

## Prosecuting Islamic extremism

### Counteracting impunity for the armed *jihad* of the Islamic State group through international criminal justice

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#### Abstract

The systematic targeting of religious minorities in Iraq and Syria constitutes one of the most serious threats to international peace and security. The legal accountability of the Islamic *jihadist* militia responsible for such atrocities is an important means to protect international religious freedom, prevent future religious oppression and counteract impunity. The human rights violations and atrocities committed by the Islamic State have been classified as war crimes, terrorism, ethnic cleansing and crimes against humanity by the international community. However, the religious persecutory intent underlining the Islamic State's violent enforcement of extremist Islamic ideology merit the classification of such crimes as 'genocide by religious persecution' and 'crimes against humanity of religious persecution'.

**Keywords** Genocide, crimes against humanity, international criminal prosecution, counteracting impunity, international human rights, persecution, religious freedom, military *jihad*, Islamic extremism.

The rise of a global Islamic *caliphate*<sup>2</sup> and the subsequent human rights abuses and unlawful massacre at the hands of Islamic extremists in northern Iraq and Syria has been at the forefront of international human rights concern in recent months.<sup>3</sup> It is clear that a course of conduct that constitutes gross human rights violations, especially the persecution of religious minorities, may be attributed to Islamic extremists in the area.<sup>4</sup> In essence, the Islamic fundamentalist group responsible

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<sup>2</sup> A *caliphate* (meaning "succession") is an Islamic state led by a supreme religious and political leader known as a *fatwa* – i.e. "successor" – to Muhammad. <http://en.wikipedia.org/wiki/Caliphate>. 20/08/2014.

<sup>3</sup> Human Rights Watch – World Report 2015. <http://www.hrw.org/world-report/2015>. 06/02/2015.

<sup>4</sup> "Islamic State". *Australian National Security*. Australian Government. <http://www.nationalsecurity.gov.au/Listedterroristorganisations/Pages/IslamicState.aspx>. 20/08/2014.

endorse a self-proclaimed ideology of a violent and sectarian Islam which does not necessarily epitomize the followers of the global Islamic faith. A rudimentary analysis of the violations in northern Iraq and Syria in recent months unveils *prima facie* evidence of crimes that have shocked the conscience of humanity and have led to a destabilisation in the region<sup>5</sup>; threatening international peace, security and the well-being of humanity.<sup>6</sup> To restrain the plight of the religiously persecuted in northern Iraq and Syria, regardless of religious beliefs, every endeavour should be made to advocate religious freedom and counteract impunity and expedite justice for victims.

Although the violation of religious freedom may originate at a regional level and thus fall within the scope of national jurisdictional powers, national control mechanisms may be biased or ineffective.<sup>7</sup> Furthermore, due process is seemingly impossible for indigent persecuted if the *de facto* authority is the instigator of such religious persecution<sup>8</sup>; as is the context *in casu*. Therefore, the protection of human rights requires a supranational dimension through an international prosecution mechanism, such as the International Criminal Court.<sup>9</sup> International criminal law is a generally accepted course through which basic human rights may be protected and enforced in cases where national judicial systems offer insufficient protection or recognition; or when recourse through human rights systems and courts will not serve the interests of justice. Legal accountability for such atrocities is an important way to protect international religious freedom and prevent future religious oppression. Therefore, this paper will implore prosecution through international criminal law as a relatively unaccustomed method or process to advocate a sanction-based solution to curb religious intolerance and impunity whereby religious persecution as a human rights concern may be protected and enforced and further violations deterred. For purposes of this paper religious persecution is defined as:

<sup>5</sup> Security Council Analytical and Monitoring Committee pursuant to resolutions 1267 (1999) and 1989 (2011) concerning Al-Qaida and associated individuals and entities - *The Islamic State in Iraq and the Levant and the Al-Nusrah Front for the People of the Levant: report and recommendations submitted pursuant to resolution 2170 (2014)*. [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/2014/815](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2014/815). 26/05/2015.

<sup>6</sup> United Nations Security Council Resolution 2195 (2014) [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/2195%20\(2014\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2195%20(2014)). 06/02/2015.

<sup>7</sup> Triffterer Commentary on the Rome Statute of the International Criminal Court (2008) 24.

<sup>8</sup> L. Fernandez "Religious persecution as a crime against humanity: Ending impunity" 2013 IJRF Vol 6:1/2 159.

<sup>9</sup> The International Criminal Court (ICC) is the first permanent, treaty based, international criminal court established to help end impunity for the perpetrators of the most serious crimes of concern to the international community, crimes which by their very commission are serious and obvious infringements of fundamental human rights on a considerable level.

Unjustifiable acts; which severely violates or deprives; a believer or believers of a specific religious group; of their fundamental human rights; through a systematic oppression or attack on the religious group and/or their religious beliefs or affiliations or lack thereof; with the specific intention to oppose, discriminate against or eliminate the religious group in whole or in part; because of the religious conviction of the group.<sup>10</sup>

## 1. The ideology and objective of the military *jihad* in Iraq and Syria

In fundamentalist Islamic theology, religious freedom is to be regarded as “the freedom to belong to the one true religion, Islam, or to turn towards it”<sup>11</sup> and therefore Islamic extremism has remained a source of religious persecution.

The teachings of the *Qur'an* implore a pure Islamic faith culminating in law and religion. Therefore the ideology underlining a military *jihad* is a complex, multifaceted socio-political theological imperative based on a specific dogmatic teaching of the *Qur'an* and *Sunna*<sup>12</sup> and motivated by religious fundamentalism or irrational millenarian impulses.<sup>13</sup> Paul Berman's<sup>14</sup> interpretation of the work of the Muslim Brotherhood's theorist and inspiring source of Al Qaeda, Sayyid Qutb, concludes that modern military *jihadists* are irrational offences based on a “totalitarian Islamist state and the cleansing of pernicious Western influence”<sup>15</sup> whereby extremists aim to:

...create an authentic Islam stripped of foreign liberal influence and modern *jihadists* believe they have divine sanction to engage in violence against *apostate* regimes. This includes killing all *apostates* and *infidels* that hinder the development of a purified *ummah*. Death is welcomed as an opportunity for martyrdom and slaughter of Islam's enemies becomes a moral imperative.<sup>16</sup>

Modern terror movements are normally triggered by some form of Western intervention in Islamic affairs or States, as was the case with the fall of the Ottoman Em-

<sup>10</sup> Nel “When can the persecution of Christians be considered genocide or a crime against humanity?” 2013 IJRF Vol 6:1/2 176.

<sup>11</sup> C. Schirrmacher “Apostasy: What do contemporary Muslim theologians teach about religious freedom?” 2013 IJRF Vol 6:1/2 190.

<sup>12</sup> One of the primary sources of Islam and refers to the sayings and traditions of the Prophet.

<sup>13</sup> A.N. Celso “Jihadist Organizational Failure and Regeneration: the Transcendental Role of Takfiri Violence”. (2014). <http://www.psa.ac.uk/sites/default/files/conference/papers/2014/PSU%20presentation.pdf>. 08/01/2015.

<sup>14</sup> P. Berman *Terror and Liberalism* (W.W. Norton: New York, 2003)

<sup>15</sup> Celso *ibid* (n 12) 2.

