron Schwabach (n 213) 5.
[243] See John Fawcett and Victor Tanner, ibid, 32.
[244] See the Trial before the IHT in the Case of the Marshlands drying and displacing their population, available at <http://www.youtube.com/watch?v=UVtpiyah2vE> accessed on March 27, 2013.
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villages and homes.[245] If it is taken into account the nature of the attacks, the destruction of villages, the bombing and burning of houses, the destruction of means of livelihood, then there is not the slightest doubt that the forced displacement of the population was the immediate objective of the commission of such acts. According to one of the complainants, all the houses were blown up and burned except for one house, which had been adopted as the headquarters of the attacking forces.[246] Moreover, the nature of these attacks confirms that the exodus was intended to be permanent.

The question is whether such internal displacement of the Marshes population can meet the requirements of the crime of "other inhumane acts" as a crime against humanity. It has been shown previously that internal displacement is a blatant violation of human rights particularly when it curtails freedom of movement, choice of residence and the right to housing. It is proven by and settled in the findings of the jurisprudence of international criminal tribunals, particularly the ICTY, that forcible transfer is an inhumane act, and 'causes serious mental or physical suffering to the victim or constitute a serious attack upon human dignity'. Thus it constitutes the *actus reus* of the crime of other inhumane acts if there is an intention to bring about such suffering or there is foreknowledge that the act will cause such harm. Moreover, it is noted that there are two types of the acts, apart from a direct act of dislocation or transfer, that can constitute the act of forced displacement. Such acts are armed attacks bombing and inhumane and criminal acts against a civilian population. With regard to the first method, the Trial Chamber in the case of *Prosecutor v. Gotovina* noted that the bombing was sufficient to spread fear and terror among the civilian population and to drive them away from their dwellings.[247] At the same time that the Trial Chamber did not find that they left because of evacuation plans.[248] The Chamber enhanced its findings through the testimony of witnesses and the testimony of the 'expert Konings on the psychological effects of artillery on civilians.'[249] In the end the Chamber decided that the shelling was an act of forced displacement

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[245]See the Trial before the IHT in the Case of the Marshlands drying and displacing their population, available at <http://www.youtube.com/watch?v=OB85MZQ5Wzo>; <http://www.youtube.com/watch?v=0mo6sWqzN18>; <http://www.youtube.com/watch?v=fom8Nxj9DFQ>; <http://www.youtube.com/watch?v=u6SGf_tuNUc> accessed on March 27, 2013. See also, The Iraqi Government Assault on the Marsh Arabs (n 203).
محاكمة أمام المحكمة الجنائية العراقية العليا في قضية تجفيف الاهوار وتهجير سكانها.

[246] Janie Hampton, *Internally displaced people: A global survey* (Taylor & Francis, 2000) 175. See the Trial before the IHT in the Case of the Marshlands drying and displacing their population, available at <http://www.youtube.com/watch?v=OB85MZQ5Wzo> accessed on March 27, 2013. See also, G. Broadbent (n 213), 21.

[247] Prosecutor v. Gotovina (Trial Judgement) ICTY-IT-06-90-T (15 April 2011), para. 1743-1744.

[248] Ibid.

[249] Ibid.

because it creates coercion so that the only solution for the civilian population is exodus from their home regions.[250] The second method that can cause such a coercive situation is inhumane and criminal acts committed against the civilian population. The Trial Chamber in the case above reached the conclusion that violations and crimes such as looting, destruction, detention and murder can create a situation of fear among the civilian population whether who had been victims or had witnessed such acts.[251] The situation led to the inhabitants fleeing from their homes to avoid such terrifying events.[252] Therefore, the Trial Chamber established that such crimes and inhumane acts constitute an act of forced displacement.[253]

The displacement of the marshlands inhabitants, as described above, was the direct goal and result of the campaign. Such forced displacement without the slightest doubt meets the requirements of inflicting "serious mental or physical suffering to the victim or constitute a serious attack upon human dignity'. Hence it is without doubt that the forced displacement and acts of expulsion of the marshes population constitute the *actus reus* of "other inhumane acts" as a crime against humanity, especially since the element of intention and knowledge of the commission of the acts were present.

4.3.2. The case of Al-Dujail

Al-Dujail is a small town located north of Baghdad (the Iraqi capital) in Salahuddin province, and is close to hometown of Saddam Hussein, the former Iraqi president. The majority of the population of Al-Dujail town belong to the Shi'ite sect. In 1982, a convoy escorting Saddam Hussein was fired upon as it passed through the town. It had been an assassination although no one was hurt. Immediately after the incident, Al-Dujail and its inhabitants were exposed to a broad campaign of attacks and abuses, including forcible transfer.

4.3.2.1. The facts of the Dujail Case

After the shooting incident, the former Iraqi president granted full powers to his half-brother Barzan to conduct a retaliatory action. Barzan was head of the Intelligence Service, and on the day following of the accident he grouped together military, security and police forces and the members of Ba'ath party, and brought military aircraft and helicopters to bombard the town, farms and other sites to punish the city's population by a large-scale attack.[254] These forces

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[250] Ibid, 1745.
[251] Ibid, 1756.
[252] Ibid.
[253] Ibid.
[254] Al-Dujail Lawsuit (Trial Judgement) IHT-1/9 First/2005, 9, 16. (Therein after Al-Dujail Trial Judgement). See also, James Menendez, 'Seeking justice in Dujail' available at <http://news.bbc.co.uk/1/hi/world/middle_east/4350104.stm> accessed on November 23, 2016.2016.

also launched a campaign of collective punishment against Dujail's civilian residents who as a consequence suffered assaults, murder, psychological and physical torture, humiliation and degrading treatment, followed by arrest and transportation.[255]

In the first stage of the operation, the armed forces transported Dujail's families, including children, infants, women and the elderly, to the Hakimiyah Building in Baghdad to be under the control of the Intelligence Service.[256] The stated purpose in regard to the transfer and collection these families had been for investigation of the shooting incident. In this detention, the families sustained the worst kinds of inhumane violations, perpetrated against even children and girls. Dozens died from torture.[257] For example, electricity wires were placed in particular parts of the victims' bodies and lighted cigarettes were extinguished on bodies.[258] Torture was used on children, women and girls were stripped of their clothes and raped in front of their families whether adults and children, and women were forced to witness the torture of husbands and sons.[259] Families were then transferred again to the intelligence department in Abu Ghraib prison, where the families suffered the same abuses and poor conditions. One of complainants described what had happened. A woman had given birth and another had aborted inside the oubliette of the prison,[260] children and infants were put alone in quarantine rooms under conditions of malnutrition.[261] One of the infants was prevented from being breastfed and when his mother breastfeed him from behind a cell window the baby died and his dead body was put in a waste bin.[262]

The victims included people such as soldiers and workers who had not been in Dujail in the time of incident and had no knowledge of it.[263] Moreover, the campaign included relatives of

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[255] Rory Carroll, 'Saddam trial to open with village massacre' *Global Policy Forum,* available at <http://www.globalpolicy.org/component/content/article/163-general/28977.html> accessed on September 25, 2013. See also, Christine Hauser, 'First case against Hussein, involving killings in 1982, is sent to a Trial Court' (17/7/2005) *The New York Times* available at <http://www.nytimes.com/2005/07/17/international/middleeast/17cnd-iraq.html?_r=0> accessed on September 25, 2013. See also, International Centre for Transitional Justice, 'Dujail: Trial and error?' (2006) *Briefing Paper: International Centre for Transitional Justice (ICTJ)*, 2.

[256] Al-Dujail Trial Judgement (n 254) 157.

[257] Ibid, 18-19, 129.

[258] Ibid.

[259] Ibid.

[260] Ibid, 157- 158. See also, Saffy Al-Yasery, 'Al- Dujail: Twon and case' 556 (2005) *Almada Newspaper*, 7. صافي الياسري، الدجيل: المدينة والقضية، 556 (2005) جريدة المدى.

[261] Al-Dujail Trial Judgement, ibid. See also, Saffy Al-Yasery, ibid, 7.

[262] Al-Dujail Trial Judgement, ibid.

[263] Ibid, 15.

Dujail families whose kinship was of the fifth and sixth degree and who lived elsewhere, namely the Shiite Al Kathimiya area of Baghdad.[264]

In the final phase and after death of dozens under torture and 148 executions including more than thirty minors,[265] families were transferred to the Lea camp in the desert near the border with Saudi Arabia.[266] These families stayed in the Lea for three years under the harsh government control, before being allowed to return to Dujail according to what was called an amnesty decree.[267] In the Lea camp, in addition to the bad conditions and cruel treatment, there was hunger and extremely hot temperature, with water that was unfit to drink.[268] A number of people died and their bodies were left to be eaten by hyenas and wild desert animals.[269] Moreover, the government had more than once drove the male victims to serve in battle fronts during the armed conflict between Iraq and Iran, and governmental forces, even in those circumstances, had collected the contributions from the victims to support the war.[270]

The campaign not only targeted the civilian population, it included destruction of homes, looted property, destruction of farms and irrigation systems, and seizure of property by a presidential decree.[271] This destruction was justified under the pretext of the "development" of this small township.[272] This destruction had been under the supervision of Taha Yassin Ramadan who was a member of the RCC, which was the highest official in the country during the rule of the Ba'ath Party, and was Vice President of the Republic.[273]

4.3.2.2. The legal findings in Al-Dujail Case amounted to the crime of 'other inhumane acts'

It is clear that this campaign cannot be justified. It had been a vengeful reaction and a collective punishment by no means commensurate with its motive, the shooting incident. The later

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[264] Ibid.

[265] Ibid. See also, Condemnation Decision No. (26/ 1987) issued by the Court of the Intelligence Service on (23/9/1987). See also, Judgement and Condemnation Decision No. (944/C/1984) issued by the Revolutionary Court on (14/6/1984). See also, Presidential Decree on 'The ratification of death sentences' No. (778) on (16/6/1984).

[266] See, for example, Iraqi Intelligence Service Doc. No. 1147/ M7/ W. T (14/5/1983). See also, Iraqi Intelligence Service Doc. No. M7/ Sh3/ 841 (17/ 5/ 1984).

[267] Al-Dujail Trial Judgement, ibid, 161.

[268] Ibid, 20, 161. See also, Saffy Al-Yasery (n 260) 7.

[269] Al-Dujail Trial Judgement, ibid. See also, Saffy Al-Yasery, ibid, 7.

[270] Al-Dujail Trial Judgement, ibid, 20.

[271] Ibid, 15-16. See also, RCC Resolution No. (1283) of (1982). See also Iraqi Intelligence Service Doc. No. M7/ Sh. T/ 5682 (23/ 9/ 1982). See also Document from Member of RCC and Deputy Prime Minister 'Taha Yassin Ramadan' Doc. No. (14446) on (29/ 11/ 1984).

[272] Al-Dujail Trial Judgement, ibid.

[273] In addition to documents which confirm that the plan of destruction was organised by Taha Yassin Ramadan, there is evidence that a phone call, recorded to the letter, informed former president Saddam on the prepared plan and the procedures that would take place. This recorded conversation available at <http://www.youtube.com/watch?v=5fj9Q9RtNcM> accessed on September 5, 2013.

investigations estimated that the number of bullets fired was between 10 and12, and the number of accused was no more than ten individuals.[274] However, the culprits and the site of the shooting were unknown according to the testimony of the head of investigation at the time of the incident.[275] One officer involved in the investigation wondered during his testimony whether there was any justification for punishing such a large number of residents of Dujail.[276] Moreover, the IHT indicated that there was strong evidence that the military campaign had been prepared in advance and that the incident had hastened its implementation.[277]

It appears, from the testimony of witnesses and complainants, that the documents were issued by Barzan, who was primarily responsible for the campaign. For example, the witness Waddah Al-Shaykh, who had been Head of Investigation at the time of the incident, said that the transfer to the Abu Ghraib prison in 1983 and then to the desert camp Lea had been in accordance with the orders of Barzan.[278] A committee had been formed for the purpose of transferring the Dujail families, and it had organized and prepared dated and numbered official documents that included the number of people transferred and their names.[279] It is clear that the transfer occurred in the conditions of terror abuse, humiliation, beatings and murder, and that the victims had been of both genders and of all ages. This situation continued until the issuance of the so-called presidential amnesty decree. Thus there is no doubt that this transfer of the families of Dujail had brought the degree of suffering, injury and an insults to dignity that are required by the elements of the crime of other inhumane acts as a crime against humanity. In addition, the intention and knowledge of bringing such suffering, injury and insult to the victims was established through documents, testimony and facts. On the basis of the evidence and facts above, the forcible transfer of the families of Dujail is eligible to fall under the title of the crime of other inhumane acts as a crime against humanity.

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[274] Jennifer Trahan, 'Book Review on: Michael A. Newton and Michael P. Scharf, Enemy of State: The trial and execution of Saddam Hussein' 18 (2009) *Cornell Journal of Law and Public Policy*, 831.
[275] Al-Dujail Trial Judgement (n 254) 9, 155.
[276] Ibid. See also, Michael J. Kelly, *Ghosts of Halabja: Saddam Hussein and the Kurdish genocide* (Greenwood Publishing Group, 2008), 67.
[277] Al-Dujail Trial Judgement, ibid, 9.
[278] Ibid, 155-156.
[279] Ibid, 234, 235. See also, Report of the 'Common Committee of the Intelligence Service and Security Service concerning the families who were transferred and their numbers according to categories of families, children, men and women'.

4.3.3. The Kurdish case 'Al-Anfal Case'

The population of Kurdistan are Iraqi citizens of Kurdish ethnicity. The Kurdish people were subject to many extensive campaigns by the former Ba'ath regime. The worst of these were the chemical weapon attacks carried out in many phases, and in addition there was the use various other kinds of weapons and all forms of inhuman abuses against the civilian population of Kurdish villages, including forcible transfer.

4.3.3.1. The facts of the Kurdish Case

According to the evidence, documents, witnesses and complainants, three-four thousand Kurdish villages were fully destroyed in full and the dwellings razed to the ground during the Al-Anfal campaigns.[280] During this campaign the civilian village populations were exposed to attacks by chemical weapons, aircraft, artillery and indiscriminate shooting and bombing.[281] Civilians were subjected to different crimes and abuses, such as murder, even of children, threats, economic blockade, terrorism, torture, arrest and rape, in addition to the villages and dwellings and agricultural lands destroyed and properties plundered.[282] Moreover, these violations occurred at a time when the population were suffering from the pain and consequences of chemical weapons.[283]

Forced relocation and displacement in this context had been one of the main and direct violations of the campaign.[284] In addition to what is to be expected in such circumstances and attacks it seems as a logical corollary that the civilian population will flee to escape from the consequences of such attacks on their villages.[285] In addition to the suffering from the effects

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[280] Jennifer Trahan, 'A critical guide to the Iraqi High Tribunal's Anfal judgement: Genocide against the Kurds' 30 (2009) *Michigan Journal of International Law*. See also, A Middle East Watch Report on 'Genocide in Iraq: The Anfal campaign against the Kurds' Human Rights Watch (1993). (Therein after HRW Report on Genocide in Iraq: The Anfal campaign). See also, Human Rights Watch Report on 'Claims in conflict: Reversing ethnic cleansing in Northern Iraq' 16 (2004) Human Rights Watch, No. 4(E), 9. (Therein after HRW Report on 'Claims in conflict').

[281] Jennifer Trahan, ibid, 372. See also, Michael A. Newton, 'The Anfal genocide: Personal reflections and legal residue' 40 (2007) *Vanderbilt Journal of Transnational Law,* 1525. See also, HRW Report on Genocide in Iraq: The Anfal campaign, ibid. See also, Al- Anfal Lawsuit (Special Verdict) IHT-1/ CSecond/2006, 62, 76. (Therein after Al-Anfal Trial Judgement).

[282] Michael A. Newton, ibid, 1525. See also, A Middle East Watch Report on 'Bureaucracy of repression: The Iraqi government in its own words' Human Rights Watch (1994). (Therein after HRW Report on 'Bureaucracy of repression'). See also Al-Anfal Trial Judgement, ibid, 76.

[283] HRW Report on Genocide in Iraq: The Anfal campaign (n 280). See also, Report of Physicians for Human Rights on 'A Medical Mission to Turkish Kurdistan: Winds of death: Iraq's use of poison gas against its population Kurdish population' (1989), 1-7. (Therein after Report of Physicians for Human Rights on 'Winds of death').

[284] HRW Report on Genocide in Iraq: The Anfal campaign, ibid.

[285] Jennifer Trahan (n 280) 367. See also, Martin van Bruinessen, 'Genocide in Kurdistan? The Suppression of the Dersim Rebellion in Turkey (1937-38) and the Chemical War against the Iraqi Kurds (1988)'. In George J. Andreopoulos (ed), *Conceptual and historical dimensions of genocide* (University of Pennsylvania Press, 1994), 141-70.

of chemical weapons, beatings, and torture and ill-treatment[286] and refusal of medical treatment, the displaced and transported people had been in a state of terror about their fate, and they doubted that they would survive, since thousands of them were executed or buried in mass graves.[287] Attacking forces had relocated even people who had been reached the civil hospital to obtain treatment.[288] The military told them that they would be taken to a military hospital, and later the doctors found that this was untrue and the military hospital did not receive them.[289] Women, children, elderly and young people were all victims of a campaign of forcible transfer or displacement. The transferees victims were taken to the Office of the North of the Ba'ath Party and then to the prisons and camps such as 'Tupzawh, Dibs, the women's prison in Sulaimaniya, Nugrat Al-Salman in southern Iraq, etc.'.[290] According to facts offered before the IHT, the names of these Iraqi prisons and camps are enough in themselves to stand as witnesses to horror because they were centres for the practice of the worst abuses.[291] Transferees suffered ill-treatment and torture, rape and chemical weapons injuries were left to die.[292] During the multiple stages of the transfer men and women were separated, as were children and parents.[293] The most attractive women were isolated from the rest.[294] Male youths were taken to an unknown location and their fate remains unknown.[295] During the stages of forced transportation between camps and detention centres and on the way there, many of the victims died, including women, children and the elderly.[296]

4.3.3.2. The legal findings on the forced internal displacement of Kurdish people amount to crime of 'other inhumane acts'

The campaign orders stressed that the targeted villages must be emptied of their inhabitants, the purpose being the destruction of a kind that would prevents any attempt or hope of later return on the part of the displaced and fleeing victims.[297] Therefore, the plan of campaign was

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[286] HRW Report on 'Bureaucracy of repression' (n 282). See also, HRW Report on Genocide in Iraq: The Anfal campaign (n 280). See also, Report of Physicians for Human Rights on 'Winds of death' (n 283) 1-7. See also, Al-Anfal Trial Judgement (n 281) 16, 170, 176, 178.

[287] See, Bruce P. Montgomery, 'The Iraqi Secret Police files: A documentary record of the Anfal genocide' 52 (2001) *Archivaria*.

[288] Michael A. Newton (n 281).

[289] Ibid. See also, Martin van Bruinessen (n 285) 17. See also, HRW Report on Genocide in Iraq: The Anfal campaign (n 280).

[290] Michael A. Newton, ibid, 1525.

[291] Al-Anfal Trial Judgement (n 281).

[292] Ibid. See also, Michael A. Newton (n 281) 1525.

[293] See also, Al-Anfal Trial Judgement, ibid, 155.

[294] Ibid.

[295] Ibid. See also, HRW Report on Genocide in Iraq: The Anfal campaign (n 280).

[296] Al-Anfal Trial Judgement, ibid, 151- 155. See also, HRW Report on Genocide in Iraq: The Anfal campaign, ibid.

[297] See, Document on 'Dealing with the villages that are prohibited for security reasons' Northern Bureau Command Doc. No. 28/4008 (20/6/1987). See also, Document of Northern Bureau Command Doc. No. 28/3650

to destroy the villages completely. Thus even the water sources had been bombed and poisoned to eliminate any vestige of human and animal life.[298]

Although the fleeing and displacement of populations is a logical and natural result of such campaigns, the forcible transfer of the population had been an explicit goal and an essential part of the plan of attacks on Kurdish villages in northern Iraq.[299] Direct orders were issued by Ali Al-Majeed, and some military commanders responsible for the campaign had demanded that the civilian population must be dislocated and removed, and that,[300] people who did not flee or get transported would be targeted by shooting and execution.[301] Ali Al-Majid who is Saddam's cousin had been given complete authority in accordance with RCC Decree No. (160).[302] On the basis of this decree 'Ali Al-Majid' had been granted all authorities over all State institutions such as military, popular army, security and police forces in addition to intelligence and offices of the Ba'ath Party.[303] It is notable that all these institutions participated in the military campaigns and abuses against the Iraqi Kurds in northern Iraq. The decree required everyone to be committed and to carry out the orders issued by 'Ali Al-Majid'.[304] Defendants who had been heads and members of the above institutions confessed before the IHT that they had carried out the orders related to the forcible transfer. However, they claimed that the campaign and the transfer had been for the purpose of protecting the civilian people and partly as requirements of military necessity.[305] These arguments are shown to be false in the context of the events and abuses and ill-treatment imposed on these people and this is probably what caused the IHT to reject this justification. The IHT also rejected arguments that the campaign had been designed against Iranian forces and Kurdish rebels co-operating with Iranian forces.[306] The defendants added that the rebels had been regular army and not civilians.[307] However, these arguments do not constitute a legal basis for the commission of

(3/6/1987). See also, Document on 'Minutes of meeting of the Security Committee in Shaqlawa', Doc. No. Security/55 (5/4/1987). See also Document on 'Elimination of villages', issued by Qaradagh Section Command (Military Intelligence) Doc. No. I.S./28/56 (31/5/1988).

[298] Michael A. Newton (n 281) 1525. See also, HRW Report on Genocide in Iraq: The Anfal campaign (n 280).

[299] See: Document on 'Dealing with the villages that are prohibited for security reasons' (n 297). See also Document of Northern Bureau Command Doc. No. 28/3650 (3/6/1987) (n 297).

[300] See also, HRW Report on Genocide in Iraq: The Anfal campaign (n 280). See also, HRW Report on 'Bureaucracy of repression' (n 282).

[301] HRW Report on Genocide in Iraq: The Anfal campaign, ibid. See also, HRW Report on 'Bureaucracy of repression', ibid. See also Document on 'Dealing with the villages that are prohibited for security reasons' (n 297). See also Document of Northern Bureau Command. Doc. No. 28/3650 (3/6/1987) (n 297).

[302] RCC Decree No.160 (29/3/1987).

[303] Ibid.

[304] Ibid.

[305] Jennifer Trahan (n 280) 367, 371, 374, 402.

[306] Jennifer Trahan, ibid, 402.

[307] Ibid, 374.

attacks on civilians people, and therefore those attacks and violations are not absolutely justified under the law of armed conflict. These attacks and violations cannot be justified by military necessity and the security of civilians, or by military advantages that the attacking forces had perhaps sought to acquire.

The intent of forcible transfer and displacement is clear and proven through the testimony of witnesses and documents and confessions of the accused, which confirm that there had been explicit orders followed by the implementation of such transfer and displacement. The facts also show with regard to the suffering of the displaced population that their suffering, humiliation and ill-treatment had been deliberately inflicted and were known by the persons who responsible for the implementation of the attacks. Hence it is clear that this transfer or forced displacement undoubtedly meet both the general and special requirements of the crime of other inhumane acts as a crime against humanity especially if the conditions associated with the transfer are taken into account, and also the gender and ages of victims who had been relocated or forced to flee.

4.3.4. Cases of the forced internal displacement in Iraq amount to crime of persecution

It was shown in the first section of this chapter that persecution as a crime against humanity is well established under customary international law. The crime of persecution requires an additional element that distinguishes it from other crimes against humanity, and this element is discrimination against a victim on at least one of three foundations, i.e., political, religious or racial. In addition, the *actus reus* of the crime of persecution is wide, because it can be found in the criminal acts of international crimes, which are genocide, war crimes and crimes against humanity. The crime of persecution can occur through an act that blatantly violates essential human rights. Although internal displacement or forcible transfer as a crime *per se* against humanity is not a part of customary international law, however it is part of the law under the headings of war crimes. In addition, internal displacement blatantly violates essential human rights. Therefore, it is inferred that the forcible transfer of a population, if it is committed with one or more of the three foundations of discrimination, can be tantamount to a crime of persecution. However, the element of discrimination must be realistic with respect to the victim, in other words the victim should belong to racially or religiously or politically targeted group, or be involved in a political activity.

With regard to the cases of forced internal displacement and forced relocation in Iraq discussed above, it appears that these cases fall under the crime of other inhumane acts as a crime against

humanity. However, they can be criminalized according to the crime of persecution because they were committed on the basis of a religious or racial element, in addition to other reasons.

4.3.4.1. Forced internal displacement in Iraq does not amount to crime of persecution based on political basis

The former Ba'ath rule regime had claimed that people who had dislocated had been traitors and agents of Iran, and that they had been armed rebels and had carried out hostile activities against Iraq or the political system in Iraq.[308] The reality, as shown previously, is that the majority of displaced victims had been civilians uninvolved in political groups or activities. The transfers or displacements had been directed against all or most families in the targeted villages, and not against specific people. In addition, the victimised families had proved their loyalty to Iraq, especially during the armed conflict with Iran, by their support and participation in the defence of Iraq alongside other Iraqi soldiers.[309] Therefore, forcible transfer as a crime of persecution cannot be established on a political basis because such a basis cannot be supported by the facts concerning the displaced victims.

4.3.4.2. Forced internal displacement in the cases of the Marshlands and Al-Dujail amount to a crime of persecution

To investigate whether the internal displacements in Iraq can be considered under the heading of the crime of persecution on the basis of religious identity, it will be necessary to examine two cases, those involving the population of the Marshlands and those involving Dujail, because in both of these cases, the victims belonged to the Shi'ite religious sect. Those populations had been targeted because of their adherence to the Shi'ite faith which is also that of the political regime in Iran. The Iraqi Ba'ath regime had considered them to be an extension of the Iranian regime.[310] For example, at the time of attacks the prime minister, Tariq Aziz, expressed to the a Western Journalist, that the Marsh Arabs

> '[w]ere of Persian origin. We said to them, 'You love Khomeini. Go back to his paradise. 'We put them on trucks and sent them to the border.'[311]

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[308] Document on 'Plan of action for the Marshes' issued by General Security-Directorate of Security in Erbil Governorate Doc. No. Sh.5/1657 (30/1/1989).
[309] Meredith Vinez and Sarah Leonard (n 204) 4, 13. See also, Aaron Schwabach (n 213) 25.
[310] The Iraqi Government Assault on the Marsh Arabs (n 203) 1-2. See also, Hanne Kirstine Adriansen (n 213) 13. See also, Iraq: Sectarian violence (n 211) 11.
[311] James R. Arnold, *Dictatorships: Saddam Hussein's Iraq* (Twenty-First Century Books, Minneapolis, 2009), 75.

This is clear, and is confirmed by explicit threats and words uttered by members of the attacking forces. For example, the complainants and witnesses before the IHT in the Marshelands case said that those members had said to them

> '[y]ou are traitors and tend to the Iranian side because you are Shiite and Iran is Shi'ite State.'[312]

Therefore, the intent and knowledge of the discriminatory element which is required in the *actus reus* of the crime of persecution had been held in the mind by those responsible for the attacks and by members of the attacking forces. In addition, the element of discrimination towards those who followed the Shi'ite doctrine already existed.[313] Thus, all the requirements and elements of the crime of persecution are available in the case of forcible transfer of the marshes population, and so such transfers falls under the crime of persecution as a crime against humanity.

Another case relates to the forced relocation of the families of Dujail. It was mentioned above that the majority of the Dujail population are Shiites. Although there were families who were Sunni the victims were Shia families only.[314] Moreover, the investigations had not determined the identity of the shooters in the assassination attempt.[315] In addition, the number of bullets was between 10 and 12 and around ten people were accused, whereas the campaign was conducted against many Shi'ites families in Dujail and, as mentioned previously, their relatives who lived in the Shiite area of Kadhimiya in Baghdad. Also as mention previously, the campaign had been included members of victim families who had been either soldiers in the battlefield or workers outside the town of Dujail and had not been present during or aware of the incident. Moreover, this campaign had not implemented on the basis of normal procedural investigation, other than it had been based on the religious identity the Shi'ite sect, especially since the victim families were accused of being 'ravaging traitors'. The findings of the IHT were the result of an examination of the decisions of the Revolutionary Court in the Dujail case.[316] The latter's findings decision, as described by the victims of Al-Dujail, was that

> '[t]hey belong to the convocation party (Al Daawa) and participated in distributing hostile publications that incites religious conflicts and establishing a

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[312] See testimony of witnesses in the Trial before the IHT in the Case of the Marshlands drying and displacing their population, available at <http://www.youtube.com/watch?v=OB85MZQ5Wzo> and <http://www.youtube.com/watch?v=0mo6sWqzN18> accessed on March 27, 2013.
[313] See chapter one, 26-27, 30-31. See also, Sayyed Nadeem Kazmi and Stuart Leiderman (n 205).
[314] Al-Dujail Trial Judgement (n 254).
[315] Ibid.
[316] Al-Dujail Trial Judgement (n 254) 14.

> disordered regime similar to treason regime in Qum and Tehran; the execution of their criminal plan was directed by their Persian masters.'[317]

According to IHT it is

> '[j]ust identifying the accused as (the convocation party –the traitor) and traitors of their Persian masters and inciting religious conflicts indicates clearly to a 'specified group of people in town.'[318]

Therefore, the attacks and abuses including the forcible transfer against Dujail families seems without a doubt based on the affiliation of these families to the Shiite sect, and therefore such transfers fulfil the requirements and elements of the crime of persecution. Thus, acts of forcible transfer against Shiite families of Dujail are tantamount to a crime of persecution as a crime against humanity.

4.3.4.3. Forced internal displacement in the case of Kurdish people amount to crime of persecution

The last case of forced displacement is related to Kurdish people. This case is shown to be founded on ethnicity. It is notable that the meaning of racial group does not restricted to those people who have distinct inherited physical traits. Instead, it was given a broad sense in international law. It was used as synonymous with ethnic, religious and national groups, since it also refers, for example, to the consequences of prejudice, slavery, colonialism, discrimination and genocide.[319] This understanding can be found in the trials of the post- World War II and in several international instruments.[320] In this respect, the Kurds has considered as a distinct group from the other Iraqi people, and the Iraqi Constitutions recognize their own nationalist rights and language.[321] The kurds share a common history, language, culture and aspiration to form an independent Kurdish nation state.[322] They are regarded as having Indo-European origins, and their existence in the present geographical territory back date to around four thousand years.[323]

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[317] Ibid.
[318] Ibid, 15.
[319] William A. Schabas, *Genocide in international law* (Cambridge University Press, Cambridge, 2000) 120-123.
[320] For example see, ibid.
[321] See for example, Art. (3) of the Iraqi Constitution of (1958), Art. (19) of the Iraqi Constitution of (1963), Art. (21) of the Iraqi Constitution of (1968), Art. (5)(b) and (7)(b) of the Iraqi Constitution of (1970), Art. (6) and (7) of the Iraqi Draft Constitution of (1991), Art. (9) of the LAT and Art. (4) of the PCI of (2005).
[322] Jamal Jalal Abdullah, The Kurds: A Nation on the Way to Statehood (Author House, Bloomington, 2012). See also David McDowall, A Modern History of the Kurds (I.B Tauris & Co Ltd., London, 2004). See also Livingston T. Merchant, Introduction to Sorani Kurdish: The Principal Kurdish Dialect spoken in the Regions of Northern Iraq and Western Iran (Createspace, United States, 2013). See also Wadie Jwaideh, The Kurdish National Movement: Its Origins and Development (Syracuse University Press, New York, 2006).
[323] Jamal Jalal Abdullah, ibid. See also Wadie Jwaideh, ibid. See also David McDowall, ibid.

Kurds had been for a long period victims of a policy of forced displacement and transfer, especially after 1974.[324] Kurdish areas and villages had been subjected to wide-ranging Arabization programs and demographic change.[325] The Ba'ath government had used techniques of persuasion, enticement and intimidation to coerce the Kurdish population into leaving their villages, and their property and land bonds were revoked.[326] The government provided the various enticements and facilities for purposes of resettling the Arab population in the regions and villages of displaced Kurds.[327] Some Arab tribes who were transferred to Kurdistan were also victims because of suspicion of their political affiliation to the Islamic Dawa Party or the Communist Party, and these tribes also lost their property and lands.[328]

Campaigns of forced internal displacement and transfer conducted against the Kurdish population continued as political programmes of demographic change.[329] These campaigns had escalated with the Al-Anfal campaigns and were chemical attacks rose to the level of the full destruction of thousands of villages and their inhabitants. The ethnic origin was essential reason for the inhumane violations perpetrated against civilian Kurds and[330] this identity of the Kurdish population was without a doubt one of the main reasons for displacement. Some experts have commented that the motive of Saddam's regime was to destroy the Kurds to prevent them from gaining independence.[331] Therefore, it is clear that the internal displacements of the Kurdish population constitute the *actus reus* and *mens rea* of the crime of persecution.

It has been shown previously that similar acts of internal displacement in Iraq constituted the crime of other inhumane acts. These actions should, however, be addressed under one heading, either the crime of persecution or the crime of "other inhumane acts" because there cannot be

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[324] See, Martin van Bruinessen (n 285) 17. See also, HRW Report on 'Claims in conflict' (n 280) 9-10.
[325] Martin van Bruinessen, ibid, 17. See also, Jennifer Trahan (n 280). 355. See also: Document on 'The Arab Citizens' The Socialist Arab Ba'ath Party Doc. No. 1/950 (16/6/1987).
[326] HRW Report on 'Claims in conflict' (n 280) 9-10.
[327] Ibid. See also, HRW Report on 'Bureaucracy of repression' (n 282).
[328] Ibid.
[329] For example, Ali Al-Majid who is Saddam's cousin stated about demographic change in Kirkuk province that '[t]he Arabs and Turkomans were not more than fifty-one percent of the total population of Kirkuk ... I spent sixty million dinars until we reached the present situation the Arabs who were brought to Kirkuk didn't raise the percentage to sixty percent. Then we issued directives. I prohibited the Kurds from working in Kirkuk, the neighborhoods and the villages around it, outside the Autonomous Region.' He also stated that '[W]e must Arabize your area [Mosul]--and only real Arabs.' See, HRW Report on Genocide in Iraq: The Anfal campaign (n 280) 268, 270.
[330] Michael A. Newton (n 281) 1530, 1534.
[331] Alyssa C. Scott, 'Prosecution of Reproductive Crimes Committed During the Halabja Attack in the Iraqi High Tribunal' 6 (2010) *Berkeley Journal of International Law Publicist*, 13.

more than one conviction for the same act.[332] Thus the internal displacements in Iraq should be judged specifically as the crime of persecution, because this crime requires a distinct element, which is discriminatory element.

Conclusion

This chapter discussed and investigated whether the cases of internal displacement in Iraq during the Ba'ath regime can fall under the headings of international crimes, although appeared in the previous chapter that forcible transfer *per se* was not a crime under international law, except in a limited range of situations which do not apply to the Iraqi cases. This chapter investigated, first, whether certain international crimes, particularly the crime of persecution and other inhumane acts crime are established in customary international,, and then discussed their definition and determined their *actus reus* in addition to their additional requirements. Then the chapter examined whether the forced internal displacement or forcible transfer can be located within the definition of these crimes and meet their requirements.

This chapter has demonstrated that both the crime of persecution and the crime of other inhumane acts are crimes well established in customary international law. Moreover, it was shown that the *actus reus* of these crimes can involve acts of forced internal displacement. With respect to the *actus reus* of the crime of persecution it was shown that it can be constituted by two categories of actions. Some of these actions fall under the headings of the crime of genocide, war crimes and crimes against humanity. However, it will be sufficient if a persecutory action flagrantly violates essential human rights. Investigation proved that the act of forced internal displacement or forcible transfer could fall within these categories, which constitute the *actus reus* of the crime of persecution. In the context of customary international law it is established that the act of forcible transfer falls within the title of war crimes, as well as constituting an act of genocide with regard to the category of actions against children. Moreover, it is proven that forcible transfer blatantly violates basic human rights. Therefore, an act of forcible transfer can be considered tantamount to the *actus reus* of the crime of persecution, and then can criminalize under this crime. if such transfer meets the other requirements of persecution crime, especially that of the gravity, which should be equal to the

[332] See, *Krstic* Trial Judgement (n 127) 676.

gravity of other crimes against humanity and includes an element of discrimination on one or more of the three categories of political, religious or racial.

With regard to the cases of forced internal displacement in Iraq discussed in this chapter it was proved that these displacements fulfilled all the requirements which are mentioned and are therefore tantamount to the crime of persecution. It was shown that adherence to the Shi'ite religious sect had been a main fundamental reason for displace inhabitants both of the Marshlands and of Al-Dujail. In addition, the ethnic identity of the Kurdish people had been a main reason for displacing them.

The *actus reus* of the crime of "other inhumane acts" can be comprised of an act of forced internal displacement. It was shown that the *actus reus* of the crime of "other inhumane acts" should be a flagrant violation of basic human rights and be equal in gravity to other crimes against humanity. In addition to the *actus reus* of the crime of "other inhumane acts" it must cause suffering or injury to the victim or be an insult to human dignity. It was shown that the act of forced internal displacement involves all of these requirements, and this is confirmed by the findings the ICTY in many cases. Moreover, it appeared that the cases of forced internal displacement in Iraq, whether perpetrated against the population of the Marshlands or Al-Dujail or the Kurds, are without a doubt encompassed by the *actus reus* of the crime of "other inhumane acts", because all the requirements of this crime are provided by these cases in Iraq. These findings appear similar, whether the forcible transfer occurred by direct expulsion orders or was a logical and foreseeable consequence of the military attacks, or inhumane attacks on human rights, of the victim population. Such findings are supported by cases of the ICTY. These two types of forced relocation or displacement occurred both in the Marshlands and in Kurdistan. It has also been demonstrated that the intention and/or knowledge of causing suffering or injury or insult to human dignity required by the elements of the crime of "other inhumane acts" are available in all cases of internal displacement that occurred in Iraq. Therefore, the last cases are without doubt tantamount to the crime of "other inhumane acts" as a crime against humanity.

In conclusion, it appears that forced internal displacement in Iraq could constitute both the crime of persecution and the crime of 'other inhumane acts'. However, there cannot be simultaneous convictions for two crimes in relation to one act. Therefore there should be one condemnation and this should be under the crime of persecution, since this crime requires a specific element of discrimination on the foundations of religious or racial or political

discrimination. Thus the situations of internal displacement in Iraq fall under the title of the crime of persecution.

However, some of these displacements may constitute the crime of genocide and this will be investigated and discussed in a next chapter.

CHAPTER FIVE

CRIMINAL REQUIREMENTS OF FORCED INTERNAL DISPLACEMENT AND THEIR APPLICATION TO THE IRAQI CASES

Introduction

This chapter will explore when an unlawful act of forced internal displacement may amount to an international crime under the heading of crimes against humanity, and will then demonstrate that the Iraqi cases of the forced internal displacement were unlawful and were international crimes.

The chapter will investigate the legal and substantive elements and conditions that render an act of forced displacement illegal. Moreover, this chapter examines the chapeau requirements and elements by which an act of forced displacement can constitute an international crime against humanity. In view of all these points it will be determined whether the instances of forced internal displacement committed against many of Iraqi population during the Ba'ath ruling regime era were illegal displacements or were permissible. If they were unlawful then it will explore whether these displacements meet the chapeau elements of crimes against humanity. The chapter will demonstrate that the forced internal displacements that occurred in Iraq fulfil all of the conditions and requirements of both illegal displacement and criminal displacement as a crime against humanity, and that these displacements were not justified under human rights, international humanitarian or international criminal law.

5.1. The criminal requirements of forced internal displacement

Article 7(2)(d) of the Rome Statute defines the terms as follows: the phrase

> '[D]eportation or forcible transfer of population 'means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.'[1]

Moreover, in the view of this definition, the Elements of Crimes specify the elements of forcible transfer in Article 7(1)(e) as follows:

> '1. The perpetrator deported or forcibly transferred without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts.

[1] Art. 7(2)(d) of the Rome Statute.

2. Such person or persons were lawfully present in the area from which they were so deported or transferred.

3. The perpetrator was aware of the factual circumstances that established the lawfulness of such presence.'[2]

It is clear that the formulations of both the Rome Statute and the Elements of Crimes are based on the jurisprudence of the ICTY. Consequently, the international criminal jurisprudence is agreed concerning the meaning and conditions of the crime of forcible transfer. Thus, the Statute of the IHT does not differ from the jurisprudence cited above in its definition of the same crime. Accordingly, displacement that falls under the provisions of international crime is necessary to meet three conditions or specific components, which are that 1. The displacement be coerced or against the will of the people who are displaced 2. The presence of those displaced persons in the area from which they were displaced is not unlawful, and their displacement was not due to exceptional conditions of the kind permitted under international law.[3] Therefore, all these conditions will be addressed in order to discover which model of forced displacement should be treated as an international crime, and also whether the cases of Al-Dujail, Marshlands and Al-Anfal entailed unlawful forced internal displacements.

5.1.1. Displaced people were coerced or their freedom of choice was not considered when the displacement was implemented

As shown above that for an act of forced displacement to be seen as an international crime it should be caused by expulsion or other means of coercion. This does not mean that the "forced" element of the displacement should be narrowly understood, since it includes not only the use of physical coercion or force in order to coerce people to flee. On the contrary, the case law and jurisprudence of international criminal law are in agreement that the forced character of the displacement must be read in a way that extends beyond such a narrow understanding.[4] Coercion may be understood as

> '[t]hreat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment.'[5]

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[2] Art. 7(1)(e) of the ICC Elements of Crimes.

