

Conflicting Domestic and International Law: Yazidi-ISIL Children's Right to Nationality Under Iraqi Law

An analysis of Iraq's legal framework and practice

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To all children of war; the invisible victims of war

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List of Abbreviations

CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CRC	Convention on the Rights of Child
CRSV	Conflict Related Sexual Violence
De plano	The rule of father-child relationship for recognition of child's status
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ID	Identity Documentation
INL	Iraqi Nationality Law
ISIL	Islamic State of Iraq and Levant
Jus sanguinis	Right to nationality through the nationality of one or both parents
Jus soli	Nationality right of anyone born in a state's territory
NICA	National Identity Act
PSC	Personal Status Code
VCLT	Vienna Convention on the Law of Treaties
UPR	Universal Periodic Review

1 Introduction

1.1 Background

Between 2014 and 2017, the Islamic State of Iraq and the Levant (ISIL) took control over a 45,000 square kilometer area of Iraq and Syria. The occupation resulted in a large number of civilian casualties and the displacement of large sections of the population. ISIL's genocidal actions included the killing of men, forced conversion and sexual violence towards women and children.¹ On 7 August 2014, after Obama's administration's call for the international community to intervene, 62 countries formed a global coalition to help Iraq defeat ISIL. In 2017, Iraq regained its territory and reduced ISIL's ability to control the territory and the population.² However, the Iraqi government is still trying to deal with several challenges which are the consequence of the war against ISIL. 1, 774, 980 people still have not returned to their areas, many lack formal educational opportunities for children as well as access to health-care services.³

Among all these challenges, the situation of children born through the capture and enslavement of Yazidi women by ISIL fighters (Yazidi-ISIL children) is perhaps the most pressing. It is undeniable that Yazidi women are victims of sexual and gender-based violence, but as result of genocidal rape the Yazidi-ISIL children are invisible victims of war that have not been given the same attention as their mothers.⁴ While some of the Yazidi-ISIL children born of sexual violence are still living in the camps, many of them are separated from their mothers and face extensive challenges.⁵ Several years after the war, the mothers of these children still face challenges relating to the legal status of their children born in the meantime. This is because they have ISIL fathers and are without documentary evidence, official documents and birth certificates.⁶ Consequently, this lack of identity documents is a serious obstacle for the rights of these children to have a nationality. This is the situation which is the subject of this thesis.

1.2 Research question and objective of the study

Nationality is a gateway to the enjoyment of human rights and the principle of non-discrimination functions as a restriction on the freedom of State in matters of nationality (i.e.

¹ UN Human Rights Council, A/HR/32/CRP.2, Introduction Para. 2 & Summary

² Drennan, November 12, 2014

³ UN, First National Voluntary Review on Sustainable Development Goals 2019, Iraq, P 49

⁴ Mitchell Kathleen, 2005, pp 2-3

⁵ Ferguson, 30 July 2020

⁶ UN, First National Voluntary Review on Sustainable Development Goals 2019, Iraq, P 61

for acquiring nationality or being deprived of nationality).⁷ The term nationality is generally understood as a legal relationship between a State and its people.⁸ With a focus on the right to nationality for Yazidi-ISIL children, this thesis aims to explore to what extent the legal framework and practice of Iraq is compatible with aspects of international human rights law.⁹ The international instruments such as the Convention on the Rights of the Child (CRC), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) will be addressed to illustrate the extent of this compatibility. It will look into whether the Iraqi government has carried out its responsibility to protect the right of Yazidi-ISIL children to nationality, or whether the current legal structures causes Iraq to violate the human rights of these children.

This thesis aims to examine the legal challenges that confront the Yazidi-ISIL children today. The present situation has created several legal problems. Among all the legal issues, such as rights to privacy, security, education and adequate health, that these children face, this thesis will investigate the right to an Iraqi nationality, which also entails the right to obtain identity documents. Even though, the right to nationality is not an absolute right, the deprivation of this right causes the deprivation of many other rights. As a state, Iraq has the power to determine who is its nationals under the country's domestic law. However, at the same time, Iraq is bound by restrictions arising from international law. As part of the development of international human rights law, treaties have established principles and rules that defines how a State and its legislation may allocate nationality to individuals in its territory.¹⁰ The principles of non-discrimination and the best interests of the child are two of these principles.

Regarding the right to nationality, Article 18 of the 2005 Iraqi Constitution, in its second paragraph, stipulates that anyone who is born to "an Iraqi mother" or "an Iraqi father" shall be considered an Iraqi.¹¹ In addition, Article 14 of the Constitution guarantees the equal rights of all Iraqi people before the law, without discrimination on any ground.¹² This thesis aims at discussing whether relevant laws of Iraq, and its government's practice, effectively guarantee these principles of equality and non-discrimination. The focus will therefore be placed on the current national legislation and practices of Iraq regarding the birth registration, and the issuing of identity documents for acquiring Iraqi nationality. In defining 'current legislation', this

⁷ Thornberry, 2016, P 342

⁸ Eide, 2000, p 91

⁹ Andersen, 2018, pp 19-20

¹⁰ Eide, 2000, p 88

¹¹ Iraqi 2005 Constitution, Art. 18

¹² Iraqi 2005 Constitution, Art. 14

thesis means the laws of Iraq since the 2005 Iraqi Constitution entered into force. Along with the Iraqi Constitution, this thesis will refer to the Iraqi Nationality Law No. 26 of 2006 and the National Identity Card Act (NICA) No. 3, 2016 which are of particular importance. Once a review of domestic law has been carried out, the thesis will utilize international human rights law as a framework for exposing Iraq's international obligations. The laws of Iraq will be compared with several international instruments, particularly the CRC.