<sup>16</sup> Celso *ibid* (n 12) 2.

pire which “protected the roots of Islam and acted as the last *Caliphate* of Islam”.<sup>17</sup> The demise of the *caliphate* during the First World War prompted a return to Islamic fundamentalism thereby inviting an extremist or radical ideology in restoring the tarnished prestige of Islam, giving rise to various Islamist extremists groups such as the Muslim Brotherhood.<sup>18</sup>

The Islamic *jihadist* militia responsible for the atrocities in Iraq and Syria follows an interpretation of the *Qur'an* known as *Salafist Jihadism*, a belief that *jihad* in the form of violence and terrorism is justified to realize political objectives<sup>19</sup> and “to carry out radical resistance to Western aggression against Muslim peoples”<sup>20</sup>. Two main groups responsible for the atrocities in northern Iraq and Syria are the Al-Nusra Front for the People of the Levant (ANF) and the Islamic State in Iraq and the Levant (ISIL); however the latter will form the topic of discussion for purposes of this paper.

ISIL originated from a Jordanian-led extremist group in 1999 and in 2004 was re-branded as Al-Qaeda in the Islamic State of Iraq (AQI), but has also been known as the Islamic State of Iraq and Syria (ISIS). The group has been categorised, in all its forms, as a terrorist organization.<sup>21</sup> In June 2014, ISIS proclaimed its intention of succession, by declaring the territories under its control in Iraq and Syria to be a *Caliphate*, and demanded all Muslims pledge obedience to its leader, Abu Bakr al-Baghdadi, whom it referred to as *Caliph Ibrahim* a would-be successor to Mohammed.<sup>22</sup> Abu Bakr al-Baghdadi, now known as Amir al-Mu'minin Caliph Ibrahim became the leader of AQI following the death of his predecessor, Abu Hamza alMuhajir in 2010 and was proclaimed a terrorist individual by the USA in 2011.<sup>23</sup> What distinguishes al-Baghdadi from his Al-Qaeda counterpart, Ayman al-Zawahiri and his predecessor Osama bin Laden, is the *de facto* control over territory which corroborates his claim to a *caliphate*.<sup>24</sup>

<sup>17</sup> J Hume. “Balance of Powers: Syria.” (2014). <http://numun.org/blog/wp-content/uploads/2014/02/BOP-Syria-Committee-Dossier.pdf>. 08/01/2015.

<sup>18</sup> Hume *ibid* (n 16) 8-9.

<sup>19</sup> Kepel Jihad: The Trail of Political Islam. I.B. Taurus & Co Ltd. UK (2006) 26 – 30.

<sup>20</sup> “Islamic approach to international law” - Max Planck Encyclopedia on Public International Law, published by the Max Planck Institute for Comparative Public Law and International Law, Heidelberg and Oxford University Press (2011) 392.

<sup>21</sup> The List established and maintained by the Al-Qaida Sanctions Committee pursuant to resolutions 1267 (1999) and 1989 (2011) with respect to individuals, groups, undertakings and other entities associated with Al-Qaida. [http://www.un.org/sc/committees/1267/aq\\_sanctions\\_list.shtml](http://www.un.org/sc/committees/1267/aq_sanctions_list.shtml)

<sup>22</sup> Spencer “Isis declares its captive territories an ‘Islamic Caliphate’” (2014). <http://www.telegraph.co.uk/news/worldnews/middleeast/10934427/Isis-declares-its-captive-territories-an-Islamic-Caliphate.html>. 20/08/2014.

<sup>23</sup> Joshi “Abu Bakr al-Baghdadi: The world’s most wanted man” (2014). <http://www.telegraph.co.uk/news/worldnews/middleeast/10935790/Abu-Bakr-al-Baghdadi-The-worlds-most-wanted-man.html>. 20/08/2014

<sup>24</sup> This is significant in light of the justification for an armed jihad, which is discussed later in this paper.

... [T]he scale of the threat posed by [ISIL] is qualitatively and quantitatively different [from AQI] because of the nexus between the funding of ISIL and its control over significant population and territory and the thousands of foreign terrorist fighters from over 80 countries that have joined ANF and ISIL.<sup>25</sup>

In July 2014, the group publicized its overall objective for accession in a video released by an ISIS fighter which is to eliminate all modern borders between Islamic Middle Eastern countries and create a pure State of Islam.<sup>26</sup> “The legality of all emirates, groups, states, and organisations, becomes null by the expansion of the Caliph’s authority and arrival of its troops to their areas”<sup>27</sup>

With the proclamation of a pure State of Islam in the territory under its control and the subsequent demand on all Muslims to obey Caliph Ibrahim, the group has now ascended above a territorial claim and consequently refer to themselves simply as *Dawla al-Islamiya*, or the Islamic State (IS)<sup>28</sup>. The IS group has emerged as the “world’s most committed and fanatical radical organization”<sup>29</sup> and is determined to pursue a broader regional agenda beginning in Iraq and the Syrian Arab Republic, seeking “to change the existing political order in the Middle East through terrorist violence, to establish a state based on a widely repudiated misinterpretation of religion, and to expel foreign influence — political, economic and ideological.”<sup>30</sup>

The Islamic State follows an extreme interpretation of Islam which is anti-Western, promotes sectarian violence and targets those that do not agree with its interpretations as infidels and apostates.<sup>31</sup>

The IS group is a self-sufficient organization with diversified funding streams<sup>32</sup> directly financing terrorist activities on a daily basis, with a *modus operandi* based

<sup>25</sup> Security Council Analytical and Monitoring Committee *ibid* (n 4) 5.

<sup>26</sup> McGrath “Watch this English-speaking ISIS fighter explain how a 98-year-old colonial map created today’s conflict” (2014). <http://www.dailynews.com/general-news/20140702/watch-this-english-speaking-isis-fighter-explain-how-a-98-year-old-colonial-map-created-todays-conflict-20/08/2014>.

<sup>27</sup> Spencer (n 21).

<sup>28</sup> Differentiate from Islamic State as a type of government, in which the primary basis for government is Sharia law. In the current sphere of political systems, many Muslim countries have incorporated Islam, in whole or in part, as their state religion.

<sup>29</sup> All you need to know about ISIS and what is happening in Iraq”. <http://rt.com/news/166836-isis-isil-al-qaeda-iraq/>. 20/08/2014

<sup>30</sup> Security Council Analytical and Monitoring Committee *ibid* (n 4) 6.

<sup>31</sup> “Islamic State” (n 3).

<sup>32</sup> IS has seized considerable assets in both Iraq and the Syrian Arab Republic and benefits from a substantial continuing revenue flow gained from a range of sources, including the sale of crude oil, kidnapping for ransom, extortion and – to a lesser extent today – donations. Security Council Analytical and

on instigating a regime of fear by conducting public executions and violent punishments against civilians and civilian targets and restricting the right to freedom of religion.<sup>33</sup> IS has made calculated use of public brutality and indoctrination to ensure the violent and ruthless enforcement of an indiscriminate form of *Sbaria* law, which is without a doubt a religious holy war or *jihad* against minority religions, such as Christians, and dissenting Muslims, such as Yazidis and Shia.<sup>34</sup> The question beckons, can IS legitimately conduct such a *jihad*?

## 2. A non-Muslim's perspective regarding a legitimate jihad in terms of Islamic law

In the early days of Islam there was a permanent state of war between Muslims and non-Muslims and the world according to the teachings of Islam was thus divided between these two worlds; *dar-al-Islam* (the territory of Islam) and the *dar-al-barb* (the territory of war).<sup>35</sup> Furthermore, this state of war between Muslims and non-Muslims had to continue throughout the world, until the non-Islam States had accepted the sovereignty of Islam. The ultimate objective of Islam was "that the *umma* (one single Islamic nation) would encompass all mankind"<sup>36</sup>, through military *jihad* if necessary.