[3] Prosecutor v. Krnojelac (Trial Judgement) ICTY-IT-97-25-T (15 March 2002), para. 474. (Therein after *Krnojelac* Trial Judgement).

[4] Ibid.

[5] See, ibid, para. 475. See also, Prosecutor v. Simic (Trial Judgement) ICTY-IT-95-9-T (17 October 2003), 125. See also, Prosecutor v. Krstic (Trial Judgement) ICTY-IT-98-33-T (2 August 2001), 229. See also, Element of Crimes, footnote 12.

Moreover, the realization of coercion or duress does not require to be directed to the intended victims of the displacement. The victims could be displaced owing to the harm or the threat of harm that targets third persons, such as relatives.[6] The threat to third persons to coerce other people to leave their dwelling places must be taken into account in the context of the criminality test of the conditions and the elements of acts of forced displacement. Furthermore, it does not require that the offender must intervene personally by his/ or her behaviour to produce the coercion case: it is enough for a displacement to be considered forced if the perpetrator exploits or invokes certain environmental circumstances that can be employed to pay the individuals to flee reluctantly.[7]

One more essential meaning concerning the criterion of coercion in distinguishing between legal and illegal displacement is that the criterion can extend to all models of migration of an involuntary nature.[8] Or, in other words, when that the displacement is which is not performed on the basis of the real will of the people who are dislodged.[9] Although this standard is clear and explicit, the investigation into whether the will of displaced people is a real one seems not to be a simple factual matter. One of the difficulties which is faced by the investigation whether the displacement was based on the desire of displaced individuals, since the perpetrator may resort to forcing people who are displaced to sign or provide permits to confirm that their displacement was voluntary and based on their free choice. In this example, it is clear that the displaced did not have more than one option that is not to stay in their places of residence. Therefore, the jurisprudence which is derived from ICTY case law, which tested the genuine will of displaced and decided that this free will is opposite to the ostensible contentment which is expressed under intimidation or compulsion.[10] Thus, the merely subjective criterion of expressed personal satisfaction is not enough to infer that the displacement was voluntary; instead it is necessary, in the context of the process of assessing genuine free will, to be take into account all the circumstances surrounding the exodus.[11] It would not be appropriate to say that the choice and desire of victims were exhibited freely when they departed from their places of residence if they had undergone ill-treatment, arrest, threats, crimes or there were military operations or attacks directed against civilian properties and targets, or there were other crimes

[6] *Krnojelac* Trial Judgement, ibid, para. 475. *Simic* Trial Judgement, ibid, para. 125. *Krstic* Trial Judgement, ibid, para. 229.
[7] *Krnojelac* Trial Judgement, ibid. *Simic* Trial Judgement, ibid. *Krstic* Trial Judgement, ibid.
[8] *Simic* Trial Judgement, ibid. See also, Prosecutor v. Brdjanin (Trial Judgement) ICTY-IT-99-36-T (1 September 2004), para. 543.
[9] *Simic* Trial Judgement, ibid. See also, *Brdjanin* Trial Judgement, ibid.
[10] *Simic* Trial Judgement, ibid.
[11] Ibid, para. 126.

that terrorised the population.[12] On the other hand, the absence of discrimination or persecution could indicate that the displaced did truly have freedom of choice.[13]

The last question that should be answered is whether the forced displacement can convert to a legal and volitional one if there is common accord between the military and political leaders, consent of the official authorities or even the collective consent of a group of people to be displaced. In other words, can these accords and consents be a substitute for the individual's free will, and thus make the displacement lawful?

As long as such accord or consent was not given personally and individually by a victim of displacement, then the will of the victim has been ignored and the displacement will not be lawful and non-coercive.[14] It is noteworthy that a similar inference should hold even if the forced displacement is implemented under the supervision of humanitarian organizations.[15] Consequently, the forced or coercive adjective of displacement should be interpreted as contrary to the genuine voluntariness and free will of the displaced individuals.

An examination of the Iraqi situation in the light of the discussion above reveals without any doubt that the displacements of targeted people were not instituted on the bases of genuine free will or choice. On the contrary, the pattern of serious destruction, the facts of atrocities, the nature of the force involved the military attacks and discrimination with which the displacements were carried out confirms that the targeted people were under severe coercion and were lived in a frightening environment.[16] Moreover, such a conclusion is manifested in documents in which the governmental plans and their enforcement mechanisms were described.[17]

5.1.2. Foundations of international law that allow forced displacement

Displacement carried out in an involuntary and forced way constitutes an international crime, but only if there is no justification under international law which may permit or necessitate impose such displacement, whether in time of peace or war. Therefore, it should be decided whether such allowable pretexts were existent on the occasion of the forced internal

[12] Ibid.
[13] Ibid.
[14] Ibid, paras. 127-128.
[15] Ibid.
[16] See Chapter 4, 206-224.
[17] Ibid.

displacements in Iraq. The international law of human rights and international humanitarian law must be examined in order to determine whether the forced displacement is prohibited or lawful, especially when the forced displacement curtails rights such as the right of liberty of movement and choice of residence and the right to adequate housing. In such situations, there may be violations of some provisions of international humanitarian law as they are explicitly stated in Article 49 of the Geneva Convention IV and Article 17 of Protocol II. However, both of these laws point to some cases in which the displacement can be permissible or may be a duty.

5.1.2.1. The cases of forced displacement permitted under the justifications of international law of human rights

There are two reasons which can render the forced displacement allowable in the context of this law. The first type is the exceptional 'derogations' which can be imposed on many of the fundamental human rights and freedoms as provided by Article 4 of the ICCPR. The other type is the 'ordinary limitations', such as those that are contained in Article 12 of the ICCPR on the freedom of movement and residence.

5.1.2.1.1. Derogations of human rights

A guarantee the human rights and liberties themselves as well as the higher interests of a community assume, in some cases, that these rights cannot be rigid or inflexible.[18] For example, it may be necessary to save those rights and interests that a State has recourse to deprivation of property or liberty of speech and communication to deal with blatant cases of 'civil unrest, the threat to perceived territory, flagrant famine, geographical disaster or armed conflicts.'[19] The drafters of the Covenant bore this issue in mind, and their legal solution was stated in Article 4 of the ICCPR.

What it is afforded in Article 4 is that

> '1 . In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present

[18] See, Emilie M. Hafner-Burton, Laurence R. Helfer and Christopher J. Fariss, 'Emergency and escape: Explaining derogations from human rights treaties' 65 (2011) *International Organization*, available at <http://scholarship.law.duke.edu/faculty_scholarship/2324/> accessed on October 22, 2016, 673-676. See also, Philip Alston and Ryan Goodman, *International human rights: The successor to international human rights in context* (Oxford University Press, Oxford, 2013), 394-402. See also, Julian M. Lehmann, 'Limits to counter-terrorism: Comparing derogation from the International Covenant on Civil and Political Rights and the European Convention on Human Rights' 8 (2011) *Essex Human Rights Review*, available at <http://projects.essex.ac.uk/ehrr/vol8no1.html> accessed on October 22, 2016, 104, 107.

[19] Rhona K. M. Smith, *Texts and materials on international human rights* (Routledge, abingdone, 2010), 101.

Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.'[20]

It is clear from this text that human rights and liberties commitments can curtailed or reduced if it is found that one or more of the public emergency situations, such as armed conflict, threaten normal life and the nation as whole.[21] In such emergency cases, states can give up some of their obligations to break a prohibition against violating or to restricting the right of individuals to enjoy their rights. However, this does not mean that the curtailments can be absolute or unconditional. On the contrary, there is a set of conditions that must be available or afforded by the conduct of concerned state in order to be congruous with the aforesaid provisions of Article 4.[22]

1. The existence of a state of emergency

It is not sufficient that the state of emergency should be perceived or foreseen, rather it must be real and existing. If it is not, then the state concerned cannot resort to exceptional measures to restrict human rights.[23] In addition to, it is not every state of emergency that empowers the state authorities to restrict human rights; it must be a serious emergency that worries the

[20] Art. (4) of the ICCPR.
[21] CCPR General Comment No. (29) on 'State of emergency (Art. 4) of ICCPR)' UN Doc. CCPR/C/21/Rev.1/Add.11 (31 August 2001), para. 3. (Therein after CCPR General Comment No. 29).
[22] Ibid.
[23] Walter Kalin and Jorg Kunzli, *The law of international human rights protection* (Oxford University Press, New York, 2009), 144, at footnote 103. See for further details and jurisprudence on these situations, Joan F. Hartman, 'Derogation from human rights treaties in public emergencies: A critique of implementation by the European Commission and Court of Human Rights and the Human Rights Committee of the United Nations' 22 (1981) *Harvard International Law Journal*, 16, 23-31.

international community, particularly in relation to peace and security.[24] The provisions of Article 4 are designed to apply to the most serious situations of emergency.[25]

2. Respect for the principle of proportionality

Measures taken to address states of emergency that interfere with one or more human rights should be chosen so as not to exceed the exigencies of the state of emergency.[26] In addition, the exceptional measures should not be permanent or habitual, but should be suspended when the threat to life ends and they are no longer necessary.[27] Also, the measures should be carefully chosen with regard to the suspension of each human right.[28] Hence, the derogation should be related to the 'duration, physical scope and geographical coverage'[29] of the emergency. Therefore, states must return to full respect for human rights as stipulated in the Covenant when normal life is restored.[30]

3. Adherence to the principle of non-discrimination

The derogation measures do not entitle states to use them as a pretext or a modality to discriminate against members of ethnic, racial or religious groups or on the basis of gender.[31] This principle must not be violated in any circumstances. It is one of the basic principles governing the policies of countries in the application and implementation of human rights obligations.[32]

4. Rights are non-derogable

Authorization which allows states to restrict one or more of human rights during the state of emergency does not extend to all kinds of human rights. There are rights which must be guaranteed and effective in all circumstances, regardless of whether there is an emergency situation.[33] For example, the prohibition of retroactive laws, the prohibition of prison for debt, the right of recognition as a person before the law, freedom of thought and conscience and

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[24] Joan F. Hartman, ibid. See also, Rosalyn Higgins, 'Derogations from human rights treaties'. In: Pat Rogers, *Themes and theories* (Oxford Scholarship Online, 2012), 286-287. See also, Julian M. Lehmann (n 18) 107. See also, Rhona K. M. Smith (n 19) 85.
[25] Joan F. Hartman, ibid, 24.
[26] See Art. 4(1) of the ICCPR. See also, Art. 15 of the ECHR. For further details and case jurisprudence on this topic see Rosalyn Higgins (n 24) 302-305. See also, Joan F. Hartman, ibid, 17-18, 31-36.
[27] CCPR General Comment No. 29 (n 21) paras. 1, 4. See also, Julian M. Lehmann (n 18) 109-111. See also, Walter Kalin and Jorg Kunzli (n 23) 144-145.
[28] Ibid. See also, Joan F. Hartman (n 23) 17.
[29] See also, Rhona K. M. Smith (n 19). See also, CCPR General Comment No. 29 (n 21) para. 4.
[30] Ibid.
[31] Art. (4)(1) of the ICCPR. See, CCPR General Comment No. 29 (n 21) para. 8. See also, Walter Kalin and Jorg Kunzli (n 23) at footnote 107.
[32] Walter Kalin and Jorg Kunzli, ibid.
[33] Art. (4)(1) of the ICCPR.

religion are non-derogable.[34] However, these categories of rights are not exclusive and other rights not mentioned here are also non-derogable.[35] In this regard, the CCPR confirmed that some of the violations that constitute international crimes including illegal forcible transfer or forced displacement are within the range of rights that are non-derogable.[36]

5. Respect for other obligations of the state under international law

To preserve the legal nature of the measures that are taken in a state of emergency, these measures should not give rise to the violation of other commitments of the State under international law.[37] That is, the special provisions relating to the state of emergency can not be a justification for ignoring other international obligations. There are commitments relating to human rights that amount peremptory norms or that may not be restricted under special treaties, and there are those that have emerged from international humanitarian law particularly the Geneva Conventions and the Additional Protocols thereto.[38]

6. Advertising and notification of the emergency measures

To be in compliance with the provisions of Article 4, the extraordinary emergency measures need to be formally declared within the country concerned. Also, the CCPR or other international bodies concerned must be informed so that they can oversee the emergency state and the measures adopted.[39] Such a declaration or report will ensure that the principles of the rule of law are safeguarded.[40] The announcement should reveal the nature of the emergency powers that are exercised and which rights are to be derogated and the consequences.[41] Thus, the emergency measures and powers should be organized through the constitution or laws and regulations that do not contradict the purpose and provisions of Article 4 of the ICCPR.[42] In addition, the announcement and reporting will provide assurance to the CCPR concerning the

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[34] See Art. (4)(2) of the ICCPR. See also, Rosalyn Higgins (n 24) 287. See also, Linda Camp Keith, 'The United Nations International Covenant on Civil and Political Rights: Does it make a difference inhuman rights behavior?' 36 (1999) *Journal of Peace Research*, 104-105.
[35] CCPR General Comment No. 29 (n 21) paras. 7, 11-16.
[36] Ibid, para. 13.
[37] Ibid, paras. 9-10. See also, Rosalyn Higgins (n 24) 305-306.
[38] CCPR General Comment No. 29, ibid, para. 9-11. See also, Julian M. Lehmann (n 18) 115-118. See also for further details on this point, Philip Alston and Ryan Goodman (n 18) 404-412.
[39] CCPR General Comment No. 29, ibid, para. 17. See also, Julian M. Lehmann, ibid, 111-112. See also, Rosalyn Higgins (n 24) 289-293. See also, Joan F. Hartman (n 23) 18-21.
[40] CCPR General Comment No. 29, ibid, para. 2. See also, Joan F. Hartman, ibid.
[41] Rosalyn Higgins (n 24) 289.
[42] Ibid.

control measures, and emergency authorities and show whether they are compatible with the Covenant.[43]

5.1.2.1.2. Ordinary limitations on human rights

These restrictions can be applied in normal circumstances. The goals of such restrictions are the maintenance of national security, public order, public morality and/ or public health, and also to uphold the rights of other individuals.[44] Rights and freedoms such as freedom of movement and residence, freedom of expression, freedom of religion and belief and public trial and others can be subject to such restrictions.[45]Article 12 of the ICCPR provides that individuals have freedom of movement inside and outside a State as well as the freedom to choose a place of residence, but these freedoms may be restricted in accordance with Article 12(3), which states

> '[T]he above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.'[46]

Such restrictions may in some cases require that the people should be evacuated from a certain area to ensure their protection from hazardous events that cause harm, such as natural disasters or armed conflict areas.[47] There may also be an evacuation as one of the consequences of vital development projects, such as the building of a dam, or the construction of an airport or elevated road.[48] It is worth mentioning that the legislature must recognize these limitations by

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[43] In this respect, there are many cases in which a party State did not respect its obligation concerning the condition in question. See for example, Emilie M. Hafner-Burton, Laurence R. Helfer and Christopher J. Fariss, (n 18) 682-683. See For further details on the historical context of these limitations, see Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (Norbert Paul Verlag, Eisenbahnstr-Germany, 2005), 270. See also Rosalyn Higgins, ibid, 287, 307-308.

[44] For further details on the historical context of these limitations, see Manfred Nowak, ibid, 270. For example, it may be forbidden for the individuals to pass through military domains, or the freedom of movement may not freely practiced by those persons who hold military secrets. Also, the restrictive measures may be invoked for the prevention of diseases, dangerous epidemics, sanitation problems or other serious health risks; or prohibition of prostitution, especially in particular areas, or it may prohibit public bathing in other than designated places. See, Manfred Nowak, ibid, 276, 280. See also, Walter Kalin and Jorg Kunzli (n 23) 489.

[45] Ibid. See also, Rosalyn Higgins (n 24) 287, 307-308.

[46] Art. 12(3) of the ICCPR.

[47] Walter Kalin and Jorg Kunzli (n 23) 488-489, 503.

[48] Ibid, 503.

the law.[49] This law should not contradict international law and should be accessible and foreseeable.[50]

With respect to the Iraqi examples of forced displacement in the cases of Al-Dujail, Marshlands and Al-Anfal, and whether or not these displacements could be justified under a state of emergency. It is notable that in case of Al-Dujail although there was assassination attempt of former president 'Saddam', the attempt failed and ended in the same day.[51] The doers of attempt were around ten persons; even so, the Ba'ath government launched a revenge campaign of violence and military attack against the Shiite families in Al-Dujail.[52] Regarding the situation in Marshlands, the governmental allegations were conflicting. It claimed that its campaign carried out because the Marshlands presented a hidden place for criminal elements who were either military deserters or participants in the March 1991 uprisings.[53] However, the Special Rapporteur on Iraq, Mr. Max van der Stoel, viewed this insufficient reason to justify the random military attacks and blatant violations against the civilians in order to capture or eliminate a small group of military deserters or opponents.[54] It also pretended that the campaign were for the purpose of agricultural reclamation and to improving the life of population.[55] As shown by Chapter Four, this allegation was false, since the marshes remained parched, salty, infertile earth and even desert.[56] According to Iraqi military documents, the plans against the marshes was prepared in 1987, i.e. even before the uprising of 1991.[57] These plans were put for punitive purpose.[58] Thus, it is difficult to claim that there was a state of emergency in both Al-Dujail and Marshlands cases. While a situation of emergency could be invoked in the context of Al-Anfal case due to a situation of internal armed conflict between forces of government and Kurdish armed group. However, this is not free from challenges, since Al-

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[49] See, Manfred Nowak (n 43) 271-272.
[50] Chaloka Beyani, *Human rights standards and the movement of people within States* (Oxford University Press, New York, 2000), 9-10.
[51] Chapter 4, 213-217.
[52] Jennifer Trahan, 'Book Review on: Michael A. Newton and Michael P. Scharf, Enemy of State: The trial and execution of Saddam Hussein' 18 (2009) *Cornell Journal of Law and Public Policy*, 838-840.
[53] Report of Special Rapporteur on Iraq, Mr. Max van der Stoel, on 'Human rights questions: Human rights situation and Reports of Special Rapporteurs and Representatives, Situation of human rights in Iraq' UN Doc. A/47/367 (10 Aug.ust 1992), para. 11. (Therein after Report of Special Rapporteur on Iraq, Mr. Max van der Stoel, on Situation of human rights in Iraq). See also, G. Broadbent, 'The ecology of the mudhif'. In: Geoffrey Broadbent and C. A. Brebbia, (eds) *Eco-architecture II: Harmonisation Between Architecture and Nature* (WIT Press, Boston, 2008), 21.
[54] Report of Special Rapporteur on Iraq, Mr. Max van der Stoel, on Situation of human rights in Iraq, ibid, para. 11.
[55] Chapter 4, 208-210.
[56] G. Broadbent (n 53) 21.
[57] Ibid.
[58] Ibid.

Anfal campaigns aimed to destroying the civilian of Kurdish people, and these campaigns would be taken whether the armed conflict was or was not existed.[59] In particular, the Iraqi government rejected to engage in negotiation with the Kurdish leader 'Jalal Talabani', and its rejection was expressed by a message of military attacks.[60] In addition, the campaigns in the cases above were discriminatory and based on either religious ground against the Shiite population of both Al-Dujail and Marshlands or ethnic ground against the Kurds.[61] The displacements in these examples involved gross violations, a sizeable number of casualties including women, children and elderly; and wide destruction for the targeted areas, homes, lands, means of livelihood.[62] Then, this breaches the stipulations of the emergency state that should be met as discussed above. Furthermore, it is mentioned above that the prohibition against the forced displacements is one of the non-derogable rights that should not be violated even if there a state of emergency. Thus, it can be concluded that neither displacements nor other violations in Iraqi were and could be justified by a pretext of an emergency state. This is, in particular, the Iraqi government did not announce that a state of emergency would be applied and then there would be set exceptional rules and restrictions to the human rights and freedoms. This was confirmed by the UNCHR and its Special Rapporteur on the Situation of human rights in Iraq. For example, they affirmed that

> '[W]ith respect to the Government of Iraq's references to the period of the Iran-Iraq war as a period of abnormal circumstances somehow mitigating the Government's responsibility for human rights violations, the Special Rapporteur finds this argument untenable primarily because there is no relation in law or in logic between the existence of a state of emergency like a war and the commission of the various egregious acts of which the Government has been accused, such as widespread and systematic torture and arbitrary or summary execution of civilians or combatants. In this last respect, it must be noted that even the tenets of international humanitarian law (which may be said to be largely embodied in the four Geneva Conventions of 1949, to which Iraq is a

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[59] See also, A Middle East Watch Report on 'Genocide in Iraq: The Anfal campaign against the Kurds' Human Rights Watch (1993), 266-270. (Therein after HRW Report on 'Genocide in Iraq').

[60] Ibid.

[61] James R. Arnold, *Dictatorships: Saddam Hussein's Iraq* (Twenty-First Century Books, Minneapolis, 2009), 77-78. See also, Human Rights Watch, 'Iraq: Devastation of Marsh Arabs' available at <https://www.hrw.org/legacy/press/2003/01/iraq012503.htm> accessed on November 30, 2016. See also, Report of Special Rapporteur on Iraq, Mr. Max van der Stoel, on Situation of human rights in Iraq (n 53), para. 10. See also, HRW Report on 'Genocide in Iraq' (n 59). See also, Bruce P. Montgomery, 'The Iraqi Secret Police files: A documentary record of the Anfal genocide' 52 (2001) *Archivaria*.

[62] G. Broadbent (n 53) 21. See also, Robyn Eckersley, 'Ecological intervention: Prospects and limits.' In: Joel H. Rosenthal and Christian Barry, (eds). *Ethics & International Affairs: A Reader* (Georgetown Unversity Press, Washington, 2009), 138. Thomas Cushman, 'The Human rights case for the war in Iraq: A consequentialist view'. In: Richard Wilson (ed). *Human rights in the 'War on Terror'* (Cambridge Unversity Press, 2005), 88. See also, Bruce P. Montgomery, ibid. See also, See also, HRW Report on 'Genocide in Iraq', ibid. See also, Jennifer Trahan (n 52) 13.

> party) prohibit such acts as are attributed to the Government. Moreover, the Special Rapporteur observes that many of the allegations of violations by the Government of Iraq relate to events that took place well outside the actual war zone, while many other allegations relate to events before or after the period of the war which began with Iraq's attack on Iran in September 1980 (see Security Council document S/23273) and continued to the ceasefire of July 1988.
>
> ... the Government of Iraq has neither officially declared a state of emergency nor otherwise proceeded under article 4 of the Covenant on Civil and Political Rights to effect permissible derogations from its human rights obligations. ... the Special Rapporteur refers to his remarks in paragraph 60 of his interim report in rejecting the above arguments of "special circumstances" and concluding again that all normal standards apply.'[63]

Regarding the ordinary restrictions two reason that are national security and public order might be invoked in related to the Iraqi cases above. However, as the case with the emergency state these two reasons could not be sufficient to justify the massive abuses and atrocities including the forced displacements that committed against the population. This is since that the restrictive measures must not be arbitrary or implemented through assault or intimidation or by deprivation of benefits such as employment or education.[64] This ensures that the principle of proportionality will be maintained and ensures the application of the minimum of humane standards.[65] The restrictive measures also must be acceptable in terms of other rights contained in the ICCPR.[66] For example, the provisions of Article 27 of the ICCPR state that an individual must not be prevented from living within his/ or her special cultural community, and the members of this community must not be prevented from communicating in their own language or enjoying their own social and cultural identity.[67] It is notable that this provision was violated in the context of the attacks and displacements occurred against the Kurdish and Marshlands communities. Thus, the forced displacements in the Iraqi examples above can not be authorised under the ordinary restrictions rules. In particular, the CCPR rejected to dealing with forced displacement as a lawful measures under the ordinary restrictions. The CCPR stated that

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[63] UNCHR Report of the Special Rapporteur on 'Situation of human rights in Iraq, submitted by the UNCHR-UNESC in its (48th Session), pursuant to UNCHR Res. 1991/74,' UN Doc. E/CN.4/1992/31 (18 February 1992), paras. 25, 39.

[64] CCPR General Comment No. (27) on 'Freedom of Movement (Art. 12) of ICCPR' UN Doc. CCPR/C/21/Rev.1/Add.9 (1 November 1999), para. 17. (Therein after CCPR General Comment No. 27). See also, Chaloka Beyani (n 50) 13.

[65] Manfred Nowak (n 43) 275.

[66] Chaloka Beyani (n 50) 13.

[67] Ibid, 12-13. Also, Art (27) of the ICCPR provides 'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.'

'[S]ubject to the provisions of article 12, paragraph 3, the right to reside in a place of one's choice within the territory includes protection against all forms of forced internal displacement. It also precludes preventing the entry or stay of persons in a defined part of the territory.'[68]

5.1.2.2. Justifications for displacement in international humanitarian law

Forced displacement is mentioned principally in two significant contexts in international humanitarian law. Article 49 of the Geneva Convention IV mentions the prohibition of the practice of transfer and deportation of occupied populations by the occupying power. In addition, Article 17 of Protocol II states that it is forbidden for the parties involved in internal armed conflict to resort to the practice of the movement of civilian population. However, each of these texts confirms that the armed conflict parties or occupying power can, or sometimes must, ignore such prohibitions for two purposes: either the protection of civilians' security or for imperative military reasons. These exceptional situations are described under the term 'evacuation'.

5.1.2.2.1. The security of the civilian population

The parties in an armed conflict, including internal conflicts, are obliged in their conduct during hostilities to prevent civilians from suffering its consequences, such as heavy shelling, especially when the civilians are in areas close to military targets.[69] In some cases it may be difficult to avoid inflicting damage on civilians unless those civilians are evacuated from those areas for the purpose of protecting them.[70] In some cases the duty imposed on the parties is a legal obligation, since it is derived from the precautionary instruments set forth in Article 58 of Protocol I.[71] Although these provisions are related to international armed conflicts, they are can apply also to internal armed conflicts, which are subject to the provisions of Common Article 3 of the Geneva Conventions and the provisions of the Protocol II. The reasons for reaching this conclusion can be found in ICTY case law and the study of customary

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[68] CCPR General Comment No. 27 (n 68) para. 7.

[69] See, Jean S. Pictet, (ed), *Commentary: IV Geneva Convention relative to the protection of civilian persons in time of war* (ICRC, Geneva, 1958), 280.

[70] There are many cases which allow or impose on the warring parties an obligation to evacuate civilian populations. Such cases can be traced through Articles (17), (22-31), (38)(4), and (49)(2) of the Geneva Convention IV, as well as Articles (4)(3), (5)(c)(2)(c)(d), (17)(1) and (78)(1) of the Protocol II. See, Humanitarian Law Consultancy, 'Burundi's regroupment policy: a pilot study on its legality' (1997) Humanitarian Law Consultancy, 17.

[71] Art. (58) of Protocol I provides 'The Parties to the conflict shall, to the maximum extent feasible:
(a) without prejudice to Article 49 of the Fourth Convention, endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives; (b) avoid locating military objectives within or near densely populated areas; (c) take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.'

international humanitarian law prepared by the ICRC. In this regard, a duty to keep civilians away from military targets was acknowledged by the Trial Chamber in the case of *Prosecutor v. Kupreskic* when it stated, in relation to Article 58 of Protocol I that this duty without a doubt existed as a general rule even before it was officially formulated in a binding document.[72] The ICRC endorsed the same opinion on the basis of the principle of the distinction between civilians and combatants and on the grounds of general protection of the civilian population, as laid down in Article 13(1) of Protocol II.[73] Article 13(1) says

> '[t]he civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations.'[74]

Relatedly, the ICRC comment on Article 24 of its study that the provisions of Article 13(1) necessarily implies the duty to set in place the precautionary measures, including the evacuation of the civilian population.[75] This analysis reflects one of the major objectives of humanitarian international law which seeks to reduce the consequences of war and military operations on civilian populations to the minimum and to put in place all possible measures for safeguarding them.[76] The ICRC commentary spoke of evacuation measures and other means of giving protection, such as 'hospital and safety zones, neutralized zones, and the evacuation of besieged or encircled areas.'[77] It also stated, concerning the evacuation mentioned in Article 17(1) of the Protocol II that

> '[i]t is self-evident that a displacement designed to prevent the population from being exposed to grave danger cannot be expressly prohibited.'[78]

However, the existence of such rules does not guarantee that the parties in an armed conflict will transfer civilians to places safety. There is also the possibility that such rules can be used

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[72] Prosecutor v. Kupreskic (Trial Judegment) ICTY-IT-95-16-T (14 January 2000), 176.
[73] Jean-Marie Henckaerts and Louise Doswald-Beck, (ed), *Customary international humanitarian law Vol (I)* (Cambridge University Press, New York, 2005), 74-76.
[74] Art. (13)(1) of the Protocol II.
[75] The study observed that case law and other material supports its conclusions and reflects customary international law in the context of both international and non-international armed conflicts. See, Jean-Marie Henckaerts and Louise Doswald-Beck (n 73) 74-75. See also, for practice and case law, Jean-Marie Henckaerts and Louise Doswald-Beck, (ed), *Customary international humanitarian law Vol (II)* (Cambridge University Press, Cambridge, 2005), 441-450.
[76] This is clearly stated even in the Lieber Code (1863) and the Petresburg Declaration (1868). See, Humanitarian Law Consultancy (n 70) 16.
[77] See articles (14) and (15) and (17) of the Geneva Convention IV. See also, Jean S. Pictet (n 69) 280.
[78] Yves Sandoz, Christophe Swinarski and Bruno Zimmermann, (ed), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff Publishers, Geneva, 1987), para. 4853, 1472.

as a pretext to justify the targeting of the civilian population through the displacement as a criminal act in the context of war or as a military tactic.

5.1.2.2.2. Imperative military reasons

On the basis of military necessity, civilian populations can be geographically relocated without violating the provisions of international humanitarian law, or international criminal law. It is notable that Article 7(2)(d) of the Rome Statute uses the phrase 'imperative military reasons.' This phrase seems to have been borrowed from both Article 49(2) of the Geneva Convention IV and Article 17(1) of Protocol II. While the Elements of Crimes uses the phrase 'military necessity'. This makes no difference, since both phrases give same meaning. This as one writer have commented that this is not an effective major or substantive change.[79] In this connection, the ICRC commentary compared the two phrases as follows:

> '[I]mperative military reasons. Military necessity as a ground for derogation from a rule always requires the most meticulous assessment of the circumstances. In this case, military necessity is qualified by referring to 'imperative military reasons'.[80]

With regard to these reasons, the ICRC commentary stated that these reasons allow or may impose on the warring parties a duty to evacuate the civilian population. The commentary said in this respect that

> '[T]he same applies when the presence of protected persons in an area hampers military operations. Evacuation is only permitted in such cases, however, when overriding military considerations make it imperative; if it is not imperative, evacuation ceases to be legitimate.'[81]

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[79] William A. Schabas, *The International Criminal Court: A commentary on the Rome Statute* (Oxford University Press, New York, 2010).

[80] Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (n 78) para. 4853, 1472-1473. Despite the difficulty of defining and determining the concept and conditions of military necessity without controversy the ICRC commentary afforded some definitions. For example, bearing in mind the balance between military necessity and humanitarian requirements as a basic purpose of international humanitarian law, the ICRC commentary explained that '[M]ilitary necessity means the necessity for measures which are essential to attain the goals of war, and which are lawful in accordance with the laws and customs of war. Consequently a rule of the law of armed conflict cannot be derogated from by invoking military necessity unless this possibility is explicitly provided for by the rule in question. Conversely, when the law of armed conflict does not provide for any prohibition, the Parties to the conflict are in principle free within the constraints of customary law and general principles ... This is the Martens clause. ... When this possibility is explicitly provided for, the Parties to the conflict can only invoke it to the extent that it is ... provided for.' See, Yves Sandoz, Christophe Swinarski and Bruno Zimmermann, ibid, para. 1389, 392-393. For more discussion on military necessity, see also ibid, para. 1390-1397, 394-396.

[81] Jean S. Pictet (n 69) 280.

Thus, before an order for displacement is given, the situation should be inspected with great caution because the attribute 'imperative' should be applied in only a minimal number cases,[82] and in cases when the population staying in place is more hazardous than the evacuation.[83] Moreover, it is not justified under this measure to move people for political motives, because such motives cannot be described as imperative military reasons.[84] It is not acceptable, for example, to recourse to displacement measures if the purpose is to place a dissident ethnic group under the effective control of the authorities.[85] Similarly, the concentration of thousands of civilians in camps for the sole purpose of depriving the insurgent groups of local support is not justified under international humanitarian law.[86]

5.1.2.2.3. Evacuation should be conducted under humane conditions

It is significant to note that the evacuation will not be lawful, even when it is in the interests of the security civilians or for imperative military reasons unless it carried out in a humane manner, as is stipulated in both Article 49(3) of the Geneva Convention IV and Article 17(1) of Protocol II. In these provisions displacement as an exceptional measure must be accompanied with the utmost care for such as appropriate accommodation, health care, nourishment and hygiene.[87] In addition, the evacuation processes should maintain the unity of family members.[88] The evacuation must be ended and the displaced persons returned to their dwellings when the reasons for the evacuation cease, to exist, since the evacuation arrangements are of a provisional nature.[89] If these humane requirements are not fulfilled then the evacuation will not be lawfully justified and may amount to a war crime or other type of international crime.

In the case of Iraq, especially during the internal armed conflict between the Kurdish military group and the government forces, the government expelled and transferred the Kurdish population from many villages. In the case of Al-Anfal before the IHT, the defendants alleged that their actions including the forced displacements had been in accordance with the requirements of military necessity and protection of civilians.[90] In reality, an examination to

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[82] Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (n 78) para. 4853, 1473.
[83] Humanitarian Law Consultancy (n 70) 16.
[84] Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (n 78) para. 4854, 1473.
[85] Ibid.
[86] Melanie Jacques, *Armed conflict and displacement: The protection of refugee and displaced persons under international humanitarian law* (Cambridge University Press, New York, 2012) 56.
[87] See, art. (49)(3) of the Geneva Convention IV and art. (17)(1) of the Protocol II.
[88] See, art. (49)(3) of the Geneva Convention IV.
[89] Art. (49)(3) of the Geneva Convention IV.
[90] See, Chapter 4, 219.

the facts, violations, statements and documents of Al-Anfal campaigns shows that the military necessity and even the protection of civilians could not be invoked in this case. In this respect, the statements of Ali Al-Majid who was principal official for implementing of Al-Anfal campaigns reveal clearly that neither the protection of civilians nor the requirements of military necessity as set in international humanitarian law were behind the displacements. For example, he stated that

> '[B]y next summer there will be no more villages remaining spread out here and there, but only complexes. It'll be just like the hen when she puts the chicks under her wing. We'll put the people in the complexes and keep an eye on them. We'll no longer let them live in the villages where the saboteurs can go and visit them. Emigration from the villages to the city is necessary in the north of Iraq. .... If we don't act in this way the saboteurs' activities will never end, not for a million years. ..... this [deportation] hurt them. It kills them'[91]

He disclosed that a decision had been taken to

> '[d]eport all the villagers in order to isolate the saboteurs. ... anyone who was arrested in those areas was to be killed immediately without any hesitation, according to the directives which are still in force.'[92]

Thus, it can be deduced that the government was seeking to impose complete domination over the areas to in which populations were targeted, and to prevent dissident military groups to obtain support from those populations. The governmental plans sought to impose conditions that would destroy and eliminate the armed opposition groups. The governmental plan was motivated on ethnic grounds because the vulnerable population and the armed groups belong to the same ethnic group, the Kurds.[93] On the part of civilians, they were prevented from getting kerosene, electricity, flour, water and sugar.[94] They experienced shocking violence and the effects of chemical weapons attacks. Furthermore, the camps and constructions to which the population was moved were detention centres under rigorous governmental control. In these places, the conditions of the displaced were harsh, and some of them were centres of horror and death, and a large number of displaced were buried in mass graves.[95] There was comprehensive destruction of human life; lands, homes, animals, cattle, birds and environment, water supply and an economic blockade.[96] Thus, this demonstrates that Ba'athist Iraqi governmental plans blatantly infringed all provisions which prohibit displacement, even those

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[91] HRW Report on 'Genocide in Iraq' (n 59) 266-267.
[92] Ibid, 269.
[93] Ibid.
[94] Ibid, 266.
[95] See, Chapter 4, 217-219, 224. See also, Bruce P. Montgomery (n 61) 89-95.
[96] Bruce P. Montgomery (n 61) 89-95.

provisions which allow the evacuation of the population as exceptional measures. These displacements also certainly amount to international crimes, as was shown in previous chapter. Then, it cannot be said, that these displacements took place under the provisions of international humanitarian law.

5.1.3. Clause of lawful presence

To amount to an international crime, forced displacement requires that the displaced people were not dislocated from a place where they resided illegally. In other words, if the attendance of people in certain areas was forbidden according to the law, and then such people were relocated, and thus this cannot lead to the inference that those responsible committed the crime of forcible transfer. However, the interpretation of this clause faces some difficulties. It is not clear whether the lawful character of their presence in an area should be based on domestic or international law. Another difficulty is whether this stipulation is intended to cover only displacement practices outside the boundaries of a State or within these boundaries as well. In other words, does the word 'area' refer to the territory of State, if this true then this condition will be limited to those foreigners who dwell in a territory which is other than their own State, because only such foreigners need legal permission.

There is no direct and clear explanation to illustrate this condition.[97] The jurisprudence deals with acts of forced displacement by referring to the necessity or otherwise of this requirement; when the Chambers of the ICTY analysed the facts of forced displacement they referred to the circumstance of whether or not that the presence of the displaced was lawful without further explanation or detail.[98] Nonetheless, the Trial Judgement in the case of *Prosecutor v. Popovic* remarked that

> '[t]he requirement for lawful presence is intended to exclude only those situations where the individuals are occupying houses or premises unlawfully or illegally and not to impose a requirement for "residency" to be demonstrated as a legal standard.'[99]

International law in turn can be helpful to provide some interpretations to answer the question regarding the nature of the laws which must be taken into account in order to decide whether or not the presence of people in certain areas was lawful. These interpretations show that it is

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[97] Guido Acquaviva, 'Forced displacement and international crimes' (2011) *Legal and Protection Policy Research Series*: United Nations High Commissioner for Refugees (UNHCR), 22-23.
[98] Ibid, 22.
[99] Ibid. See also, Prosecutor v. Popovic (Trial Judgment) ICTY- IT-05-88-T (10 June 2010), para. 900.

national law that has the authority to determine when and where the presence of people is or is not an abuse of the law.[100] However, such national law is not free from all external restraint: it must be consistent with the standards and provisions of international law, particularly with the international obligations of the state concerned.[101] In this respect, the ICCPR uses words similar in meaning to 'lawfully present'. Regarding the freedom of movement and freedom of choice of place of residence, it employs the phrase

> '[E]veryone lawfully within the territory of a State … .'[102]

In its comment, the CCPR distinguished between two categories of persons: those who are national citizens whose presence is legal within the territory of their own country; and others who are aliens whose legal presence in a country other than their own requires a state law by which they must abide.[103] Nonetheless, the enjoyment of this freedom can be restricted by a domestic law when one or more of the legal justifications specified in Article 12(3) of the ICCPR pertain, as explained above. In addition, the domestic law should not be opposed to other rights and freedoms cited in the ICCPR and should not violate the gist of freedom. It must also fulfil a set of international legal standards and the obligations of the state concerned must be respected. Consequently it can be concluded that both domestic law and international law play a part in specifying where and when the presence of someone is lawful. Such a view concerning the law that should also take into account what has been established through jurisprudence in cases addressed by regional human rights organs, such as the ECtHR, the Inter- American Court on Human Rights[104] and the African Commission on Human Rights.[105]

It is noteworthy that all the victims of forced displacement carried out by the Ba'ath regime were Iraqi citizens. Moreover, the ancestors of victims, such as the Kurdish and Marshland communities, had lived for thousands of years in the areas and villages from where they were displaced.[106] This confirms that the presence of these victims was lawful, and there was no a

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[100] CCPR General Comment No. 27 (68) See, Manfred Nowak (n 43).

[101] See, Oxford Pro Bono Publico Group, 'Are the activities conducted during operation murambatsvina crimes against humanity within the meaning of article 7 of the Rome Statute?' *International Law Opinion: Oxford Pro Bono Publico Group*- University of Oxford available at <http://abahlali.org/files/OPBPZimbabweOpinion.pdf> accessed on November 5, 2016, 21-26. (Therein after Oxford Pro Bono Publico Group on 'Operation Murambatsvina crimes against humanity'). See also, CCPR General Comment No. 27, ibid. See also Manfred Nowak, ibid.

[102] See Art. 12(1) of the ICCPR.

[103] CCPR General Comment No. 27 (n 68) para. 4.

[104] Oxford Pro Bono Publico Group on 'Operation Murambatsvina crimes against humanity' (n 101) 21-24. For further discussion, see also, Chaloka Beyani (n 50) 8-13.

[105] Oxford Pro Bono Publico Group on 'Operation Murambatsvina crimes against humanity', ibid, 24-26.

[106] Chapter 4, 224. See also, John Fawcett and Victor Tanner, 'Again and again: The UN's betrayal of the internally displaced in South and Central Iraq, 1991-2003.' In: Anne F. Bayefsky, Joan M. Fitzpatrick and Arthur

law that prevented or restricted them from living in the areas where the forced displacements occurred.

5.2. The contextual requirements of crimes against humanity and their position in the context of the customary international law

The definitional elements of crimes against humanity are one of the more complex aspects of international criminal law. This may be owing to the fact that these crimes have not been formulated into a private convention which could help to determine their parameters. Instead they have remained subject to the developments of customary international law and international jurisprudence since their first appearance as substantive provisions in the Nuremberg Charter. In particular, all the statutes and charters of international tribunals, except the Rome Statute, defined these crimes in terms view of temporal and limited jurisdiction.[107] However, what is established that these crimes need to meet the overall requirements common among them in order to be valid. Thus, it is not enough that an inhuman criminal act has met its special conditions, more than that it must attain overall descriptions or conditions of a crime against humanity. Such contextual or overall conditions can be noted, for example, in the Chapeau of Article (7)(1) of the Rome Statute. According to Article (7) (1) of the Rome Statute, these additional or contextual conditions require that an offence, to be considered as a crime against humanity, needs to be

> '[c]ommitted as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.'[108]

Similarly to the Rome Statute, the Statute of IHT considers that these contextual requirements are relevant in the context of the crimes committed during the former Ba'ath regime.[109] In terms of the principle of legality, it is not appropriate to rely on the Rome Statute alone unless those contextual requirements are recognized as a component of customary international law, since the Rome Statute came into force more than a decade after the crimes committed by the Ba'ath regime in Iraq. Therefore, it is necessary to investigate whether the contextual conditions in

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C. Helton, (eds). *Human rights and refugees, internally displaced persons and migrant workers: Essays in memory of Joan Fitzpatrick and Arthur Helton* (Martinus Nijhoff Publishers, 2006), 165.

[107] For the historical development of crimes against humanity, see M. Cherif Bassiouni, *Crimes against humanity: historical evolution and contemporary application* (Cambridge University Press, New York, 2011). See also, Matthew Lippman, 'Crimes against humanity' 17 (1997) *Boston College Third World Law Journal*. See also, Beth Van Schaack, 'The definition of crimes against humanity: Resolving the incoherence' 37 (1999) *Columbia Journal of Transnational Law*. See also, Phylilis Hwang, 'Defining crimes against humanity in the Rome Statute of the International Criminal Court' 22 (1998) *Fordham International Law Journal*. See also, Art. (7)(1) of the Rome Statute.

[108] Art. (7)(1) of the Rome Statute.

[109] See, art. (12)(1) of the Statute of IHT.

Article (7)(1) of the Rome Statute exist in customary international law. In addition to, it is significant to specify the contents of these conditions or elements and whether they were satisfied in the course of the Iraqi cases, including cases of forced internal displacement.

5.2.1. Jurisprudence prior the ad hoc Tribunals

Some commentators are of the opinion out that the provisions of the Rome Statute concerning crimes against humanity are no more than an expression of customary international law. This opinion was professed by a judge of the ECtHR: Judge Loukis Loucaides said in his dissenting opinion regarding the case of *Korbely v. Hungary* that

> '[A]s regards the elements of crimes against humanity, one may take the recent Rome Statute of the International Criminal Court as declaratory of the definition in international law of this crime'.[110]

However, such public or absolute statement was criticized[111] because is inconsistent with the explicit wording of the texts in Article 7 (1) and Article 10 of the Rome Statute.[112] It is clearly implied in each of these texts that the provisions and definitions of the Rome Statute are laid down to determine the jurisdiction of the ICC and are not intended to serve as a codification of what exists in customary international law. In reality, this does not mean that there are no identical rules in customary international law.

Prior to the Rome Statute, the ICTR Statute throws light on the contextual conditions of crimes against humanity.[113] The Charters of the post-World War II tribunals and the ICTY Statute articulated in a few words that crimes against humanity are any inhumane offence 'committed against any civilian population'.[114] On the other hand apart from the requirement for discriminatory foundations, it can be observed that Article 3 of the ICTR Statute defined crimes against humanity as those 'crimes when committed as part of a widespread or systematic attack

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[110] *Korbely v. Hungary* (Judgement) ECtHR-Application No. 9174/02 (19 September 2008) available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-88429> accessed on December 11, 2016.

[111] See, William A. Schabas (n 79) 144.

[112] Art. 7(1) of the Rome Statute confirms that the contextual requirements of crimes against humanity are '[F]or the purpose of this Statute.' Moreover, Art. (10) of the same Statute articulates that '[N]othing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.'

[113] See for example the comparison among the ICC, ICTY and ICTR Statutes on the definitional elements. See, Simon Chesterman 'An altogether Different order: Defining the eements of crimes against humanity' 10 (2000) *Duke Journal of Comparative and International Law*, 309-311.

[114] See Art. 6(c) Nuremberg Charter, Art. II(c) of the CCL No. 10, Art. 5(c) of the Tokyo Charter, and the Chapeau of Art. 5 of the ICTY Statute.

against any civilian population'.[115] This manner is closer to what appeared later in Article 7(1) of the ICC Statute. In this connection, it will be demonstrated below that the draft of the ICTR Statute provisions codifies mainly what exists in customary international law. Thus it can be said that some of the contextual conditions contained in Article 3 of the ICTR Statute are nothing more than a written text of the provisions of the latter law.

Although the instruments of previous criminal tribunals did not refer plainly to the contextual elements of crimes against humanity, nevertheless these elements were not completely absent from the range of precedents devised by those tribunals. In this regard, the sentence, 'against any civilian population,' which is mentioned in all the charters and statutes of international tribunals, suggests that there are some general conditions that should be fulfilled with respect to inhumane acts if the latter are to be designated as crimes against humanity. Such an understanding can be inferred, for example, from the *Judgement of Justice Case*, which stated that this

> '[i]s not the isolated crime by a private German individual which is condemned, nor is it the isolated crime perpetrated by the German Reich through its officers against a private individual. It is significant that the enactment employs the words "against any civilian population" instead of "against any civilian individual". The provision is directed against offenses and inhumane acts and persecutions on political, racial, or religious grounds systematically organized and conducted by or with the approval of government.'[116]

Likewise, other judicial precedents reveal some definitional traits concerning the nature of crimes against humanity.[117] For instance, the Judgement of the Military Tribunal of Nuremberg pointed out with regard to these crimes that

> '[T]he policy of terror was certainly carried out on a vast scale, and in many cases was organized and systematic.'[118]

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[115] It is laid down in Art. 3 of the ICTR Statute that 'The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.' It is noteworthy that the discriminatory grounds pertain to the jurisdiction of the Tribunal, and are not even part of the definition of the crimes in question according to customary international law. However, these grounds must be understood as a private stipulation of the crime of persecution.

[116] Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10: The Justice Case, Vol III (United States Government Printing Office, Washington, 1951), 973. See also, Doug Linder, 'A Commentary on the Justice Case' available at <http://law2.umkc.edu/faculty/projects/ftrials/nuremberg/alstoetter.htm#War%20Crimes%20and%20Crimes%20Against> accessed on December 11, 2016. See also, Phylilis Hwang (n 107) 461.

[117] Phylilis Hwang, ibid, 491.

[118] Office of United States Chief of Counsel for Prosecution of Axis Criminality, Nazi Conspiracy and Aggression: Opinion and Judgement (United States Government Printing Office, Washington, 1947), 84. For more detail, see

A similar approach can be recognised in the judgements of the French courts in both the *Barbie* case[119] and the *Touvier* case.[120] In the *Barbie* case, the French Court of Cassation gave attention in its judgement to the crimes against humanity as set forth in Article 6(c) of the Nuremberg Charter, which spoke of

> '[i]nhumane acts and persecution committed in a systematic manner in the name of a State practising a policy of ideological supremacy, not only against persons by reason of their membership of a racial or religious community, but also against the opponents of that policy, whatever the form of their opposition.'[121]

In a later judgement of the same Court, it was underlined that the crimes in this case were elements of a common plan but that this cannot be considered as an aggravating circumstance or a discrete felony instead that they are

> '[a]n essential element of the crime against humanity, consisting of the fact that the acts charged were performed in a systematic manner in the name of a State practising by those means a policy of ideological supremacy.'[122]

Later, this viewpoint in the *Barbie* case was accepted by the Appeal Court in the case of *Paul Touvier*. The latter Court ruled

> '[T]he specific intent necessary to establish a crime against humanity was the intention to take part in the execution of a common plan by committing, in a systematic manner, inhuman acts or persecutions in the name of a State practising a policy of ideological supremacy.'[123]

Trial of the Major War Criminals before the International Military Tribunal: Nuremberg 14 November 1945-1 October 1946, Vol I (Nuremberg, 1947).

[119] In the *Barbie* case, the accused, Klaus Barbie, who was the head of the Gestapo in Lyons from November 1942 to August 1944, during the wartime occupation of France, was convicted in 1987 of crimes against humanity for his role in the deportation and extermination of civilians. See, France v. Klaus Barbie (Settlement of Judges) Court of Cassation- 86-92714 (25 November 1986) available at <http://www.asser.nl/upload/documents/20120329T113042-Barbie%20Klaus%20-%20Arret%20-%2025-11-1986%20-%20Cour%20de%20Cassation%20Francais.pdf> accessed on November 10, 2016. See also, *Prosecutor v. Akayesu* (Trial Judgement) ICTR--96-4-T (2 September 1998), para. 569. (Therein after *Akayesu* Trial Judgement). See also, Phylilis Hwang (n 107) 469-471.

[120] Paul Touvier had been a high-ranking officer in the Militia (Milice) of Lyons, which operated in 'Vichy' France during the German occupation. He was convicted of crimes against humanity for his role in the shooting of seven Jews at Rillieux on 29 June 1994 as a reprisal for the assassination by members of the Resistance, on the previous day, of the Minister for Propaganda of the 'Vichy' Government. See, France v. Paul Touvier (Partial Cassation) Court of Cassation-92-82409 (27 November 1992) available at <http://www.asser.nl/upload/documents/20121107T024316-touvier_cassation_arret_27-11-92.pdf> accessed on November 10, 2016. See also, *Akayesu* Trial Judgement, ibid, para. 571. See also, Phylilis Hwang, ibid, 471.

[121] See the case of France v. *Klaus Barbie* (n 119) 2. See similar position in the case of France v. *Paul Touvier*, ibid. See also *Akayesu* Trial Judgement, ibid, para. 569. See also, Phylilis Hwang, ibid, 470.

[122] *Akayesu* Trial Judgement, ibid, para. 570. See also, Phylilis Hwang, ibid.

[123] See the case of France v. *Paul Touvier*, ibid, 25. See, *Akayesu* Trial Judgement, ibid, para. 572. See also, Phylilis Hwang, ibid, 471.

Thus, the cases above show some of the aspects of crimes against humanity which the aspects of crimes against humanity which appeared later in Article 3 of the ICTR Statute and Article 7(1) of the Rome Statute. These aspects can be determined through 'the vast or massive scale or systematic nature, the approval or involvement of a government or through a policy or common plan'.[124]

5.2.2. The jurisprudence of ad hoc tribunals

The jurisprudence of the *ad hoc* tribunals after the end of the Cold War, did not deviate from most of the aforesaid descriptions.[125] This is in itself an important point because it means that this jurisprudence established what is existed in customary international law. Relatedly, the UNSG report on the establishment of the ICTY revealed, in regard to the writing of the substantive provisions of customary criminal international law, that crimes against humanity:

> '[r]efer to inhumane acts of a very serious nature, such as wilful killing, torture, or rape, commited as part of a wide spread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.'[126]

Nonetheless, the words 'a very serious nature' and 'a widespread or systematic attack' were not introduced at the final text of Article 5 of the ICTY Statute, which addresses crimes against humanity.[127] This was due to the work of the UNSC. However, this does not render the omitted qualifications as questionable in terms of customary international law.[128] In this respect, all the case law that reflects the jurisprudence of the ICTY stressed that if an offence is to be described as a crime against humanity, mainly in accordance with customary international law, there need to be additional conditions other than those appointed for each of the crimes against humanity. From the time of the first opportunity to prosecute the authors of crimes against humanity, the Trial Chamber in the case of *Prosecutor v. Tadic* positively affirmed through the phrase

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[124] See also, Beth Van Schaack (n 107) 810, 812, 820.

[125] Ibid, 812.

[126] UNSG Report pursuant to Paragraph 2 of UNSC Res. 808 (1993): Addendum, UN Doc. S/25704/add.1 (3 May 1993), para. 47. See also, Phylilis Hwang (n 107) 478. UN War Crimes Commission stated that 'The word 'population' appears to indicate that a larger body of victims is visualized and that single or isolated acts committed against individuals may be held to fall outside the scope of the concept of crimes against humanity.' See, UN War Crimes Commission Report on 'Information concerning human rights arising from trials of war criminal' UN Doc. E/CN.4/W.19 (15 May 1948), 35. (Therein after UN War Crimes Commission Report of 1948).

[127] See, Leila Nadya Sadat, 'Crimes against humanity in the modern age' (2012) *Legal Studies Research Paper Series*: Washington University School of Law, 25.

[128] See, Otto Triffterer, (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (C.H. Beck. Hart. Nomos, 2008), 173. See also in this respect, UNSG Letter dated 24 May 1994 to the President of the UNSC to transmit 'Final Report of the Commission of Experts established pursuant to UNSC Res. 780 (1992)' UN Doc. S/1994/674 (27 May 1994), para. 72-86. (Therein after UNSG on Final Report of the Commission of Experts).

'directed against any civilian population' that the concept of these crimes presupposes general requirements as follows:

> '(1) that the accused committed one of the acts enumerated in Article 5; ...
>
> (3) at the time of the commission of the acts or omissions there was an ongoing widespread or systematic attack directed against a civilian population; and
>
> (4) the accused knew or had reason to know that by his acts or omission, he was participating in the attack on the population.'[129]

Moreover, this Chamber regarded that a component of policy is also incorporated within these conditions.[130] All subsequent cases did not oppose or ignore the need to provide these requirements in order to condemn an action as a crime against humanity.[131] This can also be observed in the jurisprudence of the ICTR since the *Akayesu* judgement.[132]

5.2.3. The work of the ILC

On the level of the ILC, there were attempts to use the criteria 'massive and systematic' to reflect the magnitude and nature of inhumane acts that should be converted from ordinary or domestic acts to acts that arouse the concern of the international community, and then to address them as crimes against humanity.[133] Moreover, it was suggested during the work of the ILC in 1951 to stipulate that inhumane acts must be of a 'mass' nature in order to amount to international crimes against humanity.[134] This qualifier had not been mentioned in the Nuremberg Charter and therefore it was rejected. This in turn led to the return of the 'war

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[129] Prosecutor v. Tadic (Trial Opinion and Judgement) ICTY- IT-94-1 (7 May 1997), para. 626. For interpretation of these elements from the same Chamber, see ibid, paras, 635-649, 653-659. It is noteworthy that the Chamber indicated that an armed conflict situation and discriminatory grounds are needed; however neither of these requirements reflect customary international law. A stipulation of an armed conflict pertains to the jurisdiction of the ICTY and is not substantive ingredient. Also discriminatory grounds were ignored in subsequent cases since the Appeals Chamber in the same case decided after reviewing a great amount of material that the conclusion on this point by the Trial Chamber had been incorrect. See Prosecutor v. Tadic (Appeals Judgement) ICTY- IT-94-1-A (15 July 1999), para. 249, 305. The other overall ingredients reflected in the words 'directed against the civilian population' were approved by the Appeals Chamber. See, ibid, paras. 248, 250.

[130] *Tadic* Trial Judgement, ibid, para.653. This opinion was abandoned in all subsequent cases since *Kunarac* Trial Judgement established that this condition is no more than evidence which can be useful to prove or to infer the nature of the inhumane acts. See, Prosecutor v. Kunarac et al. (Trial Judgement) ICTY-IT-96-23-T and ICTY-IT-96-23/1-T (22 February 2001), para. 410.

[131] See for example, Prosecutor v. Limaj et al. (Trial Judgement) ICTY-IT-03-66-T (30 November 2005), para. 181. See also, *Prosecutor v. Blagojevic* (Trial Judgement) ICTY-IT-02-60-T (17 January 2005), para. 541. See also, *Brdjanin* Trial Judgement (n 8) para. 130. See also, Prosecutor v. Galic (Trial Judgement) ICTY- IT-98-29-T (5 December 2003), para. 140. See also, *Simic* Trial Judgement (n 5) para. 37. See also, Prosecutor v. Stakic (Trial Judgement) ICTY- IT-97-24-T (31 July 2003), para. 621.

[132] *Akayesu* Trial Judgement (n 119) para. 578.

[133] Beth Van Schaack (n 107) 821.

[134] Ibid, 822.

nexus'.[135] In their work of 1954, the delegates to the ILC abandoned the war nexus in favour of the criteria of 'instigation and approval by authorities and the discrimination'.[136] However, the ILC's position changed after the resumption of its work on the drafting of the Crimes Code in the draft of 1991. The ILC resorted to formulating and defining the nature of crimes against humanity and their elements so as to distinguish between these crimes and other inhumane acts, such as isolated or random acts or other domestic or international crimes.

Due to the progress of the protection of human rights, the ILC decided that since 1954 the area of legal protection had experienced developments that should not be ignored, and therefore it decided in its draft of 1991 of the Code of Crimes to replace the phrase 'inhumane acts', which had been given to crimes against humanity in Article 2(11) of draft Code of Crimes of 1954 and had used an alternative formulation: 'systematic or mass violations of human rights'.[137] The ILC saw that the serious nature of the violations is a feature shared by all crimes against humanity,[138] and that in order to assess whether a violation is an extremely serious one, and thus a crime against humanity, there are two criteria, which are that a violation must be either a systematic or mass one.[139] All acts which are listed within the category of crimes against humanity should be read in this context, even acts of 'deportation or forcible transfer' which, although not mentioned within this context, should however be interpreted in the same way because of their nature, which is necessarily on a mass scale.[140]

It can be said that these ideas concerning the contextual elements of crimes against humanity and which are inspired from developments in international law in its customary part were the foundations which crystalized into the formulation of Article 7(1) of the Rome Statute. In this view, it seems that the work of the ILC on the Code of Crimes, specifically the draft of 1996, effectively inspired the formulation of Article 7(1) of the Rome Statute. This seems obvious

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[135] Ibid. See also, Phylilis Hwang (n 107) 462. The ILC witnessed a disagreement on a return to link crimes against humanity with war. Some of delegates were in favour of such a nexus to avoid municipal or isolated offenses as long as there was no another criterion, while other delegates did not accept to resort to the war nexus because this nexus is a jurisdictional component and is not substantive. See, Beth Van Schaack, ibid, 822.

[136] See ILC Report on 'Work of its 6th Session (3 June-28 July 1954) Official Records of the UNGA (9th Session), Supplement No. 9 (A/2693), UN Doc. A/CN.4/88 (1954), and UN Doc. A/CN.4/SER.A/1954/Add.1 (1954), Yearbook of the ILC Vol. II, 150. (Therein after Report of the ILC of 1954). See also, Phylilis Hwang, ibid, 464.

[137] See draft Art. (2)(11) of the Code of Crimes in: Report of the ILC of 1954, ibid. See the commentary on the draft art. (21) of the Code Crimes in: ILC Report on 'Work of its 43rd Session (29 April-19 July 1991)' Official Records of the UNGA (46th Session), Supplement No. 10, UN Doc. A/46/10 (1991), and UN Doc. A/CN.4/SER.A/1991/Add.1 (1991), Yearbook of the ILC Vol. II(2), 96, 103. (Therein after Report of the ILC of 1991).

[138] Report of the ILC of 1991, ibid, 103.

[139] Ibid.

[140] See, ibid, 103-104. See also, Otto Triffterer (n 128) 172.

when it is compared with draft Article 18 of the draft of the Code of Crimes of 1996.[141] The previous draft Article 18 of the Code of Crimes of 1996 stated that crimes against humanity are

> '[a]ny of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group.'[142]

In commenting on this Chapeau paragraph, the ILC confirmed that its origins are a legacy of Nuremberg.[143] It is true that the Nuremberg Charter did not provide for the contextual elements; however the jurisprudence of the Nuremberg judgement inspired military tribunals to resort to specific criteria to test which of acts should be condemned as crimes against humanity. In this connection, it was said above that the tribunal stated, concerning inhumane acts, that the policy of terror in many cases had been 'organized and systematic', as well as carried out on 'a vast scale'.[144] The other requirement is instigation of, or instruction to commit the inhumane acts, whether the author is a government, an organization or a group which incites or leads the commission of the acts.[145] This understanding grants inhumane acts a large dimension.[146] It is notable that draft Article 18 of the Code of Crimes of 1996 in its turn depended on the ILC draft of the Code of Crimes of 1991.

This analysis discloses that some of the contextual stipulations are fully established in customary international law and are not new elements added on occasions to the ILC drafts of the Code of Crimes or the Rome Statute. It can be inferred then that the definitional elements of crimes against humanity in the view of the Statute of IHT that were cited from Article 7(1) of the Rome Statute do not violate the customary international law that was in force at the time when the Ba'ath regime crimes were perpetrated. Article 12 of the IHT Statute defined the crimes against humanity as

> '... part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.'[147]

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[141] Otto Triffterer, ibid, 173.
[142] Draft Art. (18) of the Code of Crimes of 1996. ILC Report on 'Work of its 48th Session (6 May-26 July 1996)' Official Records of the UNGA (51st Session), Supplement No. 10, UN Doc. A/51/10 (1996), and UN Doc. A/CN.4/SER.A/1996/Add.l (1996), Yearbook of the ILC Vol. II(2), 47. (Therein after Report of the ILC of 1996).
[143] Ibid. See also, UNSG on Final Report of the Commission of Experts (n 128) para. 72-86.
[144] Report of the ILC of 1996, ibid.
[145] Simon Chesterman (n 113) 317. See also, Phylilis Hwang (n 107) 466-467.
[146] Darryl Robinson, 'Defining crimes against humanity at the Rome Conference' 93 (1999) *American Journal of International Law*, 49. See also, Simon Chesterman, ibid.
[147] Article 12(first) of the IHT Statute.

Thus, neither the Statute of IHT nor the IHT itself violated the principle of legality in that respect.

5.3. The contextual requirements of crimes against humanity

5.3.1. A contextual requirement of 'widespread or systematic attack'

5.3.1.1. An Attack

The word 'attack' is used in both the ICTR and the ICC Statutes; however some ambiguity surrounds this word.[148] Use of this word sparked some controversy in the context of the preparatory work of the Rome Statute. The natural context for the use of the word is armed conflict, and for that reason some delegations were of the opinion that, in order to avoid the perception that crimes against humanity were committed only in the context of the armed conflict, it would be inappropriate to borrow the expression 'attack' in the definition of other crimes.[149] And that the use of an alternative term or word, such as 'acts', will make these crimes more specific and precise.[150] In particular, in customary international law it is accepted that armed conflict is not an element of the definition of crimes against humanity.[151] In addition, crimes against humanity can be crimes omission, unlike an "attack", which seems to suggest a positive aggression.[152] Despite these concerns, other state delegations elected to keep the word 'attack' as part of the definition of crimes against humanity, and this is the word that appears in the text of Article 7(1) of the Rome Statute.[153] Moreover, the latter Statute and the Elements of Crimes and even the preparatory work signified uncontroversially that "attack" within the meaning of crimes against humanity does not require that an armed conflict or military action must exist. It was noted in the preparatory work that the word 'attack' involves

> '[a]ny activity intended to harm or cause harm to the victim(s) through use of force or compulsion. It does not necessarily involve military conduct'[154]

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[148] John Cerone and Susana SaCouto, *International Criminal Law: a Discussion Guide* (War Crimes Research Office, American University's Washington-College of Law, 2004), 14.

[149] Report of Preparatory Committee on the establishment of An International Criminal Court on 'Summary of the Proceedings of the Preparatory Committee during the period (25 March-12 April 1996)' UN Doc. A/AC.249/1 (7 May 1996), para. 46. (Therein after Report of Preparatory Committee on the ICC of 1996). See also, Sawsan Tmrkhan, *Crimes against humanity in the light of the provisions of the Statute of the International Criminal* Court (Al-Halabi Legal Publications, Beirut, 2006), 243. See also, Otto Triffterer (n 128) at footnote (45), 175. سوسن تمر خان بكه، *الجرائم ضد الإنسانية في ضوء أحكام النظام الأساسي للمحكمة الجنائية الدولية* (منشورات الحلبي الحقوقية، بيروت، 2006).

[150] Ibid.

[151] See, Antonio Cassese, Guido Acquaviva, Mary Fan, and Alex Whiting, *International criminal law: Cases and commentary* (Oxford University press, New York, 2011), 181. See also, *Galic* Trial Judgement (n 131) para. 141. Prosecutor v. Tadic (Dicision on Defence Motion for Interlocutory Appeal on Jurisprudence) (2 October 1995), para. 141. See also, M. Cherif Bassiouni (n 107) 33-34. See also, Phylilis Hwang (n 107) 466-468.

[152] Sawsan Tmrkhan (n 149).

[153] Report of Preparatory Committee on the ICC of 1996 (n 149) para. 46.

[154] Report on 'Reports and other documents' of UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court during (15 June-17 July 1998), A/CONF.183/13 (Vol. III), 230.

Article 7(2)(a) of the Rome Statute displays a similar understanding that 'attack'

> '[m]eans a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population...'[155]

In addition, the Elements of Crimes mentions that '[T]he acts need not constitute a military attack.'[156] Thus, it is clear that neither the presence nor absence of an armed attack, hostilities or military force will prevent it from being said that there are other non-military means that can institute crimes against humanity.[157] For example, attack as an integral part of the definition of the category of crimes against humanity can be instituted through the political or legal programs and legislation such as the Nazi Führer Law or through a policy such as apartheid violent or through the use of food which is genetically modified or expired for the purpose of eliminating or damaging a civilian population.[158] These crimes can be committed without physical force.[159] However, this does not mean to say that crimes against humanity cannot be established through the use of military force or in an armed conflict.[160] Such a position is not limited to the provisions of the Rome Statute, it is also to be found in the many of the judgements of the ICTY and the ICTR.[161] It was decided, for example, in the opinion of the ICTR Trial Chamber in the case of *Akayesu* that

> '[A]n attack may also be non violent in nature, like imposing a system of apartheid, which is declared a crime against humanity in Article 1 of the

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[155] Art. 7(2)(a) of the Rome Statute. See also similar understanding in the Report of the Preparatory Committee on the ICC of 1996 (n 149) para. 46.

[156] Para. (3) of Introduction to the element of crimes against humanity as stated in the Element of Crimes.

[157] See, Roberta Arnold, 'The prosecution of terrorism as a crime against humanity' 64 (2004) *Heidelberg Journal of International Law* (HJIL), 982, available at <http://www.zaoerv.de/64_2004/vol64.cfm> accessed on December 7, 2016. See also, John Cerone and Susana SaCouto (n 148) 14.

[158] M. Cherif Bassiouni, *Crimes against humanity* (Kluwer Law International, Huge, 1999), 37. See also, Prosecutor v. Musema (Trial Judgement) ICTR-96-13-A (27 January 2000), 205. See also, David Luban, 'A theory of crimes against humanity' 29 (2004) *Yale Journal of International Law*, 102-103. See also, William A. Schabas (n 79) 153. See also, Otto Triffterer (n 128) at footnotes (45, 46), 175.

[159] Guénaël Mettraux, *International crimes and the ad hoc Tribunals* (Oxford University Press, New York, 2005), 156. In: Otto Triffterer (n 128) at footnote (45), 175. See also, Virginia Morris and Michael P. Scharf, *An insider's guide to the International Criminal Tribunal for the Former Yugoslavia: A documentary history and analysis* (Martinus Nijhoff, 1995), 392. Cited in, Sawsan Tmrkhan (n 149) 247. See also, Simon Chesterman (n 113) 315-316. See also, David Luban, ibid.

[160] See, Antonio Cassese, Guido Acquaviva, Mary Fan, and Alex Whiting (n 151) 181. See also, *Tadic* Appeals Judgement (n 129) para. 251.

[161] See, Simon Chesterman (n 113) 315-316. See also, *Akayesu* Trial Judgement (n 119) 581. See also, Prosecutor v. Rutaganda (Trial Judgement) ICTR-96-3-T (6 December 1999), 69. See also, *Musema* Trial Judgement (n 158) para. 205. See also, Prosecutor v. Kunarac et al. (Appeals Judgement) ICTY-IT-96-23 and ICTY-IT-96-23/1-A (12 June 2002), para. 86. See also, *Limaj* Trial Judgement (n 131) para. 182. See also, *Brdjanin* Trial Judgement (n 8) para. 131. See also, *Galic* Trial Judgement (n 131) para. 141. See also, *Simic* Trial Judgement (n 5) para. 39. See also, Prosecutor v. Naletilic (Trial Judgement) ICTY-IT-98-34-T (31 March 2003), para. 233.

> Apartheid Convention of 1973, or exerting pressure on the population to act in a particular manner.'[162]

A similar approach was embraced in the judgements of the ICTY, in which it was stated that the concept of attack

> '[i]s not limited to armed combat. It may also encompass situations of mistreatment of persons taking no active part in hostilities, such as of a person in detention.'[163]

An 'attack' therefore involves the violation of fundamental freedoms and human rights which can take the character of inhumane acts as an international crime. This can deduced through the words of the UN War Crimes Commission which stated

> '[a]ttacks on the fundamental liberties and constitutional rights of peoples and of individual pereons, i.e. inhuman acts, constitute not only in time of war, but also in time of peace, in certain circtmistances, international crimes.'[164]

Thus, the definition of attack does not demand that there must be a state of armed conflict.

This is also recognized under customary international law.[165] The war nexus was required by the Nuremberg Charter. However, the war nexus was considered as a jurisdictional limitation and not a definitional element of the crimes against humanity.[166] Retention of the war nexus in the ICTY Statute also was not definitional element; instead, it was merely jurisdictional.[167] It is well known that the Nuremberg Charter was the first one that extracted the inhumane acts committed by a government against its citizens from the national jurisdiction and made them a subject of the international prosecution. This faced two challenges, namely the prohibition against application of a retroactive law and principle the sovereignty of State.[168] Therefore, the

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[162] *Akayesu* Trial Judgement, ibid. See also, *Rutaganda* Trial Judgement, ibid. See also, *Musema* Trial Judgement, ibid.

[163] *Galic* Trial Judgement (n 131) para. 141. See also, *Kunarac* Appeals Judgement (n 161) para. 86. See also, *Limaj* Trial Judgement (n 131) para. 182, 194.

[164] UN War Crimes Commission Report of 1948 (n 126) 34.

[165] Antonio Cassese, Guido Acquaviva, Mary Fan, and Alex Whiting (n 151) 181. See also, *Galic* Trial Judgement (n 131) para. 141. See also, *Kunarac* Appeals Judgement (n 161) para. 86. See also, *Brdjanin* Trial Judgement (n 8) para. 131. See also, *Stakic* Trial Judgement (n 131) para. 623.

[166] Evelyne Schmid, *Taking economic, social and cultural rights seriously in international criminal law* (Cambridge University Press, Cambridge, 2015), 90-91. See also, Roger S. Clark, 'History of efforts to codify crimes against humanity: From the Charter of Nuremberg to the Statute of Rome'. In: Leila Nadya Sadat, (ed). *Forging a convention for crimes against humanity* (Cambridge University Press, 2011), 11.

[167] Caroline Fournet, *Genocide and crimes against humanity: Misconceptions and confusion in French law and practice* (Hart Publishing, 2013), 24.

[168] Kerstin von Lingen, 'Defining crimes against humanity: The contribution of the United Nations War Crimes Commission to international criminal law, 1944–1947'. In: Morten Bergsmo, Cheah Wui Ling and YI Ping (eds) *Historical origins of international criminal Law: Volume 1* (Torkel Opsahl Academic EPublisher, 2014), 478-479.

war nexus was a means by which the IMT avoided the mentioned challenges, and then this ensured that the Nazi atrocities against the German citizens of Jews would not go unpunished.

As underlined by Justice Jackson that there was a duty to deliver the justice for the people who had suffered from the Nazi barbarism.[169] He observed that

> '[U]nless we have a war connection as a basis for reaching them, I would think we have no basis for dealing with atrocities.'[170]

In respect to extermination of Jews, the US prosecutor endorsed that a government has the power and sovereignty over its internal affairs including the way by which treats its citizens. Nonetheless, he emphasized that this stops when a government oppression exceeds "in magnitude and savagery any limits of what is tolerable by modern civilization", since this concerns the international community which if does nothing and be 'silence, would take a consenting part in these crimes".[171] Thus, the war nexus was a jurisdictional limitation for specific reason and situation. Therefore, a claim that the war nexus is necessary under customary international law will lead to use this nexus as a pretext against its original idea and purpose. In particular, the international community made extensive efforts in order to extract the human rights and its violations from the exclusive jurisdiction of State. This is clear through the UNDR, ICCPR, ICESCR and other instruments. Moreover, the nexus of war was eliminated in the CCL No. (10),[172] and this enabled the courts in British Occupation zone in Germany to hold around one hundred fifty trials involving crimes against humanity that occurred out between 1933 and the end of the World War II.[173] In addition, the war nexus was not a matter in the Genocide Convention of 1948,[174] Apartheid Convention of 1973[175] and the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes

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[169] Ibid, 496.
[170] Ibid 496-497.
[171] Ibid, 498.
[172] See, Article II(1)(C) of the CCL No. (10). See, Roger S. Clark (n 166) 11-12.
[173] See, Kerstin von Lingen (n 168) 497.
[174] See, Article I of the Genocide Convention of 1948 provides that 'The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.'
[175] Article I(1) of the Apartheid Convention of 1973 lays down that 'The States Parties to the present Convention declare that apartheid is a crime against humanity and that inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination, as defined in article II of the Convention, are crimes violating the principles of international law, in particular the purposes and principles of the Charter of the United Nations, and constituting a serious threat to international peace and security.'

Against Humanity of 1968.[176] This also was noted by the ILC.[177] It is noteworthy that the ILC work on the Code of Crimes removed the war nexus since its report of 1954, and then its reports of 1991 and 1996.

Concerning the Iraqi cases, it is notable that the crimes constitute an attack in the same sense as stated above, since there were various inhumane violations, in addition the military operations were used as well. This was shown in the previous chapter, and other details will be seen in the next paragraph.

5.3.1.2. 'Widespread' or 'systematic'

These terms are not defined within the provisions of the Statutes of the ICTR and the ICC. Despite this omission, the judicial precedents and the ILC work offered some explanations that provide useful determinants as to when an attack crosses the threshold of 'widespread' or 'systematic'. These thresholds are substantive and legal elements, and so they should not be considered or defined as aggravating circumstances.[178] The purpose of the notion of 'widespread or systematic' seems a central idea by which jurisprudence and case law were guided in their understanding of this threshold. As previously mentioned, isolated, random or single inhumane acts or other domestic and international offenses can be set aside because they are not intended to be prosecuted under the title of crimes against humanity.[179] Crimes against humanity could be described rather as targeting humanity itself,[180] and it can be observed that all jurisprudential and judicial examples reviewed above share this approach. The determinants used in order to specify the crossing of thresholds are the number of victims, the magnitude and number of acts committed, the size of the geographic area, etc.[181] Relatedly, most of the ICTY and ICTR Chambers decided that the term 'widespread' denotes

[176] Article I(b) of Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 1968 provides that 'Crimes against humanity whether committed in time of war or in time of peace as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations, eviction by armed attack or occupation and inhuman acts resulting from the policy of apartheid , and the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, even if such acts do not constitute a violation of the domestic law of the country in which they were committed.'

[177] See, Report of the ILC of 1996 (n 142) 48.

[178] Stefan Kirsch, 'Two kinds of wrong: On the context element of crimes against humanity' 22 (2009) *Leiden Journal of International Law*, 525.

[179] See also, Sawsan Tmrkhan (n 149) 255. See also, *Tadic* Trial Judgement (n 129) para. 648.

[180] Stefan Kirsch (n 178) 87. See also, Beth Van Schaack (n 107) 806, 822. See also, Roberta Arnold (n 157) 981.

[181] William A. Schabas (n 79). See also, Darryl Robinson (n 146) 47. Beth Van Schaack, ibid, 821. See also, John Cerone and Susana SaCouto (n 148) 14-15. See also, David, 158, 98.

'[t]he large-scale nature of the attack and the number of targeted persons...'[182]

Other Chambers ruled that a 'widespread' attack can be the

> '...[c]umulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude.'[183]

It appears from these definitions that an individual act can be classified as a crime against humanity if its consequences crossed the thresholds of widespread and systematic.[184] This interpretation is different from earlier opinions, which offered a higher threshold and is the reason why the subsequent jurisprudence of the ICTY and ICTR chose a different definition, as described above.[185] An earlier attempt can be observed, in the *Akayesu* Trial Judgement, which proposed that "widespread" indicates

> '[m]assive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims.'[186]

A review of the jurisprudence of case law shows that they were guided in determining the meaning of the term 'widespread' by draft Article 18 of the Code of Crimes of 1996. This draft article used the phrase 'large scale' to reflect the nature of the attack and the number of victims, which are an indispensable factor in crimes against humanity.[187] It is obvious that such a

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[182] See the case law of the ICTY, for example, Prosecutor v. Kordic and Cerkez (Appeals Judgement) ICTY-IT-95-14/2-A (17 December 2004), para. 94; Prosecutor v. Blaskic (Appeals Judgement) ICTY-IT-95-14-A (29 July 2004), para. 101; *Limaj* Trial Judgement (n 131) para. 183; *Blagojevic* Trial Judgement (n 131) para. 545; *Brdjanin* Trial Judgement (n 8) para. 135; *Galic* Trial Judgement (n 131) para. 146; *Simic* Trial Judgement (n 5) para.43; *Stakic* Trial Judgement (n 131) para. 625. See also the case law of the ICTR, for example, Prosecutor v. Nahimana et al. (Appeals Judgement) ICTR-99-52-A (28 November 2007), para. 920; *Prosecutor v. Bagosora et al.* (Trial Judgement) ICTR-98-41-T (18 December 2008), para. 2165; Prosecutor v. Nchamihigo (Trial Judgement) ICTR-01-63-T (12 November 2008), para. 340; Prosecutor v. Karera (Trial Judgement) ICTR-01-74-T (7 December 2007), para. 551; Prosecutor v. Gacumbitsi (Appeals Judgement) ICTR-2001-64-A (7 July 2006), para. 101; Prosecutor v. Nzabirinda (Trial Judgement) ICTR-2001-77-T (23 February 2007), para. 21. Prosecutor v. Muvunyi (Trial Judgement) ICTR-2000-55A-T (12 September 2006), para. 512; *Prosecutor v. Bisengimana* (Trial Judgement) ICTR-00-60-T (13 April 2006), para. 44; Prosecutor v. Kamuhanda (Trial Judgement) ICTR-95-54A-T (22 January 2004), para. 664; Prosecutor v. Kajelijeli (Trial Judgement) ICTR-98-44A-T (1 December 2003), para. 871.

[183] See for example, *Blagojevic* Trial Judgement, ibid, para.545. See also, *Naletilic* Trial Judgement (n 161) para. 236; Prosecutor v. Kordic and Cerkez (Trial Judgement) ICTY-IT-95-14/2-T (26 February 2001), para. 179.

[184] See also, Phylilis Hwang (n 107) 481. See also, Beth Van Schaack (n 107) 824. See also, Roberta Arnold (n 157) 985.

[185] Otto Triffterer (n 128) 173.

[186] See, *Akayesu* Trial Judgement (n 119) para. 580; Prosecutor v. Seromba (Trial Judgement) ICTR-2001-66-I (13 December 2006), para. 356; *Musema* Trial Judgement (n 158) para. 204; *Rutaganda* Trial Judgement (n 161) para. 69.

[187] In this respect see, Report of the ILC of 1996 (n142). In this draft Code Crimes of 1996 the ILC favoured to ignore the alternative phrase 'mass scale' which had appeared in the draft Code Crimes of 1991 and which is, according to the ILC, short compared with the phrase 'large scale' in order to indicate various situations which can include 'multiplicity of victims'. See, ibid. See also, Report of the ILC of 1991 (n 137).

limitation was intended to restrict the definition of crimes against humanity to non-isolated inhumane acts only.[188]

The term 'systematic', like the term 'widespread' was originally given a high threshold in the interpretations of both the ICTY and the ICTR.[189] The concept of "systematic" had to entail a methodical or common plan or policy.[190] 'Systematic attack' was interpreted in the *Tadic* Trial Judgement as '[a] pattern or methodical plan'.[191] In the same manner, the *Akayesu* Trial Judgement declared that 'systematic attack' is one which

> '[t]horoughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources. There is no requirement that this policy must be adopted formally as the policy of a state. There must however be some kind of preconceived plan or policy.'[192]

It can be noted that such an approach depended on the example of the ILC. This latter had taken the view that the attribute 'systematic' appears on the occasion of plan or policy which was previously formulated and could produce in 'repeated or continuous' perpetration.[193] It is noteworthy that the ILC in its turn had borrowed its view from that of the Nuremberg judgement.[194] Later this threshold was reduced, since subsequent cases of the ICTY and ICTR expanded the idea of 'systematic attack', so that the "policy" or "plan" element was no longer required, and:

> '[t]he organised nature of the acts of violence and the improbability of their random occurrence'[195]

became a sufficient criterion. In addition, "systematic" came to be defined as

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[188] See, ibid.
[189] Otto Triffterer (n 128) 179.
[190] Ibid. See also, Simon Chesterman (n 113) 314-324.
[191] *Tadic* Trial Judgement (n 129) para. 648.
[192] See, *Akayesu* Trial Judgement (n 119) para. 580; *Prosecutor v. Bagilishema* (Trial Judgement) ICTR-95-1A-T (7 June 2001), para. 77; *Musema* Trial Judgement (n 158) para. 204; *Rutaganda* Trial Judgement (n 161) para. 69; Prosecutor v. Kayishema and Ruzindana (Trial Judgement) ICTR- 95-1-T (21 May 1999), paras. 123-24, 581.
[193] In this regard see, Report of the ILC of 1996 (n 142) 47.
[194] Ibid.
[195] See the ICTY case law, for example, *Kordic* Appeals Judgement (n 182) para. 94; *Blaskic* Appeals Judgement (n 182) para. 101; *Limaj* Trial Judgement (n 131) para. 183; *Simic* Trial Judgement (n 5) para. 43; *Stakic* Trial Judgement (n 131) para. 625; *Naletilic* Trial Judgement (n 161) para. 236. See also the ICTR case law, for example, *Nahimana* Appeals Judgement (n 182) para. 920, *Bagosora* Trial Judgement (n 182) para. 2165; *Muvunyi* Trial Judgement (n 182) para. 512; Prosecutor v. Ndindabahizi (Trial Judgement) ICTR-01-71-T (15 July 2004), para. 477.