*Jihad* means "to struggle in the way of Allah". The obedience of a call to *jihad* is an important religious duty for Muslims. A Muslim engaged in *jihad* is referred to as a *mujabideen*, or *mujabideen* for plural. There are three commonly accepted meanings of the term *jihad*<sup>37</sup>: Firstly, a believer's internal struggle to live out the Muslim faith as well as possible; secondly, the struggle to build a good Muslim society; thirdly, religious holy war to defend Islam, with force if necessary. It is this third interpretation of *jihad* that is the cause of *Islamophobia*<sup>38</sup> in some states<sup>39</sup> and which will form the topic of this paper.

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Monitoring Committee *ibid* (n 4) 19.

<sup>33</sup> "Islamic State" (n 3).

<sup>34</sup> M. Abi-Habib "Iraq's Christian Minority Feels Militant Threat". (2014). *The Wall Street Journal*. 20/08/2014.

<sup>35</sup> Islamic approach to international law *ibid* (n 19) par 21.

<sup>36</sup> Islamic approach to international law *ibid* (n 19) 388.

<sup>37</sup> "Jihad" (2014). [http://www.bbc.co.uk/religion/religions/islam/beliefs/jihad\\_1.shtml](http://www.bbc.co.uk/religion/religions/islam/beliefs/jihad_1.shtml). 20/08/2014.

<sup>38</sup> Islamophobia or fear of Islam is "considered by some to currently be the most dangerous form of prejudice, discriminating against individuals on basis of the religious belief in Islam" - R. Imhoff & J. Recker, "Differentiating Islamophobia: Introducing a new scale to measure Islamoprejudice and Secular Islam Critique." [https://www.academia.edu/545302/Differentiating\\_Islamophobia\\_Introducing\\_a\\_new\\_scale\\_to\\_measure\\_Islamoprejudice\\_and\\_Secular\\_Islam\\_Critique](https://www.academia.edu/545302/Differentiating_Islamophobia_Introducing_a_new_scale_to_measure_Islamoprejudice_and_Secular_Islam_Critique). 05/01/2014.

<sup>39</sup> Report of the United Nations World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Declaration, par 61.

*Jihad* is the only form of warfare permissible under Islamic law, and may consist in wars against unbelievers, apostates and dissenters renouncing the authority of Islam<sup>40</sup>

Different Muslim groups may also differ in their interpretation of the rules regarding *jihad* based on the teachings of the various *suras* in the Qur'an referencing *jihad*. An accurate interpretation of the Qur'an is a task best left to an *ulema* (Muslim scholar) or an Islamic cleric or theologian, therefore the writer offers only a few remarks and conclusions based on an article written by Javed Ghamidi.<sup>41</sup>

Although the Qur'an considers peace and freedom as two essential requirements of a society, both forms of *qital*, i.e. armed *jihad* against injustice and oppression; and against the rejecters of truth after the truth has become evident to them, may be permitted or regarded as legitimate under certain circumstances and in terms of certain rules and restrictions. The Qur'an clarifies the "nature of responsibility the Muslims have been entrusted with *viz a viz Jihad*, the real force from which they should derive their motivation in waging *Jihad*, the moral and ethical limits of this undertaking and finally the real objective of *Jihad*." *Sharia* law has developed a comprehensive set of rules regulating the resort to military *jihad* (*ius ad bellum*) and also the limitations during armed *jihad* (*ius in bello*).<sup>42</sup>

#### *Ius ad bellum* aspects of *jihad*

The authority to go to war. The existence of a religious ruler is a requirement to exercise the prerogative to declare a *jihad*, because no one else has the right to punish another person. Amir al-Mu'minin Caliph Ibrahim is now the self-proclaimed *fatwa* or supreme religious leader and successor to Muhammad. Furthermore, no Muslim group or organization of people is authorized to wage military *jihad* unless it wields political authority in an independent piece of land. This is significant, as IS has already claimed *de facto* authority and control over parts of Iraq and Syria.<sup>43</sup>

Just or legitimate cause for war. The ultimate objectives of "*jihad* as warfare is not the conversion of non-Muslims to Islam by force, but rather the expansion and defence of the Islamic State".<sup>44</sup> Muslims may only conduct a military *jihad* in

<sup>40</sup> Majid Khadduri, *War and Peace in the Law of Islam* (The Johns Hopkins Press, 1955) 74–80.

<sup>41</sup> Ghamidi "The Islamic Law of Jihad" *Mizan*. Dar ul-Ishraq OCLC <http://www.studying-islam.org/articletext.aspx?id=771>. 20/08/2014.

<sup>42</sup> Islamic approach to international law *ibid* (n 19) 391.

<sup>43</sup> "Islamic State slaps branding on U.N. food aid" (2014). <http://www.humanosphere.org/world-politics/2015/02/islamic-state-slaps-branding-u-n-food-aid/>. 15/01/2015.

<sup>44</sup> "Djih d". *Encyclopedia of Islam Online*. [http://referenceworks.brillonline.com/search?s.q=djihad&s.f.s2\\_parent=s.f.book.encyclopaedia-of-islam-2&search-go=Search](http://referenceworks.brillonline.com/search?s.q=djihad&s.f.s2_parent=s.f.book.encyclopaedia-of-islam-2&search-go=Search). 21/08/2014.

defence of Islam, however this does not require an armed attack by the enemy and may continue until the enemy surrenders or departs from Islamic territory.<sup>45</sup> *Jihad* in defence of Islam will only be achieved when two objectives are totally achieved: Firstly, the *fitnah* or persecution, from either external sources or even dissenting Muslims, is uprooted<sup>46</sup>. Although the Qur'an provides a person with the right to freely choose his religion and ideology, a *fatwa* is given divine authority to interpret the Islam texts and condemn dissenting versions. Such radical religious leaders also employ the doctrine of *fitnah*, whereby a *fatwa* is declared thereby stripping or excommunicating a fellow Muslim or a Muslim community of their Islamic status, branding them as apostates or non-believers, and providing theological justification for indiscriminate violence and killing intra-Muslim.<sup>47</sup> Secondly, only Islam reigns supreme in the Arab peninsula. *Jihad* in the form of warfare may therefore continue until such time as this aim has been achieved.

An honourable motive and a reasonable hope of success. Armed warfare must neither be undertaken to gratify one's whims nor to obtain wealth and riches, it must be fought to bring about good. All other remedies must be exhausted to mediate the conflict before armed conflict is sought.

### *Ius in bello* aspects of *jihad*

The principle of proportionality. "Allah is with those who remain within the bounds." (Qur'an 2:194). Indiscriminate attacks and methods of war are forbidden, for example chemical or nuclear warfare. The ethical limits referred to will not only take on physical proportions pertaining to acts of war, but also a component based on honour and honesty.

The principle of distinction in regards to legitimate military targets, prisoners of war and civilians. "Fight in the way of Allah those who fight you, but do not transgress. Indeed, Allah does not like transgressors." (Qur'an 2:190).

ISIS has violated its obligations toward civilians and persons hors de combat in terms of International Humanitarian Laws (IHL)<sup>48</sup>, amounting to war crimes.<sup>49</sup>

<sup>45</sup> Islamic approach to international law *ibid* (n 19) 391.

<sup>46</sup> The directive of waging war against *fitnah* or 'persecution', ie to force a person to give up his religion, but may likely include all forms of oppression against the life and wealth as well as freedom of opinion and expression of Muslims. *Fitnah* is regarded by the Quran as a crime greater than murder.

<sup>47</sup> Celso (n 12).