> '[P]atterns of crimes, in the sense of the non-accidental repetition of similar criminal conduct on a regular basis, are a common expression of such systematic occurrence.'[196]

Some writers believe that even in according to the later definitions, the policy element remains a requirement.[197] Others however, have argued that 'systematic' and the policy condition should not be understood as similar or duplicate, since the former reflects a high level arrangement and orchestration while policy is not necessarily as strict.[198] Nonetheless, what it is settled and predominant in the belief of the ICTY and ICTR Chambers is that a pre-existing plan or policy is not a necessary ingredient. Rather it is no more than a helpful factor in inferring the true elements of the crimes against humanity. In this regard, it was stated that

> '[n]either the attack nor the acts of the accused needs to be supported by any form of 'policy' or 'plan.' There was nothing in the Statute or in customary international law at the time of the alleged acts which required proof of the existence of a plan or policy to commit these crimes. As indicated above, proof that the attack was directed against a civilian population and that it was widespread or systematic, are legal elements of the crime. But to prove these elements, it is not necessary to show that they were the result of the existence of a policy or plan. It may be useful in establishing that the attack was directed against a civilian population and that it was widespread or systematic (especially the latter) to show that there was in fact a policy or plan, but it may be possible to prove these things by reference to other matters. Thus, the existence of a policy or plan may be evidentially relevant, but it is not a legal element of the crime.'[199]

Accordingly, a policy is an evidentiary element and not a legal element, and that its absence will not affect the establishment of crimes against humanity. The attack only needs to be perpetrated by means of organized and non-random actions in order to be systematic and this is for the purpose to exclude all acts which are based on the personal motives of a criminal author. Some scholars, including Cherif Bassiouni, Virginia Morris, Michael Scharf and

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[196] See, *Kordic* Appeals Judgement, ibid, para. 94; *Blaskic* Appeals Judgement, ibid, para. 101; *Kunarac* Appeals Judgement (n 161); *Limaj* Trial Judgement, ibid, para. 183; *Nahimana* Appeals Judgement, ibid, para. 920.

[197] See Gerhard Werle, *Principles of international criminal law* (T.M.C. Asser Press, Hague, 2005), 225-226. See also, M. Cherif Bassiouni (107) 196. See also, John Cerone and Susana SaCouto (n 148) 14-15.

[198] Darryl Robinson (n 146) 51.

[199] See the ICTY case law, for example, *Kunarac* Appeals Judgement (n 161) para. 98; *Blaskic* Appeals Judgement (n 182) paras. 100, 120, 126; *Limaj* Trial Judgement (n 131) paras. 184, 212; *Blagojevic* Trial Judgement (n 131) para. 546; *Brdjanin* Trial Judgement (n 8) para. 137; *Galic* Trial Judgement (n 131) para. 147; *Simic* Trial Judgement (n 5) para. 44. As well as, the same doctrine prevails in the jurisprudence of the ICTR. See for example, Prosecutor v. Seromba (Appeals Judgement) ICTR-2001-66-A (12 March 2008), para. 149; *Nahimana* Appeals Judgement (n 182) para. 922; *Gacumbitsi* Appeals Judgement (n 182) para. 84, 101; *Seromba* Trial Judgement (n 186) para. 356; Prosecutor v. Muhimana (Trial Judgement) ICTR- 95-1B-T (28 April 2005), para. 527; Prosecutor v. Semanza (Trial Judgement) ICTR-97-20-T (15 May 2003), para. 329; Prosecutor v. Semanza (Appeals Judgement) ICTR-97-20-A (20 May 2005), para. 269; *Muvunyi* Trial Judgement (n 182) para. 512; *Kamuhanda* Trial Judgement (n 182) para. 665; *Kajelijeli* Trial Judgement (n 182) para. 872.

William Schabas and others, did not approve this.[200] Indeed, the policy condition, whether as an independent element or as part of the sense of the word "systematic" is the jurisprudential problem in the context of crimes against humanity, particularly in the context of customary international law. While a policy or plan component is indispensable according to the express text of Article 7(2)(a) of the Rome Statute, although this is limited to the jurisprudence of ICC.[201] The present author concurs with those scholars and the early jurisprudence of the *ad hoc* tribunals that a policy element is required. This can be based on the case law that took place after the World War II. In this respect, some cases mentioned previously, such as the Nuremberg Judgement and the judgements in the *Barbie* and *Touvier* cases before the French Courts expressly indicated policy and its nature. For example, the Nuremberg Judgment expressed that

> '[T]he policy of terror was certainly carried out on a vast scale, and in many cases was organized and systematic.'[202]

The trial in the *Barbie* case referred to 'the terror policy', and the *Touvier* case mentioned '[i]nhuman acts or persecutions in the name of a State practising a policy of ideological supremacy'.[203] Also, policy appears in the words of the Dutch Supreme Court (Hoge Raad), in *Public Prosecutor v. Menten*, which regarded crimes against humanity as necessarily crimes that

> '[f]orm a part of a system based on terror or constitute a link in a consciously pursued policy directed against particular groups of people.'[204]

Moreover, the Canadian Supreme Court on the occasion of addressing the *Finta* case stated that there had been a 'discriminatory or persecutory policy'.[205] The ILC also repeated words from the Nuremberg Judgement when it addressed the meaning of the term 'large scale' and 'systematic'. The ILC commented that the phrase 'systematic manner' requires

> '[a] preconceived plan or policy. ... The thrust of this requirement is to exclude a random act which was not committed as part of a broader plan or policy. The Charter of the Nurnberg Tribunal did not include such a requirement.

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[200] See, Darryl Robinson (n 146)49. For further details see, M. Cherif Bassiouni (n 107) 19, 196. See also, William A. Schabas 'State policy as an element of international crimes' 98 (2008) *The Journal of Criminal Law and Criminology*. See also, Thomas Obel Hansen, 'The policy requirement in crimes against humanity: Lessons from and for the case of Kenya' 43 (2011) *The George Washington International Law Review*. See also, Phylilis Hwang (n 107) 483-484. See also, Leila Nadya Sadat (n 127) 26.
[201] See, Leila Nadya Sadat (n 127) 26-27.
[202] See the present chapter, 249, 250.
[203] Ibid.
[204] *Tadic* Trial Judgement (n129) para. 653.
[205] Darryl Robinson (n 146) 49-50.

> Nonetheless the Nurnberg Tribunal emphasized that the inhumane acts were committed as part of the policy of terror and were 'in many cases . . . organized and systematic" in considering whether such acts constituted crimes against humanity.'[206]

The ILC confirmed this meaning in its comment on the phrase of 'large scale' as well.[207] Thus, a policy can not be ignored as requirement for definition of crimes against humanity in the context of customary international law.

Regarding the Iraqi situation as it appears from the facts and documents, it is very clear that the crimes of the Ba'ath regime, including forced internal displacement, were not isolated. On the contrary, they were in each case a widespread criminal enterprise, as is shown by evidentiary materials revealing that the attacks extended throughout large areas. For example, the UN Environment Programme (UNEP) published satellite images showing that the campaigns of Ba'ath regime had destroyed 90 percent of the Marshlands which extend on 20,000 square kilometres of waterways.[208] Experts proclaimed that if there were no urgent measures then the ecosystem of Marshlands would be wholly lost.[209] The government ordered the burning and shelling the villages in Marshlands, and had dams, embankments and canals built to divert water from marshes.[210] There was large-scale hydro-engineering projects.[211] The number of the Marshlands population was estimated between 350000-500000.[212] This number was dropped to 20000 dwellers after the campaigns[213] and compulsory displacements whether by direct orders or because of vast violations such as assassination of local leaders and other prominent community members, and abduction of heads of families, executing, torturing, arresting and deadly chemical attacks.[214] Other tactics included use of napalm, the deliberate contamination of water supplies, poisoning fishing grounds, commercial blockades, destruction of the livelihoods, the denial of aid, and the refusal of access to aid agencies.[215] In his conclusion made in 1995 the UN special rapporteur on Iraq, Max van der Stoel, found that

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[206] See, Report of the ILC of 1996 (n 142) 47.
[207] See, ibid.
[208] Janie Hampton, *Internally displaced people: A global survey* (Taylor & Francis, 2000) 175. See also, UN Environment Programme, 'Support for environmental management of the Iraqi Marshlands' (UN Environment Programme) available at <http://marshlands.unep.or.jp/> accessed on November 19, 2016.
[209] See, Support for environmental management of the Iraqi Marshlands, ibid.
[210] John Fawcett and Victor Tanner (n 106) 166-167. See also, Janie Hampton (n 208) 175.
[211] Heather Sharp, 'Iraq's 'devastated' Marsh Arabs' available at <http://news.bbc.co.uk/1/hi/world/middle_east/2807821.stm> accessed on November 27, 2016.
[212] Janie Hampton (n 208) 175. See also, Heather Sharp, ibid.
[213] Heather Sharp, ibid.
[214] John Fawcett and Victor Tanner (n 106) 167. See also, Forgotten people: The Marsh Arabs of Iraq, available at <http://reliefweb.int/report/iraq/forgotten-people-marsh-arabs-iraq> accessed on November 19, 2016.
[215] John Fawcett and Victor Tanner, ibid.

there was 'extremely little evidence' of successful land reclamation and 'indisputable evidence of widespread destruction and human suffering.'[216] In preparation for the attacks on the marshes, the Iraqi state media inflamed this view with a series of articles degrading the Marshlands population as 'monkey-faced' people who were not real Iraqis.[217] In 1992, the Special Rapporteur on Iraq stated that

> '[t]here is in fact a specific policy aimed at the Marsh Arabs in particular. In this connection, the Special Rapporteur is especially aware of a videotape in his possession wherein the present Prime Minister is heard to instruct several Iraqi army generals late last year to "wipe out" three specified Marsh Arab tribes. The same videotape, portions of which have been broadcast on various national television networks, shows Iraqi army personnel apparently training to carry out assaults on the population, with some portions of the videotape appearing to show actual interrogations and raids in progress. In this context, then, the many recent reports of full-scale military attacks on southern marsh villages are extremely disturbing and may be seen as the manifestation of a preconceived policy.'[218]

In the case of Al-Dujail town, the great majority of its Shiite population was targeted and its agricultural nature was wholly transformed. As mentioned in the previous chapter Al-Dujail is a small town and is a 'place of palm groves, citrus trees, and grapevines'. Although the interrogation showed that number of doers who had been implicated in the failed assassination attempt of the former president 'Saddam' had been ten persons; however, the town was sealed off and attacked by the military forces and the tanks and helicopters.[219] While some civilians were immediately killed in the town, others who had no chance to flee were detained in a full-scale military operation.[220] The detainees were Shi'ite families in whole including women, children and elderly. They experienced blatant abuses and many of them including babies died under the torture, and then those who remained survival were displaced to a remote camp in the desert and under harsh conditions for years.[221] One hundred and forty-eight persons including thirty-nine minors were executed according to a sentence issued by the Revolutionary

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[216] Cited in: Heather Sharp (n 211).
[217] John Fawcett and Victor Tanner (n 106) 165.
[218] Report of Special Rapporteur on Iraq, Mr. Max van der Stoel, on Situation of human rights in Iraq (n 53), para. 8.
[219] Jennifer Trahan (n 52) 838.
[220] Ibid. See also, James Menendez, 'Seeking justice in Dujail' available at <http://news.bbc.co.uk/1/hi/world/middle_east/4350104.stm> accessed on November 23, 2016. See also, Rory Carroll, 'Saddam trial to open with village massacre', available at <https://www.globalpolicy.org/component/content/article/163-general/28977.html> accessed on September 25, 2013.
[221] Michael J. Kelly, *Ghosts of Halabja: Saddam Hussein and the Kurdish Genocide* (Greenwood Publishing Group, 2008), 67-68. See also, Rory Carroll, ibid. See also, Jennifer Trahan (n 52) 839-840.

Court.[222] A sole justification for this sentence was that those victims were capable to bear arms.[223] The campaign included destruction of orchards and fields.[224] In addition, large swathes of farmlands and a number of houses were confiscated or bulldozed by the government.[225]

The campaign was taken place under supervision and orders of the high-ranking officials and other senior members of the Ba'ath Party members. For example, both Barzan al-Tikriti who is Saddam's half brother and was head of the Intelligence service 'secret police' and Taha Yassin Ramadan who was Vice-President and head of the Popular Army were implicated in the campaign.[226] Statements and documents show that the attack against the Shi'ite families in Al-Dujail was not isolated. Instead, it was systematically planned. For example, in his speech Saddam promised that he will 'root out the 'small number' of traitors in the town, 'agents of foreigners' he says, meaning the Iranians.'[227] In his testify before the IHT he said that he gave the order for destroying the orchards and houses and attacking the townspeople who were subject to the abuses,[228] and even so he rejected to describe these acts as being crimes.[229] He plead that the attempt on his life authorises him to commit such violations against the Shi'ite people including women, children and elderly.[230] In this respect, one expert commented that the Ba'ath regime wanted to prove that

> '[T]he response has to be swift and it has to be bloody to prove to the population of the town, and the whole of Iraq, that any attack on the president will be punished in brutal and horrific terms.'[231]

There were organized documents which were related to the orders of displacements, seizing the property, death certificates and executions.[232] In addition, a recorded dialogue between Saddam and then Vice-President Taha Yassin Ramadan reveals that there were plans and arrangements for destroying the agricultural nature of Al-Dujail.[233] A handwriting document shows that Saddam granted rewards for the officials who had been exercised the apprehensions against the victims. This also was confirmed by testimony of an intelligence officer who

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[222] Report of the Human Rights Watch on 'Iraq, Judging Dujail: The first trial before the Iraqi High Tribunal' (November 2006), 2. (Therein after HRW Report on Judging Dujail).
[223] Jennifer Trahan (n 52) 839.
[224] Ibid.
[225] HRW Report on Judging Dujail (n 222), 2.
[226] Jennifer Trahan (n 52) 838.
[227] James Menendez (n 220).
[228] Jennifer Trahan (n 52) 839.
[229] Michael J. Kelly (n 221) 70.
[230] Ibid, 67.
[231] James Menendez (n 220).
[232] Michael J. Kelly (n 221) 70.
[233] Ibid, 72.

participated in the campaign and Hamed Youssef Hamadi who was Saddam's former personal assistant and cultural minister.[234] This demonstrates that the head of State and government approved the campaign and abuses.

In the case of Al-Anfal campaigns, it can be evidenced that the Kurds were targeted systematically and in large scale, since the atrocities and military attacks were mass, deliberate and organized. This finding appear clearly through the facts and documentary archive of the Ba'ath regime which was analysed by the non-governmental organizations such as Middle East Watch and the Physicians for Human Rights. The estimations refer that around four thousands of villages were destroyed, in addition to hundred and eighty-two thousands of Kurds were disappeared.[235] Investigative reports of the organizations above underlined that the campaigns had aimed both the Kurdish insurgents and civilian, and the villages had been attacked widely and systematically with chemical weapons such as sarin and mustard gas, which had caused thousands of deaths.[236] Other tactics included razing the villages, demolition of homes, confiscation of property; in addition to the various violations such as mass executions, torturing, disappearances, and mass graves.[237] Hundreds of thousands of the Kurds were expelled or transferred to the camps and detentions where they faced harsh conditions and violent abuses.[238] Tens thousands of those displaced including women, children and elderly were forever vanished, since they were killed or buried in mass graves.[239] In this respect, the human rights researchers found hundreds of lists within the documentary archive of Al-Anfal operations, and these lists included thousands of displaced names and recommended to put them to death.[240] This policy had encompassed even those Kurds who had voluntarily left their villages and had been described by the government as 'returnees to the national ranks'.[241]

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[234] Ibid, 70.

[235] See, Ali A. Allawi, 'The state and intergroup violence: The case of modern Iraq'. In: Abdelwahab El-Affendi, (ed). *Genocidal nightmares: Narratives of insecurity and the logic of mass atrocities* (Bloomsbury, 2015), 181. See also, Michael M. Gunter, *Historical dictionary of the Kurds* (The Scarecrow Press, Inc., 2011), 36. See also, Choman Hardi, *Gendered experiences of genocide: Anfal survivors in Kurdistan-Iraq* (Routledge, 2011), 28.

[236] Bruce P. Montgomery (n 61). See also, Choman Hardi, 'The Anfal campaign against the Kurds: Chemical weapons in service of mass murder'. In: Rene Lemarchand, *Forgotten genocides: Oblivion, denial, and memory* (University of Pennsylvania Press, Philadelphia, 2011), 119. See also, Report of Middle East Watch and Physicians for Human Rights on 'Unquiet Graves: The search for the disappeared in Iraqi Kurdistan' (February 1992). (Thereinafter Report of Middle East Watch and Physicians for Human Rights on 'Unquiet Graves').

[237] See, Martin van Bruinessen, 'Genocide of Kurds'. In: Israel W. Charny, (ed). *The widening circle of genocide, Genocide: A critical bibliographic review, volume 3* (Transaction Publishers, New Brunswick, 1994), 173.

[238] Bruce P. Montgomery (n 61).

[239] Ibid. See also, Martin van Bruinessen (n 237) 173-174. See also, Report of Middle East Watch and Physicians for Human Rights on 'Unquiet Graves' (n 236). See also, Choman Hardi (n 235) 27-28.

[240] Bruce P. Montgomery (n 61).

[241] Ibid.

In his directives, Ali Al-Majid confirmed for the commanders who were participated in execution of Al-Anfal campaigns that it would be seen that

> '[a]ll the vehicles of God Himself will not be enough to carry them all. I think and expect that they will be defeated. I swear that I am sure we will defeat them.'[242]

He also exposed his intention for kill them by using chemical weapons, and the bulldozers would be used to bury those displaced who were in a huge number and there was not enough places for their detention.[243] He added that

> '[A]t a time when we had this huge military! I swear to God it was not done in that way. All the Iraqi troops couldn't have done what we did. But this [deportation] hurt them. It kills them.'[244]

Other documents refer undoubtedly that the attacks were intentionally designed to hit the civilians and not only the rebels. For example, one document prohibited any human existence in the targeted villages, and any such existence should be subject to policy of shot-to-kill immediately.[245] Other document directed that the randomly bombings, helicopters, artillery, and aircraft should ensure that the villages and population would not take a rest whether in the day or night times in order to causing the largest figure of killings.[246] This document also ordered that any one of those population when be captured should be detained, interrogated and obtained all useful information, and then those who are between the ages of 15-70 should be executed.[247]

Thus, it is clear that the attacks against the population in the three cases above were widespread and systematic. The governmental documents, statements, arrangements, size of atrocities and institutions that were implicated in the attacks show that these attacks were not isolated. Instead, they were previously detailed and deliberate planning by the highest ranking political and military leadership with approval of the ruling regime and according to governmental plans and policies against the targeted population and were based on discriminatory grounds. Moreover, it was demonstrated in chapter one that there were many evidentiary materials from which it can be inferred that the conduct of the former Iraqi regime was part of its policy against the Shiite and Kurdish communities in particular, and against any person opposed to it, or even

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[242] HRW Report on 'Genocide in Iraq' (n 59).
[243] Ibid.
[244] Ibid.
[245] Bruce P. Montgomery (n 61).
[246] Ibid. See also, Choman Hardi (n 235) 29-30.
[247] Bruce P. Montgomery, ibid. See also, Choman Hardi, ibid.

any political activity outside the general structure of the ruling party.[248] In addition, it was previously noted that all those opinions that regard the policy element as a legal or evidentiary one recognize that this policy can be inferred from the nature of widespread or systematic attack or other circumstances. Then it can be said that the condition of a policy or plan existed with regard to the Ba'ath regime crimes.

5.3.2. A contextual requirement of an 'attack directed against any civilian population'

5.3.2.1. 'Directed against'

These words reveal the essential object for implementing the attack, which is the targeting of the civilian population.[249] To specify whether the attack is directed or not can be examined through a number of factors. For example, it is helpful to investigate inter alia, the means and manners which are employed, the status and numbers of casualties, the discriminatory grounds and the nature of the offences.[250] It is also useful in a war situation to take into consideration any resistance to the aggressors, whether or not the precautionary measures were taken, the magnitude of the alleged crimes against humanity, the nature of the attack and whether or not the acts carried out in the course of it are lawful.[251] Regarding the Iraqi cases, including the acts of forced internal displacement, it can be said that they targeted the civilian population in large numbers and over wide area, that they were based on discrimination grounds by implemented various means and violations.

5.3.2.2. 'any'

The origins of the use of the word 'any' in this context dates back to the trials held after World War II. It was incorporated to remedy the loophole in international law in order to protect civilian individuals against the offences of their government.[252] The word was inserted in order to prosecute or punish any brutal acts of the Nazi government, regardless whether the targeted people were of the same nationality as the government or whether they were foreigners or stateless.[253] Therefore, the aim of the Nuremberg Charter was to cancel this distinction between two categories of people and to expand the scope of the criminal provisions of international

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[248] See in Chapter one, 22-31.

[249] See, *Kunarac* Appeals Judgement (n 161) para. 91; *Blaskic* Appeals Judgement (n 182) para. 106; *Kordic* Appeals Judgement (n 182) para. 96; *Limaj* Trial Judgement (n 131) para. 185; *Brdjanin* Trial Judgement (n 8) para. 134; *Galic* Trial Judgement (n 131) para. 142; *Stakic* Trial Judgement (n 131) para.624; *Naletilic* Trial Judgement (n 161) para. 235.

[250] *Kunarac* Appeals Judgement, ibid, para. 91.

[251] Ibid.

[252] UN War Crimes Commission Report of 1948 (n 126) 34. See, Beth Van Schaack (n 107) 794-804. See also, Roberta Arnold (n 157) 981. See also, Antonio Cassese, Guido Acquaviva, Mary Fan, and Alex Whiting (n 151). See also, Sawsan Tmrkhan (n 149) 263-264.

[253] UN War Crimes Commission Report of 1948, ibid, 34. See also, Sawsan Tmrkhan, ibid, 263-264.

law to criminalize and prosecute inhumane acts, regardless of the nationality of the victims and the perpetrators.[254] It was also the aim not to take into consideration henceforth whether or not the victims were connected to one of the parties in the armed conflict.[255] Therefore, the purpose of this phrase in the provisions of crimes against humanity was to circumvent the situation of impunity which was enjoyed by perpetrators who had the same nationality as their victims. It is noteworthy that all the targeted people and victims who suffered under the Ba'ath regime were Iraqi citizens.

5.3.2.3. 'population'

With regard to the word 'population', it is uncontroversial to say that this word used in the Chapeau of crimes against humanity in order to strengthen and confirm that these crimes are collective and therefore if any act is not thus characterized, such as an isolated or single act, then it cannot be condemned as a crime against humanity. Instead, it may be classified as a domestic offence.[256] This ruling, therefore, seems to reflect the widespread and systematic nature of the attacks.[257] However, it should not be imagined that crimes against humanity do not exist unless all residents of a geographic area are targeted by attack.[258] What is important that a tribunal is satisfied that the people targeted by the attack are not randomly chosen; but were rather targeted because of their location or as part of population.[259] In this connection and depending on the number of casualties, a tribunal has the authority to estimate whether the available cases are collective or not and then whether or not crimes against humanity have been committed.[260] In this respect, as has been shown the crimes in Iraq during the era of the Ba'ath regime fulfil the population condition.

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[254] Darryl Robinson (n 146) 51. See also, Phylilis Hwang (n 107) 463, 482. See also, Prosecutor v. Vasiljevic (Trial Judgement) ICTY-IT-98-32-T (29 November 2002), para. 33. See also, *Blagojevic* Trial Judgement (n 131) para. 544. See also, *Limaj* Trial Judgement (n 131) para. 186.

[255] *Vasiljevic* Trial Judgement, ibid, para. 33.

[256] Darryl Robinson (n 146) 48, 51. See also, Phylilis Hwang (n 107) 468, 482, 499. See also, *Bagilishema* Trial Judgement (n 192) para. 80.

[257] Leila Nadya Sadat (n 127) 27. See also, Phylilis Hwang, ibid, 483. Some opinions claim that the word population must involve a pattern of policy.

[258] Otto Triffterer (n 128). See jurisprudence of the ICTY, for example, *Kunarac* Appeals Judgement (n 161) para. 90; *Kordic* Appeals Judgement (n 182) para. 95; *Blaskic* Appeals Judgement (n 182) para. 105; *Limaj* Trial Judgement (n 131) para. 187; *Brdjanin* Trial Judgement (n 8) para. 134; *Galic* Trial Judgement (n 131) para. 143; *Simic* Trial Judgement (n 5) para. 42; *Stakic* Trial Judgement (n 131) para. 624; *Naletilic* Trial Judgement (n 161) para. 235. From the jurisprudence of ICTR see, for example, *Bagilishema* Trial Judgement (n 192) para. 80; *Bisengimana* Trial Judgement (n 182) para. 50; *Kamuhanda* Trial Judgement (n 182) para. 669; *Kajelijeli* Trial Judgement (n 182) paras. 875-76.

[259] See the case-law from the ICTY at footnote (229). See also, John Cerone and Susana SaCouto (n 148) 16.

[260] Ibid.

5.3.2.4. 'civilian'

It is worth noted that the population who are subject to the attack must be civilians. In this respect, it can be observed that the Ba'ath regime government alleged that those targeted were traitors and enemies of the people and that in addition some of them were armed. Therefore, it is important to investigate the meaning of a "civilian" population and whether the presence of some armed individuals alters the civilian status of that population. This raises a set of difficult issues, because it is well known that the terms 'civilians' and 'civilian population' refer to one of the categories protected in international humanitarian law and this normally relates to war crimes. For this reason and on the occasion of the drafting of the ICC Statute, some state delegations argued that the words 'population' and 'civilian' should not be used together. They argued that coupling these words will lead to the inference that a state of armed conflict would have to exist, especially when with the word 'attack', thus it is vital to avoid grouping the two words together.[261] On the other hand, other delegations found that if word 'population' is restricted to mean 'civilian', then this will give the best introductory formulation for crimes against humanity.[262]

It is worth mentioning that all the charters of international tribunals' have not ignored the fact that the population are precisely those civilian people. However, all these instruments pose explanatory problems if they do not specify precisely who these civilians are in the context of crimes against humanity. Moreover, these problems are made more complicated because of the different interpretations that come from case law and international jurisprudence. For example, it is not clear whether or not the term 'civilian' carries the same meaning in international humanitarian law as in laws dealing with war crimes. If it is the same meaning, then what is the causation appropriate to be applied to crimes against humanity which are in a different class than the elements of war crimes? Another issue is whether the term 'civilian' is to be applied to cover fighters who have become hors de combat. Another issue is whether the targeting of civilians is a condition to establish the 'attack' only as a contextual condition of crimes against humanity, or whether it is a prerequisite for determining the nature of the victims regarding the elements of each inhumane act which is cited as a crime against humanity. In other words, if the attack is specifically and only directed against the civilian population, but at the same time

[261] Report of Preparatory Committee on the ICC of 1996 (n 149) para. 49. This appeared in the positions of the delegations of Jamaica, the Republic of Korea and Malta. See, Report on 'Summary records of the plenary meetings and of the meetings of the Committee of the Whole' UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court during (15 June-17 July 1998), A/CONF.183/13 (Vol. II), 148-149, 328.

[262] Ibid.

the victims of an inhumane act such as persecution or murder are a mix of civilians and non-civilians, will negatively affect the decision as to whether a crime against humanity was committed?

It was said above that the charters and statutes of all international criminal tribunals fail to provide answers to these questions. Also, the judicial precedents give different definitions of civilians. The jurisprudence of ad hoc Tribunals has referred to international humanitarian law on the grounds that this law affords some definitions of the expression 'civilian" namely in Article 50(1) of Protocol I, Article 3(1) Common to the four Geneva Conventions and Article 13 of Protocol II. Common Article 3(1) says

> '[P]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely.'[263]

It will be noted that this article uses a broad expression which is not specifically restricted to civilians or to the civilian population 'who do not bear arms'. Instead it extends to the armed individuals who are mentioned in third Geneva Convention.[264] In other words, it attempts to determine the people who are entitled to be protected against inhumane treatment. Article 50 of Protocol I specifies that ae person who should be regarded as 'civilian' is

> '1. ...any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.
>
> 2. The civilian population comprises all persons who are civilians.
>
> 3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.'[265]

It is noteworthy that owing to the difference of fields of application between the crimes against humanity on the one hand and war crimes and international humanitarian law on the other, a high degree of caution should be employed when the concepts of one category are used in the

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[263] Art. (3)(1) Common to the four Geneva Conventions.

[264] See the commentary on Article 3(1) Common, <http://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?viewComments=LookUpCOMART&articleUNID=A4E145A2A7A68875C12563CD0051B9AE> accessed on October 22, 2016.

[265] Art. 50(1) of Protocol I. It is noteworthy that the Art. 4(a) of the third Geneva Convention ppointed that 'Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.'

context of the other. Therefore, it is needed a reasonable argument for adopting the concept of a civilian given in international humanitarian law and war crimes laws. Relatedly, attention has been given to the *Tadic* judgement, which set the principle of analogy as a legal basis for borrowing the meaning of civilians from the laws of armed conflicts.[266] This judgement has been criticized because the analogy method necessitates the assumption that both forms of law are similar, and this is not the case.[267] Otherwise, some jurisprudence and judicial opinions have found that it can cite the definition of civilians laid down in the laws of armed conflicts, in so far as this definition gives the ordinary meaning and keeps the purpose and objective of the 'civilians' term.[268] It is notable that the 'civilians' term in both the laws of armed conflicts and category of crimes against humanity does goes beyond its ordinary sense, purpose and objective.[269]

In the first cases considered by both the ICTY and the ICTR, Common Article 3 was set to guide to the interpretation of the term 'civilian' in the context of crimes against humanity. The term was used in the *Tadic* case and the *Akayesu c*ase to mean that civilians are distinct from fighters, who are members of military forces,[270] and moreover a civilian status is applicable when a person is not playing an 'active part in hostilities' and can be extended beyond these meanings.[271] For example, the *Tadic* Trial Judgement reviewed case law and number of sources and decided that the term a 'civilian' person should be given a broad definition. Thus, it classified armed members of the resistance and military personnel who leave their weapons and their participation in the hostilities because of their wounds or other reasons as within the category of civilians, because the Trial Chamber concluded from the case law and resources that these categories of people had been regarded as victims of crimes against humanity.[272] In addition, this Chamber counted that civilians include both the people who had been targeted by the attack in order to meet the contextual conditions and the victims who had been targeted

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[266] *Tadic* Trial Judgement (n 129). See also, Roberta Arnold (n 157) 984.
[267] Alexander Zahar and Goran Slutitter, *International criminal law: A critical introduction* (Oxford University Express, New York, 2008), 200. See also, Antonio Cassese, Guido Acquaviva, Mary Fan, and Alex Whiting (n 151) 176-178.
[268] Antonio Cassese, Guido Acquaviva, Mary Fan, and Alex Whiting, ibid.
[269] Ibid.
[270] This is according to Art. 50 of Protocol I. See also, Leila Nadya Sadat (n 127) 27-28.
[271] See, Darryl Robinson (n 146) 982. See also, Leila Nadya Sadat, ibid, 27-28. See case law, for example, *Tadic* Trial Judgement (n 129) paras. 636-643; *Akayesu* Trial Judgement (n 119) para. 582; *Bisengimana* Trial Judgement (n 182) para. 48; *Rutaganda* Trial Judgement (n 161) para.72; *Musema* Trial Judgement (n 158) para. 207; *Kajelijeli* Trial Judgement (n 182) paras. 873-74; *Seromba* Trial Judgement (n 186) para. 358; *Kamuhanda* Trial Judgement (n 182) para. 667; *Muvunyi* Trial Judgement (n 182) para. 513.
[272] See Roberta Arnold (n 157) 984. See also Darryl Robinson, ibid, 51. See also, Phylilis Hwang (n 107) 480-481. *Tadic* Trial Judgement, ibid, paras. 636-643.

by each one of inhumane acts that shape the attack.[273] The Trial Chamber in the case of *Prosecutor v. Blaskic* followed the approach above. It said that when the victims were soldiers it was necessary to make a distinction between those who were in a combat situation and those who were not during the commission of the inhumane acts, because it was not enough to depend on their status as solders.[274] This Chamber also stated that it was not the civilian or non-civilian status of the victim that affects the specificity of a crime against humanity, it was instead the scale and organisation of the inhuman acts that decide the specificity of these crimes.[275] Consequently, the Chamber concluded that the victims of crimes against humanity should be understood to include members of resistance groups and former combatants who have ceased to take part in hostilities or are hors de combat, and that it is not their status as military or non-military that categorizes them as civilians but rather their situation during the perpetration of the crimes.[276] This approach was not accepted by the Appeal Chamber in the case of *Prosecutor v. Blaskic*, which declined the idea that the establishment of a crime against humanity needs to be based on the victim's status.[277] On the contrary, the Chamber found that members of resistance groups and former combatants could not be regarded as civilians.[278] The Chamber established its argument on two bases: Articles 50 and 43 of Protocol I and Article 4(a) of the third Geneva Convention and also on the grounds of the commentaries of the ICRC.[279] This author approves this finding, since it was a rational and based on the express texts. This can be observed through the mentioned articles and commentaries of the ICRC. These resources specified the persons and populations who are civilian are not combatants,[280] and that combatants are only members of 'the armed forces of a party to the conflict, militias or volunteer corps including organized resistance movements, regular armed forces and dwellers of a non-occupied territory who bear the weaponry to counter the invading forces.'[281] In addition, the commentary of the ICRC confirms that

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[273] Ibid.
[274] Prosecutor v. Blaskic (Trial Judgement), ICTY-IT-95-14-T (3 March 2000), para. 208. (Therein after *Blaskic* Trial Judgement). See also, Roberta Arnold (n 157) 982-984. See also, John Cerone and Susana SaCouto (n 148) 10.
[275] *Blaskic* Trial Judgement, ibid.
[276] Ibid, para. 214. See also, Roberta Arnold (n 157) 982-984. See also, *Bisengimana* Trial Judgement (n 182) para. 49. See also, *Kamuhanda* Trial Judgement (n 182) para. 668. See also, John Cerone and Susana SaCouto (n 148) 10.
[277] *Blaskic* Appeals Judgement (n 182) para. 107. See also, Simon Chesterman (n 113) 321.
[278] *Blaskic* Appeals Judgement, ibid, para. 114.
[279] Ibid, paras. 110-115.
[280] Art. 50(1) of Protocol I.
[281] See Art. 4(a) of the third Geneva Convention, and Art. 43 of Protocol I. See also, Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (n 78) 611, para. 1915.

> '[A]ll members of the armed forces are combatants, and only members of the armed forces are combatants. This should therefore dispense with the concept of quasi-combatants, which has sometimes been used on the basis of activities related more or less directly with the war effort. Similarly, any concept of a part-time status, a semi-civilian, semi-military status, soldier by night and peaceful citizen by day, also disappears.'[282]

Thus, the criterion is that if a person is a member of one of the armed forces or groups cited, then that person has combatant status, regardless of his or her situation and as long as he or she is not permanently demobilized.[283] Such a person deserves protection but not civilian status in the event of injury, sickness, shipwreck or capture.[284] Consequently, the meaning of the term 'civilian population' should be understood in the view of such analysis. It is noteworthy that the status of such population will not change if combatants are found among them as long as the number of combatants is not significant and the civilians are in the majority.[285] In this respect, the ICRC commentary asserted

> '[i]n wartime conditions it is inevitable that individuals belonging to the category of combatants become intermingled with the civilian population, for example, soldiers on leave visiting their families. However, provided that these are not regular units with fairly large numbers, this does not in any way change the civilian character of a population.'[286]

This analysis is reasonable, especially in view of the ordinary meaning and purpose of the term 'civilian'. The Appeals Chamber classified Article 50(1) of Protocol I as the best example of the determination of the normal content of the term 'civilian'.[287] Moreover, by such an analysis it can distinguish between two categories of victims in the context of the crimes against humanity. The first one involves a population that is targeted and intended to suffer the attack and composed of civilians, the second category is a victim of an inhumane act, such as persecution or murder, and that type of victim can be non-civilian.[288] This, approach can

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[282] See comment of the ICRC in: Yves Sandoz, Christophe Swinarski and Bruno Zimmermann, ibid, 515, para. 1676.
[283] Ibid.
[284] Ibid.
[285] See, Article 50(3) provides that 'The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.' See case law of the ICTY, for example, *Blaskic* Appeals Judgement (n 182) para. 113, 115; *Simic* Trial Judgement (n 5) para. 42; *Brdjanin* Trial Judgement (n 8) para. 134; *Limaj* Trial Judgement (n 131) para. 186. See case law of the ICTY, for example, *Akayesu* Trial Judgement (n 119) para. 582; *Seromba* Trial Judgement (n 186) para. 358; *Semanza* Trial Judgement (n 199) para. 330; *Nzabirinda* Trial Judgement (n 182) para. 22.
[286] Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (n 78) 612, para. 1922.
[287] Antonio Cassese, Guido Acquaviva, Mary Fan, and Alex Whiting (n 177) 177.
[288] Ibid, 177-179. See also, Leila Nadya Sadat (n 127) 28.

address the fact that the victim is not civilian in the context of crimes against humanity, while retaining the ordinary meaning of 'civilian', as required by the Chapeau elements.

In the view of the analysis above and an examination of the Iraqi cases, it can be established through documents, factual evidences and eye witnesses that the attacks were directed at the civilian population as a whole within the areas that were attacked.[289] For example, in the Al-Dujail case there were about ten persons who took up arms and fired shots at Saddam's motorcade, after which, in accordance with a governmental plan, civilian Shi'ite families, including children and women, were targeted in a widespread or systematic attack.[290] The nature of the destruction of the properties and lands of those families also reveals that the attack was directed against the Shi'ite civilian population. Similar findings apply to the cases of the Marshlands population and the Kurdish population. It was shown that the attacks had destroyed ninety percent of Marshlands and reduced their people to around twenty thousands of dwellers.[291] The Ba'ath media attacked the population of Marshlands, denied their Iraqi identity, and described them as those people who have monkeys' faces.[292] In 1992, then Parliamentary Speaker Saadi Mehdi Saleh justified the action against the Marsh population: 'America wiped the Red Indians off the face of the earth and nobody an eyebrow.'[293] All these confirm that the attacks were directed to the civilian population. For example, in his description in 1992, the Special Rapporteur on Iraq affirmed that the 'blatant violations of human rights' against Marshlands population had been a form of 'military attacks against the civilian population'.[294] He also added that he

> '[c]annot understand how indiscriminate bombardments of civilian settlements could possibly be justified by police actions directed against a small number of individuals.'[295]

Regarding Al-Anfal campaigns, although a confirmation made by Ali Al-Majid that the armed rebels were just shelling the governmental forces from far away with light artillery, i.e. from mountains.[296] Nonetheless, many evidentiary materials such as documents, voice recorders,

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[289] See chapter 4, 208-225. See also in the present chapter, 235-237, 262-268.
[290] See chapter 4, 213-217. See also in the present chapter, 236-238, 263-266.
[291] See in the present chapter, 262-263.
[292] See, Report of Special Rapporteur on Iraq, Mr. Max van der Stoel (n 53) para. 9. See also, John Fawcett and Victor Tanner (n 106), 165.
[293] John Fawcett and Victor Tanner, ibid, 168.
[294] Report of Special Rapporteur on Iraq, Mr. Max van der Stoel (n 53) paras. 11-16. See also, Philip Alston, 'The Security Council and human rights: Lessons to be learned from the Iraq-Kuwait crisis and its aftermath' 13 (1992) *Australian Year Book of International Law*, 165.
[295] Report of Special Rapporteur on Iraq, Mr. Max van der Stoel, ibid, para. 11.
[296] HRW Report on 'Genocide in Iraq' (n 59) 267.

reports and victims of atrocities leave no doubt that the civilians were deliberately an aim of campaigns.[297] For example, Saddam expressly confirmed to a military commander implicated in Al-Anfal campaigns that the attacks should be directed to the civilians and should kill thousands of them.[298] He asserted that the civilians should lose their ability to eat, drink and sleep.[299] Attacking of civilians appeared in many voice recorders and orders attributed for Ali Al-Majid. For example, he excluded only the governors of Erbil and Suleimaniyeh, and regarded that all other Kurds are not good or loyal ones.[300] He ordered to eliminate any human existence in the targeted villages, and all villagers will be killed with chemical weapons and aerial and artillery bombings.[301] He confirmed that those displaced people will be put under the eyes, executed and buried an enormous number of them in mass graves with bulldozers.[302] This included tens thousands of civilians including women, children and elderly. In the view of the discussion and findings above, it can be said that the people targeted in widespread and systematic attacks by the former Ba'ath government were members of a civilian population.