<sup>48</sup> It includes "the Geneva Conventions and the Hague Conventions, as well as subsequent treaties, case law, and customary international law." Website of the International Committee of the Red Cross, What is international humanitarian law? (2014). <https://www.icrc.org/en/document/what-international-humanitarian-law#.VDv3EFOa4wo>. 26/05/2015.

<sup>49</sup> Report of the Independent International Commission of Inquiry on the Syrian Arab Republic - Rule of Terror: Living under ISIS in Syria. [http://www.ohchr.org/Documents/HRBodies/HRCouncil/ColSyria/HRC\\_CRP\\_ISIS\\_14Nov2014.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/ColSyria/HRC_CRP_ISIS_14Nov2014.pdf). 13/02/2015.



However, *jihad* is a military as well as a religious imperative on all Muslims, man or woman, and therefore Muslims have a collective obligation to wage *jihad*, thereby nullifying the distinction between combatants and non-combatants in terms of Muslim people.<sup>50</sup> The *mujabideen* will likewise consider its enemies in the same way. However, innocent people, women, children and the elderly must not be harmed, killed or raped. However, “ISIS has systematically denied basic human rights and freedoms and in the context of its attack against the civilian population, has perpetrated crimes against humanity”<sup>51</sup>

Muslims should not initiate proceedings to violate anything which is sacred, such as property. “In attacking churches, historic monuments and buildings dedicated to religion and culture, which did not contain any military objectives, ISIS violated its obligations under customary international humanitarian law. Targeted as such, ISIS has perpetrated the war crime of attacking protected objects.”<sup>52</sup> The treatment of the enemy and enemy soldiers should be confined within the limits of *Sharia* justice. “Prisoners could not be tried and punished for mere belligerency, but for crimes committed beyond the right of belligerence”.<sup>53</sup>

*Sharia* law explicitly forbids intra-Muslim violence. However, during armed *jihad* Islamic extremists, such as IS normally employ the doctrine of *fitnah*, which “allows them to proclaim as *fitnah* (heretics) Muslims who deviate from their strictly defined interpretation of Islam. The penalty for heresy is death.”<sup>54</sup>

IS employs *jihad* in the form of a militant holy war inferring the use of violence, including paramilitary action against Muslim and non-Muslim persons and groups, including governmental forces, deemed to be enemies of their fundamentalist version of Islam.<sup>55</sup> Based on the interpretation of the Qur’an and *Sunnah* above, and the rules and restrictions placed on Muslim *mujabideen* in terms of a combatant *jihad*, it is clearly impossible that the course of conduct of IS constitutes a legitimate armed *jihad*. This assessment of illegitimacy is shared by many Muslim groups:

We disagree with ISIS, first for its extremist ideas, and second, for its violent action approach. ISIS has adopted extremist thought that deviates from the correct understanding of Islam. It accuses anyone who does not agree with it of being *Kafir* (non-believer), and sees most Muslims as apostates... ISIS’s modus operandi, it

<sup>50</sup> Islamic approach to international law *ibid* (n 19) 393.

<sup>51</sup> Rule of Terror *ibid* (n 48).

<sup>52</sup> Rule of Terror *ibid* (n 48). See also UNSC Resolution 2199.

<sup>53</sup> Islamic approach to international law *ibid* (n 19) 393.

<sup>54</sup> “Special Report: The Islamic State” - <http://www.clarionproject.org/sites/default/files/islamic-state-isis-isis-factsheet-1.pdf>. 10/02/2015.

<sup>55</sup> Cook. *Understanding Jihad* (2005) University of California Press. Retrieved from Google Books on 20/08/2014. ISBN 0-520-24203-3, ISBN 978-0-520-24203-6.

shed blood unjustly, cut off people's heads, forced people into allegiance under threats, and attacked non-Muslim citizens and asked them to choose between Islam or forced displacement. These are all behaviors contrary to the teachings of Islam. ISIS should refer to the Qur'an and *Sunnah* to understand Islam correctly and improve its approach.<sup>56</sup>

### 3. International response to the regime of terror by IS

The United Nations Security Council, prompted by "ongoing and multiple criminal terrorist acts aimed at causing the deaths of civilians and other victims, destruction of property and of cultural and religious sites, and greatly undermining stability" in Iraq and Syria attributable to the IS group, unanimously adopted UNSC resolution 2170 confirming the IS as a terrorist organization whose actions are considered a threat to international peace and security:

Expressing its gravest concern that territory in parts of Iraq and Syria is under the control of ISIL... and about the negative impact of their presence, violent extremist ideology and actions on stability in Iraq, Syria and the region, including the devastating humanitarian impact on the civilian populations... and about their acts of violence that foment sectarian tensions.<sup>57</sup>

The UN designated the situation in northern Iraq and Syria with its highest level of emergency, citing the scale and complexity of the situation consequential of a humanitarian crisis.<sup>58</sup> The UNSC's call upon States "to take all measures as may be necessary and appropriate... to counter incitement of terrorist acts motivated by extremism and intolerance perpetrated by individuals or entities associated with ISIL, ANF and Al-Qaida" seems to justify the US humanitarian intervention in August 2014<sup>59</sup> and the formation of the Global Coalition to Counter the ISIL in December 2014.<sup>60</sup> The counter-ISIL coalition includes western powers such as the U.S.A. and the UK; middle eastern states, such as the UAE, Turkey and Saudi Arabia; as well as multi-national organizations such as the EU, NATO and the Cooperation Council for

<sup>56</sup> Ikhwanweb: The Muslim Brotherhood's Official English Website - "Syria Muslim Brotherhood Leader: We Disagree with ISIS in Principle, Approach" (2014). <http://www.ikhwanweb.com/article.php?id=31783&ref=search.php.09/02/2015>.

<sup>57</sup> United Nations Security Council Resolution 2170. [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/2170%20%282014%29.21/08/2014](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2170%20%282014%29.21/08/2014).

<sup>58</sup> UN News Centre "Adopting resolution, Security Council approves sanctions against militants in Iraq, Syria" [http://www.un.org/apps/news/story.asp?NewsID=48494#\\_br6WMMdMuM](http://www.un.org/apps/news/story.asp?NewsID=48494#_br6WMMdMuM). 22/08/2014.

<sup>59</sup> Chulov et al "US forces bomb Isis militant positions in northern Iraq." <http://www.theguardian.com/world/2014/aug/08/us-iraq-air-strikes-isis-irbil>. 22/08/2014.

<sup>60</sup> "Joint Statement Issued by Partners at the Counter-ISIL Coalition Ministerial Meeting" Washington DC, 3 December 2014. <http://www.state.gov/r/pa/prs/ps/2014/12/234627.htm>. 13/02/2015.

the Arab States of the Gulf. The coalition agreed on “a common, multifaceted, and long-term strategy to degrade and defeat ISIL/Daesh” which includes *inter alia*:

military operations, capacity building, and training; stopping the flow of foreign terrorist fighters; cutting off ISIL/Daesh’s access to financing and funding; addressing associated humanitarian relief and crises; and exposing ISIL/Daesh’s true nature (ideological delegitimization).<sup>61</sup>

Religious leaders have also uttered their support for action against the IS group. Newspaper articles reflecting the response by various religious factions whose constituents have been affected by the human rights atrocities reads: “Religious leaders say ISIS persecution of Iraqi Christians has become genocide”<sup>62</sup>; “Religious Extremism is a Major Threat for The Area and The Whole World”<sup>63</sup> and “Chaldean Patriarch calls for armed response to defend Christians from Genocide”<sup>64</sup> Dr. Geoff Tunnicliffe, Secretary General of the World Evangelical Alliance stated that:

We condemn the awful evil being committed against minority communities in general and Christians in particular by militant Islamists in Iraq and Syria... there can never be any justification whatsoever for this indiscriminate persecution of a community which has lived in the region since long before the arrival of Islam.<sup>65</sup>

It seems as though the greater majority of Muslims and *ulema* reject the ISIL ideology<sup>66</sup> as both Christians and Muslims, especially Shia’s, are being targeted as infidels or apostates. The Federation of Islamic Organisations in Europe “vigorously denounces the unjust discriminatory practices against Christians and others, which are a slander against Islam”.<sup>67</sup>

<sup>61</sup> Ibid (n 59).