5.3.3. A contextual requirement of a knowledge element of the attack

It is not appropriate to convict a criminal author with crimes against humanity because his or her offences or actions occurred during the course of a widespread and systematic attack on a civilian population. To establish the conviction on a true basis then the criminal author must have awareness concerning the broad dimensions of the attack and understand that his or her offences or actions were a component of the attack.[303] However, in the process of the examination of the knowledge component, it is unnecessary to show that the accused had or shared information regarding the details, purposes or aims pertinent to the wider context of attack.[304] Also, with crimes against humanity, as with other crimes it is not necessary to prove

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[297] See Chapter 4, 217-220, 224. See also in the present chapter, 236-238, 242-244, 265-268.
[298] Report of the Center of Halabja against Anfalization and genocide of the Kurds on 'Anfal: The Iraqi State's Genocide against the Kurds' (The Center of Halabja against Anfalization and genocide of the Kurds 'CHAK', 2007) 62.
[299] Ibid.
[300] HRW Report on 'Genocide in Iraq' (n 59) 270.
[301] See Chapter 4, 217-220. See also in the present Chapter, 242-244, 265-267.
[302] Bruce P. Montgomery (n 61) 44, 89-95. See also, HRW Report on 'Genocide in Iraq' (n 59) 266, 269.
[303] See case law of the ICTY, for example, *Tadic* Appeals Judgement (n 129) para. 271; *Kunarac* Appeals Judgement (n 161) para. 99; *Limaj* Trial Judgement (n 131) para. 190. See also case law of the ICTR, for example, *Kayishema* Trial Judgement (n 192) paras. 133-134, Prosecutor v. Ruggiu (Trial Judgement) ICTR-97-32-I (1 June 2000), para. 20; Prosecutor v. Zigiranyirazo (Trial Judgement) ICTR-01-73-T (18 December 2008), para. 430.
[304] See for example, *Simic* Trial Judgement (n 5) para. 45; *Blaskic* Trial Judgement (n 274) para. 244, 247; Prosecutor v. Jelisic (Trial Judgement) ICTY- IT-95-10-T (14 December 1999), para. 56; *Kunarac* Appeals Judgement, ibid, para. 102-103.

a particular motive, such as the acquisition of personal benefits, or economic, political or other motives, because motive is not a primary factor in the structure of the *mens rea* component, although of it may serve in the building of evidence.[305] In addition, determination of the knowledge element will not be affected even if the intention of the offender is to target particular victims and not the intended population by the attack in general.[306] Thus, overall knowledge of the nature of the attack and the inhumane acts that occurred will be sufficient to institute the knowledge element as a Chapeau stipulation of crimes against humanity. It is notable that evidence of this element may vary and needs to be approached on a case-by-case basis, and therefore it is the particular facts of a case that may prove such element.[307] One further aspect is that the knowledge element is necessarily related to the attack in general and is distinct from an intention pertinent to each underlying offence of crimes against humanity, such as persecution or murder. It is therefore indispensable that an intention relevant to each underlying offence be proved in addition to the knowledge element that is necessary in order to establish each offence.[308]

Although the knowledge element need to be examined on the basis of case-by-case and with regard to each one of defendants, however the facts, documents and evidence material can serve to establishment the mentioned element. Although the knowledge element needs to be examined on the basis of case-by-case and with regard to each one of defendants, however the facts, documents and evidence material can serve to establish the mentioned element. In respect to the Iraqi cases, such finding can be noted in the light of the facts which were previously discussed at the present chapter and chapter five. For example, in the case of Al-Dujail, it was previously shown that one of the interrogatory officers wondered why this huge number of the people including women, children and elderly were detained. In addition, the former president Saddam made a speech in the same day of the attempt on his life and threatened that he will uproot the traitors in Al-Dujail. The large scope of the violations and destruction of lands, houses and property show clear that there was an attack against a specific group of people who are Shi'ite. Then, it is difficult to suppose that the accuseds were not aware of this attack.

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[305] See for example, Prosecutor v. Jelisic (Appeals Judgement) ICTY- IT-95-10-A (5 July 2001), para. 49; Prosecutor v. Krnojelac (Appeals Judgement) ICTY-IT-97-25-A (17 September 2003), para. 102; *Tadic* Appeals Judgement (n 129) paras. 270, 272.

[306] See, *Limaj* Trial Judgement (n 131) para. 190; *Kordic* Appeals Judgement, ibid, para. 99; *Blaskic* Appeals Judgement (n 182) para. 124; *Kunarac* Appeals Judgement (n 161) para. 103.

[307] *Blaskic* Appeals Judgement, ibid, para. 126. See also, *Limaj* Trial Judgement, ibid, para. 190.

[308] Ibid, para. 126. See also, for example, *Blagojevic* Trial Judgement (n 131) para. 548; *Kupreskic* Trial Judgement (n 72) para. 556; *Galic* Trial Judgement (n 131) para. 148; *Kordic* Appeals Judgement (n 182) para. 99.

Particularly, there were organized documents and recorded conversation with regard to the violations and destruction and there was governmental approval and awards for some of those officials who participated in the attack.

The knowledge element is more evident in the case of the Marshlands, since the Ba'athist government employed the media through publishing of a series of articles against the marshes' population. In addition, some statements of the high-ranking officials to the media included explicit references to the campaigns. International Organizations and the efforts of the UNCHR Special Rapporteur disclosed their worries about the widespread attack and abuses commited by government against the civilian marshes' population. Moreover, a governmental document titled 'Plan of action for the Marshes' reveals that the attack was deliberate and organized. In addition, the destruction which covered ninty percent of the Marshlands area and the sizable abuses and displacements which inflicted a largest number of inhabitants leave no doubt that a knowledge element of the attack was existing.

In Al-Anfal case, in addition to the large number of victims and atrocities, there were a large number of the documents and recorded vocal tapes for the former president Saddam, Ali Al-Majid with high-ranking of military commanders, Ba'ath Party members and other officials. These documents and tapes give a sufficient and clear perception about the nature of the attacks and victims people, since they disclose that those who were participated in the attacks recieved the instructions, orders, plans, intentions of the attacks and the size of discriminatory violations against the Kurdish people. Thus, the knowledge element can be established regarding the mentioned cases.

Conclusion

This chapter examined requirements of internal displacement, the criteria for deciding whether an internal displacement is legal or illegal and the criteria that are needed in order to convict such displacement under one of the headings of crimes against humanity. It also examined cases of internal displacement in the context of these requirements.

Not every incidence of forced internal displacement can be described as criminal, and to decide whether a particular situation involves criminality, a number of conditions and requirements need to be examined. For example, the internal displacement must be committed under coercion and the affected people should not have been able to exercise genuinely free in leaving their places of residence. Moreover, even with such coercion and absence of genuine free will, internal displacement should not be permissible on any grounds according to international law. However, international human rights law affords some bases that justify internal displacement, such as an emergency situation or under a general restriction of choice in choosing a place of residence. International humanitarian law determines two grounds on which internal displacement can be legal and non-criminal in the context of an armed conflict. These grounds are either to ensure the security of civilians and military necessity or imperative military reasons. However, the justifications for carrying out internal displacement in both international human rights law and international humanitarian law require a restricted number of conditions and circumstances. One more condition required in order to classify the internal displacement as illegal and criminal that is that the presence of the displaced people in their place of residence should be lawful. In relation to the internal displacements in Iraq, it appears that these situations were not justified by any reason under international law. In particular, the practice of internal displacements in Iraq were conducted under circumstances and by means that blatantly violated all the standards and requirements of international law and the rules of human rights and armed conflicts.

It has been shown that even if internal displacement is unlawful, there can be no conviction for an international criminal act unless other criminal elements and requirements are available. There are a number of Chapeau requirements that must be met in order to criminalize internal displacement under the heading of crimes against humanity. These Chapeau elements of crimes against humanity can be summarized as an act that is part of a 'widespread or systematic attack directed against any civilian population, with knowledge of the attack'. The jurisprudence of both of the international tribunals and the ILC demonstrates that these elements have been well established as part of customary international, law since the Nuremberg Judgements.

Therefore, these conditions must be fulfilled if the perpetrators of the Iraqi internal displacements are to be tried under the heading of crimes against humanity. These latter crimes are particularly suited to establish the criminality of the most of the Iraqi internal displacements. This conclusion was shown in the previous Chapter. The facts and circumstances prove that the Chapeau or contextual elements were established on the occasion of the Iraqi internal displacements and consequently these displacements warrant conviction as crimes against humanity. However, these displacements need to be under one of the sub-headings of crimes against humanity, such as the crime of persecution and/ or the crime of other inhumane acts. This aspect was discussed and proved in Chapter 4.

CHAPTER SIX

FORCED DISPLACEMENT IN THE CONTEXT OF THE TERMS OF THE CRIME OF GENOCIDE

Introduction

This chapter investigates whether forced displacement can fulfil the *actus reus* and *mens rea*, including the *dolus specialis*, of the crime of genocide. Consequently, it will determine whether there are some types of forced displacement that can amount to genocide. From there, it will examine whether any of the situations of forced displacement that occurred in Iraq during the Ba'athist era should be addressed in terms of the crime of genocide. Cases of forced displacement in Iraq were implemented to achieve various objectives. Some were designed to dislocate the victims from a specific area and force them to live in other cities, as was the case with the Shi'ite Arab Marshlands population. In addition, these actions were intended to destroy the livelihood, traditions, history, land, culture and social relationships of that population. It is necessary to discover whether the forced geographic and social displacement of those population groups constitutes a form of genocide. This requires an analysis of the term genocide and determination of whether it can apply to these types of forced displacement. Another case of Iraqi forced displacement was that which was perpetrated against the Kurds. This is an important case because it includes various types of forced displacement which continued for years. The Kurdish forced displacements began with the objectives of demographic change and ethnic cleansing. However, at a later stage these actions involved the intentional killing of Kurdish people and the destruction of many Kurdish villages. Therefore, these cases need to determine whether they can be covered by the genocide crime.

Investigation of whether these action amount to the crime of genocide necessitate in turn an investigation of whether the destruction of the geographic demographic, social and cultural existence of a group in addition to the ethnic cleansing can meet the definition of genocidal intention, including the elements including the special genocidal intent of destruction of a protected group. It must be determined next whether the actions against the Kurds amount to the crime of genocide, or whether the crimes are to be regarded as the physical and/or material destruction of a group. It will be determined whether the forced displacement can be classified as the crime of genocide.

In relation to the crime of genocide, there is more than one legal doctrine for defining the various types of destruction. According to one analysis, forced displacement is excluded from the definition of the crime of genocide, especially when such forced displacement is directed

at the devastation of social, cultural, geographic existence or even ethnic cleansing. The other one recognizes that all or some of the previous types of destruction should be included in the meaning and terms of genocide. The difference between these two analyses is based on different understandings of the term special genocidal intent and whether this intent covers forced displacement. It is notable that forced displacement is not mentioned as an independent act within the list of genocidal underlying acts that have been expressly enumerated. Consequently, to prove that forced displacement can amount to genocide; it will investigate which one of the genocidal underlying acts applies to acts of forced displacement. Moreover, to address the situations of displacement in Iraq requires an examination of the status of the four of protected groups and then to determine which of them belong to groups covered by the definition of forced displacement in Iraq and which groups can be deemed to be victims of the crime of genocide.

6.1. Dolus specialis and forced internal displacement as cultural, social or physical destruction

The question of whether forcible transfer (forced internal displacement) can be treated as the crime of genocide was discussed by case law and jurisprudential experts. Some judicial and jurisprudential opinion denies that the crime of genocide can serve to criminalise actions of forced displacement, while others adopted e a contrary view.

6.1.1. A restrictive view of *dolus specialis* excluding forcible transfer as a form of genocide

In some cases addressed by the ICTY, such as those of *Stakic*, *Krstic* and *Brdjanin*, it was ruled that it would be illogical to consider forcible transfer as one of the acts constituting genocide. For example, in the case of *Prosecutor v. Stakic*, the Trial Chamber made a distinction between genocide and forced displacement (deportation). The Chamber took the view that the purpose of the forced displacement of the whole or part of a targeted group is no more than the disintegration of the targeted group.[1] Thence, such disintegration should not be seen as a form of genocide because its threshold is lower than the physical destruction of a group which must be carried out if someone is to be charged with committing a genocidal deed.[2] The Trial Chamber cited the opinion given by Kress.[3] The latter asserted that the dispersion or even

[1] Prosecutor v. Stakic (Trial Judgement) ICTY-IT-97-24-T (31 July 2003), para. 519. (Therein after the *Stakic* Trial Judgement).
[2] Ibid.
[3] Ibid.

assimilation that disassembles the unity of a group does not conform to the definition of the crime of genocide, because it does not involve physical destruction.[4]

The same view can be found in the later opinion of the Appeals Chambers in the case *Prosecutor v. Krstic* regarding acts of forcible transfer that had been perpetrated in the Bosnia. The Appeals Chamber endorsed[5] the defence submission that it is unacceptable to broaden the legal notion of genocide[6] because this would criminalise the notions and deeds located beyond the scope and intention of those who had designed the Genocide Convention.[7] This response of the Chamber shows that a broad definition will be legally inadmissible, and the argument presented by the defence regarding the non-inclusion of forcible transfer within the definition of genocide is weighty and should not be ignored.[8] According to the defence objection, the Trial Chamber was not correct in dealing with forcible transfer that expels people of a protected community from their normal lodging site, since an extra element is not necessary to attain the high threshold of genocidal *mens rea* of *'dolus specialis'*.[9] Nevertheless, both of the two Chambers deemed that the facts of forcible transfer can have a useful effect in raising the question of whether the high intent of genocide was formed.[10]

The above findings on the forcible transfer were referred to by the Trial Chamber in the case of *Prosecutor v. Brdjanin*.[11] Furthermore, the same conclusion regarding the exclusion of forcible transfer from criminalisation as a form of genocide crime was reached by the ICJ. The ICJ had discussed forcible transfer as a major aim and method in the execution of policy of ethnic cleansing which had been perpetrated in Bosnia and Herzegovina by Serbian forces

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[4] See, Kress K., Münchner Kommentar zum StGB, Rn 57, §6 VStGB, (Munich 2003). Cited in *Stakic* Trial Judgement, ibid.

[5] This sounds intelligible when a comparison is made between understanding of the defence and the Appeals Chamber. See Prosecutor v. Krstic (Appeals Judgement) ICTR-IT-98-33-A (19 April 2004), paras. 24, 30-31, 33. (Thereinafter *Krstic* Appeals Judgement).

[6] Ibid, para. 24.

[7] Ibid. paras. 24, 31, 33. 'The Trial Chamber, the Defence submits, impermissibly broadened the definition of genocide by concluding that an effort to displace a community from its traditional residence is sufficient to show that the alleged perpetrator intended to destroy a protected group.'

[8] Ibid.

[9] Ibid.

[10] See, ibid, 33. See also, Ralph Henham and Paul Behrens, (ed). *The Criminal law of genocide: International, comparative and contextual Aspects* (Ashgate Publishing Limited, England, 2007), 82.

[11] Prosecutor v. Brdjanin (Trial Judgement) ICTY-IT-99-36-T (1 September 2004), para.975. (Therein after the *Brdjanin* Trial Judgement).

against both the Bosnian Muslims and Croats.[12] After examining whether ethnic cleansing raises a criminal responsibility for committing acts of genocide, the court concluded that that:

> '[N]either the intent, as a matter of policy, to render an area "ethnically homogeneous", nor the operations that may be carried out to implement such policy, can as such be designated as genocide: the intent that characterizes genocide is "to destroy, in whole or in part" a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement.'[13]

6.1.1.1. A basis for denying the forced displacement as a form of the crime of genocide

Nearly the viewpoints above were predicated on the will of those who authored the Genocide Convention and who had set aside the modification to add an item regarding displacement and refugees that had been proposed by the representative of Syria.[14] The Syrian attempt to amend the draft and the current article (II) of the Genocide Convention referred to:

> '[i]mposing measures *intended to oblige members of a group to abandon their homes* in order to escape the threat of subsequent ill-treatment.'[15]

Such views underlined that, although forced displacement disassembles ae group of individuals and then eliminates their unity as a social entity, this does not appear to be physical or biological devastation.[16] Hence, such transfer or displacement should not be held as a form of genocide because it is lacked the high intent of a subjective genocidal element. This supposes that the destruction of a group must be considered as the material destruction of group members. Such a claim is supported by the words of both the Trial and Appeals Chambers in the case of *Prosecutor v. Krstic*. The former Chamber had showed that:

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[12] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*) (Judgement) (ICJ Reports 2007), 43. (Thereinafter ICJ Judgement on Application of Genocide Convention). See also, Larry May, *A normative account: Genocide* (Cambridge Unversity Press, New York, 2010), 106.

[13] ICJ Judgement on Application of Genocide Convention, ibid, para. 190.

[14] *Stakic* Trial Judgement (n 1) para. 519. See also, *Krstic* Appeals Judgement (n 5). See also, ICJ Judgement on Application of Genocide Convention, ibid, para. 190.

[15] Proposal of Syria on 'Amendment to Article (II) of the Draft Convention on Genocide submitted to the UN Sixth Committee (2nd Session)' UN Doc. A/C.6/234 (15 October 1948). (Therein after the Proposal of Syria). See also, Summary record of UN Sixth Committee for its 82nd Meeting on 'Continuation of the consideration of the draft Convention on Genocide [E/794]' UN Doc A/C.6/SR.82 (23 October 1948). (Therein after Summary record of UN Sixth Committee for its 82nd Meeting).

[16] *Stakic* Trial Judgement (n 1) paras. 518, 519. See also, *Krstic* Appeals Judgement (n 5). See also, the ICJ Judgement on the Application of the Genocide Convention (n 12) para.190, 344. See the same opinion rejecting the idea of social destruction, stated by the Report of the Darfur Inquiry Commission. See, UNSG Letter dated 31 January 2005 to the President of the UNSC to transmit 'Report of the International Commission of Inquiry on Darfur to investigate reports of violations of international humanitarian law and human rights law in Darfur-Sudan, submitted to the UNSG pursuant to UNSC Res. 1564 (18 September 2004)' UN Doc. S/2005/60 (1 February 2005), paras. 515, 517-518, 520. (Therein after Report of Darfur Inquiry Commission). See also, Claus Kress, 'The International Court of Justice and the elements of the crime of genocide' 18 (2007) *The European Journal of International Law* (4), 626.

> '[C]ustomary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group. [A]n enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate these elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide.'[17]

The Appeals Chamber approved the position of the Trial Chamber and added that customary international law as well as conventional, as it appears in the Genocide Convention, assumes that a group is only protected against physical and biological destruction.[18] Such a restriction imposes a definition of genocide in a non-broad content, and both Chambers mentioned above, and also the Trial Chambers in the cases of *Stakic and Brdjnian* did not allow that mere displacement can be regarded as adequate to achieve the *'dolus specialis'* of the destruction of a group.[19] In the same context, the ICJ in its judgement in the case of 'Application of the Genocide Convention' affirmed that it is only physical and biological destruction that must take into consideration in order to construe genocidal intent and to assess whether a certain deed should be deemed genocidal.[20]

According to this analysis, therefore, it is not reasonable to agree with the view given in the following paragraph by the Trial and Appeals Chambers in the *Krstic* case. This view[21] quoted the opinion of the Chambers:

> '[A]s the Trial Chamber explained, forcible transfer could be an additional means by which to ensure the physical destruction of the Bosnian Muslim community in Srebrenica. The transfer completed the removal of all Bosnian Muslims from Srebrenica, thereby eliminating even the residual possibility that the Muslim community in the area could reconstitute itself.'[22]

Depending on these words, the view in question concluded that the Chambers recognized that forcible transfer is physical destruction.[23] These words have created controversy and confusion.

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[17] Prosecutor v. Krstic (Trial Judgement) ICTY- IT-98-33-T (02 August 2001), para. 580. (Therein after *Krstic* Trial Judgement).
[18] *Krstic* Appeals Judgement (n 5) para. 25. See also on this opinion, Ralph Henham and Paul Behrens (n 10) 83.
[19] *Stakic* Trial Judgement (n 1). See also, *Brdjanin* Trial Judgement (n 11).
[20] the ICJ Judgement on the Application of the Genocide Convention (n 12) paras. 190, 344. See also, Caroline Ehlert, *Prosecuting the Destruction of Cultural Property in International Criminal Law: with a case study on the Khmer Rouge's destruction of Cambodia's heritage* (Koninklijke Brill NV, The Netherlands, 2014), 36-37. See also, Christian J. Tams, and James Sloan, (ed) *The Development of International Law by the International Court of Justice* (Oxford University Press, New York, 2013), 345.
[21] See, H.G. van der Wilt, J. Vervliet, G.K. Sluiter and J.Th.M. Houwink ten Cate, *The Genocide Convention: The legacy of 60 years (Koninklijke Brill NV, Leiden, The Netherlands, 2012)*, 53-54. See also, Tatiana E. Sinatiti, 'Toward a comparative approach to the crime of genocide' 62 (2012) *Duke Law Journal*, 186.
[22] See *Krstic* Trial Judgement (n 17) para. 595. See also, *Krstic* Appeals Judgement (n 5) para.31.
[23] H.G. van der Wilt, J. Vervliet, G.K. Sluiter and J.Th.M. Houwink ten Cate (n 21) 53-54.

They should, however, be read in the whole context of the findings of these Chambers. For example, these Chambers dismissed the interpretation of forcible transfer as physical and biological destruction,[24] and within the framework of the crime of genocide.[25] Furthermore, the Appeals Chamber asserted that the Trial Chamber referred to non-genocidal events, such as forcible transfer, in order to prove genocidal intent with respect to other culpable acts of genocide, especially the killings of Bosnian Muslims.[26] In addition, the literal expression of the words '*to ensure* the physical destruction' does not necessarily have precisely the same meaning as other phrases, such as 'to cause or to commit the physical destruction'. Therefore, it can be said that the words 'to ensure' meant that the consequences of physical destruction by killing the men would be maintained.

This seems to be clear in the findings of the Trial Chamber in the case of *Prosecutor v. Brdjanin,* which indicated that

> '[w]hilst forcible displacement does not constitute in and of itself a genocidal act, it does not preclude ... relying on it as evidence of intent. But in the Trial Chamber's view it is not appropriate to rely on it as evidence of the actual destruction of the targeted parts of the protected groups, since that would in effect mean the consideration, as it were through the back door, of forcible displacement as an underlying act.'[27]

6.1.2. A wider view of *dolus specialis,* alleging the forcible transfer as a form of the crime of genocide

All the previous opinions precluded the forced displacement as a genocidal misdeed, a conclusion with which the present author agrees. It will be demonstrated later that mere displacement intent cannot fulfil the *dolus specialis* of the crime of genocide. Nevertheless, there are other views incompatible with aforementioned. In some judicial debates, it is argued that there is no justification for dismissing genocidal deed if the forced transfer lacked the high intent of the genocidal *mens rea, 'dolus specialis'*. However, the analyses of these debates were inconsistent with regard to the meaning of the special intent of genocide.

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[24] See for example, the comment on the position of German court, *Krstic* Trial Judgement (n 17) para. 580. This seems what is approval by the Appeals Chamber, *Krstic* Appeals Chamber (n 5) para. 25.

[25] See, *Krstic* Appeals Judgement, ibid, para.33.

[26] As mentioned before that the facts on the occurrences of forcible transfer can serve in the process of evidences to infer whether certain misdeeds but other than the acts of displacement were intended to commit genocide. See in this meaning, ibid. See also such meaning in the confirmation of, *Prosecutor v. Blagojevic* (Trial Judgement) ICTY-IT-02-60-T (17 January 2005), para. 122-123. (Therein after *Blagojevic* Trial Judgement). See also, Prosecutor v. Jelisic (Appeals Judgement) ICTY-IT-95-10-A (5 July 2001), 47. (Thereinafter *Jelisic* Appeals Judgement).

[27] *Brdjanin* Trial Judgement (n 11) para. 575-576.

6.1.2.1. Forcible transfer as a destruction of the social unity involved in the dolus specialis

6.1.2.1.1. View of Judge Shahbuddeen

Regarding forcible transfer, Judge Shahabuddeen commented on the Appeals judgement in the case of the *Prosecutor v. Krstic*. In his opinions, one of the intentions of the law of genocide was to preserve the social unity of a human group. He then inferred that such unity will be destroyed when the characteristics of group are targeted by the physical and biological acts enumerated in Article 2 of the Genocide Convention.[28] Moreover, he added that he respected the view of the Appeals judgement that the forcible transfer was not eligible to be regarded as bearing the high guilt of genocide, yet he asserted this is true only when the forcible transfer was not carried out along with other listed genocidal deeds.[29] Conversely, if the forcible transfer aims to dissolve a group and is implemented by acts that together form a single criminal plan, then its criminal author can be sentenced as guilty of genocide crime as long as such a criminal plan was intended to demolish a distinguished group, fractionally or more.[30] For instance, Judge Shahabuddeen perceived that there are common traits that define a group of people as a featured social entity compared with other social categories.[31] Consequently, he found that it was logical that the social unity of a group will be demolished as a distinct entity when its common traits are attacked, and the group has dissolved and disappeared.[32] This, in particular, is when an action such as forced displacement causes disintegration of the characteristics and unified social entity of a group.[33] Thus, there is no necessity to interpret the intent of genocidal destruction intent only in terms of its physical or biological nature.[34] This perception by Judge Shahabuddeen distinguished between the *actus reus* and *mens rea* of genocide. Accordingly, it is only the *actus rea* that should be understood physically and biologically for the purposes of the destruction, while the special intent is not strict as such.[35]

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[28] Partial dissenting opinion of Judge Shahabuddeen, para. 50. (Therein after Opinion of Judge Shahabuddeen). See also, *Blagojevic* Trial Judgement (n 26) para. 659. See also, Caroline Ehlert (n 20) 36. See also, H.G. van der Wilt, J. Vervliet, G.K. Sluiter and J.Th.M. Houwink ten Cate (n 21) 54-55.

[29] Opinion of Judge Shahabuddeen, ibid, para. 57.

[30] Opinion of Judge Shahabuddeen, ibid, para. 57. See also, *Blagojevic* Trial Judgement in relation to the analysis of Judge Shahabudeen's view. *Blagojevic* Trial Judgement (n 26) para.660. '[...] there was more than mere displacement. The killings, together with a determined effort to capture others for killing, the forced transportation or exile of the remaining population, and the destruction of homes and places of worship, constituted a single operation which was executed with intent to destroy a group in whole or in part within the meaning of the chapeau to paragraph 2 of Article 4 of the Statute.'

[31] Opinion of Judge Shahabuddeen, ibid.

[32] Ibid.

[33] See in this meaning, ibid, para. 50, 55.

[34] Ibid, paras. 48-51. See also, H.G. van der Wilt, J. Vervliet, G.K. Sluiter and J.Th.M. Houwink ten Cate (n 21) 54-55. See also, Claus Kress (n 16) 26. See also, Report of Darfur Inquiry Commission (n 16) paras. 515, 517-518, 520.

[35] Opinion of Judge Shahabuddeen (n 28) paras. 48, 50-51. '[t]he intent certainly has to be to destroy, but, except for the listed act, there is no reason why the destruction must always be physical or biological.' See, ibid, para.

Consequently, Shahabuddeen emphasised that special genocidal intent can mean also the devastation of the social unity and the obliteration of group traits.[36] Consequently, it is beyond question that the dissolution of a group by displacement will mean that a genocidal crime has occurred. However, as Shahabuddeen says this will not be true unless such dissolution is perpetrated with the listed acts in Article 2 of the Genocide Convention.[37]

6.1.2.1.2. A broad meaning of dolus specialis derived from the German Courts and the ECtHR

The broad approach had appeared in German courts and the ECtHR in the case of the *Prosecutor v. Nikola Jorgic*. Both the German Higher Regional Court of Düsseldorf and the German Federal Supreme Court had established that it would be enough to meet the high threshold of destruction if the intention that was in the mind of the perpetrator was to demolish the social unity of a particular group,[38] regardless of whether such an intention includes physical and biological destruction.[39] This approach acquired the endorsement of the German Constitutional Court, which regarded it as concordant with international law.[40] This Court showed reason for adopting such an approach through the clarification of the primary function embodied in the act of genocide.[41] This viewpoint emphasises the maintenance of the social entity or existence of a group which is higher than the protection of a mere group of individuals.[42] Consequently, any eradication, apart from cultural identity even if it is not physical or biological, that leads to the disbanding of the social composition of a group falls within the legal definition of genocide.[43] Hence, the special intent of destruction should not be

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51. See also, Caroline Ehlert (n 20) 36. See also, See also, H.G. van der Wilt, J. Vervliet, G.K. Sluiter and J.Th.M. Houwink ten Cate, ibid, 54-55. See also, Ralph Henham and Paul Behrens (n 10) 83.

[36] Opinion of Judge Shahabuddeen, ibid.

[37] See, Opinion of Judge Shahabuddeen, ibid, paras. 50, 53, 55, 57.

[38] Cited in *Blagojevic* Trial Judgement (n 26) para.664. For original text of Judgement see, Prosecutor v. Nikola Jorgic (Judgement) Düsseldorf Higher Regional Court (Oberlandesgericht) IV-26/ 96-2 StE 8/96 (26 September 1997), 94-95, available at <http://www.asser.nl/upload/documents/20120611T032446-Jorgic_Urteil_26-9-1997.pdf > accessed on November 10, 2016. See also Prosecutor v. Nikola Jorgic (Judgement) Federal Court of Justice (Bundesgerichtshof) 30 StR 215/98 (30 April 1999) 25, available at <http://www.asser.nl/upload/documents/20120611T032623-Jorgic_Urteil_30-4-1999.pdf> accessed on November 10, 2016. See also, Claus Kress (n 16) 625. See also, Cecile Tournaye, 'Genocidal intent before the ICTY' 52 (2003) *International and Comparative Law Quarterly*, 454.

[39] *Nikola Jorgic* Judgement by the Higher Regional Court, ibid. See in this respect: Report of Amnesty International on 'Germany: End impunity through universal jurisdiction' 3 (2008) *No Safe Haven Series-International Amnesty*, 38. (Therein after Report on 'Germany: End impunity through universal jurisdiction).

[40] Cited by *Blagojevic* Trial Chamber (n 26). See original text of Judgement, Prosecutor v. Nikola Jorgic (Judgement) Federal Constitutional Court (Bundesverfassungsgericht) 2 BvR 1290/99 (12 December 2000) 13, 17-22, available at <http://www.bverfg.de/entscheidungen/rk20001212_2bvr129099.html> accessed on accessed on November 10, 2016.

[41] Ibid.

[42] Ibid. See also, John B. Quigley, *The Genocide Convention: An International Law Analysis* (Ashgate Publishing Limited, England, 2006), 181.

[43] *Nikola Jorgic*, Judgement by Federal Constitutional Court, ibid.

considered as restricted to situations in which the individuals in a group are devastated physically.[44] In the same case, the ECtHR handed down the aforesaid reasoning on the concept of 'social unity' so that it is considered to be implicit in the phrase '"to destroy a group'.[45] The ECtHR admitted that the majority of jurists do not recognise that social destruction is one of the forms of genocide. However, the ECtHR tended to agree with some different doctrines such as those presented by Hans-Heinrech Jescheck and B. Jahnke.[46] Jescek, for example, argued that it is acceptable

> '[r]ead the term 'destroy' to extend beyond biological or physical destruction. He wrote that the general subjective unlawful element of genocide is in the broad sense and includes as well the destruction of the group as a social entity in its particularity, so that an intent to eliminate ... without exterminating the broader masses of the group will also suffice'.[47]

6.1.2.2. Geographical displacement or demographical change and 'ethnic cleansing'

The ad hoc Judge Elihu Lauterpacht made a finding similar to the one above when dealing with forced displacement as subject to the crime of genocide. His opinion was appended separately to the 'ICJ Order on Provisional Measures in the case of *Bosnia and Herzegovina v. Serbia and Montenegro*'. His conclusion was as follows:

> '[T]he evidence also indicates plainly that, in particular, the forced migration of civilians, more commonly known as 'ethnic cleansing', is, in truth, part of a deliberate campaign by the Serbs to eliminate Muslim control of, and presence in, substantial parts of Bosnia-Herzegovina. Such being the case, it is difficult to regard the Serbian acts as other than acts of genocide in that they clearly fall within categories (a), (b) and (c) of the definition of genocide quoted above, they are clearly directed against an ethnical or religious group as such, and they are intended to destroy that group, if not in whole certainly in part, to the extent necessary to ensure that that group no longer occupies the parts of Bosnia-Herzegovina coveted by the Serbs.'[48]

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[44] Ibid. See also, John B. Quigley (n 42) 181.

[45] See, *Jorgic v. Germany* Judgement (Judgement) ECtHR-Application no. 74613/01 (12 July 2007), 5th Section, para. 36. (Therein after ECtHR Judgement on the *Jorgic* Application) See also, Claus Kress (n 16) 626.

[46] ECtHR Judgement on the *Jorgic* Application, ibid.

[47] Jescheck, H.-H. (1954, 'Die internationale Genocidium-Konvention vom 9. Dezember 1948 und die Lehre vom Volkerstrafrecht,' Zeitschrift fur die Gesamte Strafrichtwissenschaft, 193, 213. Cited in John B. Quigley (n 42) 181. When this case was considered by the ECtHR, the interpretation given to the meaning of 'intent to destroy' was the same as that given by the German courts. The ECtHR compared the formulation of each of the texts contained in Article (II) of the Genocide Convention and Article (220) of Criminal German Code. The ECtHR concluded that there was a correspondence and that the concept of social unity was to be recognised as an essential element in safeguarding a group from destruction, as intended by the Genocide Convention. See also, Report on 'Germany: End impunity through universal jurisdiction (n 39) 28.

[48] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*) (ICJ Order on Provisional Measures, 13 September 1993) (Separate opinion of Judge Lauterpacht), para.69. For further details on this opinion See, Larry May (n 12) 106.

It is clear that Judge Elihu Lauterpacht equated forced migration with other deeds of genocide, based on geographical elements and the policy of ethnic cleansing. He then interprets the disappearance or dismissal of a certain group from their habitual geographical site by acts of forced displacement as genocide and so genocide was inflicted on Bosnian Muslims in the case cited.[49]

In the same context, other opinions referred to the wording of the Trial Judgement in the *Krstic* case in order to show that the forcible transfer is a genocidal crime.[50] The judgement cited reported that the Serb forces had had the knowledge that 'physical disappearance of the Bosnian Muslim population at Srebrenica' had been affected by means of both the killings and forced displacement.[51] However, it is not necessary that every 'physical disappearance' of a group from an appointed place should amount to physical destruction. For instance, in the 'Srebrenica' example above it can be seen that the 'physical disappearance' was perpetrated in two ways. The first is when the Bosnian Muslim men were killed, and this gives rise to the special intent of destruction. The second, however, is when the remaining Bosnian Muslims were driven away from Srebrenica: this is mere disappearance from a geographic location, and differs from intentional physical destruction: a view that finds some support in the *Krstic* trial judgement itself. This judgement declared that only the physically destructive acts of killing constituted the crime of genocide.[52] However, other acts, including forcible transfer, were used as evidence of genocidal intent in relation to these killings.

Moreover, the analysis above, equating geographic displacement or disappearance or even the ethnic cleansing with genocide cannot be accepted. It will be demonstrated that such an interpretation does not satisfy the terms of genocidal high intent. The latter intent should not be perceived to imply the threat to the geographical existence of a protected group in a specific area. Specifically, the exclusion from the definition of genocide of the mass displacement of a group from one area to another was undisputedly established from the time when the Genocide Convention was first drafted. This can be noted from the work of the General-Secretariat on the Convention.[53]

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[49] See, Larry May, ibid. See also, Robert Cryer, Hakan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, New York, 2010), 215.
[50] See, Opinion of Judge Shahabuddeen (n 28) para. 57.
[51] *Krstic* Trial Judgement (n 17) para. 595.
[52] Ibid, paras. 597-598.
[53] See, Draft Convention on the Crime of Genocide 'prepared by the Secretary- General of United Nation in pursuance of the resolution of UNESC dated 28 March 1947' UN Doc. E/447 (26 June 1947), 23-24. (Thereinafter, Draft Secretariat on the Genocide Convention).

Moreover, the same notion of ethnic cleansing had been proposed by Yugoslav delegate during the examination of the Syrian proposal to the Sixth Committee and had been rejected. In order to support the Syrian proposal, Yugoslav delegate had mentioned a specific case related to ethnic cleansing. He stated that:

> '[t]he Nazis had dispersed a Slav majority from a certain part of Yugoslavia in order to establish a German majority there. That action was tantamount to the deliberate destruction of a group. Genocide could be committed by forcing members of a group to abandon their homes.'[54]

In the same context, Schabas, in his analysis of the policy of ethnic cleansing that incorporate displacement as a primary element, asserted that that policy surely did not share the same special intent as the crime of genocide.[55] Such an understanding was endorsed by both the ICTY and the ICC.[56] Ethnic cleansing does not go beyond the intention to displace an undesirable group in order to restructure the demographic of a given area ethnically.[57] The perpetrators of genocide have an intention beyond ethnic cleansing, since he intends to destroy an undesirable group and does not merely intent to move a group from one area to another.[58] There is no doubt that both genocide and ethnic cleansing seek to achieve a similar purpose, which is disappearance of the existence of an undesirable group from a certain region.[59] Moreover, the same material elements may be present.[60] However, the difference in intention remains the critical factor in distinguishing between them in terms of criminality, and therefore forced displacement as an act of ethnic cleansing cannot fulfil the criteria of genocide.[61]

6.1.2.3. An understanding of the 'physical and biological' destruction in a broad sense, so as to include forced displacement

The previous viewpoints, which extend the definition of the crime of genocide to cover forcible transfer and in addition to what is mentioned in the Final Report of Experts Committee and the

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[54] Summary record of UN Sixth Committee for its 82nd Meeting (n 15) 185.
[55] William A. Schabas, *Genocide in International Law* (Cambridge University Press, United Kingdom, 2000), 200.
[56] See, *Brdjanin* Trial Judgement (n 11) paras. 977-978. This judgement decided that if there is nothing more than a deliberate enterprise to displace the people from a given region, then it cannot be said that such an enterprise amounts to the specific intent of genocide. This can be tacitly understood from the words of ICC in the *Prosecutor v. Al Bashir* ICC-02/05-01/09-3 (4 March 2009), para. 145. In this case it was found that the only situation in which the practice of ethnic cleansing can be defined as genocide is when the former meets the same objective and subjective intent, including special intent of genocide. For further details, see Martin Shaw, *What is genocide* (Polity Press, United Kingdom, 2007), 48-58.
[57] William A. Schabas (n 55) 200.
[58] Ibid.
[59] Ibid.
[60] *Brdjanin* Trial Judgement (n 11) para. 981.
[61] Ibid.

General Assembly resolutions,[62] featured strongly in the reasons for the Trial Chamber conviction in the case of *Prosecutor v. Blagojevic and Jokic*. This Trial Chamber argued that the law of genocide can be applied to forced displacement.[63] In this respect, the Trial Chamber has focused on the distinct social and historical composition of a protected group as a criterion for criminalising forced displacement under the rules of genocide, particularly when the consequences of the displacement ruin the composition of a group as a distinct entity.[64] However, the devastation wreaked by the displacement will not be sufficient unless it impedes the reformation or reshaping of the unity of the group, as when, for example, the individuals of the group that is dispersed cannot merge together again as unified entity socially.[65] This approach was built on an explication of the words 'physical and biological destruction of a distinct group', which is the primary stipulation for satisfying the genocidal special intent. In this respect, the Trial Chamber classified the dissolution of the group, as detailed above, as a pattern of 'physical and biological destruction'.[66] Accordingly, there is no doubt that the forced displacement that causes such dissolution can be included in the physical and biological destruction and then meets the criteria for intentional the crime of genocide. Consequently, the Trial Chamber asserted that the legal content of genocide crime should be applicable to forced displacement that targets the distinct composition of the entity of a group.[67] The Trial Chamber decided that

> '[t]he physical or biological destruction of the group is the likely outcome of a forcible transfer of the population when this transfer is conducted in such a way that the group can no longer reconstitute itself – particularly when it involves the separation of its members..... since the group ceases to exist as a group, or at least as the group it was.'[68]

The Chamber offered other arguments to support its view. It stated that the destruction is not limited to the death of individuals in a group; it covers acts and situations lesser than acts of

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[62] The Final Report of the Expert Committee stated that 'The character of the attack on the leadership must be viewed in the context of the fate or what happened to the rest of the group. If a group has its leadership exterminated, and at the same time or in the wake of that, has a relatively large number of the members of the group killed or subjected to other heinous acts, for example deported on a large scale or forced to flee, the cluster of violations ought to be considered in its entirety in order to interpret the provisions of the Convention in a spirit consistent with its purpose.' See, UNSG Letter dated 24 May 1994 to the President of the UNSC to transmit 'Final Report of the Commission of Experts established pursuant to UNSC Res. 780 (1992)' UN Doc. S/1994/674 (27 May 1994), para. 94. Furthermore, the UNGA described the ethnic cleansing as a model of genocide. See, UNGA Res. No. (47/121) on 'The situation in Bosnia and Herzegovina' UN Doc. AG/Res/47/121 (18 December 1992), preamble.

[63] *Blagojevic* Trial Judgement (n 26) para. 665.

[64] Ibid, paras. 665-666.

[65] See, ibid, 666. See also, Claus Kress (n 16) 626.

[66] *Blagojevic* Trial Judgement, ibid. See also, Ralph Henham and Paul Behrens (n 10).

[67] *Blagojevic* Trial Judgement, ibid, paras. 665-666.