<sup>62</sup> Jones and Bowcott “Religious leaders say Isis persecution of Iraqi Christians has become genocide” The Guardian, 9 August 2014. <http://www.theguardian.com/world/2014/aug/08/isis-persecution-iraqi-christians-genocide-asylum>. 22/08/2014.

<sup>63</sup> Holy Land Christian Ecumenical Foundation website: <http://hcef.org/publications/hcef-news/790793990-the-patriarchs-of-the-east-religious-extremism-is-a-major-threat-for-the-area-and-the-whole-world>. (2014) 23/08/2014.

<sup>64</sup> Catholic online “Chaldean Patriarch calls for ARMED RESPONSE to defend Christians from Genocide” [http://www.catholic.org/news/international/middle\\_east/story.php?id=56510](http://www.catholic.org/news/international/middle_east/story.php?id=56510). (2014) 22/08/2014.

<sup>65</sup> WEA website “WEA Condemns Violent Attacks on Christians and Others, Calls for Prayer for Christians in Iraq.” <http://www.worldea.org/news/4451/wea-condemns-violent-attacks-on-christians-and-others-calls-for-prayer-for-christians-in-iraq>. (2014) 22/08/2014.

<sup>66</sup> Security Council Analytical and Monitoring Committee *ibid* (n 4) 13.

<sup>67</sup> “FIOE condemns the violations against Christians and Islamic monuments in North Iraq” 28 July 2014. [http://www.fioe.org/ShowNews\\_en.php?id=146](http://www.fioe.org/ShowNews_en.php?id=146). 22/08/2014. See also Press re-

#### 4. The Islamic context underpinning the IS jihad

While characterizing the nature of the severe human rights violations in Iraq and Syria at the hands of IS, the UNSC's essentially contradicting statement regarding the nature of the deadly attacks against minority religions and dissenting Muslims, is perplexing when it is stated that "terrorism, including the actions of ISIL, cannot and should not be associated with any religion, nationality, or civilization".<sup>68</sup>

Justifiably, the UNSC's statement is probably aimed at the prevention of inter-religious retaliation by isolating the terrorist activities of the IS group from their religious affiliation with Islam. However the writer contends that the UNSC should accept and acknowledge the occurrence of religious persecution in Iraq and Syria, as is the situation in various areas in the world, as a form of inter-religious persecution at the hands of Islamic extremists.

Discarding the affiliation of IS with Islam, however distorted such an interpretation of fundamentalist Islam may be, falsifies the true nature of the atrocities by hiding behind diplomatic rhetoric and legitimizes their *jihadist* ideology. Obscuring the religious context of the IS extremists' actions in this way creates suspicion about the legitimacy, independence and capability of the international organizations ultimately responsible for the protection and enforcement of human rights. As a result the UN has become diplomatically docile regarding these issues which debilitates decisive action for fear of diplomatic confrontation and has resulted in a failure to protect whichever religious group against whatever source of persecution. The UN is so religiously numb that they have become a source of religious secularism, disregarding religious persecution in favor of diplomacy and impeding in religious advocacy efforts on behalf of the persecuted. There are many ideologies that shape different Islamic denominations based on various interpretations of the Qur'an and *Sunnab* which can all validly claim to be theologically based on the same Islamic source texts. Therefore, the unfortunate truth is that a radical and fundamentalist form of Islam will persevere as long as Islamic clerics and Muslim leaders publicly indoctrinate a radical literalist interpretation of Islam's source texts in countries like Saudi Arabia, Qatar and Turkey, and therefore the actions of IS can and should be associated with Islam until they themselves remedy such extremist incitement which leads to the persecution of dissenting religious groups globally.<sup>69</sup>

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lease by the Muslim Judicial Council, South Africa on 1 September 2014. [http://www.mjc.org.za/index.php?option=com\\_content&view=article&id=575:mjc-requests-urgent-state-security-probe&catid=15:press-releases&Itemid=13](http://www.mjc.org.za/index.php?option=com_content&view=article&id=575:mjc-requests-urgent-state-security-probe&catid=15:press-releases&Itemid=13). 09/02/2015.

<sup>68</sup> UNSC Res. 2170 (n 56).

<sup>69</sup> P. Sookhdeo "Editorial: The Two Faces of Islam" <https://barnabasfund.org/news/Editorial-The-Two-Faces-of-Islam>. (2014) 09/02/2015.

However, the military *jihad* by IS in Iraq and Syria is not simply an inter-religious persecution of Christians. It is a complex, multifaceted and religiously motivated war against all dissenting religions, against democracy and against fundamental human rights. The UNSC should rather isolate the religiously and politically motivated terrorist group, whose ideology is obviously rooted in a fundamentalist ideology of Islam, from the rest of an otherwise presumably peace-loving international Muslim community.

The writer therefore agree that “ISIL speaks for no religion”<sup>70</sup>, because the IS group should be regarded as a sect of Islam and their ideology should be considered as an extreme or fundamentalist interpretation of Islam. The ideology of IS can be associated with an Islamic religious foundation, however their terrorist actions, crimes and human rights abuses do not speak on behalf of the whole Muslim community.

## 5. Prosecuting religious persecution by IS under international criminal law

The right to freedom of thought, conscience and religion or belief are universally recognized basic human rights<sup>71</sup>; however religious persecution remains an impediment on the enjoyment of such rights and is therefore a severe human rights violation.<sup>72</sup>

...religious intolerance are among the causes of violence, ethnic cleansing, and armed conflict, leading to genocidal policies and practices, and often serious violations of international humanitarian law... international prosecution systems, as provided by the ICC, are to be resorted to in the pursuit of criminal accountability.<sup>73</sup>

The right to religious freedom should be enforced not only at state level, but with the enforcement of effective penal sanctions against the perpetrators or authors of these human rights violations at an international level. Therefore the crime of per-

<sup>70</sup> Statement by President Barack Obama, Martha's Vineyard, Massachusetts on 20 August 2014. <http://www.whitehouse.gov/the-press-office/2014/08/20/statement-president>. 22/08/2014.

<sup>71</sup> Most notably the International Bill of Human Rights which consists of the Universal Declaration of Human Rights (adopted by General Assembly resolution 217 A (III) of 10 December 1948), the International Covenant on Economic, Social and Cultural Rights (UNGA resolution 2200A (XXI) of 16 December 1966, and the International Covenant on Civil and Political Rights (UNGA General resolution 2200A (XXI) of 16 December 1966) (ICCPR) and its two Optional Protocols.

<sup>72</sup> Religious persecution is the overarching term that will be used to explain the various forms of religious intolerance regardless of the specific religion. For purposes of this study religious discrimination, such as the denial of civil rights on the basis of religion, will also be considered as acts which may constitute religious persecution.