[68] Ibid, para. 666.

killing.[69] It referred to the case law of the ICTR which had followed such an approach. For example, the Trial Chambers of the ICTR had asserted that acts of rape and sexual violence are located within the meaning of physical and biological destruction, even when such acts do not involve the death of members of a protected group.[70] Consequently, the Chamber endeavoured to define more accurately what the content of the physical and biological characteristics of destruction that is necessary to fulfil the legal notion of genocide.[71] The Chamber decided that:

> '[t]he physical or biological destruction of a group is not necessarily the death of the group members. While killing large numbers of a group may be the most direct means of destroying a group, other acts or series of acts, can also lead to the destruction of the group. A group is comprised of its individuals, but also of its history, traditions, the relationship between its members, the relationship with other groups, the relationship with the land.'[72]

It appears that the Chamber did not diverge from the jurisprudence which denies that the genocide crime can be produced by other than the physical and biological demolition. However, the Chamber constructed its analysis on the consideration that physical and biological destruction can be achieved, not only by destruction of the group members, but also when a group loses its common attributes and unified social entity by dissolution. Owing to the fact forced displacement can produce such loss and dissolution because it disperses the members who carry those attributes and compose the unified entity of group, then it is a form of physical and biological destruction.

Therefore, the Chamber gave a broad meaning to the phrase 'physical and biological destruction'. This is contrary to most jurisprudential and judicial analyses whether or not they classified forced displacement that targets the social unity of a particular group as genocide, because all these analyses dealt with the social dissolution of a group as a concept independent of physical and biological aspects.[73]

It is notable that the Trial Chamber pointed out its doctrine should be understood as no more than an attempt to accurately describe the content of 'physical and biological destruction',

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[69] Ibid. paras. 658, 662. Regarding this view, see Ralph Henham and Paul Behrens (n 10) 83.

[70] *Blagojevic* Trial Judgement ibid, para. 662. See also such acts in *Prosecutor v. Akayesu (*Trial Judgement) ICTR--96-4-T (2 September 1998), paras. 731-732. See also, Prosecutor v. Kayishema and Ruzindana (Trial Judgement) ICTR-95-1 (21 May 1999), para. 95. (Therein after *Kayishema* Trial Judgement).

[71] *Blagojevic* Trial Judgement, ibid.

[72] Ibid, para. 666. See also Ralph Henham and Paul Behrens (n 10) 83.

[73] This Chamber provided all the views which criminalize the forced displacement as genocide, as an argumentation to reinforce its finding that the forcible transfer is a form of genocide. Nevertheless, the Chamber did not concurred with their analyses that the specific intent is not limited to the physical and biological destruction, as the *actus reus* necessitates. See *Blagojevic* Trial Judgement, ibid, paras. 657-658, 666.

thence it does not go on to criminalize cultural genocide.[74] Moreover, the Chamber seemed to favour the examination of deeds of forced displacement deeds through the whole criminal project by treating displacement as a component, together with other acts which together constitute a single criminal plan. This conclusion was adopted by the Trial Chamber when it decided that all the misdeeds committed by the Serb forces, including forcible transfer had constituted a single project, which was genocide.[75]

6.2. The limitations of destruction as required for the definition of genocidal intent

The main critical issue to determine whether a particular act, such as forced displacement, is genocide, depends on whether the perpetrators had in mind a specific intention. This intention must be that of eradicating the full or partial existence of a human group. It is certainly also necessary that the perpetrator should commit a deed that is one of the underlying acts of the crime of genocide.

Those that rejected the opinion that the forced displacement of group members is a form of genocide argued that the destruction required under the terms of genocide crime must be physical and biological.[76] Thus, any conduct that does not aim to cause that form of destruction is not subject to conviction for the crime of genocide. On the other hand, Judge Shahabuddeen, the German courts and the ECtHR took the view that the special intent should be broader and should include other forms of annihilation apart from the physical and biological. The latter opinion is problematic, and as one writer rightly observed, it widens the notion of genocide to include unlimited forms of destruction such as economic, social, political, cultural and even traditions and lifestyle of the aboriginal societies.[77] It is notable that such a definition of the crime of genocide closes to the view that had been advocated by Raphael Lemkin and which had been strongly rejected at the time of the preparatory work on the Genocide Convention.[78] It is notable that the Trial Chamber in the *Blagojevic* case followed the same broad

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[74] Ibid.

[75] Ibid, para. 674.

[76] *Stakic* Trial Judgement (n 1) paras. 518, 519. See also, *Krstic* Appeals Judgement (n 5) paras.. See also, ICJ Judgement on Application of Genocide Convention (n 12) para.190, 344. Even the Trial Chamber in the case *Blagojevic* believed that the requirement was that which had appeared previously, although, the Trial Chamber in the case of *Blagojevic* admitted that the definition of the crime of genocide is confined to these two types of destruction. However it interpreted the meaning of the two types broadly, in a manner that covered forcible transfer.

[77] William A. Schabas (n 55) 229.

[78] See for example, Paul Behrens and Ralph Henham, (ed), *Elements of Genocide* (Routledge), 82. See also, Draft Secretariat on the Genocide Convention (n 53). See also, Josef L. Kunz, 'The United Nations Convention on Genocide' 43 (1949) *The American Journal of International Law*, (4), 738-739. See also, Cecile Tournaye (n 38) 454-455.

interpretation but proceeded by means of a different route. It decided that such a broad interpretation is precisely the meaning from the physical destruction and not from the *dolus specialis*. Another opinion, such as that of Judge Elihu Lauterpacht[79] interpreted dolus *specialis* to include the geographic existence of a group.

Therefore, the term dolus *specialis* or specific intent need to be examined in order to determine which one of the previous analyses is compatible with legal notion of genocidal destruction.

6.2.1. Dolus specialis involves only the physical and biological destruction

It can be demonstrated that only the restrictive definition of *dolus specialis* can arise the commission of the crime of genocide. Such a conclusion can be inferred from the preparatory work on the Genocide Convention. It can be seen from the discussions of State delegations and documents of the Genocide Convention, that the authors of the Convention had in mind only physical, biological and cultural forms of destruction.[80] For example, both the draft of the UNSG and the draft of the ad hoc Committee had defined the genocide in these three modalities exclusively.[81] Other form of destruction, such as the destruction of the social unity of a group, had not been mentioned, indicating that the broader notion of destruction as a definition of the crime of genocide had been absent from the minds of the authors of the Convention; although such a notion did exist in the mind of Raphael Lemkin.[82]

Moreover, the detailed discussions of the draft by State delegates reveal unquestionably that there were three different concepts of the idea of genocide.[83] The stages of the formulation of

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[79] See also the same opinion as that of Judge Riad in the case Prosecutor v. Karadzic and Mlaic and the Trial Chamber in the case of Prosecutor v. Nikolic. Cited in William A. Schabas (n 55) 197.

[80] See for example, Summary record of the Ad Hoc Committee on Genocide for its 10th Meeting on 'Discussion of the drafting of various articles of the Convention of Genocide' UN. Doc. E/Ac.25/SR.10 (16 April 1948). See also, Summary record of Ad Hoc Committee on Genocide for its 5th Meeting on 'Continuation of the discussion on the draft basic principles of a Convention on Genocide submitted by the delegation of the Union of the Soviet Socialist Republic' UN Doc. E/Ac.25/SR.5 (16 April 1948). See also, Summary record of the Ad Hoc Committee on Genocide for its 12th Meeting on 'Drafting of the proposed Convention on Genocide: Continuation of the discussion' UN Doc. E/AC.25/SR.12 (23 April 1948). Summary record of Ad Hoc Committee on Genocide for its 13th Meeting on 'Preparation of a Draft Convention on Genocide' UN Doc. E/Ac.25/SR.13 (29 April 1948). See also, Summary record of Ad Hoc Committee on Genocide for its 14th Meeting on 'Preparation of a Draft Convention on Genocide: Continuation of the discussion' UN Doc. E/Ac.25/SR.14 (27 April 1948). See also, Ad Hoc Committee on Genocide, 'Commentary on articles adopted by the Committee' UN Doc. E/AC.25/W.1 (26 April 1948). See also, Draft Secretariat on the Genocide Convention (n 53). See also, Summary record of UN Sixth Committee for its 81st Meeting on 'Continuation of the consideration of the Draft Convention on Genocide [E/794]' UN Doc. A/C.6/SR.81 (22 October 1948). See also, Summary record of UN Sixth Committee for its 82nd Meeting (n 15).

[81] See these definitions of modalities of genocide in both drafts derived from the Secretariat draft and draft of the Ad Hoc Committee.

[82] Raphael Lemkin is one of the three scholars who had written the Secretariat draft. For further investigation of the Raphael Lemkin's position, see Draft Secretariat on the Genocide Convention (n 53).

[83] See, Micol Sirkin, 'Expanding the crime of genocide to include ethnic cleansing: a return to established principles in the light of contemporary interpretation 33 (2010), *Seattle University Law Review*, 503-504. See also, Claus Kress (n 16) 627.

the Genocide Convention show that the notion of cultural genocide had been severely controversial from the beginning of the formulation the draft convention. There had been an insistence on ruling out such a notion from the draft Convention.[84] This insistence had succeeded step-by-step. First, it had dealt with cultural genocide alone in a separate article which had the purpose of defining the meaning and terms included in the intent of that type of genocide.[85] It had dismissed on the one hand, to provide a unified generic concept to define all notions of physical and biological and cultural genocide in one paragraph, and on the other, an enumeration of the acts of cultural genocide in a separate article.[86] It can observed that the voting had been in favour of the formulation consisting of two separate articles, the first one to include the terms of the intention and acts of physical and biological genocide, and another one to include the terms including the intention and acts of cultural genocide.[87] Thus the draft Genocide Convention, which is derived from the work of the Ad hoc Committee had stipulated in Draft Article II that

> '[P]hysical and biological' genocide] in this Convention genocide means any of the following deliberate acts committed with the intent to destroy a national, racial, religious or political group, ...'[88]

Draft Article III defines 'Cultural Genocide':

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[84] See for example, Summary record of the Ad Hoc Committee on Genocide for its 10th Meeting (n 80). See also, Summary record of the Ad Hoc Committee on Genocide for its 5th Meeting (n 80). See also, Summary record of the Ad Hoc Committee on Genocide for its 13th Meeting (n 80). See also, Summary record of the Ad Hoc Committee on Genocide for its 14th Meeting (n 80). See also, Ad Hoc Committee on Genocide, 'Commentary on articles adopted by the Committee' (n 80). For further details, see Micol Sirkin, ibid, 503-504. See also, Larry May (n 12) 102-105. See also, Caroline Ehlert (n 20) 34.

[85] See Summary record of the Ad Hoc Committee on Genocide for its 10th Meeting, ibid. See also, Summary record of the Ad Hoc Committee on Genocide for its 14th Meeting, ibid. See also, Ad Hoc Committee on Genocide, 'Commentary on articles adopted by the Committee', ibid.

[86] See Summary record of the Ad Hoc Committee on Genocide for its 10th Meeting, ibid. See the French suggestion that 'Another solution is to put in an article on the general principle and then separate articles that deal with the materials means. 8-9.' See also, Ad Hoc Committee on Genocide, 'Commentary on articles adopted by the Committee', ibid.

[87] Mr. Perez Peroso (Venezuela) supported the Chairman's suggestion. He would make one criticism of the text proposed by China: it mentioned cultural genocide only as part of an enumeration and not in the definition. He proposed that the Committee should vote on whether to include cultural genocide at the beginning of the definition contained in the text proposed by China. Then, the Committee decided to insert the notion of cultural genocide in a separate article. See, Summary record of the Ad Hoc Committee on Genocide for its 10th Meeting, ibid, 12. See also, Ad Hoc Committee on Genocide, 'Commentary on articles adopted by the Committee', ibid. It is noteworthy that the designation of an independent article on cultural genocide arose in order to eschew the position of dissenting States who wished to list the notion of cultural genocide, because such a notion of cultural genocide is not specified and would violate the legality principle. This position may have caused non-ratification of the convention. , Such a solution would allow to the dissenting States to make their reservations on the purpose of the exclusion of the cultural genocide application. See also, Caroline Ehlert (n 20) 34. See Summary record of the Ad Hoc Committee on Genocide for its 10th Meeting, ibid. 5. See Summary record of the Ad Hoc Committee on Genocide for its 14th Meeting (n 80) 7. See also, Ad Hoc Committee on Genocide, 'Commentary on articles adopted by the Committee', ibid, 4, 5.

[88] Draft art. (II) of draft Ad Hoc Committee on Genocide Convention.

> '[I]n this Convention genocide also means any deliberate act committed with the intent to destroy the language, religion, or culture of a national, racial or religious group on grounds of the national or racial origin or the religious belief of its members'[89]

Secondly, the Draft Convention could pay attention to the fact that there was a strong opposition, which emerged again in the UN Sixth Committee against the inclusion of the notion of cultural genocide. The opposition view was that the said notion should be removed from the definition of genocide crime and should be addressed in accordance with the international law of human rights.[90] In the end the opposition States achieved their desire, since the cultural genocide was excluded completely from the draft Convention.[91] Consequently, it can be said that the Convention only covered physical and biological acts and the intent of destruction. Furthermore, this interpretation was apparent, for example, through the critical controversy that had been arisen regarding the Greek proposal to insert the forcible transfer of children into the draft article (II). Relatedly, it should be pointed out that some delegations had felt that this form of transfer should be treated as cultural genocide under Draft Article III.[92] Other delegations considered that the forcible transfer of children should be included in Draft Article (II) because it causes physical destruction.[93]

Therefore, it true what some views held that it does not appear clearly in the preparation of the Genocide Convention that there had been attempt to restrict the *actus reus* to physical and biological adjectives.[94] Conversely, the use of these adjectives was extended to include specific intent. There is evidence of this in the French suggestion. According to this suggestion, the intent to destroy the physical existence of a group should be reformulated in one term in the introductory paragraph of Article (II), rather than repeating it in each underlying act.[95] This clearly means that the original idea of the biological and physical destruction is an essential component of genocidal intent.

To judge from the discussions of the state delegates involved in drafting the Convention, it is obvious that the authors of the Convention, after they had dismissed the notion of cultural

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[89] Draft Art. (II) of Draft Ad Hoc Committee on Genocide Convention. See also, Draft Art. (1)(II)(1)(2)(3) of the Secretariat Draft of the Genocide Convention which had provided '1. [Physical genocide] Causing the death of members of a group or injuring their health or physical integrity by ..., 2. [Biological genocide] Restricting births..., 3. [Cultural genocide] Destroying the specific characteristics of the group by ....'

[90] Regarding this opposition, see Summary record of UN Sixth Committee for its 83th Meeting on 'Continuation of the consideration of the Draft Convention on Genocide [E/794]' UN Doc. A/C.6/SR.83 (25 October 1948).

[91] Ibid. See also, Caroline Ehlert (n 20) 34.

[92] For such a controversy, see, Summary record of UN Sixth Committee for its 82nd Meeting (n 15).

[93] Ibid.

[94] See Alberto Costi, 'The 60th anniversary of the Genocide Convention' 39 (2008) *Victoria University of Wellington Legal Research Papers (VUWLR)*, 844. See also, William A. Schabas (n 55).

[95] See, Summary record of the Ad Hoc Committee for its 10th Meeting (n 80).

genocide wished to criminalize only physical and biological destruction.[96] Those authors had particularly emphasized that the concept of genocide must be limited to case where a defined group had been subjected to specific cases of destruction.[97] As Schabas argued convincingly, such understanding can be derived from the spirit of the debates during the preparation of the Genocide Convention.[98] Moreover, if a different understanding had prevailed, it would have meant that the general principles of criminality, and especially the principle of legality, had been violated.

Moreover, the conclusion that the specific intent of '*dolus specialis*' is limited to a restrictive interpretation that indicates only physical and biological destruction finds support in case law derived from the ICJ,[99] the ICTR[100] and the ICTY.[101] It can also be supported by the comments of the ILC on the 'Code of Crimes'. The ILC stated that

> '[t]he destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group. The national or religious element and the racial or ethnic element are not taken into consideration in the definition of the word 'destruction,' which must be taken only in its material sense, its physical or biological sense. It is true that the 1947 draft Convention prepared by the Secretary-General and the 1948 draft prepared by the ad hoc Committee on Genocide contained provisions on 'cultural genocide' covering any deliberate act committed with the intent to destroy the language, religion or cultural of a group, such as prohibiting the use of the language of a group ... However, the text of the Convention, did not include the concept of 'cultural genocide' contained in the two drafts and simply listed acts which come within the category of 'physical' or 'biological' genocide.'[102]

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[96] For confirmation of this finding, see what was indicated by the Ad Hoc Committee, which stated regarding the current Art. II of the Genocide Convention that '[I]n this Convention, the word "genocide" means a criminal act aimed at the physical destruction, in whole or in part, of a group of human beings, for racial, national or religious reasons.' See, Summary record of the Ad Hoc Committee for its 10th Meeting (n 80).

[97] See Summary Record of the Ad Hoc Committee for its 5th Meeting (n 80). See also, Ad Hoc Committee on Genocide, 'Commentary on articles adopted by the Committee' (n 80). See the comment of the Lebanese and USA representatives.

[98] William A. Schabas (n 55) 229. See also Alberto Costi (n 94) 84.

[99] ICJ Judgement on Application of Genocide Convention (n 12) para. 344.

[100] Prosecutor v. Kamuhanda (Trial Judgement) ICTR-95-54A-T (22 January 2004), para. 627. See also, Prosecutor v. Semanza (Trial Judgement) ICTR-97-20-T (15 May 2003), para. 315. (Therein after *Semanza* Trial Judgement).

[101] *Stakic* Trial Judgement (n 1) para. 518-519. *Krstic* Appeals Chamber (n 5) para. 25. *Krstic* Trial Judgement (n 17) para. 580. See also, *Semanza* Trial Judgement, ibid, para. 315. See also, Prosecutor v. Milosevic (Decision on the Motion for the Judgement of Acquittal) ICTY-IT-02-54-T (16 June 2004), para. 124. (Therein after *Milosevic* Decision for the Judgement of Acquittal).

[102] ILC Report on 'Work of its 48th Session (6 May-26 July 1996)' Official Records of the UNGA (51st Session), Supplement No. 10, UN Doc. A/51/10 (1996), and UN Doc. A/CN.4/SER.A/1996/Add.l (1996), Yearbook of the ILC Vol. II(2), 45-46. (Therein after Report of the ILC (1996)).

6.2.2. Material destruction of the members of group as the exclusive meaning of physical and biological destruction

A single matter remains to be discussed and solved concerning the intent of destruction. This is the proposal of the Trial Chamber of the ICTY in the case of *Blagojevic.* This Chamber did not differ from most jurisprudential and judicial doctrines, which hold that the destructive intent must be material and either physical and/ or biological. However, it provided a broader understanding of the words of 'physical and biological'. The Chamber decided that the terms 'physical and biological' refer not only to the lives of the members of a group, but that they also refer to the social, historical and geographical aspects and relationships of a distinct group.[103] Consequently, it concluded that forced displacement that destroys these aspects and relationships would destroy the group and would constitute the crime of genocide.[104] Cryer takes the view and this author concurs, that this is an unreasonable interpretation of the meaning of physical and biological destruction,[105] and it can be added that this is well established by each of the *travaux preparatoires*, the ILC, the ICTY, and the ICTR, who have all maintained that if any destructive intent with regard to group is not directed at the destruction of the members of group, then it will not constitute the crime of genocide.[106] Therefore, physical and biological destruction is only that which injures or impairs the life of a member of a targeted group.[107] This means that the Physical destruction specifically targets the members of a group, rather than the traits that create their identity and build their unified entity, although affiliation to such features or identity is an essential reason to presuppose that a genocide crime had committed. In other words, it is true that the both the destruction of the group members as well as their identity and their social unity lead to the annihilation of a targeted group as a group; but only in the first case has genocide been committed. The second case should be handled by means of the protection and obligation afforded by international human rights norms. This view is supported by case law, as in the following words from the Trial Chamber in the case of *Prosecutor v. Sikirica*. This Chamber stated that

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[103] For this interpretation, see *Blagojevic* Trial Judgement (n 26). See also Ralph Henham and Paul Behrens (n 10) 83.

[104] *Blagojevic* Trial Judgement, ibid, para. See also, Ralph Henham and Paul Behrens, ibid, 83.

[105] Robert Cryer, Hakan Friman, Darryl Robinson and Elizabeth Wilmshurst (n 49).

[106] See also in this understanding, Ralph Henham and Paul Behrens (n 10) 83.

[107] Such a finding finds support, for example, from the France delegation, which stated in the Ad Hoc Committee that there was also a reason of principle: cultural genocide and physical genocide' were not exactly the same crimes. Physical genocide, consisted in attacks on life (murder), whereas cultural genocide 'involved various acts which might be directed against objects and things, such as the "culture" of a group. Same meaning can be derived from the definition of the delegation of Soviet Union. See Report on 'Germany: End impunity through universal jurisdiction (n 39) 38.

> '[t]he ultimate victim of genocide is the group, although its destruction necessarily requires the commission of crimes against its members, that is, against individuals belonging to that group.'[108]

Other Chambers have endorsed this approach.[109] In addition, the Appeals Chamber in the *Blagojevic* case criticised and dismissed the findings of the Trial Chamber which had decided that the dislocation of a group from a certain place is tantamount to the destruction of that group.[110]

6.2.3. A calling to develop the definition of the crime of genocide

The viewpoint of Schabas is more realistic and logical. As stated above, Schabas does not deny the narrower meaning of destruction that had been given by the drafters of the Genocide Convention. However he believed that this meaning can be developed by the courts to include cultural or social destruction in addition to physical and biological destruction.[111] It may be that the principles of interpretation will help the courts with this point.[112] However, it is clear from the discussions above that most jurisprudential positions and case law of the ICJ, the ICTY and the ILC did not wish to depart from the strict meaning of destruction which had been asserted by the drafters of the Genocide Convention in both conventional and customary international law.[113] Moreover, it seems that the same stricter meaning was accepted even by the drafters of ICC Statute. All these confirm that the genocide crime should not be given the broader definition.

Regarding acts of forced displacement committed in Iraq, it is clear, then, that those perpetrated against the Shiite Arab Marshes and in the many campaigns of ethnic cleansing and demographic changes imposed on Kurdish, Turkmen, Filli Kurds, Shabak and other minorities

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[108] Prosecutor v. Sikirica (Judgement on Defence Motion to Acquit) ICTY-IT-95-8-T (3 September 2001), para.89.

[109] See for instance, the Brdganin Trial Judgement (n 11) para. 698. See also Kirstic Appeals Judgement (n 5) para. 226. See also *Milosevic* Decision for Judgement of Acquittal (n 101) para. 123. Furthermore, in the latter case it was stated that 'Genocide is a discriminatory crime in that, for the crime to be established, the underlying acts must target individuals because of their membership of a group. The perpetrator of genocide selects and targets his victims because they are part of a group that he seeks to destroy. This means that the destruction of the group must have been sought as a separate and distinct entity. According to the International Law Commission, 'the action taken against individual members of the group is the means used to achieve the ultimate objective with respect to the group.'

[110] See this rejection in, *Prosecutor v. Blagojevic* (Appeals Judgement) ICTY- IT-02-60-A (9 May 2007), footnote 337.

[111] William A. Schabas (n 55) 229-230.

[112] Ibid. See also, Alberto Costi (n 94) 844-845.

[113] ICJ Judgement on Application of the Genocide Convention (n 12) 344. *Krstic* Appeals Chamber (n 5) para.25. See also, Cecile Tournaye (n 38) 454.

were intended to remove the displaced people from their places of residence, and consequently these displacements fall outside the definition of genocide.

It is notable that all opinions, whether or not they equated forcible transfer with genocide crime, focused on certain models of forcible transfer. All these opinions dealt with forcible transfer as a pattern which is employed deliberately by the offender to destroy a protected group through, social, geographical and/or cultural dissolution. The reason for the similarity of the approaches may be that all cases were handled by case law and jurisprudence in the context of the ethnic armed conflicts in former Yugoslavia. These ethnic conflicts were characteristically aimed at implementing a policy of ethnic cleansing by creating ethnically homogeneous areas and acquiring territory through the expulsion and displacement of the population of targeted groups.

Therefore, the question that should be addressed is whether the forcible transfer or forced displacement can be intentionally employed to carry out the physical or biological annihilation of a protected group. In such cases, can forcible transfer or forced displacement serve as a model of the crime of genocide?

6.2.4. A forced displacement achieving the intent of physical and biological destruction

It is now apparent that the forced displacement is no more than an act which can be implemented to achieve various objectives and intentions.[114] The criterion of genocide as crime of specifically intended physical destruction, is not fulfilled by forced displacement. However, it can be argued that such a finding does not apply to all models of forced displacement. When the forced displacement is aimed at destroying the physical existence of a group by targeting or injuring the life of a group of individuals. Then it should be considered as involving genocidal intent. It is important to note that physical destruction as a specific intent is a subjective element which depends on the mental attitude of the perpetrator. On this basis, there is no reason why the perpetrators cannot hold in their minds that specific intent if they resort to implementing forced displacement. It is logical to say that the forced displacement can be employed to achieve various aims, including the specific genocidal intent to destroy a group physically. However, even if the forced displacement is used to carry out a specific genocidal

[114] For example, the forced displacement can be classified in various models which may be/ may not be legal or criminal. As well as, if it is criminal then it may shape normal crime or persecution as a crime against humanity or other according to the terms of each crime. Similar to a killing act which may be legal such as the defence situation during the conflict, as well as it may be a normal murder crime or a crime against humanity or even genocide. This depends on availability of the requirements each crime.

specific intent, the act cannot amount to genocide unless it meets the *actus reus* requirements of genocide. It is well known that forced displacement is not expressly listed as one of the underling acts of the crime of genocide; and therefore it should fulfil at least one of the terms of genocidal underlying acts. In other words, it is not enough to classify the forced displacement as genocide crime unless such displacement is features additional elements, such as causing serious mental and physical harm or inhumane conditions for life, in addition to specific genocidal intent. If this happens then forced displacement that intends to cause the physical destruction of a group can be addressed in terms of the crime of genocide. This conclusion can be found in both the *travaux preparatoires* and case law.

6.2.4.1. Travaux preparatoires

It can be argued that it was through the *travaux preparatoires* that forced displacement came to be recognised under the rubric of genocide. The Syrian delegate proposed the addition of the following sub-paragraph to the definition of genocide:

> '[i]mposing measures *intended to oblige members of a group to abandon their homes* in order to escape the threat of subsequent ill-treatment.'[115]

Some notes to this suggestion could be made. Indeed, it appear clear that the Syrian representative had sought by his amendment to find legal measures applicable to the problem of refugees and displaced persons.[116] The proposal had focused only on the intention that causes forced displacement or abandonment of homes. It should also be noted that the Syrian text had been premised on the element of threat that precedes the conduct of ill-treatment, and there had therefore been objections to the inclusion of this text.[117] In this respect, the Syrian delegate had stated, during the discussion of the Greek suggestion concerning the forcible transfer of children to another group that he

> '[w]ould vote in favour of the Greek amendment since it considered that the crime of genocide was not confined only to the destruction of a human being, but included also *the threat of destruction*, In the case under discussion that element of threat constituted a decisive factor.'[118]

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[115] Proposal of Syria (n 15).

[116] '[T]he problem of refugees and displaced persons to which his delegation's proposal referred had arisen at the end of the Second World War and remained extremely acute....any measures directed towards forcing members of a group *to leave their homes* should be regarded as constituting genocide. That crime was far more serious than ill-treatment.' See, Summary record of UN Sixth Committee for its 82nd Meeting (n 15) 184.

[117] Ibid, 184-186.

[118] Ibid, 187.

The representative of the United State of America commented that the Syrian text deviated too much from the original concept of genocide,[119] because it

> '[w]as too indefinite to allow...of strict interpretation: for example, the time factor came into play in the term "subsequent ill treatment"; it went beyond the definition of the crime of genocide.'[120]

The delegations of Belgium, India and United Kingdom voiced similar objections because they considered that the threat does have the same gravity as the original idea of genocide.[121] However, this does not imply that the problem of the Syrian text is simply the element of 'threat'. It can be argued that even if the Syrian text did not refer to a prior threat it would still be unacceptable. The difference between the intent cited in the Syrian text and the original intent of genocide is the real problem. It is noteworthy that the Syrian text expressly provides for forced displacement as an intent with the words '*intended to oblige members of a group to abandon their homes*', while describing the *actus reus* with the words 'imposing measures'. Moreover, if the 'threat' element is the only problem, then a simply solution would be to remove this element. This solution found some support during the preparatory work, particularly from the Yugoslav delegation. The Yugoslav representative who had supported the Syrian text had requested the deletion from the text of the phrase 'in order to escape the threat of subsequent ill-treatment' in order to make it acceptable.[122] However, it seems that this suggestion did not find favour. This may be because that the mere intention to displace members of a group from their homes does not fulfil the definition of destruction required by original idea of genocide as targeting or injuring the lives of members of a group. This appears from the comments of the Syrian delegation on the Greek proposal mentioned above, and the following comment from the Cuban delegation:

> '[t]he Syrian amendment ... did not seem to come within the definition of the crime of genocide, which was, essentially, the destruction of a human group.'[123]

Furthermore, there is another notion of displacement derived from the Secretariat draft, especially the paragraph which drew attention to coercive activities directed at the expulsion

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[119] Ibid, 185.
[120] Ibid, 187.
[121] Ibid, 184-185. (Belgium delegation) 'It should be made clear in the text that the threat of ill-treatment had to be serious in order to constitute genocide; if not, the concept of genocide would be given indefinite scope.'
(India delegation) 'He objected to the Syrian proposal on the ground that it went too far: abandonment of homes under the threat of ill-treatment and not even the threat of genocide should not be considered genocide.'
(The United Kingdom delegation) 'said that in the view of his delegation the problem raised by the Syrian amendment was a serious one but did not fall within the definition of genocide. He regarded it as a problem for the Third Committee.
[122] Ibid, 185.
[123] Ibid.

of members of a particular group. The Secretariat copy had stated in its Draft Article. (I)(II)(3)(b) that one form of cultural genocide is

> '[f]orced and systemic exile of individuals representing the culture of a group'.[124]

On the other hand, the words of the Secretariat copy were limited to a specific case of forced displacement that causes the perdition or destruction of the culture of a group. This displacement referred too acts that target those who embody the culture of their group, such as writers, teachers, doctors, artists and intellectuals. Such an interpretation is frankly proclaimed in the explanations by the Secretariat of the draft paragraph (I)(II)(3)(b) above.[125]

Moreover, both of the explanation on Secretariat draft and the discussions of the wording of the Genocide Convention by the UN Sixth Committee disclose that there had been some problems with the adoption of the general idea of displacement within the Convention.[126] These problems are related to the policies of assimilation and integration of distinct groups and foreign groups into the national community and culture.[127] Therefore, it seems that there had been a wish to rule out those measures and acts, including forced displacements that were used to carry out these policies.

On the other hand, this explanation asserted that such exclusions should not be understood e as extending certain acts of displacement especially the following

> '[M]]ass displacements of population from one region to another also does not constitute genocide. It would, however, become genocide if the operation were attended by such circumstances as to lead to the death of the whole or part of the displaced population. (if, for example, people were driven from their homes and forced to travel long distances in a country where they were exposed to starvation, thirst, heat, cold and epidemic).'[128]

It was seen above that the mere intent to oblige a group of individuals to abandon their homes was not regarded as acceptable for inclusion in the Genocide Convention. However, the *travaux preparatoires* and case law, as will appear later, uphold the interpretation, that if the attack on the dwelling places is used to inflict withering conditions on the lives of individuals, then this will be considered as genocide as long as it is intended by this means to eradicate the individuals' group. Thus, both the Syrian text and the draft paragraph on displacement in the Secretariat copy do not completely rule out all modalities of forced displacement. Moreover, it is noteworthy that the elucidations of Secretariat in its draft showed that the dissolution of a

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[124] Draft Secretariat on the Genocide Convention (n 53) 21, 27-28.
[125] Ibid, 28.
[126] Ibid. See also Summary record of UN Sixth Committee for its 83th Meeting (n 90).
[127] Ibid.
[128] Draft Secretariat on the Genocide Convention (n 53) 23-24.

group by displacement or assimilation had been obviated from the beginning. One question remains to be investigated is whether forced displacement can be covered by one of the underlying acts of genocide.

6.3. Forced displacement in the context of genocidal underlying acts of genocide

Forced displacement is not mentioned among the underlying acts of genocide; however it can be argued that forced displacement can be subject to two subheadings of genocidal *actus reus*. These subheadings will be investigated to determine whether they cover acts of forced displacement. Such subheadings are mentioned in Article II(b) and (c) of the Genocide Convention.

6.3.1. Forced displacement in the context of serious bodily or mental harm

6.3.1.1. Genocidal acts of serious bodily or mental harm

The Genocide Convention provides as one of the underlying acts in Article II(b) that

> '[C]ausing serious bodily or mental harm to members of the group.'[129]

Neither the Genocide Convention nor the *ad hoc* Tribunal Statutes afford a definition to explain these types of harm. Nevertheless, what is intended by this *actus reus* is to show that the destruction of a protected group is not limited to the death of its members.[130] Such destruction can be realised when a group of individuals suffer from serious detriment, whether bodily or mental, owing to the acts of its criminal author. This interpretation can be deduced by reason of adopting this *actus reus*. The latter had been posed and adopted during the wording of the draft Convention by the Ad Hoc Committee. The original text had been submitted by France and it had referred only to 'corporal integrity':

> '[A]ny act directed against the corporal integrity of members of the group'.[131]

The reason that had been given by the French delegation to justify his proposal, i.e., that the Convention should not be employed only to safeguard the group from the death of members, but rather that the group should be protected from violent destructive acts, or 'the enfeeblement

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[129] Art. (II)(b) of Genocide Convention.

[130] See for example, Prosecutor v. *Muvunyi,* (Trial Judgement) ICTR-2000-55A- (12 September 2006) para. 487. (Therein after *Muvunyi* Trial Judgement). This Judgement stated, according to many Trial Chambers that the harm in question does not require that the victim should die.

[131] See Summary record of the Ad Hoc Committee on Genocide for its 13th Meeting (n 80) 12.

of members of a group' which is less than acts of killing.[132] Such violent destructive acts can take many forms other than killing, such as the infliction of blows, wounds, torture, mutilation, harmful injections, biological experiments conducted with no useful end in view etc.[133] This *actus reus* had undergone many proposals for alteration when the UN Sixth Committee reviewed the draft Convention.[134] In the end, it had appeared to include mental harm as well as bodily harm when they inflict serious suffering. On the other hand, there were attempts to provide some parameters from case law that could be helpful in defining the nature of the mental or bodily harm that could be included in the definition of a genocidal act. In this regard, the Trial Chamber in the case of *Prosecutor v. Krstic* said that the 'serious harm' must

> '[i]nvolve harm that goes beyond temporary unhappiness, embarrassment or humiliation. It must be harm that results in a grave and long-term disadvantage to a person's ability to lead a normal and constructive life.'[135]

In addition, the Chamber decided that it is irrelevant whether the serious harm is conducted by omission or by act, however it should be intentional.[136] It is notable that in other case law there a distinction was made between 'bodily' and 'mental' harm.

Bodily harm

It should be noted that most case law defined bodily harm as a 'physical violence falling short of killing', and that interpretation was given by the Trial Chamber in the case of *Prosecutor v. Kayishema and Ruzindana.*[137] According to this Chamber, the meaning of the phrase 'serious

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[132] Ibid, 9-11. See also, Ad Hoc Committee on Genocide, 'Commentary on articles adopted by the Committee' (n 80).

[133] See also, Ad Hoc Committee on Genocide, 'Commentary on articles adopted by the Committee', ibid, 3.

[134] These adjustments were stated as follows: (Former Union Soviet's adjustment) 'the infliction of physical injury or pursuit of biological experiments.' See, Proposal of Union of Soviet Socialist Republic on 'Amendments to Article (II) of the Draft Convention on Genocide submitted to the UN Sixth Committee (3rd Session)' UN Doc. A/C.6/223 (7 October 1948). See also, (Belgium's adjustment) on 'impairing physical integrity' Proposal of Belgium on 'Amendments to the Draft Convention on Genocide submitted to the UN Sixth Committee (3rd Session)' UN Doc. A/C.6/217 (5 October 1948), 1. Moreover, there had been objective adjustments afforded by the delegations of the United Kingdom, India and China in order to add or to emphasize the 'mental injury'.

[135] *Krstic* Trial Judgement (n 17) para. 513. See also, *Blagojevic* Trial Judgement (n 26) para. 645. See also *Brdjanin* Trial Judgement (n 11) para. 690. See also *Stakic* Trial Judgement (n 1) para. 516.

[136] *Krstic* Trial Judgement, ibid, para. 513.

[137] *Prosecutor v. Bagosora et al.* (Trial Chamber) ICTR-98-41-T (18 December 2008, para. 2117. (Therein after *Bagosora* Trial Judgement). See also *Muvunyi* Trial Judgement (n 130) para. 487. See also, Prosecutor v. Ntagerura et al. (Trial Judgement) ICTR-99-46-T (25 February 2004), para. 664. (Therein after *Ntagerura* Trial Judgement). See also Prosecutor v. Seromba (Trial Judgement) ICTR-2001-66-I (13 December 2006), para. 317. (Therein after *Seromba* Trial Judgement). See also, *Blagojevic* Trial Judgement (n 26) para. 645. Other Chambers said that 'Serious bodily harm means any form of physical harm or act that causes serious bodily injury to the victim, such as torture and sexual violence.' See, Prosecutor v. Gacumbitsi (Trial Judgement) ICTR-2001-64-T (17 June 2004), para. 291. (Therein after *Gacumbitsi* Trial Judgement). See also Prosecutor v. Muhimana (Trial Judgement) ICTR-95-1B-T (28 April 2005), para. 502. (Therein after *Muhimana* Trial Judgement).

bodily harm' is self evident.[138] Moreover, this Chamber stated that bodily harm can be understood more generally as to

> '[m]ean harm that seriously injures the health, causes disfigurement or causes any serious injury to the external, internal organs or senses.'[139]

Mental harm

This form of harm has produced some controversy with regard to its limitations, and there are opinions that either narrow or extend the category of harm or acts that constitute mental harm. One of the attempts to define this harm was made by the Appeals Chamber in the case of *Prosecutor v. Seromba*. It specified that

> '[m]ental harm includes more than minor or temporary impairment of mental faculties such as the infliction of strong fear or terror, intimidation or threat'.[140]

A similar definition can be found in most case law including that of the ICTR Tribunal.[141] More specifically, all case law was based on the perceptions of the prosecution in the *Kayishema* case in the latter's dissection of the content of mental harm.[142] This prosecution in turn had espoused the description given by the Preparatory Committee for the ICC.[143] However, other Chambers rejected the view that the mental harm could be impermanent, and proposed that

> '[S]erious mental harm can be construed as some type of impairment of mental faculties or harm that causes serious injury to the mental state of the victim.'[144]

Such an understanding seems similar that of the ILC. The ILC had not required that a victim should have suffered from permanent 'mental harm' in order to meet the criterion of a genocidal *actus reus*.[145] This position appears to conform to what it is stated in both the Convention text and the *travaux preparatoires*. Relatedly, the harm needed to be no more than

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[138] *Kayishema* Trial Judgement (n 70) para. 109.
[139] Ibid. The ILC had noted that this harm 'involves some type of physical injury'. See, Report of the ILC (1996) (n 102) para.14.
[140] Prosecutor v. Seromba (Appeals Judgement) ICTR-2001-66-A (March 12, 2008), para. 46.
[141] See, *Seromba* Trial Judgement (n 137) 317. See also, *Bagosora* Trial Judgement (n 137) para. 2117. See also, *Semanza* Trial Judgement (n 100) paras 321, 322; *Ntagerura* Trial Judgement (n 137) para. 664. See also, Prosecutor v. Kajelijeli (Trial Judgement) ICTR-98-44A-T (1 December 2003), para. 815. (Therein after *Kajelijeli* Trial Judgement).
[142] *Kayishema* Trial Judgement (n 70) para. 110.
[143] See footnote (3) of Report of the Preparatory Committee on the Establishment of an International Criminal Court: Addendum, UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court during (15 June-17 July 1998), UN Doc. A/CONF. 183/2/Add.1 (14 April 1998).11.
[144] See *Muhimana* Trial Judgement (n 137) para. 502. See also, *Gacumbitsi* Trial Judgement (n 137) para. 291. See also *Muvunyi* Trial Judgement (n 130) para. 487. This judgement stated that '[T]he term 'serious mental harm' has been interpreted to mean a significant injury to the mental faculties of the victim.'
[145] According to, the ILC on art. (17) of the 'Draft Code of Crimes' that this harm 'involves some type of impairment of mental faculties.' Report of the ILC (1996) (n 102) para.14.

'serious', irrespective of whether or not it was permanent.[146] This harm, however, is not limited to the mental suffering: it also includes bodily injury. Nevertheless, it is notable that the case law of the ICTY and the ICTR emphasised that the bodily harm need not be irremediable or permanent.[147] Furthermore, the original suggestion that the word 'serious' was designed to be applied only to bodily or physical harm prior to the vote to add mental harm.[148] In this respect, the United Kingdom delegation had approved the adoption of the following wording:

> 'Causing grievous bodily harm to members of the group.'[149]

At a later stage, the Indian delegation had suggested the use of the word 'serious' as an alternative to 'grievous'.[150] Therefore, there is no reference to any interpretation stipulating that the 'mental harm' must be permanent.

Another point which has been raised by some writers, for example Nehemiah Robinson, is that only the employment of drugs should be taken into account in criminalising 'mental harm' as a genocidal *actus reus*.[151] This meaning derives from China's proposal on the occasion of the review of the Draft Convention by UN Sixth Committee. The Chinese delegation had proposed the insertion of the impairment 'mental health' besides the physical one.[152] The Chinese representative had in mind what the Chinese people had suffered from exhaustion because of narcotics owing to the conducts of the Japanese perpetrators. The representative stated such a method of genocide was no less grave than the killing in gas-chambers or other Nazi and Fascist atrocities.[153] The Chinese attempt was rejected by a majority vote.[154] Consequently, it is difficult to accept that the mental harm is limited to the use of drugs as was suggested by

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[146] See both the Convention text in the art. (2)(b), and also the debates and proposals of State delegations on this text, Summary record of UN Sixth Committee for its 81st Meeting (n 80).