<sup>73</sup> Van Boven "Racial and Religious Discrimination" 2007 MPEPIL 615.

secution is defined in art 7 of the Rome Statute of the ICC<sup>74</sup> which provides a forum for the prosecution of acts that amount to religious persecution under the auspices of the international core crimes<sup>75</sup> (war crimes, genocide, crimes against humanity and crimes of aggression).

The ICC is intended as a court of last resort, investigating and prosecuting only where national courts have failed or are unwilling or incapable to do so. The court's jurisdiction shall be complementary to national jurisdictions and the court can exercise jurisdiction only when one of the three 'trigger mechanism'<sup>76</sup> are initiated:

1. When a State party refers a matter to the court<sup>77</sup> in circumstances where:
  - (a) the accused is a national of a State party<sup>78</sup>, or
  - (b) the alleged crime took place on the territory of a State party<sup>79</sup>.
1. A situation is referred to the court by the UN Security Council.<sup>80</sup>
1. The Prosecutor's initiation of an investigation *proprio motu* on the basis of information on crimes within the court's jurisdiction.<sup>81</sup>

On this basis the ICC may exercise its jurisdiction over the crimes committed by IS, and prosecute persons<sup>82</sup> responsible for crimes within the jurisdictional capacity of the court.<sup>83</sup> Amnesty International has also called upon the government of Iraq to become a party to the Rome Statute and therewith accept the court's jurisdiction.<sup>84</sup> The Independent International Commission of Inquiry on the Syrian Arab Republic recommended, *inter alia*, that the international community must employ:

international accountability mechanisms, including the International Criminal Court, to hold individuals, including ISIS commanders, responsible for war crimes and crimes against humanity.<sup>85</sup>

The abuses, violations and crimes committed by IS has hindered the exercise of basic human rights, such as religious freedoms, the freedom of expression, assembly

<sup>74</sup> Rome Statute of the International Criminal Court, Doc. A/CONF.183/9 of 17 July 1998 in force 1 July 2002 (2002) (hereafter the Rome Statute).

<sup>75</sup> G Werle Principles of International Criminal Law (2005) 26.

<sup>76</sup> Triffterer (n 6) 581.

<sup>77</sup> Rome Statute Art 14.

<sup>78</sup> Rome Statute Art 12(2)(b).

<sup>79</sup> Rome Statute Art 12(2)(a).

<sup>80</sup> Rome Statute Art 13(b).

<sup>81</sup> Rome Statute Art 15 read with Art 13(c).

<sup>82</sup> Rome Statute Art 25.

<sup>83</sup> Rome Statute Art 5.

<sup>84</sup> Amnesty International: "Iraq: Ethnic cleansing on historic scale: the Islamic State's systematic targeting of minorities in northern Iraq: <http://www.amnesty.org/en/library/info/MDE14/011/2014/en>. 12/02/2015.

<sup>85</sup> Rule of Terror *ibid* (n 48).

and association, which are guaranteed by international law.<sup>86</sup> The UNSC resolution<sup>87</sup> rightfully categorizes the atrocities violating the right to freedom of religion and belief, committed by the IS group, as religious persecution for which those responsible must incur criminal responsibility:

those who have committed or are otherwise responsible for violations of international humanitarian law or violations or abuses of human rights in Iraq and Syria, including persecution of individuals on the basis of their religion or belief, or on political grounds, must be held accountable.

This terminology is significant and places the atrocities committed by the IS group in the sphere of crimes of concern to international peace and security. The reference to violations of international humanitarian law is a direct inference of war crimes<sup>88</sup>, whilst the human rights abuses may infer genocide or crimes against humanity. IS has also been accused of terrorism:

the Islamic State continues to be directly and/or indirectly engaged in, preparing, planning, assisting in and fostering the doing of terrorist acts and advocates the doing of terrorist acts, involving threats to human life and serious damage to property.<sup>89</sup>

Terrorism in itself also constitutes an international crime.<sup>90</sup> The Convention on Combating International Terrorism provides a contentious definition of terrorism<sup>91</sup> condemning terrorism as a breach of Islamic law principles and fundamental human rights, but does not regard actions by national liberation movements in the struggle against foreign aggression and colonialism or racist regimes as terrorist acts.<sup>92</sup>

Numerous human rights violations in Iraq and Syria have been attributed to IS, including *inter alia*: the forceful invasion and occupation of territories and the sub-

<sup>86</sup> Rule of Terror *ibid* (n 48).

<sup>87</sup> UNSC res. 2170 *ibid* (n 56)

<sup>88</sup> "As an armed group bound by Common Article 3 of the Geneva Conventions and customary international law, ISIS has violated its obligations toward civilians and persons hors de combat, amounting to war crimes." – Rule of terror *ibid* (n 48) 13. For a complete analysis of IHL contraventions by IS see Amnesty International *ibid* (n 84) 24.

<sup>89</sup> "Islamic State" (n 3).

<sup>90</sup> International Convention for the Suppression of Terrorist Bombings (1998) 37 ILM 249, and the International Convention for the Suppression of the Financing of Terrorism (2000) 39 ILM 268.

<sup>91</sup> The Convention on Combating International Terrorism adopted by the Organisation of Islamic Cooperation on 1 July 1999. Article 1 describes "any act or threat of violence carried out with the aim of, among other things, imperilling people's honour, occupying or seizing public or private property, or threatening the stability, territorial integrity, political unity or sovereignty of a state."

<sup>92</sup> Islamic approach to international law *ibid* (n 18) 404.

sequent displacement of civilians; public executions and publicized beheadings; the unlawful summary killing of religious minorities; destruction of religious property; and killings and kidnappings of members of religious and ethnic minorities.<sup>93</sup> The writer believes that these religiously motivated acts can be attributed to IS under the auspices of crimes against humanity and genocide.

### **3. The classification of crimes by IS as crimes against humanity of religious persecution**

The Rome Statute classifies specific acts or omissions<sup>94</sup> as crimes against humanity, including persecution on religious grounds, if committed with the intention that such conduct forms part of a widespread or systematic attack against any civilian population. Art 7(1) read with art 7(1)(h) and art 7(2)(g) of the Rome Statute, provides an elementary basis crimes against humanity of religious persecution:

A course of conduct or omissions; that is of a widespread or systematic nature; directed against a specific civilian group because of their religious beliefs or affiliations or lack thereof; with the intent to deprive the members of the religious group of their fundamental human rights; tolerated or condoned by a government or a de facto authority; while the perpetrator/s knew or should have known that the conduct was part of or intended the conduct to be part of an overall policy or a consistent pattern of inhumanity directed against the religious group; and reaching the level of seriousness of a large scale of gross or blatant denials of fundamental human rights and perpetrated in connection with other instances of religious persecution or other crimes of serious concern.

UNSC Resolution 2170 places the atrocities committed in Iraq and Syria by the IS group in the sphere of international core crimes, justifying an indictment based on the individual criminal responsibility of the instigators for crimes against humanity of religious persecution:

widespread or systematic attacks directed against any civilian populations because of their... religion or belief may constitute a crime against humanity... for abuses of human rights and violations of international humanitarian law... including

<sup>93</sup> Wikipedia – “Timeline of events related to the Islamic State of Iraq and the Levant”. [http://en.wikipedia.org/wiki/Timeline\\_of\\_events\\_related\\_to\\_the\\_Islamic\\_State\\_of\\_Iraq\\_and\\_the\\_Levant#2013\\_events](http://en.wikipedia.org/wiki/Timeline_of_events_related_to_the_Islamic_State_of_Iraq_and_the_Levant#2013_events). 08/01/2015.