[147] *Gacumbitsi* Trial Judgement (n 137) 291.

[148] See Proposal of United Kingdom on 'Amendments to Amendment to Articles (II) and (III) of the Draft Convention on Genocide submitted to the UN Sixth Committee (3rd Session)' UN Doc. A/C.6/222 (7 October 1948).

[149] Ibid. There was another proposal by the Indian representative which had gathered the two types of harm together as follows: 'causing grievous bodily or mental harm to members of the group'. See, Proposal of India on 'Amendments to Article (II) of the Draft Convention on Genocide submitted to the UN Sixth Committee (3rd Session)' UN Doc. A/C.6/244 (21 October 1948).

[150] Summary record of UN Sixth Committee for its 81st Meeting (n 80).

[151] Nehemiah Robinson, The Genocide Convention: A Commentary (Institute of Jewish Affairs, New York, 1960), ix, Cited by William A. Schabas (n 55) 161. Another observation by Robinson on Canadian diplomat Lester B. Pearson who said that 'mental harm' could not mean anything but 'physical injury to the mental faculties' of the members of the group. Pearson's views were not supported by either by the Convention text or the *travaux*. Consequently, Robinson's interpretation of article (II)(b) is excessively narrow. William A. Schabas (n 55) 161.

[152] See the Chinese amendment on the draft article (II)(b) of Genocide Convention. Proposal of China on 'Amendment to Article (II) of the Draft Convention on Genocide submitted to the UN Sixth Committee (3rd Session)' UN Doc. A/C.6/232/Rev.1 (18 October 1948).

[153] Summary record of UN Sixth Committee for its 81st Meeting (n 80).

[154] Ibid.

Nehemiah Robinson, although this does not mean to say that the employment of narcotics cannot be an example of the causes of genocidal mental harm.[155]

Therefore, it can be said that the terms of mental harm do not differ from bodily harm, and both forms of harm are required to be no more than serious. The condition of seriousness was intended to make the meaning clearer.[156] Therefore, the mental harm covers all acts that produce serious suffering. This means that any act directed at the individuals of a group would come under this genocidal heading of hurt if the intention of the actor was to occasion such hurt so as to annihilate the group.[157] However, the crime of genocide will not have occurred unless the hurt factually occurs. Other terms can be unnecessary to specify whether an act is equivalent to genocide, such as whether the harm should or should not be irreversible, and whether it is perpetual.[158] In addition, the tribunals asserted that all the aforesaid parameters and the level of severity should be investigated on a case-by-case basis.[159] Moreover, the ICTR and the ICTY Chambers approved some examples of the acts that could serve as guidelines in the process of assessing whether an act could inflict the type of harms in question. For example, the Trial Chamber in the case of *Prosecutor v. Akayesu* indicated the following acts as examples of carnal harm

> '[a]cts of sexual violence, rape, mutilations and interrogations combined with beatings, and/or threats of death, were all acts that amount to serious bodily harm.'[160]

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[155] Principally, the conversations of States delegates had shared the Chinese concerns; however those delegates had seen that the Chinese desire was already satisfied by the words 'physical integrity' which is read in the original text from the Ad Hoc Committee. Physical integrity, according to some delegates, also includes mental integrity. Other delegates, such as that of India, had found that the Chinese concerns could be resolved by the addition of the phrase 'or mental' next to 'physical', in a way similar to that the Chinese had proposed. It is notable that the Indian view had been accepted in the final text which had been formulated on the basis of both the Indian and United Kingdom proposals. See the positions of Venezuela, the USA and Egypt. Moreover, the Egyptian delegation disclosed that there had been agreement to interpret physical integrity so as to include mental integrity. See Summary record of UN Sixth Committee for its 81st Meeting (n 80).

[156] Ibid, 178.

[157] For this interpretation, see *Krstic* Trial judgement (n 17) paras. 511, 513.

[158] *Blagojevic* Trial Judgement (n 26) para. 645. 'Causing serious bodily or mental harm to members of the group does not necessarily mean that the harm is permanent and irremediable.' See, *Akayesu* Trial Judgement (n 70) para. 502. See also, *Kayishema* Trial Judgement (n 70) para. 108. See also Bryant B. and Jones R., 'Codification of customary international law in the Genocide Convention', 16 (1975) *Harvard international law Journal*, 686, 694-695. William A. Schabas (n 55) 162.

[159] *Kayishema* Trial Judgement, ibid, para.113. See also *Blagojevic* Trial Judgement, ibid, para. 646. *Krstic* Trial Judgement (n 17) para.513. See also Prosecutor v. Blaskic (Trial Judgement) ICTY-IT-95-14-T (3 March 2000), para. 243. *Kamuhanda* Trial Judgement (n 100) para. 634. See also *Kajelijeli* Trial Judgement (n 141) para. 815.

[160] *Kayishema* Trial Judgement, ibid, para. 108. This interpretation was dependent on the findings of the *Akayesu* Trial Chamber. See, *Akayesu* Trial Judgement (n 70) paras. 706-707, 711-712.

Other case law added to this category acts of 'serious bodily or mental harm', consisting of inhuman or degrading treatment,[161] deportation,[162] harm that damages health or causes disfigurement[163] and persecution.[164]

6.3.1.2. Forced displacement can be covered by serious bodily or mental harm

Regarding forcible transfer or forced displacement generally, it is not denied that the event could lead to consequences of serious mental or corporal suffering which is no less important than other acts. For example, the Trial Chamber in the case of *Blagojevic*, after investigating the cases of forcible transfer committed in Srberchinna against the victims of the Bosnian Muslims, found that these victims had been subjected to severe pain psychologically and mentally because of this transfer.[165] It tested the circumstances and events that happened in the context of forced displacement, such as attacks by the military etc.[166] It also found that the victims' suffering, the destruction of their homes and the loss their loved ones had caused psychological pain to the women and children and old people who were displaced.[167] Thus the Chamber was convinced unequivocally that the suffering of those displaced victims is of no lesser degree of mental harm than that which is required to meet the standard of genocidal *actus reus*.[168]

Moreover, the genocidal *actus reus* of bodily and mental harm overlaps with crimes against humanity, and many Chambers, in interpreting this *actus reus,* indicated its meaning to be in the context of crimes against humanity and war crimes.[169] Furthermore, it was noted above that

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[161] *Blagojevic* Trial Judgement (n 26) para. 646. See also *Krstic* Trial Judgement (n 17) para. 513. See also *Brdjanin* Trial Judgement (n 11) para. 690. See also *Stakic* Trial Judgement (n 1) para. 516. See also, *Akayesu* Trial Judgement, ibid, para. 504. See also *Seromba* Trial Judgement (n 137) para. 317. See also, Prosecutor v. Musema (Trial Judgement) ICTR-96-13-A (27 January 2000), para. 156. (Therein after *Musema* Trial Judgement).

[162] *Blagojevic* Trial Judgement, ibid, para. 646. See also, *Krstic* Trial Judgement, ibid, para. 513. See also *Stakic* Trial Judgement, ibid, para. 516.

[163] *Brdjanin* Trial Judgement (n 11) para.690. *Eichmann* Judgement rendered by the Jerusalem District Court on 12 December 1961, according to which referred to 'enslavement, starvation, deportation and persecution ... and ....detention in ghettos, transit camps and concentration camps in conditions which were designed to cause their degradation, deprivation of their rights as human beings and to suppress them and cause them inhumane suffering and torture' and concluded that these acts constitute serious bodily or mental harm. See also the Eichman case, A-G Israel v. Eichmann (District Court, Jerusalem) 36 ILR 5 (1968), 340. See also *Akayesu* Trial Judgement (n 70) para. 503.

[164] *Akayesu* Trial Judgement, ibid, para. 504.

[165] *Blagojevic* Trial Judgement (n 26) paras. 647-654.

[166] Ibid.

[167] Ibid.

[168] Ibid.

[169] Ibid, para. 645-646. See also, *Krstic* Trial judgement (n 17) para. 511, 518. The serious bodily or mental harm included within Article 4 of the Statute can be informed by the Tribunal's interpretation of the offence of wilfully causing great suffering or serious injury to body or health under Article 2 of the Statute. See also, *Brdanin* Trial Judgement (n 11) para. 690. See also Prosecutor v. Jelisic (Trial Judgement) ICTY-IT-95-10-T (14 December 1999), para. 543. (Therein after *Jelisic* Trial judgement).

the ICTY and ICTR Chambers decided unanimously that persecution and inhuman or degrading treatment are examples of the acts that can give rise to the harm in question. To be a crime against humanity, it is essential that 'other inhuman acts' causing harm are carried out. Over and above, it is well established by jurisprudence and case law that both persecution and other inhumane acts can involve acts of displacement, as appeared to be so in the fourth chapter. Therefore, it can be said that forced displacement can bring about the two harms in question. Consequently, if the perpetrators intend to go beyond forced displacement to injury the life of victims bodily or mental seriously, and aims in this way to destroy them physically as a group, then this should be classified as a genocide.

6.3.2. Forced displacement in the context of the destructive conditions of life

6.3.2.1. Destructive Conditions of life

The other form of genocidal *actus reus* which can cover the forced displacement that is provided in Article II(c) of the Genocide Convention. This article says

> '[D]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;'[170]

As with the expression 'serious bodily or mental harm', the convention does not define the meaning of 'calculated to bring about its physical destruction'. In case-law, for example, the Trial Chamber in the case of *Prosecutor v. Akayesu* construed this phrase as following:

> '[t]he methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction.'[171]

This meaning imitates what had been stated in the Secretariat's illustration and the commentaries of the Ad Hoc Committee. This *actus reus* had been termed as a 'slow death' in the description of the Secretariat.[172] The reason for listing such an *actus reus* is to criminalise hidden and slow genocide.[173] A group may be annihilated slowly and gradually other than by

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[170] Art. (II)(b) of the Genocide Convention.

[171] *Akayesu* Trial Judgement (n 70) para. 505. For the same interpretation, see also *Kayishema* Trial judgement (n 70) para.116. See also, Nehemiah Robinson (n 151) 123. which refers to the acts involved under this heading according to what is mentioned in the Draft Convention prepared by the UN Secretariat, which interpreted this concept to include circumstances that would lead to a slow death, for example, lack of proper housing, clothing, hygiene and medical care or excessive work or physical exertion.' Such an interpretation was adopted by the Trial Chamber in the case of the *Kayishema* Trial judgement, ibid, para.115.

[172] Draft Secretariat on the Genocide Convention (n 53) 25.

[173] Ibid, 25-26.

immediate killing when the perpetrators attempt to hide their intent or if the intent is less than obvious.[174] Such a method of genocide can be committed by the imposition of certain conditions of life or by deprivation of basic needs.[175] It is notable that the Ad Hoc Committee had continued to retain the same conception of this pattern of genocide; however it had provided more specific terms in one sub-paragraph based on the suggestions of China, the Soviet Union and United States.[176] A similar view had appeared in a Venezuelan proposal which had been adopted by the Ad Hoc Committee.[177]

One more questionable matter is whether all these conditions of life and measures taken should be classified under the provision of sub-paragraph Article II(c) of the Genocide Convention. If the provision does not signify all of modalities of the life conditions and measures, then what is the criterion for determining which conditions and measures should come under the said provision? In the view of Nehemiah Robinson, it is unthinkable to make an exclusive list beforehand of the life conditions that are set forth in the Genocide Convention as an *actus reus;*[178] the decision as to which of the conditions qualify as genocidal acts should depend on the final objective beyond those conditions and whether this objective is intended and expected to be a genocidal act.[179] This understanding seems to be derived from the commentaries afforded to the UN Sixth Committee at the final stage when the final draft of the Genocide Convention was reviewed and adopted. At this stage, some interesting changes were entered in this sub-paragraph, especially through an agreement between Belgium and the Soviet Union delegations. One of the important changes offered by the Soviet Union related to entering the word 'deliberate' as an intentional factor in this *actus reus*.[180] The Soviet Union wished to

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[174] See, ibid.

[175] Ibid. The Secretariat explanation had mentioned the following acts as conditions of life which can give rise to the destruction of a group 'lack of proper housing, clothes, food, hygiene and medical care or excessive work or physical exertion, are likely to result in the debilitation or death of the individuals.' It had also referred to acts of deprivation acts, such as 'confiscation of property, looting, curtailment of work, denial of housing and of supplies otherwise available to the other inhabitants of the territory concerned.'

[176] See Summary record of the Ad Hoc Committee on Genocide for its 13th Meeting (n 80) 9, 12-13. See also, Ad Hoc Committee on Genocide, 'Commentary on articles adopted by the Committee' (n 80) 3, 4.

[177] The Ad Hoc Committee had adopted the Venezuelan suggestion, which had been as follows: 'Infliction on the members of the group such measures or conditions of life which would be aimed to cause their death.' See Summary record of the Ad Hoc Committee on Genocide for its 13th Meeting, ibid, 13-14.

[178] Nehemiah Robinson (n 151) 60, 63-64. William A. Schabas (n 55) 167. This had been the position of the Soviet Union at the UN Sixth Committee. See Summary record of the Sixth Committee on Genocide for its 81st Meeting (n 80) 180.

[179] See Nehemiah Robinson, ibid. See also, Summary record of the Sixth Committee on Genocide for its 81st Meeting, ibid.

[180] See Proposal of Union of Soviet Socialist Republic (n 134). In this context, there was one objection by the Egypt delegate to the use of the word 'deliberate' in the text, because he regarded it as dispensable to duplicate what had been stated in the first paragraph of the same article. However, the Belgium delegate underlined an important difference: while the first paragraph meant 'definite intent to destroy a group or groups', sub-paragraph (3) referred to another intention that concerned with 'the creation of conditions of life' and therefore, both

ascertain the conditions of life and measures taken that should be regarded as genocidal acts, particularly as noted previously these conditions are not enumerated and indeed are impossible to list comprehensively.[181] The Belgian delegate found that this reiterates the intentional factor in the same text of sub-paragraph, since the text already contained the words 'as it aimed at'.[182] Later, the two delegates agreed and others accepted the substitution of a new wording, which was 'as are calculated to bring about', and also to retain the word 'deliberate'.[183] Thus, the text as it currently appears in Article II(b) was adopted.[184]

6.3.2.2. Forced displacement can be covered by destructive conditions of life

Concerning forced displacement, it can be proposed that, in some cases, forced displacement can bring about destructive conditions of life. In this respect, jurisprudence and the case law of tribunals infer that there are many acts which can be considered to involve this sub-paragraph of Article II(c) of the Genocide Convention. The acts that have been cited include rape, causing extreme malnourishment, denial of the right to housing by means of organised expulsion, by withholding appropriate dwelling space for a sensible term and withholding medical services.[185] There are other means of bringing about slow death, as for example when members of a group are subjected to insufficient clothing, immoderate tasks or immoderate corporal exertion.[186] It should be noted that two of these examples can cover forced displacement. The first and obvious one is expulsion. The second is the right to housing or an appropriate living space. In this context it was demonstrated in the fifth chapter that forced displacement is a gross infringement of the right to housing and in this way it two crimes against humanity are involved. Moreover, forced displacement can be employed by its criminal perpetrators to inflict harsh and deadly conditions and preventing access to indispensable services and the necessities of life.

Such findings can be supported by the ICJ judgement in the case of *Bosnia and Herzegovina v. Serbia and Montenegro*. In this judgement, the ICJ was convinced that 'ethnic cleansing' which is basically composed of acts of forced displacement, can be the cause of 'deliberate

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wordings are necessary. See Summary record of the Sixth Committee on Genocide for its 81st Meeting, ibid. See also Summary record of the Sixth Committee on Genocide for its 82nd Meeting (n 80) 182.

[181] Summary record of the Sixth Committee on Genocide for its 81st Meeting, ibid.

[182] See ibid, 181.

[183] Ibid. These had received support from the United States of America, the United Kingdom and India.

[184] Ibid, 183.

[185] *Brdjanin* Trial judgement (n 11) para. 691. See also *Stakic* Trial judgement (n 1) para. 517. See also *Kayishema* Trial judgement (n 70) para. 116. See also *Akayesu* Trial judgement (n 70) paras 505-506.

[186] *Brdjanin* Trial judgement, ibid, para. 691. See also *Stakic* Trial judgement, ibid, para. 517. See also *Kayishema* Trial judgement, ibid, 115. This meaning is indicated in Nehemiah Robinson (n 151) 123.

infliction of conditions of life' as set forth in Article II(c) of the Genocide Convention.[187] However, the judgement declined to deal with ethnic cleansing as a pattern of genocide because the former does not have the same intent of genocidal crime.[188] On the other hand, it can be said that forced displacement that can produce 'deliberate infliction of conditions of life' may be considered as a genocidal crime if the displacement was not aimed at changing the ethnic demography of a certain region but instead was aimed at physically destroying a targeted group. In other words, forced displacement is an act that can be used to achieve various intentions. Further support can be obtained through the clear expression in the commentary on the 'Elements of Crimes' concerning the genocidal *actus reus* in question. The 'Elements of Crimes' refers in its footnote 4 to 'systemic expulsion' as an example of measures that can cause the conditions of life in the question.[189] The Rome Statute in particular offers the same objective provisions on genocide crime as are established in conventional and customary international law.

A widely known historical example is what befell the Armenian people during the era of the Ottoman Empire. In April 1915, the Ottoman authorities began to displace two millions ethnic Armenians whom they had not killed from Anatolia towards the Syrian Desert in the south of the Empire.[190] Subsequently a law was passed that enabled the issue of an order to expel the vast majority of Armenian people, giving the women and children three days to organize their belongings.[191] The column of displaced people had stretched for hundreds of kilometres and became a death march as a consequence of exposure starvation, famine and diseases, the harsh conditions of the Syrian Desert and attacks by bandits and Turkish soldiers.[192]

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[187] ICJ Judgement on Application of the Genocide Convention (n 12) para. 190.
[188] Ibid.
[189] See, ICC Elements of Crimes (adopted at the 2010 Review Conference on the Rome Statute of the International Criminal Court of 1998). 3.
[190] For further details see also, Ralph Henham, and Paul Behrens, (ed) (n 10) 3-13. See also, Joyce Apsel and Ernesto Verdeja (eds), *Genocide matters: Ongoing issues and emerging perspectives* (Routledge, 2013), 111. This exodus policy had begun with raids that destroyed homes and villages and shops. This had rendered the Armenians to homeless and they were subject to arrest, torture and expulsion. Moreover, the Ottoman authorities had killed several hundred Armenians, especially intellectuals, reporters, businessmen and clerics. See also, Alfred de. Zayas, *The genocide against the Armenians 1915-1923 and the relevance of the 1948 Genocide Convention* (Haigazian University, 2010). See also, Robert Melson, 'Developments in the study of the Armenian genocide' 27 (2013) *Holocaust and Genocide Studies* (2), 15-16.
[191] The men had been forced to leave immediately. However they were killed outside the cities. Apsel and Ernesto Verdeja (eds), ibid.
[192] Between May and August 1915, 1.2 million Armenians, almost half of the population of Armenia before the war, disappeared from the Ottoman Empire in a gradual but coordinated process of attrition. See, Joyce Apsel, and Ernesto Verdeja, (ed), ibid. See also Robert Melson (n 190) 14-16.

It is therefore beyond doubt that, as demonstrated by jurisprudence, case law and factual instances, that forced displacement can cause destructive conditions of life thus can constitute the *actus reus* of genocide under Article (II)(c) of the Genocide Convention.

6.3.3. Protected groups

The crime of genocide is based on protection of human groups from any kind of material destruction. However, this protection only covers four human groups, which are listed in the convention explicitly. According to the Convention at least one national, ethnic, racial or religious group must be subjected to material destruction in order to establish the elements of genocide crime. If a targeted group does not belong to any of the aforesaid groups then the crime of genocide cannot be invoked, even when all the other elements and terms of the crime of genocide are present. This is why the crime of genocide is different from the crime of persecution, since the former needs highest degree of special intent, that of targeting the group itself by destruction of its members, whereas the latter targets the members of a group but because of their membership and does not extend to attacking the group itself.

It is notable that the convention does not define the nature of the four groups, neither does it provide criteria that can be used to decide whether a human group falls into the category of a protected group. This authorises the tribunals to reach their own interpretation of what constitutes a protected group and to decide on a case-by-case basis whether a particular group comes within the category of a protected group.

The trial judgement in the case of *Akayesu* confirmed that the *travaux preparatoires* and the groups named in the Convention clearly intend that the protection of the Genocide Convention extends only to groups that are relatively 'stable' and 'permanent'.[193] This means that the membership of a group cannot be interchangeable, because membership is the natural product of birth and it is only through birth membership that the group exists.[194] This explains why the drafter had promoted the said groups.[195] Such a definition was not satisfied in the preparatory work because, as Schabas argued, such preparatory work does not precisely attain the 'stable and permanent' criterion.[196] Schabas, moreover observed that it is questionable whether at least

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[193] *Akayesu* Trial Judgement (n 70) paras. 511, 516, 701-702. See also The Prosecutor v. Rutaganda (Trial Judgement) ICTR-ICTR-96-3-T (6 December 1999), para. 57. See also, Agnieszka Szpak, 'National, ethnic, racial, and religious groups protected against Genocide in the jurisprudence of the ad hoc international criminal Tribunals' 23 (2012) *The European Journal of International Law*, 157.

[194] *Akayesu* Trial Judgement, ibid.

[195] Ibid.

[196] William A. Schabas (n 55). See this discussion in: David Shea Bettwy, 'The Genocide Convention and unprotected groups: Is the scope of protection expanding under customary international law?' 2 (2011) *Notre Dame Journal of International and Comparative Law,* 180.

three of the aforementioned groups can be regarded as unstable as well as impermanent.[197] The membership in each one of the ethnic, religious and national groups can be changeable.[198] For example, an individual can gain additional or alternative nationality, and his or her religious belief is not necessarily stable issue as long as there is freedom to convert from one religion to another.[199] These ideas are well established in international human rights law and provide grounds for opposing the requirement of stability and permanence' proposed by the Trial Chamber in the *Akayesu* case in their interpretation of what the drafters had in mind.[200] This may explain why the criterion used in the *Akayesu* case was receded in the subsequent case law which had labelled the Tutsi people as a community that differed ethnically from the Hutu group.[201]

On the other hand, in the context of case law, it is not logical to depend on generic connotations such as 'non-Serbs' to realize the meaning of a protected group.[202] In other words, such a non-positive method means that every group will be subject to terms of genocide crime if it does not have the traits that are similar to that given in the group to whom the offender belong. On the other hand, it is considered by case law that protected groups are best distinguished from others on the basis of 'objective and subjective' evaluations.[203] It is observed that both kinds of evaluation should be taken into account in deciding whether a victimised group belongs to the protected category,[204] because the underlying criminal acts as set forth in the Convention need to be aimed at the individuals of a group.[205] For that reason, a subjective standard alone will be insufficient unless there are additional objective facts, such as historical, social, political or/and cultural truths that support such a standard.[206] Nonetheless, from some points of view it will be enough to determine that the targeted people are a socially featured entity compared

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[197] Ibid.
[198] Ibid.
[199] Ibid.
[200] Ibid.
[201] See such case law, for example, *Kayishema* Trial Judgement (n 70) See also, Agnieszka Szpak (n 193) 164.
[202] Such a negative determination was adopted by the Trial Chamber in the case of Prosecutor v. Jelisic. This Chamber stated that 'A group may be stigmatised in this manner by way of positive or negative criteria.' On the other hand, this opinion was criticised by other Chambers, as in the cases of both *Stakic* and *Brdjanin*. See, *Jelisic* Trial Judgement (n 169) para. 71. See also, *Stakic* Trial Judgement (n 1) para. 512. See also *Brdjanin* Trial Judgement (n 11) para. 685. See also Agnieszka Szpak, ibid, 166-167.
[203] *Brdjanin* Trial Judgement, ibid, 684. See also *Blagojevic* Trial Judgement (n 26) para. 667. See also, David Shea Bettwy (n 196) 190-191.
[204] *Brdjanin* Trial Judgement, ibid. See also, *Blagojevic* Trial Judgement, ibid. See also the same doctrine in jurisprudence derived from the ICTR in the following cases, *Muvunyi* Trial Judgement (n 130) para. 484. See also *Gacumbitsi* Trial Judgement (n 137) para. 254. See also *Semanza* Trial Judgement (n 100) para. 317. See also *Rutaganda* Trial Judgement (n 193) para. 373. See also *Musema* Trial Judgement (n 161) para. 163.
[205] *Brdjanin* Trial Judgement, Ibid.
[206] *Gacumbitsi* Trial Judgement (n 137) para. 254. See also, *Semanza* Trial Judgement (n 100) para. 317. See also, *Rutaganda* Trial Judgement (n 193) para. 373. See also *Musema* Trial Judgement (n 161) para. 163.

with the rest of society, when such inference is derived from the 'self-determination' of those targeted people, or according to the estimation of an offender, or in the minds of the rest of the population.[207]

Regarding the terminology of each ethnic, racial, religious and national group, the ICTR jurisprudence stated that:

> 'An ethnic group is one whose members share a common language and culture; ... A racial group is based on hereditary physical traits often identified with geography. A religious group includes denomination or mode of worship or a group sharing common beliefs.'[208]

It was previously mentioned that the meaning of racial group should be understood in a broad sense than that one above, since instruments of international law and the trial of post-World War II applied the term of racial group or race on the people who belong to the ethnic or religious group. In addition, the *Akayesu* Judgement stated that

> '[A] national group is defined as a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties.'[209]

6.3.4. The Kurdish Case 'Al-Anfal case' amount to the crime of genocide

6.3.4.1. The Kurds as a protected group

With regard to the Kurdish people, the Iraqi constitution and various sources and documents classify them as a distinct group within the Iraqi population. The Iraqi constitution and law have recognised that they have own national rights and a distinct language, which is regarded as an official language and is quite different from Arabic, the language spoken by the majority of the Iraqi population.[210] Identity cards, which contain information classifying Iraqi citizens on the basis of both religion and nationality indicate that the Kurds belong to a Kurdish nation. The nationality itself refers to a group of people who share a common history, language, culture

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[207] This is the subjective criterion which is opposite to the objective one. The latter seeks to assemble different attributes that are founded on fact; consequently such merits can categorise a society as multi social groups. For instance, the Report of the Inquiry Commission which decided that objective criteria do not define the tribes of 'Masalit or Zaghawa' as a social category differentiated from the rest of the Sudanese population because there are no disparities in their features, and they are share in the same characteristics as other Sudanese people. Otherwise, the subjective criteria would have enabled the Commission to judge that each one of the aforesaid tribes was a discrete social group in the mind of the members of tribes, the Sudanese government and the rest of the Sudanese population. See, Report of Darfur Inquiry Commission (n 16), 508-512. See also, *Jelisic* Trial Judgement (n 169) para. 70. See also, the footnotes in the *Brdjanin* Trial Judgement (n 11) para. 683.

[208] *Kayishema* Trial Judgement (n 70) para. 98.

[209] *Akayesu* Trial Judgement (n 70) para. 512.

[210] Art. (3) of the Iraqi Constitution of (1958), Art. (19) of the Iraqi Constitution of (1963), Art. (21) of the Iraqi Constitution of (1968), Art. (5)(b) and (7)(b) of the Iraqi Constitution of (1970), Art. (6) and (7) of the Iraqi Draft Constitution of (1991), Art. (9) of the LAT and Art. (4) of the PCI of (2005).

etc. The Kurdish people are described as having Indo- European origins, and they came to their present geographical four thousand years ago and have been the subjects of different Empires, such as the Medean, Othman, and Persian.[211] As well as having a common culture and they have over a long historical period aspired to form an independent Kurdish nation state.[212] All these characteristics combine to give them a special ethnic status founded on both subjective and objective criteria and consequently they are under the protection of the Genocide rules if they are targeted on the basis of their ethnicity in an attempt to destroy their community as such. There is a large amount of evidence in the form of facts, documents, statements and voice recordings that prove that such a plan of destruction existed.[213]

6.3.4.2. The forced displacement of Kurds during the Anfal compaigns

The situation in Iraq, especially the fate of the Kurds during the Anfal campaigns, was no less atrocious than that of the Bosnian Muslims or the Armenians. Kurds who had been displaced or forcibly taken by the forces of government or Ba'athist militia, had suffered the effects of chemical weapons and had watched their relatives, and even the livestock die.[214] Even after they fled, they were subjected to military attacks and chemical weapons.[215] They were bombarded by aircraft as they fled to the mountains.[216] Many of those displaced suffered damage to their eyesight due to the effects of chemical weapons, fluids emerged from their eyes and noses, they received burns.[217] And in many cases they lost the ability to walk. They experienced hunger and thirst and were denied medical treatment.[218] The wounded fugitives were transferred from villages and hospitals to infamous concentration camps. Others had been buried in mass graves that had been prepared beforehand in the Iraqi desert or other hidden

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[211] Jamal Jalal Abdullah, *The Kurds: A Nation on the Way to Statehood* (Author House, Bloomington, 2012). See also David McDowall, *A Modern History of the Kurds* (I.B Tauris & Co Ltd., London, 2004). See also Livingston T. Merchant, *Introduction to Sorani Kurdish: The Principal Kurdish Dialect spoken in the Regions of Northern Iraq and Western Iran* (Createspace, United States, 2013). See also Wadie Jwaideh, *The Kurdish National Movement: Its Origins and Development* (Syracuse University Press, New York, 2006).

[212] Jamal Jalal Abdullah, ibid. See also Wadie Jwaideh, ibid. See also David McDowall, ibid.

[213] See for example, A Middle East Watch Report on 'Genocide in Iraq: The Anfal campaign against the Kurds' Human Rights Watch (1993). See also, Bruce P. Montgomery, 'The Iraqi Secret Police files: A documentary record of the Anfal genocide' 52 (2001) *Archivaria.* See also, Arif B., *Halabja in face of toxins of death: A legal reading on the reality of event and the papers of the Supreme Iraqi Criminal Tribunal* (2014).
عارف، بكر حمه صديق، *حلبجة في مواجهة سموم الموت: قراءة حقوقية في واقع الحدث واوراق المحكمة الجنائية العراقية العليا* (٢٠١٤).

[214] See all of Plaintiff's' statements, witness statements, Documents and Voices clips related to the Anfal operations before the Iraqi High Tribunal (IHT). Al-Anfal Lawsuit (Special Verdict) IHT-1/C Second/2006 (24 June 2007).

[215] Ibid.

[216] Ibid.

[217] Ibid.

[218] Ibid.

places.[219] Some who were later released were transferred to the mountains and hills that were devoid of food or water or protection from harsh weather conditions and a number of them died.[220] Even those victims who attempted to cross the borders to Turkey to get the treatment but had been prevented from doing so by Iraqi forces.[221]

All of these actions led to many deaths and many suffered psychological and physical damage. These actions and consequences were not only expected but were thoroughly planned by high-ranking officials. Former president Saddam Hussein, his cousin and aides were involved in the planning, as were the supreme military command and the intelligence service, senior Ba'athist officials responsible for the Kurdistan region and neighbouring provinces. Documents and audio recordings attributable to these various leaders confirm that this targeting and destruction had been their intention.[222] There is, for example, a recording of a dialogue between Saddam and one of the leaders of the campaign. This leader questioned whether the chemical weapons act against civilians and exterminate thousands of them, and then Saddam confirmed

> '[Y]es, exterminates thousands and makes them unable to drink or eat what is available so that they have to leave the city for a long period until it is completely disinfected. They will not be able to sleep, eat or drink, they go around naked.'[223]

This intention was more expressly in the words of Ali Al-Majid. For example, he stated that

> '[I] will kill them all with chemical weapons! Who is going to say anything? The international community? Fuck them! The international community and those who listen to them.'[224]

He stated concerning those who were responsible to displacing Kurds from Musol province

> '[W]e asked them to deport every Kurd who lives there and send them to the mountains to live like goats. Fuck them! Why do you feel embarrassed by them?'[225]

He also said

> '[W]hen the [September 1988] amnesty was announced, I was about to get mad. But as a responsible party member I said OK. I said probably we will find some good ones among them [the Kurds], since they are our people too. But we didn't find any, never. If you ask me about the senior officials of the Kurds, which ones

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[219] Ibid.
[220] Ibid.
[221] Ibid.
[222] Ibid.
[223] Ibid. See also, Report of the Center of Halabja against Anfalization and genocide of the Kurds on 'Anfal: The Iraqi State's Genocide against the Kurds' (The Center of Halabja against Anfalization and genocide of the Kurds 'CHAK', 2007) 62.
[224] A Middle East Watch Report on 'Genocide in Iraq: The Anfal campaign against the Kurds' (n 213) 267.
[225] Ibid, 268.

> are good and loyal, I will say only the governors of Erbil and Suleimaniyeh. Apart from those two there are no loyal or good ones.'[226]

Another example, when a member of the Ba'ath Party had not destroy some villages, Al-Majid commented

> '[H]ow were we to convince them to solve the Kurdish problem and slaughter the saboteurs?'[227]

Regarding the displaced Kurds, he supposed that he

> '[w]ill bury them with bulldozers. ... Where am I supposed to put all this enormous number of people? I started to distribute them among the governorates. I had to send bulldozers hither and thither'[228]

In view of all the above, it can be said that these facts fulfil the terms of both genocidal underlying acts, that is, serious bodily and mental harm and destructive conditions of life. They also meet the standard of genocidal specific intent, since the authors had aimed to destroy the Kurdish victims physically as an ethnic group.

Conclusion

As mentioned at the beginning of this chapter, it was stated that intention was to examine the terms of the crime of genocide and to determine whether these terms can extend to cases of forced displacement. Genocide is a distinct crime because it requires not only the general criminal elements, which are the *actus reus* and *mens rea*. However, it requires a specific intent which is strict and complex. Moreover, this specific intent is a basis for classifying which type of destruction of a protected group can be regarded as a form of genocidal crime. Therefore, it is clear that the forced displacement models should be examined in the view of these requirements. This examination has inspired many opinions and analyses. One of these asserted that the forced displacement cannot amount to the crime of genocide, regardless of whether displacement alone occurred or whether it involved social and cultural destruction. This analysis emphasised that such forced displacements do not meet the threshold of specific intent which should be understood in only one sense, which is the destruction of a protected group physically and/or biologically. This interpretation was adopted, in particularly by the ICTY Chambers in the cases of *Krstic*, *Stakic* and *Brdjanin*, in addition to the ICJ in the case of

[226] Ibid, 270.
[227] Ibid, 269.
[228] Ibid, 269. See also, Bruce P. Montgomery (n 213) 70.

Bosnia v. Serbia. On the other hand, there is an analysis that interpreted specific intent broadly, insisting that forced displacement can be regarded as a form of genocide. This analysis was supported by others. Important among these were the German Court, the ECtHR and Judge Shahbuddeen, who share the view that specific genocidal intent should not be limited to specific cases of destruction of a group; conversely it should extend to all such types of destruction regardless of whether it is physical or biological or social destruction. Judge Shahbuddeen argued that a genocidal *actus reus* should be understood in its physical and biological sense, and not terms of the mens *rea* and genocidal special intent. Therefore in his opinion forced displacement was genocide since this displacement gives rise to social destruction as a form of specific genocidal intent; it causes the dissolution of the social unity of what is defined as a distinct group, which means the crime of genocide occurred. This broad interpretation of the meaning and limitations of genocidal special intent was also adopted by the Trial Chamber in the *Blagojevic* case; however this Chamber took a different approach in order to establish its interpretation. The Chamber recognised that special intent can cover all types of destruction and that only cultural destruction should be excluded. Although it took the view that the destruction of a group cannot be other than physical or biological, it classified all other types of destruction as physical and biological destruction. It considered that it was difficult to describe a forced displacement that destroys the social unity, history and geographic existence of a distinct group as other than physical and biological destruction and thus genocide.

It is noteworthy that Judge Elihu Lauterpacht and others have classified the destruction of the geographic existence of a group in a certain location as a form of genocide. A call has been proposed by Shabas, who was of the opinion that the courts could adopt a developmental interpretation based on the provisions of the Genocide Convention in themselves and on the purpose and objectives of the Convention. Nonetheless, such an approach, however is not desirable at the present time to judge from most case law and jurisprudence at the level of the customary and conventional international law.

Despite all the justifications and argumentations in favour of adopting a the broad interpretation of the meaning of genocidal intent, it has been convincingly demonstrated that such an interpretation is unacceptable in view of the true meaning and the legal concept of the crime of genocide. Moreover, the *travaux preparatoires* and most of the case law of the ICTY and the ICJ, the jurisprudence of the ILC and most of other jurisprudence unquestionably confirm that physical and biological destruction is the only meaning which fulfils the definition of the special intent of destruction. Furthermore, destruction in this limited sense should be

understood only as the destruction of the life of group members, whether by killing or by deprivation or attrition. It cannot be accepted that forced displacement intended to destroy no more than the social unity, cultural identity or geographic existence of a group in addition to ethnic cleansing is a form of genocide. Consequently all the Iraqi forced displacement cases which involve these latter types of destruction should not be subject to classification as the crime of genocide.

An important question raised in this chapter is whether forced displacement can be used as a measure to achieve the physical destruction of a group. It has been shown, however, that such displacement had been ruled out on the basis of the rejection of the Syrian proposal which had referred to the mere displacement of group members and to the factor of the duration of the threat subsequent to the ill-treatment. Moreover, the *travaux preparatoires* had not accepted the inclusion of forced displacement that aims to move a group of individuals from one region to another, and also displacement that is intended to implement policies of assimilation and integration. However, the spirit of the *travaux preparatoires* and the wording of the Genocide Convention do not seem to be inconsistent with the understanding of the use of forced displacement as an act or a measure which intends to achieve the destruction of a group physically, especially the destructive intent depends on the mental state of the perpetrators, which can be expressed through various acts, including acts or measures of forced displacement. However, even when specific genocidal intent is present, forced displacement cannot be considered as an independent genocidal underlying act, and therefore it needs to fulfil terms of one of the enumerated genocidal acts. Forced displacement, as has been demonstrated, can classified under the *actus reus* of 'serious bodily or mental harm' and 'the destructive condition of the life of group members'. Consequently, it can be said that these models of forced displacement can amount to the crime of genocide crime as long as they are accompanied by specific genocidal intent. The *travaux preparatoires*, case law and the ILC provide support for such an understanding. In the context of this understanding, it has been shown that an example is to be found in the cases of forced displacement in Iraq, especially some that occurred during the Anfal campaign. Furthermore, the Kurdish people are classified as a distinct ethnic group, and this is in turn falls within the definition of one of the four protected group, as required by the Genocide Convention.

CHAPTER SEVEN

CONCLUSION

Introduction

This thesis was conducted in order to examine the position of the IHT with respect to the criminalisation of the Ba'ath legacy of forced internal displacements as an international crime *per se* of forcible transfer in the context of international law. It is assumed that this stance of the IHT was wrong and inconsistent with international law, which existed before the adoption and entry into force of the Rome Statute in 1998 and July 2002 respectively. However, it is argued that this legacy can be criminalised and prosecuted under other criminal law frameworks that existed in international law at the time of the commission of the Ba'athist crimes. In one deductive sentence, this thesis reveals that the allegation that the IHT's position is invalid and that there are other appropriate frameworks that exist in international criminal law. This thesis examined three examples of the Ba'athist legacy: the Al-Dujail case, the Marshlands case and the Al-Anfal case. The findings of the thesis display such conclusions clearly.

7.1. Main findings

One of the principle motivations for the removal of Saddam's Ba'ath regime was to transform Iraq into a modern democratic country and to prevent totalitarian rule in future. Logically, it should establish such objectives on the basis of a guarantee of the installation and stabilisation of human rights and the rule of law. It was also necessary to address the whole legacy of the Ba'ath abuses in order to achieve justice for its victims and to ensure that any future atrocities will not go unpunished. Ba'athists criminals have already faced trials before the IHT, which was established after the overthrow of the Ba'ath regime. There were criticisms of the process of trials, either because of the role played by the occupying power, the inclusion of international crimes, the trial procedures, capital punishment, immunity and others. The current research focused on how the IHT has violated the principle of *nullum crimen sine lege* when it applied the criminal framework of forcible transfer as an international crime *per se* to the events of forced internal displacement that took place under the Ba'ath regime.

Although the IHT is a domestic court, the research found that its inclusion and prosecution of international crimes as derived from international law accords with both Iraqi law and international law. It reached the conclusion that the jurisdiction of the IHT as based on

international law complies with the principle of *nullum crimen sine lege*. However, it noted that the problem with such compliance was that a considerable part of the list and/ or definitions of international crimes as set forth in the Statute and applied by the IHT are new and more progressive compared with the international law that operated during the time of the Ba'ath abuses. Undoubtedly, this means that the IHT applied retroactively the law on some of the Ba'ath abuses, thus violating the principle of *nullum crimen sine lege*. This is precisely what happened when the IHT prosecuted and convicted the three examples of internal displacement mentioned above under the criminal framework of forcible transfer as crime *per se*. The research showed that this criminal framework is new whether under the category of crimes against humanity or as war crimes in time of internal armed conflicts. This criminal framework had not been afforded the status of a crime *per se* in international law as it had operated during the era of Ba'ath rule and prior to the adoption and entry into force of the Rome Statute in July 2002. However, the research pointed out two exceptions regarding such legal facts, since international law considered acts of forced internal displacement as crimes *per se* under the headings of apartheid crime and the genocide crime of transference of children from their own group to another group. However, the research established that these two criminal frameworks cannot be applied to the three examples of the Ba'ath legacy of internal displacement discussed in this study, because their requirements had not been established in these cases.