<sup>94</sup> Art 7 of “The Elements of Crimes” - Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, June 2000 (International Criminal Court publication, RC/11).



persecution of individuals on the basis of their religion or belief, or on political grounds, must be held accountable.

These human rights atrocities committed by the IS group can be linked with other listed crimes under art 7(1) and include *inter alia*: the indiscriminate killing and deliberate targeting of civilians; mass executions and extrajudicial killings; persecution of individuals and entire communities on the basis of their religion or belief; forced displacement of minority groups; rape and other forms of sexual violence; arbitrary detention; destruction of cultural and religious sites; obstructing the exercise of economic, social and cultural rights.<sup>95</sup>

Discriminatory intent is an integral requirement to constitute persecution as a crime against humanity<sup>96</sup>, which in the current case is the prejudice based on religion. Evidence provides reasonable grounds to attribute religiously persecutory intent to the conduct of IS as part of a manifest pattern of deliberate and calculated violent acts endorsed and directed by IS leadership in accordance with an organisational policy directed at religious minorities in the region.

ISIS carries out large-scale victimisation through the systematic imposition of harsh restrictions on basic rights and freedoms indicating an underlying policy... the commanders of ISIS have endorsed and directed harm against the civilian population under their control... acted wilfully, perpetrating these war crimes and crimes against humanity with clear intent of attacking persons with awareness of their civilian or hors de combat status.<sup>97</sup>

The wording of the resolution is significant and there is no doubt that the international community considers the illegitimate armed *jihad*, conducted by the IS group, as crimes against humanity. The ideology of religious extremism coupled with the widespread<sup>98</sup> and systematic<sup>99</sup> approach with which, and the nature of the civilian population against whom these atrocities have been committed, warrants the classification of these human rights violations as specifically crimes against humanity of religious persecution.

<sup>95</sup> United Nations Security Council Resolution 2161. [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/2161.21/08/2014](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2161.21/08/2014).

<sup>96</sup> ICTY, Prosecutor v Blaskic, Judgement, IT-95-14-T, 3 March, 2000.

<sup>97</sup> Rule of terror *ibid* (n 48) 5.

<sup>98</sup> Widespread refers to the large-scale nature of the attack and the number of victims. ICTY, Prosecutor v. Kordic and Cerkez, Case No. IT-95-14/2-A, Appeals Judgment, 17 December 2004, para. 94. ICTR, Prosecutor v Clement Kayishema, Case No. ICTR-95-1-T, 21 May 1999, par 123.

<sup>99</sup> "A systematic attack means an attack carried out pursuant to a preconceived policy or plan" – ICTR, Prosecutor v Clement Kayishema, Case No. ICTR-95-1-T, 21 May 1999, par 123.

#### **4. The classification of crimes by IS as genocide by religious persecution**

Genocide can justifiably distinguished from the crime against humanity of persecution in that the crime of persecution is based on the targeting of victims because they belong to a specific community but does not necessarily seek to destroy the community as such, which is the case with genocide.<sup>100</sup>

Genocide by religious persecution is the denial of the right of existence of entire human groups based on their religious affiliation or lack thereof. The intentional large-scale discriminate violation of the fundamental right of existence of members belonging or affiliated with a specific religious group can also be referred to as martyrdom based on one's religion. Martyrdom is a specific form of persecution in terms of which such violent persecutory acts directly results in the unlawful death of a person for refusing to renounce, or accept, a belief or religion.<sup>101</sup>

Article 6 read with art 7(1)(h) and art 7(2)(g) of the Rome Statute provides for a classification directive for genocide by religious persecution based on the following elements:

The deliberate and systematic repudiation of fundamental human rights; by a course of discriminate genocidal attacks or omissions; against the physical or psychological integrity; or the existence, or biological, or social continuity; of a religious group as a response to their religious beliefs or affiliations or lack thereof; with the specific intent to destroy or attempt to destroy the essential foundations of life of the entire religious group or a substantial part thereof; as part of a coordinated plan or policy by a government or a de facto authority actively promoting or encouraging such an attack against the religious group; while the perpetrator/s, at the time of committing acts constituting genocide, was aware or should have been aware of the wider intention of such an attack against members of the religious group based solely on the martyrs' membership to the religious group.

Martyrdom as a specific form of religious persecution may therefore be categorised as genocide if the perpetrator has the specific intention to destroy, in whole or in part, an identifiable religious group. The acts that constitute genocide in terms of art 6 of the Rome Statute may all be classified as specific forms of genocide by religious persecution if the genocidal acts are also directed at, and intended to, destroy the existence of a specific religious group. Many of these genocidal acts are cited in the UNSC resolution and attributed to the IS group, however for such acts to be regarded as genocide requires proof of specific genocidal intent. The purpose of

<sup>100</sup> ICTY, Prosecutor v Jelisić, Case No. IT-95-10-T, December 1996.

<sup>101</sup> Tieszen Re-examining Religious Persecution (2008) 33.

the genocidal conduct must be to destroy or attempt to destroy the group or a part of it.<sup>102</sup> Furthermore, to substantiate the crime of genocide by religious persecution, the genocidal intent must be directed against a specific religious group or against the exercise of religion in general.

Therefore the question is whether the conduct of the IS group is directed at, and intended to, destroy the existence of specifically dissenting Muslim groups, Christian, Jewish, or any other dissenting religious groups in the area. Alternatively, whether a universal intention to destroy all dissenting religious groups or affiliations within their territory exists? IS indubitably acts with universal intention to destroy all dissenting religious groups or affiliations within their territory based on the employment of the Islamic practice of *fitnah*, whereby any individual or group perceived to be a threat to IS, is declared to be a heretic in order to justify their annihilation.<sup>103</sup> “We offer them three choices: Islam; the *dhimma* contract – involving payment of *jizya*; if they refuse this they will have nothing but the sword”<sup>104</sup>

This universal intent to target all dissenting or religious groups supports the classification of IS conduct as crimes against humanity since the preconditions for the classification of acts as crimes against humanity does not require the specific intention to destroy, but rather the intention to carry out large-scale and severe deprivations of the fundamental rights of a particular group as part of a widespread or systematic attack.

Substantiating genocidal policy or intent against a specific religious group is, however, more problematic and should not be confused with a mere discriminatory or persecutory intent. In an IS video<sup>105</sup>, released in August 2014, an IS commander explains that they offered the Yazidis a chance to convert to Islam before killing them, stating that the “Islamic State does its utmost for the repentance of any infidel – Yazidi, Crusader [i.e., Christian], or Jewish”<sup>106</sup> The video shows a scene of mass conversion of a hall filled with Yazidi men, a clear violation of the right to freely choose one’s religion without coercion or force. These and other violations have prompted Amnesty International in finding that IS, is pursuing ethnic cleansing through the commission of war crimes and gross human rights abuses and has referred to the violations of IS as “ethnic cleansing on a historic scale”:

<sup>102</sup> Werle *ibid* (n 74) par 565.

<sup>103</sup> Rule of terror *ibid* (n 48).

<sup>104</sup> “Convert, pay tax, or die, Islamic State warns Christians”. The Guardian. Reuters. <http://www.theguardian.com/world/2014/jul/18/isis-islamic-state-issue-ultimatum-to-iraq-christians>. 20/08/2014.

<sup>105</sup> The Middle East Media Research Institute website, “ISIS Justifies Its War on Yazidis: We Called on Them to Convert to Islam First” <http://www.memri.org/clip/en/0/0/0/0/0/0/4438.htm>. 23/08/2014.

<sup>106</sup> Jihad Watch “Islamic State justifies its jihad against Yazidis” <http://www.jihadwatch.org/2014/08/islamic-state-justifies-its-jihad-against-yazidis>. 23/08/2014.

IS has systematically targeted non-Arab and non-Sunni Muslim communities... as part of a campaign of ethnic cleansing against religious and ethnic minorities, hundreds, possibly thousands, of Yezidi men and boys have been summarily killed by IS fighters...<sup>107</sup>

Navi Pillay, UN High Commissioner for Human Rights, said that IS forces are:

...systematically targeting men, women and children based on their ethnic, religious or sectarian affiliation and ruthlessly carrying out widespread ethnic and religious cleansing in the areas under their control.<sup>108</sup>

The acts perpetrated as part of a policy of ethnic cleansing is systematically similar to the effect of genocide.<sup>109</sup> Although the definition of ethnic cleansing<sup>110</sup> has remained elusive and controversial, there is international support for categorising ethnic cleansing as a form of cultural genocide.<sup>111</sup> In the *Blagojevi* case<sup>112</sup>, the ICTY concluded that ethnic cleansing is distinguishable from genocide in that displacement is not equivalent to destruction, implying that the “primary consideration underlying ethnic cleansing is the establishment of ethnically homogenous lands”<sup>113</sup> through forced displacement rather than the *dolus specialis* of genocide aimed at the physical-biological destruction of a protected group. Although it might be easy to infer an intention at the hands of IS to assert religious homogeneous lands in the territory occupied by them and therefore substantiate a policy of forced displacement, such acts merely constitute ethnic cleansing or crime against humanity in terms of art 7(2)(d) of the Rome Statute.

<sup>107</sup> Amnesty International *ibid* (n 83)

<sup>108</sup> L. Harding “Isis accused of ethnic cleansing as story of Shia prison massacre emerges” *The Guardian*. <http://www.theguardian.com/world/2014/aug/25/isis-ethnic-cleansing-shia-prisoners-iraq-mosul>. 17/02/2015.

<sup>109</sup> ECHR - *Jorgic v. Germany* citing *Bosnia and Herzegovina v. Serbia and Montenegro* (“Case concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide”) the International Court of Justice (ICJ) found under the heading of “intent and ‘ethnic cleansing’” par 190.

<sup>110</sup> Report of the Commission of Experts Established Pursuant to United Nations Security Council Resolution 780 (1992), May 27, 1994 (S/1994/674), English page 33, Paragraph 130. Site accessed 26/02/2013. Ethnic cleansing is defined as “a purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas.”

<sup>111</sup> “Genocide” - Max Planck Encyclopedia on Public International Law, published by the Max Planck Institute for Comparative Public Law and International Law, Heidelberg and Oxford University Press (2011), par 20.

<sup>112</sup> ICTY, *Prosecutor v Blagojevi et al*, Case No.: IT-02-60-A, Appeals Judgment, 9 May 2007, para 123.

<sup>113</sup> *Genocide ibid* (n 110) par 30.

In *Krstic*, the court held that “there are obvious similarities between a genocidal policy and the policy commonly known as ethnic cleansing”<sup>114</sup>, but that “genocidal intent may be inferred, among other facts, from evidence of other culpable acts systematically directed against the same group”.<sup>115</sup> It is clear that IS has targeted any dissenting religious group in their territory with the intention of forcing such persons to either convert to Islam or to be summarily executed, it is therefore a policy or ideological imperative of IS to destroy the religion of the group, because this leads to the demise of the identity of the group and the uprooting of that religion from the area. The crime of genocide encompasses not only the physical existence of a group, but also its continued social existence<sup>116</sup> and therefore the mass killing of religious minorities coupled with the enforcement of forced conversion to the IS ideology of Islam; war crimes and crimes against humanity of persecution, when considered collectively, indicate genocidal intent by IS.

Genocidal intent by IS against every religious group individually and against all religious groups collectively can be proven by considering all the factors as a coherent genocidal policy:

- Religious persecutory intent through forced conversion to the IS ideology and restriction of religious freedom;
- Intent to destroy religious minorities through armed '*jihad*' whilst committing war crimes, crimes against humanity, religious cleansing & terrorism in pursuit of the attainment of;
- Religious homogeneous lands through succession and accession of an Islamic *Caliphate* under IS control.

On the 8th of August 2014, US President, Barack Obama warned of a threatening genocide:

[Islamic State] forces have called for the systematic destruction of the entire Yazidi people, which would constitute genocide... we can act, carefully and responsibly, to prevent a potential act of genocide.<sup>117</sup>

Another example of IS's discriminatory intent was the differentiation between Sunni's and Shia's after IS had taken over control of Mosul in June 2014. Citing testimony from eyewitnesses and survivors, the UN said IS massacred of 679 Shia captives after having split them from Sunni prisoners (who were later released).

<sup>114</sup> ICTY, Prosecutor v Krstic, Case No. IT-98-33-T, 2 August 2001, par 562.

<sup>115</sup> ICTY, Prosecutor v. Krstic – Appeals Chamber Judgment – IT-98-33 (2004) ICTY 7 (19 April 2004). Par 33.

<sup>116</sup> Werle *ibid* (n 74) par 564.

<sup>117</sup> “President Obama Makes a Statement on the Crisis in Iraq” <http://www.whitehouse.gov/blog/2014/08/07/president-obama-makes-statement-iraq>. 22/08/2014.

Such cold-blooded, systematic and intentional killings of civilians, after singling them out for their religious affiliation may amount to war crimes and crimes against humanity<sup>118</sup>

The writer believes that the singling out of persons based on their religious affiliations is proof of religious persecutory intent, and coupled with the objective of IS to form a “pure state of Islam”, which by implication means an ethnic and religious purification of Islamic territories under their *de facto* control by violent means including mass murder and extermination, shows evidence of genocidal intent to destroy in whole or in part any dissenting religious group constituting genocide by religious persecution. Based on reliable sources mentioned above, IS has acted toward a common purpose based on an organisational policy of *jihadist* extremism aimed at the destruction of all dissenting religious groups and as a result have exterminated thousands of civilians, including a substantial portion of the dissenting Yazidi population.

## 5. Conclusion

Religious freedom belongs to a genus of fundamental human rights which, although diverse, is at the heart of morality and humanity and as a result severe religious persecution and intolerance may become fertile sources of war.<sup>119</sup> Although “there has never been a persecution solely on religious grounds”<sup>120</sup>, the writer contends that the international community has created effective mechanisms for the protection of human rights as well as the restriction of impunity regardless of the multi-faceted reasons for persecutions. It has been shown that religious persecution has the potential of a crime of international concern and has validated criminal prosecution for serious violations of the right to religious freedom as a fundamental human right. Classifying religious persecution at the hands of Islamic extremism as crimes against humanity and genocide may serve the purpose of justice by conserving the right to manifest one’s freedom of religion or belief as a universally protected entitlement, and not just a privilege bequeathed on those wielding political or forceful control. The writer has shown international support for the classification of severe religious persecution at the hands of the IS group in northern Iraq and Syria as international core crimes shocking the conscience of human-kind, thus necessitating the criminalization and prosecution of the leadership and commanders of IS. ICC prosecutions in this regard will ensure justice and redress for victims, deterrence and retribution; and create stability in the area under the rule of impartial law.

<sup>118</sup> Harding *ibid* (n 107).

<sup>119</sup> Van Boven *ibid* (n 72) 615.

<sup>120</sup> T. Schirrmacher *The Persecution of Christians Concerns us all: Towards a Theology of Martyrdom* (2001) 28.