Consequently, the research provided legal solutions to ensure that the Ba'ath legacy of forced internal displacements would not go without punishment, while at the same time ensuring that these solutions respected the principle of *nullum crimen sine lege*. In this context, the thesis analysed and tested some of the international frameworks of criminal law. It then suggested that the framework of criminal law for each of the persecution crimes and also the crime of other inhumane acts had been established as crime *per se* within the category of crimes against humanity in international law that operated at the time in question. Hence, it reached the conclusion that these criminal frameworks can involve and criminalise acts of forced internal displacement. Then, the research tested and analysed the displacement cases of Al-Dujail, the Marshlands and Al-Anfal and concluded that each of these cases conform to the definitions of the crime of persecution and/ or the crime of other inhumane acts and that they can be tried under those headings. Similarly, the research examined both of the sub-headings of the crime of genocide, i.e., '[C]ausing serious bodily or mental harm to members of the group' and '[D]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part'. The research concluded that each one of these sub-heading can

cover acts of forced internal displacement and that both of them were appropriate to convict for past acts of forced internal displacement in the context of the Al-Anfal campaigns. Thus, this thesis found that the IHT should correct its approach and employ the suggested criminal law frameworks in order to respect the principle of *nullum crimen sine lege* and the non-retroactivity of the law.

7.2. Findings chapter by chapter

The first chapter displayed the roadmap for the entire work. It explained how the justice process regarding the Ba'ath legacy of violations was criticized and the challenges to its legality and legitimacy. The thesis supposed that the IHT is defied with disrespect to principle of *nullum crimen sine lege*. Definitely, this was an important criticism regarding the theme of the Ba'ath legacy of forced internal displacements. This charge is questionable because the IHT followed and applied in its judgments the list and definitions of international crimes provided by the Rome Statute. The latter is more progressive compared with the status of such crimes in international law during the time when the Ba'ath regime committed its atrocities. This view applies to the categories of crimes against humanity and war crimes during a time of internal armed conflict, and especially to the fresh criminal law framework applicable to forcible transfer or forced displacement as crime *per se* under the said categories and as added by the Rome Statute. This chapter set another problem with regard to the trial of international crimes by an Iraqi domestic court, and posed the question of the status of international law within Iraqi law. The chapter indicated that the subject matter of the jurisdiction of the IHT is also a debatable question in jurisprudential literature. However, most of this literature is critical of the role played by international law in Iraqi law and does not specifically discuss the theme and questions of this study. The literature offers no legal alternative to solve the main problem investigated by this thesis.

The thesis argued that the IHT followed the wrong legal pathway when it tried and convicted those responsible for Ba'ath legacy of forced internal displacements under the criminal framework of forcible transfer as crime *per se* and as fresh crime derived entirely from the Rome Statute. This legacy of crime, as exemplified by the cases Al-Dujail, the Marshlands and Al-Anfal, had predated the entry into force of the Rome Statute. Consequently, the thesis suggested other international criminal frameworks that comply with the principle of *nullum crimen sine lege*.

With regard to legitimacy, the chapter in question showed that such legitimacy was not entirely lacking since international humanitarian law allows the prosecution of grave violations committed before the arrival of the occupying power. The chapter also produced evidence to show that the said law does not discriminate as to whether or not the domestic law of an occupied territory incorporated the violations in question prior the occupation during the time the violations occurred. It also noted that, apart from international crimes, the IHT Statute codified some crimes that were already provided in Iraqi domestic laws and that were affective prior the occupation. Therefore, there is no way to refute the legitimacy and legality on the part of the IHT Statute and its work on the aforementioned violations and domestic crimes. Another topic was the formation of the IHT by the occupying power. The chapter revealed that the legitimacy of that formation was vindicated when the elected TNA re-established the IHT and re-issued its new Law and Statute. Moreover, this legitimacy was confirmed by the popular referendum on the new Constitution of 2005, which includes the IHT in Article 130.

The first chapter also showed that the Ba'athist violations, including the campaigns of forced internal displacement, had been integral part of the strategy of the regime, and exercised widely.

Each of the subsequent chapters answered one or more of the research questions, and the findings of the totality of chapters give credibility to the key argument proposed by the thesis. Some findings confirmed that the problems cited in the research exist, and others showed methods employed and then presented legal solutions to act as guidelines for the IHT or any other Iraqi court adjudicating forced internal displacement cases, or any other case that comes under the heading of international crime.

The second chapter demonstrated that Iraqi law, international law and jurisprudence all authorise the IHT, as a domestic court, to address the Ba'ath atrocities, on the basis of international crimes recognised in international law. The chapter determined the status of international law within the Iraqi domestic field. This has important relevance to the key question of the research and serves to prove its main argument. Various standpoints were reviewed, and one of these was the contention that the IHT Statute and its trials retroactively applied the law concerning international crimes and thus clashed with the principle of *nullum crimen sine lege*, because international law forms no part of Iraqi law and therefore have no influence in the Iraqi domestic field. Another opinion held that the said principle has been respected, and although this view concurred with the former one concerning the status of

international law in the Iraqi domestic field, it held that the IHT could prosecute international crimes on the basis of international law alone, is irrespective of the position of the Iraqi domestic legal system.

On the basis of the views above, the chapter examined the position of international law, its judiciary and jurisprudence; the practice of certain other countries; and Iraqi law and judiciary. The chapter demonstrated that international law and judiciary assert that international rules rank higher than a country's domestic rule. International law and its judiciary deal with domestic rules as no more than tenets that should not break international rules, otherwise a State where such domestic rules apply will face international liability. The chapter showed that this is well established by case-law and advisory opinions derived from international arbitration and both the PCIJ and the ICJ. This finding was also evidenced by reference to Arts. 27 and 46 of the Vienna Convention. This, then, supports the legality of the subject matter jurisdiction of the IHT on international crimes derived from international law. On the other hand, the traditional theories reflect different perceptions. The monist theory is similar to the position of international law and judiciary above, as it theorises that domestic and international rules belong to one hierarchical legal system, with precedence given to the international rules. In contrast, the dualist theory holds that each type of rule has its own legal system, so that international rules have no effect unless recognized by domestic rules. This view supports those who reject the legality of IHT jurisdiction on international crimes.

The chapter also reviewed the practice of some States. It did not find a uniform approach among these States, or even in each country, in their dealings with types of international rules. In some countries, while the customary rules and/ or general principles of international law automatically have domestic impact, the treaty rules need to be incorporated by a domestic act or procedure in order to have domestic effect. In other countries, the treaty rules have direct application in domestic field, while customary rules and/or general principles do not have such application. Another approach has been followed by some countries, such as the USA, which regards customary and treaty rules are a part of the municipal law and applicable directly, except the non-self-executing treaty rules, which need to be detailed by a municipal act. Moreover, some countries grant a special status and direct application for human rights rules. On the other hand, the courts of some countries automatically apply international rules, including those concerning human rights, although there is no a domestic provision in their legal orders on international law. In such cases, the courts interpret in assent and/ or reconcile their domestic laws with international rules based on the principle of the 'friendliness of

international law'. This approach was adopted even when there was a clash between domestic rules and international rules. The chapter reasoned that the Iraqi courts could pursue such an application, especially with the customary rules and general principles. Thus, they can interpret or reconcile the principle of *nullum crimen sine lege* in its meaning in international law as it involves international crimes. Especially, the latter meaning of the aforementioned principle is well established in international human rights law and specifically in the ICCPR. In this respect, Iraqi judicial opinion made clear that the Iraqi constitutional provisions on human rights do not differ from those rights in international law, and this explains why the latter law was not mentioned by the judgments of Iraqi courts. Therefore, the attitude of Iraqi courts does not exclude international human rights law.

The chapter also brought to light that the *jus cogens* rules overpower all the other international and municipal rules, and hence they permeate municipal legal systems, regardless of whether or not these systems point to the *jus cogens*. This assertion is supported by the practice of both the State and the international judiciary. This was vital to support the argument of the chapter, as long as the prohibition of the international crimes of genocide, crimes against humanity and war crimes imposes *erga omens* obligations and thus ascends to form *jus cogens*. What it is important, as was decided in the chapter, was that the IHT or any other Iraqi court can invoke the *jus cogens* rules to criminalize and try international crimes, and this in spite of that Iraqi law does not point to these rules. It was also stated in the chapter that there was international and Iraqi juristic endorsement in favour of the IHT to grounding its work on the said rules.

Later, the chapter tested the treaty making process and the status of treaties in the Iraqi domain. It established that there was no separation of powers under the Ba'ath regime, which had grasped all powers in one hand in a dictatorial way. Relatedly, the chapter argued that it was reasonable to suppose that treaty making by the executive branch would be approved and not face objections by legislature. It was exclusively the legislature, however, that took the final step in making the treaty binding on Iraq. This final step had been through passing the law of ratification of the treaty or accession to the treaty. In addition, the chapter noted that the legal position in dealing with treaty provisions prior to 1977 had been different from that of1977, which was based on the Law of Publishing in the Official Gazette No. (78) of 1977. Although, there had been no an explicit provision on the domestic enforcement of treaties prior to 1977, the chapter demonstrated that the ratification or accession law on each treaty is an ordinary municipal law and is operative since its publishing in Official Gazette. This was manifested through the review and analysis of the position of the judicial authority, case-law and juristic

opinion. Consequently, the chapter found that the jurisdiction of IHT on international crimes had not been retroactively applied, and thus the IHT has respected the principle of *nullum crimen sine lege* according to international law and also Iraqi law. Such a finding appears to be vindicated by Article 15 of the ICCPR, which has had domestic effect in Iraq since 1970, and the date of publication of Ratification Law No. 197 of the ICCPR in the Official Gazette. In addition, this finding is apparent in the Geneva Conventions and the Genocide Convention, which Iraq ratified in 1956 and 1959 respectively.

On the other hand, the Law of Publishing No. 78 of 1977 stipulates that treaty provisions as well as the ratification law should be published in the Official Gazette to be operative in the domestic field. However, this has no effect on the previous finding as the Law of Publishing No. 78 has no retroactive effect. Moreover, the Iraqi judiciary, even with such a stipulation, has applied the treaty provisions based on the law of ratification or accession, irrespective of whether such provisions had been published in the Official Gazette. Even in the post-Saddam era after 2003, the status of treaties, especially those on human rights, have become more influential, as they have been enhanced by constitutional provisions, laws and institutions. Both the LAT and PCI involve explicit and implicit recognition of the international crimes. Moreover, the Iraqi Government Report submitted to the CCPR emphasised that Article 19(Second) of the PCI and Article 15 of the ICCPR have the same meaning in relation to the principle of legality, which extends to cover both international and domestic crimes.

The chapter discussed the basis of legality established by the IHT. The legality of IHT with regard to international crimes was based on membership of Iraq in the UN and on the principle of justice or substantive justice as defined by the Nuremberg Tribunal. The chapter demonstrated that both of these bases are invalid. Relatedly, it is not true that each member state of the UN is bound by all international instruments, irrespective of whether or not it is a party to these instruments. This seemed clear through the positions of states in dealing with international rules as stated above. Further, the chapter established that the principle of justice or substantive justice followed by the Nuremberg Tribunal was abandoned in favour of the strict meaning of the legality principle due to developments subsequent to the trials at the end of World War II. However, the chapter referred to its findings, as cited above, that the IHT can depend on the status of international law within the Iraqi domestic field to prove that its jurisdiction on international crimes meets the principle of *nullum crimen sine lege.* The IHT can depend on the ICCPR, the Genocide Convention and the Geneva Conventions with their

ratification laws, and also on *jus cogens* rules and/or resort to interpreting or reconciling Iraqi domestic rules including the said principle in the light of international law.

Later, the chapter analysed and examined the requirements of the said principle, such as clarity, notification and non-retroactivity in order to test them with respect to the jurisdiction of the IHT. It was guided by the international, European and other national case-law in addition to other juristic opinions; and it compared them with the facts of Iraqi law and the situation regarding Ba'athist officials. It then established the above requirements regarding the jurisdiction of the IHT in cases involving international crimes. It concluded that the criminality had been foreseeable by Ba'athist officials and that the relevant laws were accessible.

Chapter Three demonstrated the validity of the research. It showed that the criminal framework of forcible transfer or forced displacement as crime *per se* as settled in the international law prior to or subsequent to the Rome Statute is inappropriate for application to the practice of internal forced displacement carried out by the Ba'ath regime. This is irrespective of whether such actions came under the category of the crime of genocide, crimes against humanity or war crimes. The chapter revealed that the Rome Statute stipulates strict temporal terms (in Articles 11 and 24) which prevent the application of the subject matter of the jurisdiction of the Rome Statute retroactively to events predating its entry into force on July 1 2002. Moreover, the chapter brought to the light the fact that such retroactive application is disallowed even under the general rules of law governing the treaties, unless the contracting states intended such an application. It was asserted that the contracting states of the Rome Statute had not intended such an application. The intention was grounded instead on the two articles mentioned above and the preparatory work of the Rome Statute. Relatedly, the chapter reviewed this preparatory work and observed that two proposals from the Lebanon presentative and the ILC concerning the retroactive application to the past crimes had been rejected. Thus, the jurisdiction of the Rome Statute cannot extend to cover past crimes, even if such crimes have been recognised by other rules of international law that were operative at the time of their commission. In addition, this jurisdiction cannot be concerned with crimes predating its entry into force, even if those crimes were referred to the ICC by the UNSC or by an announcement of a particular State.

The chapter discussed one more matter: continuing crimes. This was criminality that had started prior to the entry into force of the Rome Statute on 1 July 2002 and had continued after that date. The Rome Statute does not address this type of crimes and the ICC jurisprudence excluded it from its jurisdiction. However, this jurisprudence determined that if the continuing

crimes were committed in the context of still-continuing situation, then they could come under the jurisdiction of the Rome Statute. However, the ICC jurisprudence noted that this exception should be limited only to situations where there is a single common plan to perpetrate violations in the context of an attack against the civilian population or an armed conflict. Even then, the jurisdiction in such a case should be restricted to the criminal acts that took place after 1 July of 2002. Thus, other criminal acts that occurred before the latter date should be excluded from the jurisdiction of the Rome Statute. The chapter revealed that such jurisprudence finds support in Article 28 of the Vienna Convention. Thus, it was noted that such jurisprudence regarding continuing crimes cannot be invoked in order to criminalise and prosecute the internal displacement cases of Al-Dujail, the Marshlands and Al-Anfal examined in this thesis, because these events cases started and ended prior to July 1 2002. In other words, the Rome Statute cannot be applied to Ba'ath regime violations, including the cases of forced internal displacement. This showed that the IHT Statute, and its trials and judgments adopted a mistaken approach when depending on the Rome Statute provisions to criminalise and prosecute those violations mentioned. Such a finding was reinforced by later findings described within the chapter.

The chapter then turned to the investigation of customary international law and the statutes of the international criminal tribunal that were effective over the term of the occurrence of the above three events of forced internal displacement in Iraq. The chapter finding was that none of the said legal material substantiated the claim that the forcible transfers were an independent crime *per se* under the category of crimes against humanity during the time in question. This is despite the fact that there was a debate as to whether the crime of deportation, which was cited in the said legal material could include forcible transfer or internal displacement. The controlling jurisprudential view and practice declined to give such a broad definition of the crime of deportation. Hence, this led to the conclusion that the cases of forced internal displacement during the time in question could not be prosecuted as a crime of forcible transfer *per se* under the category of crimes against humanity based on the rules of the legal material mentioned above. Unfortunately, the IHT did not lend its attention to this difficulty and conducted its trials on the basis of an alternative legal method.

Other areas of the chapter focussed on forced internal displacement as a crime *per se* under the category of war crimes committed in the context of non-international armed conflict. The IHT used this crime to convict the Ba'ath displacements that had been executed during the Al-Anfal campaigns, which had taken place in the context of an internal armed conflict between the

Ba'ath government and Kurdish armed groups. The chapter revealed that the forced internal displacement as a crime *per se* under the category of war crimes has been only acknowledged in the context of international armed conflict and particularly during occupations by foreign powers. It is true that the Protocol II prohibited forced displacement during internal armed conflict, but nonetheless this and all the other violations concerning the internal armed conflicts have not been conjoined with criminal liability. This liability was initiated in the 1990s when the ICTR and ICTY considered the cases of violations that took place during the internal conflicts in Rwanda and the former Yugoslavia. However, this liability did not classify forced displacement as a war crime *per se*, because it was based on the violations against both Article 3 Common to the Geneva Conventions and Article 4 of Protocol II. It was noted that both of these articles contain general proscriptions and do not indicate out the prohibition of forced displacement, and thence it cannot be said that the Al-Anfal campaigns give rise to criminal liability for forced internal displacement as a war crime *per se*, especially since these campaigns took place in 1987-1988.

Subsequently, the chapter determined two types of provisions by which the forcible transfer or forced displacement during the era of the Ba'ath regime can amount to international crime *per se*. These are under Article II(e) of the Genocide Convention on 'forcible transfer of children from their own group to another group' and the Article II(d) of the Apartheid Convention relating to the isolation and separation of populations. These provisions were well established in international law during the time of the Ba'athist cases of forced internal displacement. These cases cannot, however, be subject to the aforementioned provisions, because they do not fulfil all of their elements. Relatedly, the definition of the crime of apartheid crime required as an essential element that the political regime should aim to force dominance of a particular group upon the others. It was explained that this had not been the nature of Ba'ath regime, even though this latter had been totalitarian and felonious and exercised sectarian and ethnic discrimination policies. Likewise, no evidence was found to show that the Ba'ath regime forcibly transferred children from their own group to another, at least within the context of the three cases of internal displacement examined in this thesis. Even on the assumption that the regime had conducted such transfers, Article II(e) of the Genocide Convention cannot apply to the entire number of casualties and the whole range of harmful tragedies.

Thus, it appeared that the jurisdiction and approach of the IHT in dealing with cases of forced internal displacement as international crime *per se* has violated the principle of *nullum crimen sine lege*. This, as analysed above, is because such displacement did not exist as a crime *per se*

in international law under the both categories of both crimes against humanity and war crimes in context of the internal armed conflict, although such displacement has been recognised by international law as a sub-crime *per se* under headings of both the crime of genocide and the crime of apartheid. However, the necessary conditions of these two crimes were not established in the Iraqi cases of forced internal displacement.

The fourth chapter gave some suggestions for the prevention of impunity and for bringing the Ba'ath legacy of forced internal displacement into the area of criminalization and prosecution. The solutions that were suggested ensured full adherence to the principle of *nullum crimen sine lege* and the non-retroactivity of the law. For this purpose, the chapter examined and provided two international criminal frameworks under the category of crimes against humanity. These frameworks were of the crime of persecution and other inhumane acts. The chapter tested and proved that both of these crimes were operative in international law during the time when the Ba'ath regime committed the three cases of forced internal displacements discussed by this study. In addition, the chapter analysed and determined the meaning and requirements of these crimes as established in international law during the time in question.

The chapter demonstrated that underlying criminal acts of persecution can involve acts of internal displacement. The underlying acts of the crime of persecution have not been specifically defined and enumerated and instead they have been labelled by criteria. Such criteria are limited to the other underlying acts of the crime of genocide, crimes against humanity and war crimes, and/or are limited to blatant human rights abuses. Relatedly and as shown in the third chapter, forced displacement constituted one of the underlying acts of war crime in the context of international armed conflicts. It also shaped one of the underlying acts of genocide under the title of 'forcible transfer of children'. In addition, it seriously violates human rights. Thus, the chapter proved that the Iraqi cases of internal displacement can constitute one of underlying acts of the crime of persecution. This is not sufficient to say that the Iraqi cases are to be defined as the crime of persecution, unless these cases meet the requirement of discriminatory or persecutory intent. The chapter specified three aspects of discrimination to which the crime of persecution was attributed: political, religious and racial. Relatedly, the chapter revealed that the Iraqi cases fulfil the criteria, since the displacement in the said cases had taken place on religious grounds, as was the case with the Shiite people during the events of Al-Dujail and the Marshlands; or on racial grounds, such as the actions directed against the Kurdish people during the Al-Anfal campaigns. Consequently, the chapter provided the legal framework for the crime of persecution as the first solution offered to the

IHT in order to criminalise and prosecute the Iraqi cases of internal displacement without violation of the principle of *nullum crimen sine lege.*

Similarly, the chapter found that the criminal framework of the crime of other inhumane acts can apply to acts of forced internal displacement as an example of underlying criminal acts. Although the crime of other inhumane acts does not contain a listing of underlying acts, nevertheless such underlying acts are attributed according to a criterion that embraces outrageous violations of human rights. Subsequently, the chapter tested and proved that violations of at least two human rights are involved in acts of forced internal displacement. It was shown that this displacement flagrantly abused both the right to freedom of movement and the right to choose the place of residence and access to adequate housing. These findings were supported by the jurisprudence of international human rights bodies and the ICTY. Thus, it was confirmed that the Iraqi cases of internal displacement qualify to constitute one of the underlying acts of the crime in question. In particular, the serious harm caused by the said cases satisfies the requirements of the crime of other inhumane acts.

The chapter took all the requirements of the two crimes mentioned above, and then in the third section conducted a detailed investigation of the internal displacement cases of the Marshlands, Al-Dujail and Al-Anfal. It examined the facts, the justifications of the accused and the legal findings of the cases. It demonstrated that the forced internal displacement campaigns in these three cases amounted to the crime of other inhumane acts as a crime against humanity at the time of their commission. At the same time, it proved that these campaigns also constituted the crime of persecution as a crime against humanity. Consequently, the chapter proposed charges of the crime of persecution in order to deal with the above cases. This is because it is not possible to convict two crimes under the same act at the same time; therefore, the IHT should apply the crime of persecution as a specific crime that requires a distinct element, which is that of discriminatory intent.

The fifth chapter argued that the forced displacements in Iraq fulfil the requirements that are necessary to criminalise and prosecute this displacement as an international crime. The fourth chapter had shown that the forced internal displacements in Iraq meet the requirements of both the crime of persecution and the crime of other inhuman acts as crimes against humanity. This is not enough to invoke these crimes and apply them on Iraqi cases. To do this, it is necessary to prove the existence of other elements in order to determine whether the said displacement

was legal or illegal under the terms of human rights law and international humanitarian law. This presupposes the establishment of the contextual requirements of crimes against humanity.

Both human rights law and international humanitarian law set conditions to distinguish lawful from unlawful displacement. Lawful displacement should not involve coercion and/or absence of the genuine and free will of the displaced people. This is when the presence of the people in the place from where they displaced is lawful. Moreover, the displacement should be executed on justifiable grounds, such as an emergency situation or under a general restriction on choice of place of residence in accordance with international human rights law. Other grounds are the security of civilians or military necessity or imperative military reasons in accordance with international humanitarian law. Even when one of the permitted grounds exists, however, the displacement remains illegal unless its execution satisfies the other stipulated conditions. Regarding the Iraqi cases discussed in this thesis it is apparent that these cases did not meet the above requirements and conditions, since the Ba'ath regime used violence, killing, terrorism and armed attacks, including chemical attacks, to force people to leave their homes and regions. It was noted that the Ba'athist government had informed the CCPR that it had not announced and applied an emergency situation. Even if the latter situation had existed, however, the use of violent means and the suffering imposed violated all the requirements and conditions set down in international law. This seemed clear from the facts and the governmental documents relating to the Iraqi cases of forced internal displacement. Thus, the chapter found that the displacements in Iraq had been unlawful.

Subsequently, the chapter discussed the chapeau elements of the crimes against humanity in order to discover whether these elements had been satisfied by the Iraqi cases of internal displacement, and then whether these cases amounted to the crime of persecution and the crime of other inhumane acts as crimes against humanity. These elements require that the Al-Dujail, the Marshlands and the Al-Anfal campaigns should have been implemented as part of "a widespread or systematic attack directed against any civilian population, with knowledge of the attack.' The chapter showed that these elements are required as they have been well-established as a part of customary international law since the Nuremberg trials. A simple comparison between these elements with the facts and documents relating to the said situation of internal displacements in Iraq established that these elements had been present. In the Al-Dujail, Marshlands, and Al-Anfal cases the Ba'ath regime had launched large-scale and organised attacks which had destroyed the nature and environment of the targeted areas and also killed a large number of the inhabitants, regardless of the gender or age of the victims and

involving whole families and their means of livelihoods. All the forces of the state and the Ba'ath party were involved, including the army, security and intelligence forces. High ranking officials had planned, managed and supervised the the implementation of all the attacks. The President, members of the RCC, Ba'ath Party leaders and the military and security leaders all played a part. It was also clear that the attacks had been principally directed against civilian populations.

For example, in the Al-Dujail town case, around ten persons had engaged in an assassination attempt, and in the consequent campaign of violence, about hundreds Shiite families, including women, children and infants, were subjected to horrific abuses. This attack continued even after the Revolutionary Court had convicted and executed 148 people, including some minors after a rigged trial. It was also noted that there were people who died under torture before the trial. The lands and property of victims were bulldozed and destroyed.

Likewise, in the Marshlands case, the environmental system and the traditional life style of the inhabitants were destroyed. Beginning in the 1980's, the Ba'ath regime implemented many plans and campaigns directed against the entire population of Marshland villages. The motive alleged by the regime was land reclamation, but documents found later indicated a plan to attack the population and force them to flee from their marshland villages by means of violent abuse, military attacks and destruction of the environment and traditional way of life. The documents also revealed the imposition of an economic blockade and the poisoning of water supplies. The attacks had the further purpose of hunting down army deserters and opponents of the regime. The official statements revealed that the marshlands dwellers were considered not to be Iraqis and were described as animals with the faces of monkeys. Moreover, it had compared the campaign against them as no different from the extermination of Native Americans in the Americas. The documentation leaves no doubt that the attacks were directed against the entire civilian population, and that the highest officials and institutions of the regime were complicit.

In the Al-Anfal case, too, it was clearly established that the attacks had targeted the Kurdish civilian population on a large scale. It was stated in Chapter four and five that the Al-Anfal campaigns had been accomplished by the use of chemical weapons that killed tens of thousands of civilians, including children and infants. Some people escaped from their villages but nonetheless suffered from the damaging effects of the weapons. Documents confirmed that the villages were to be destroyed and any living thing, whether human, animal or plants, should be

exterminated. Moreover, civilians suffered severely because they were deprived of treatment and hospital care. A huge number of people were interned in horrific camps where killings and torture took place. As in other cases, the attacks had been widespread and organised by high ranking officials and officers of the Ba'athist regime and other forces, particularly the army. Ali Hassan al-Majid had been in charge of the Al-Anfal campaigns by a decree authorised by his cousin Saddam Hussein. Many official documents as well as audio records of conversations between political and military leaders, including Saddam, confirm that the civilian population had been the target of the attacks. Thus there is evidence of the Ba'athist leaders' knowledge of the attacks and also of their involvement in the their planning, implementation and/ or supervision. There had been internal armed conflict between the armed Kurdish groups and the governmental forces; these attacks, however, were aimed at the civilian population and there were photographs proving that the victims were civilians.

Chapter Six demonstrated that acts of forced displacement can be addressed under the definition of the crime of genocide, that is, when such acts are accompanied by a specific genocidal intent of physical or biological destruction. The chapter found that this definition was principally applicable to the forced displacement in the Al-Anfal campaigns. Thus, this chapter suggested an additional criminal framework by which to criminalize and prosecute the Ba'ath legacy of forced internal displacement before the IHT. Indeed, the chapter examined a number of views, definitions and conditions of the crime of genocide in order to answer the question of whether forced displacement qualifies to be tried under the title of genocide. It is noteworthy that this question has inspired jurisprudential and judicial controversy, due to "different interpretations of the specific intention of the crime of genocide. There is one view according to which the specific intention of the crime of genocide is limited to the physical and/ or biological destruction of a protected group. This view excludes mere forced displacement and displacement which destroys the social and cultural structure of a protected group from the category of the crime of genocide. Another view gives a broad meaning to specific genocidal intent. This view has been given two interpretations. The first interpretation expands the notion of specific intent to encompass not only physical/ biological destruction but also social or cultural destruction. This interpretation takes the view that only the underlying acts, and not the intent, of the crime of genocide crime need to be physical or biological. Consequently, it was asserted in Chapter Six that this interpretation classifies forced displacement as genocide because such displacements lead to the dissolution of the social unity of a protected group. According to the second interpretation, the specific intent is limited to

physical and/or biological destruction. However, it broadly construes such destruction to cover the destructions of the social unit, of history and of geographic existence. Accordingly, forced displacement undoubtedly constitutes the crime of genocide. In the opinion of Judge Elihu Lauterpacht, for example, the destruction of the geographic existence of a protected group is sufficient to give rise to the crime of genocide. The chapter revealed one more view, that of Shabas, who suggested that the courts should develop their own interpretations on the basis of the provisions, purposes and objectives of the Genocide Convention. However, it appeared that most case law and jurisprudence favoured the strict interpretation as offered by the first view above and settled by customary law and international treaty law.

The chapter subsequently investigated the meaning and the legal concept of genocidal special intent. It reviewed the *travaux preparatoires* of the Genocide Convention, ICTY and ICJ case-law, the work of the ILC work and other jurisprudence. It was demonstrated that special intent should be limited to the strict meaning of physical and biological destruction that destroys the material existence of the members of a protected group, whether by death, impairment or/ and attrition. Thus, it was inferred that forced displacement that destroys the social unity, cultural identity and/or geographic existence, including ethnic cleansing, should be excluded from the scope of the crime of genocide. Therefore, the chapter ruled out Iraqi cases of forced internal displacement belonging to the latter types of destruction from the scope of genocide crime. It went on to answer the question of whether forced displacement can cause physical and biological destruction. It is noteworthy that forced displacement had not been absent from the mind of the drafters of the Genocide Convention. There had been proposals to include displacement, transfer of members of a protected group from one place to other and displacement in the context of policies of assimilation and integration policies. However, the drafters of Genocide Convention had expressly rejected these suggestions.

As mentioned above, specific genocidal intent as a strict element distinguishes the crime of genocide from other crimes. Therefore, the chapter deduced that there is no obstacle to considering forced displacement as genocide when the intention is to destroy a protected group physically or biologically and not geographically, culturally or historically, elements that had been excluded from the Genocide Convention. Moreover, criminal intent is a mental state that can result in predictable or unpredictable criminal acts. The latter acts must come under at least one of the underlying acts of the crime of genocide. Noticeably, displacement cannot form one of the mentioned acts independently, except in a situation where children are transferred from their own group to another group. Nevertheless, there are two underlying genocidal acts that

can involve a wide range of acts that are not expressly enumerated among the terms of the Genocide Conventions. These two are perpetrating 'serious bodily or mental harm' and the 'destructive condition of the life of group members'. The chapter demonstrated that forced displacement can constitute these two underlying acts. It then concluded that the latter displacement can amount to the crime of genocide if accompanied by specific genocidal intent to perpetrate physical and/or biological destruction. The chapter showed that such a conclusion is supported by the *travaux preparatoires*, case-law and the work of the ILC. It also applied such a conclusion and the terms of the crime of genocide to the case of forced displacement in the context of the attacks against the Kurdish people as a distinct ethnic group during the Al-Anfal campaigns, with the finding that this case amounted to the crime of genocide.

7.3. Recommendations

In the light of its findings, this research presents the following recommendations:

1. Iraqi legislature should review and amend the Law and Statute of the IHT, especially the subject matter of the jurisdiction of the IHT on international crimes, including the sub-headings crimes of each category of crimes against humanity and war crimes. Moreover, Iraqi judges should undertake a considerable amount of investigation when applying each of the sub-headings of each category of international crime. This is in order to comply with international law and the principle of *nullum crimen sine lege* on a case by case basis.

2. The IHT should address the charges of forced internal displacement in the context of the Al-Dujail and Marshlands cases under the terms of persecution crime as a crime against humanity. While the case of Al-Anfal should be considered under the requirements of the crime of genocide, especially since it appears that there are many defendants in the said cases who have not been tried and it is not allowed that the IHT hold their trial *in absentia*.

3. As mentioned in the first chapter, the Iraqi Representatives Council has released a resolution to expand the temporal and personal jurisdiction of the IHT in order to prosecute the crimes committed by ISIS. It is recommended that the Council should avoid such an approach and adopt another more credible and permanent approach to addressing ISIS crimes, including future crimes. This can be achieved by adopting Iraqi legislation on international crimes, based on the Rome Statute and taking into account the circumstances of the Iraqi situation. The legislation that is suggested should expressly refer to international law and jurisprudence to

solve any future challenges that the courts may face. This is important due to the fact that the new regime in Iraq is in an unsettled situation and faces dangerous challenges, in particular attacks by terrorist groups and various ethnic and religious tensions.

4. The Iraqi legislature adopt an act allows the Iraqi Supreme Judicial Council to appoint, if necessary, foreign experts, judges and prosecutors in order to provide legal advice and/ or to work with Iraqi courts that address international crimes.

5. The Iraqi legislature should address clearly the status of international law within the Iraqi legal system. It was concluded that the Iraqi judiciary applied the treaty provisions after the publication of the ratification law of each treaty, irrespective of whether the provisions of the treaty had been published, as required, by the Publishing Law in the Official Gazette of 1977. Therefore, it should amend the Publishing Law in the Official Gazette and the Law of Conventions by confirming that a treaty has domestic influence after the publishing of the ratification law of a treaty. This is consistent with domestic judicial applications and secures compliance with international law. In this respect, the suggested amendment can distinguish between the self-executing and non-self-executing provisions of a treaty. While the suggested amendment should confirm that the former provisions should enjoy direct application, on the other hand it should set a limited time for explaining and detailing the second provisions in order to bring them into domestic application. Regarding the customary rules and general principles of international law, the Iraqi legislature should clarify the status and influence of these parts of international law through a law or a constitutional amendment and put into direct effect all or some subjects of these parts, such as those involving human rights and international crimes. The Iraqi legislature should also consider the enhancement of the domestic effect of the *jus cogens* rules. A recommendation could be suggested that would address all the above matters in a single Act legislated by the Iraqi Representatives Council, or alternatively through a constitutional amendment. The Act or amendment should determine the approach that should be pursued when there is a conflict between an international and domestic rule, in cases where there is no reconciliation.

6. Iraq should become a party to the Rome Statute of the ICC and authorise the ICC to prosecute all crimes committed after the entry into force of the Rome Statute. This is a significant recommendation owing to the situation in Iraq, with its terrorist crimes and ethnic, religious and political tensions. It will prevent impunity, because the ICC can hold trials in cases where the Iraqi courts have lost the will or ability to prosecute the crimes. Trials before the ICC will

in addition be more credible than trials held by Iraqi courts, because of the failures in the construction of the new regime in Iraq and the aforementioned social tensions..

7.4. Limitations of the study

Although this study has achieved its goals, there are nonetheless some limitations that could not be avoided. The study focused on the mistaken methods employed by the IHT when it retroactively applied the criminal framework of forcible transfer as crime *per se* and violated the principle of *nullum crimen sine lege*. However, the study tested this principle in the context of the Ba'ath legacy of acts of forced internal displacement. Other violations were excluded, although they need to be investigated in order to discover whether all or some of these violations can be subject to the findings of this study. It is questionable whether a number of sub-offences *per se* under the categories of international crime as included in the Statute of the IHT had been considered as a stable part of international criminal law at the time when the Ba'athist regime carried out all or some of its atrocities. In particular, since these sub-offences seem to have been extracted largely from the Rome Statute of the ICC of 1998. Further, although the study investigated three cases of forced internal displacements: Al-Dujail, Al-Anfal, and the Marshlands, other cases were excluded, for example, some campaigns of internal forced displacement in the context of the Arabisation policy that continued late into the Ba'athist era. Furthermore, the study did not discuss the Ba'ath legacy of violations in the context of the international wars of aggression against Iran and the occupation of Kuwait, including the displacements committed during the occupation of Kuwait. Moreover, the temporal jurisdiction of the IHT is critical to the selection of cases studied. Hence, the study did not cover the violations, including forced internal displacements, that occurred after the ousting of the Ba'ath regime in 2003. Iraq has experienced many such violations, including demographical changes and forced internal displacements due to political, ethnic and religious conflicts. Relatedly, armed groups and terrorists committed widespread abuses and acts of forced internal displacement. The study ruled out other challenges which the IHT faced, such as criticisms of the trial procedures, especially the fact that the IHT followed the Iraqi Criminal Procedure Code of 1971. The study also ruled out the principle of *nulla poena sine lege*.

7.5. Future study

Further research is needed by other researchers to show whether other violations of the Ba'ath legacy had been criminalised under international law during the era of Ba'ath regime. For example, it is arguable whether the IHT's Statute and judgments on the forcible disappearance of persons as crime *per se* come within the findings of the current study regarding the violation of the principle of *nullum crimen sine lege* by the IHT when it addressed cases of forced internal displacement. It is questionable whether the forcible disappearance of persons had been recognised as an independent crimes *per se* in international law during the entire time of Ba'athist rule. Similar questions arise in relation to other crimes against humanity and war crimes committed during internal or international armed conflicts. Moreover, a question can be raised with regard to the definitions and required elements of crimes that were recognised in international law during the time of Ba'athist rule. This is because the IHT Statute listed, and its judgments followed, the more progressive definitions and requirements derived from the Rome Statute. The latter Statute came later and is advanced in comparison with the international law that had existed during the time when most of the Ba'ath atrocities were committed.

A new study might be concerned with discovering whether other campaigns of forced internal displacement had been legal. If not, they can be subject to the same findings and criminal frameworks as those examined in the current study, especially campaigns such as those directed against the Turkmen people late in the era of Ba'athist rule. In addition, a fresh study might usefully focus on the forced internal displacements and other abuses resulting from ethnic and sectarian tensions or the actions of terrorist groups. In particular, terrorist groups such as Al-Qaeda and ISIS have committed atrocities, some of them not recognised as crime *per se* in international law, for example, forced marriages and enforced changes of religion. This is significant, particularly since the ICR released a resolution in 2014 expanding the temporal jurisdiction of the IHT in order to include terrorist atrocities and the prosecution of members of terrorist groups. This may raise challenges regarding the principle of *nullum crimen sine lege*, especially since there is a jurisprudential opinion that asserts that terrorist groups are not included within the definition of organised groups as cited in the definition of crimes against humanity in the Rome Statute.

Further research is also necessary to show whether the principle of *nulla poena sine lege* has been respected in the Statute and judgments of the IHT, since the Statute does not specify punishments for its crimes. Instead, it asks the IHT to be guided in its judgments by the

punishments stipulated in the IPL. Other research could be conducted to examine the applicability of the IHT's jurisdiction in cases where defendants were charged due to their participation in a common criminal enterprise, since the IHT has not referred to international law in its judgments, depending instead on Articles 47, 48 and 49 of the IPL. The IHT faced other challenges with regard to the matters such as the responsibility of the Supreme Commander, legal guarantees for the accused and fair trial procedures. Relatedly, further researches could examine the extent to which these matters are consistent or compatible with international law.

Conclusion

This study revealed the serious problems faced by Iraqi domestic courts in criminalising and prosecuting the abuses of the former Ba'ath regime as international crimes. This is especially so with regard to the principle of *nullum crimen sine lege*. Similarly, previous chapters had focused on the legacy of internal displacements and found that the IHT had retroactively applied to them the new framework of the criminal law of forcible transfer as international crime *per se*. Unfortunately, the investigation of the IHT focused only on the main headings of the crimes against humanity, war crimes and crimes of genocide, to show that its jurisdiction on these categories of crime agrees with the international law that was in force when the Ba'ath abuses occurred. Its investigations failed to discover whether that each sub-crime under each of these three main headings had been well established in international law at the decisive time. Thus, it could have found the proper criminal framework to be applied to each one of the Ba'ath abuses, as this study did with the campaigns of internal displacement in the cases of Al-Dujail, the Marshlands population and Al-Anfal. The matter of respect for the principle of *nullum crimen sine lege* is all the more complicated, since the IHT as a domestic did not convincingly explain how its jurisdiction had been established on the basis of international law. Thus, the IHT made some mistakes in its arguments. A chapter of this study analysed and provided sufficient grounds to establish such jurisdiction through Iraqi legislation, international law, international and domestic case-law and jurisprudential opinions.

To date, these problems have not been solved. The reason is probably that the Iraqi legislature and the judges of the IHT had imagined that the prosecution of international crimes was a temporary and transitional process in the history of Iraq and would end with the completion of the trials of crimes from the Ba'athist era. This created another problem, since it ignores the

objectives of the new regime in Iraq, in which leaders, legislators and judges were to have learned lessons from the experience of Ba'ath rule, thus helping to preclude the occurrence of atrocities in future and ensuring that they would not go unpunished if they did re-occur. There is currently an imperative need to ensure that legislation and structures for the prosecution of international crimes are permanent and holistic and remain in force, so as to keep the new Iraq on the path of democracy and respect for the rule of law and human rights. Iraq today is an attractive environment for those who wish to commit dramatic atrocities in the category of international crimes. It is not sufficient for the Iraqi legislature to make selective arrangements for some cases, such as it made when it expanded IHT jurisdiction in order to cover ISIS atrocities after these atrocities were occurred. Such arrangements pose similar problems for the IHT, particularly the problems discussed in this thesis, such as respect for the principle of *nullum crimen sine lege*.

All these challenges will continue to threaten the principles of criminal justice if the Iraqi legislature does not initiate reforms and changes. The judges should also test all elements and requirements of criminal justice, including the principle of *nullum crimen sine lege* with regard to each criminal framework as sub-crimes *per se* under the three headings of international crimes mentioned above. The significant findings and recommendations of this study should be taken into account by Iraqi legislators and judges, whether with respect to Ba'athist atrocities, including the forced internal displacements; abuses committed after the fall of the Ba'ath regime in 2003; or any abuse that may occur in future. In addition to its contribution to the principles of criminal justice and non-impunity, this study is intended to play an essential part in achieving the goals of the new regime in Iraq.

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