The research question is formulated as follows:

Does current Iraqi legislation constitute a violation of international human rights law as it regulates nationality status including the issuing of identity documentations for Yazidi ISIL children?

In order to answer the main question, the following sub-questions will be looked into:

- 1- *What is the current legislation affecting children born out of forced marriages/slavery between ISIL-members and Yazidi women (Yazidi-ISIL children)?*
- 2- *What international obligations bind the approach of the Iraqi state to the Yazidi-ISIL children?*
- 3- *Are there contradictory tendencies in Iraqi legal framework and practice that create particular challenges regarding the right to nationality for the Yazidi-ISIL children?*
- 4- *To what extent is Iraqi legislation's compatible with the standards of international human rights law?*

1.3 Methodological approach

This thesis will follow a legal positivist approach, aiming to detailing current Iraqi legislation. Given the legal nature of the thesis, the legal positivist approach is chosen for its exclusive legal object theme. Consequently morality, sociology, history and other related perspectives are excluded. The thesis grapples with the law of the country as *de lege lata* which means the law as it exists.¹³

In the domestic law of Iraq, the national judiciary faces particular challenges in applying international law.¹⁴ In general, the Iraqi Federal Supreme Court has little freedom for choosing a substantive approach over an interpretive approach, given the text and structure of Article 2 of the Iraqi Constitution which makes religious law, with its interpretative approach, su-

¹³ Higgins, 1995, P 10

¹⁴ Higgins, 1995, pp 205-206

preme.¹⁵ Therefore, by current legislation, the thesis is primarily focused on the legal framework and some specific laws that are relevant for the subject of this thesis, which is to illustrate the way Iraq treats its international legal obligations.

According to Article 2 of the 2005 Iraqi Constitution, “Islam is a foundational source of the legislation” and no law may be enacted that contradicts the established provisions of Islam.¹⁶ The Personal Status Code (PSC) in Iraq regarding children, and matters related to birth, filiation, custody, also remains largely dependent on religious principles.¹⁷ Therefore, despite the recognition of the principles of equality, democracy and human rights, the supremacy of Islam and conservative interpretation of religious norms are paramount in the Constitution of Iraq.¹⁸

The research will be carried out through an exploratory and analytical study of domestic and international legislation. Although it is highly challenging for anyone to combine domestic and international law into one body of analysis, the transnational qualities of this subject matter are impossible to qualify by merely addressing international or domestic legal concerns in neat silos. Thus, this thesis will compare two different systems, which in so far as they exist in very different context are not very compatible with each other. International human rights law is based on the principles of democracy and non-discrimination. In contrast, although Iraq is a semi-secular country, religious values and principles play a key role in the country’s legislation.

The national legal sources that this work uses, are interpreted through the use of Islamic jurisprudence. When it comes to the international treaty obligation of Iraq, it will be interpreted through the use of the Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT). The VCLT was signed and ratified by Iraq in 1979.¹⁹ The use of legislative and other domestic explanatory materials in the treaty interpretation process is very often under the provisions of Articles 31 and 32 of the VCLT. This is due to the VCLT’s general rules of interpretation which accommodate interpretative approaches. Based on Article 11 of the VCLT Iraq has expressed its acceptance of and obligation to follow relevant treaties named in this thesis by signing and ratifying them.²⁰

¹⁵ Khawam, 2006, p 746

¹⁶ Iraqi 2005 Constitution, Article 2 first (A) & (B)

¹⁷ Al-Dabbagh, 2019, P 108

¹⁸ Hanish, 2007, p 40

¹⁹ Vienna Convention on Succession of States in Respect of Treaties, In Accordance with Article 49 (1), 23 August 1978

²⁰ VCLT, Art. 11

When it comes to the interpretation of these treaties, according to Jörg Kammerhofer, “interpretation in international law essentially refers to the process of assigning meaning to texts and other statements for the purpose of establishing rights, obligations, etc”.²¹ He goes on to say that interpretation is a creative act and the interpreter has choices. However, the rules of interpretation are expected to be a source of objectivity in making these kinds of choices.²² It is important to note that these rules were difficult for the treaty drafters to codify, due to various state interests, and the resulting product was a highly opaque and flexible interpretive regime that from which is hard to distill a clear meaning.

Article 31 (1) of the VCLT stipulates “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. Article 31 is designed to contain ‘the general rule’ of treaty interpretation. Paragraph 4 of this Article gives parties the freedom to replace the ordinary meaning of a term contained in a treaty provision with a term that has a special meaning.²³ So, when a treaty is ratified, whether treaty provisions are suited to be directly applicable in the relevant legal order of the state party in question. If not so, the state party has power to make reservation from the Article in question.²⁴ In this way, the phrasing of Articles 31 and 32 of the VCTL allows for Iraq to implement laws that are not necessarily in conformity with human rights standards given the large flexibility these articles give any state to redefine substantive matters (i.e paragraph 4).

Employing both primary legal sources and secondary sources, the research to be undertaken is qualitative. National and international legal sources are primary sources. The National legal sources are mainly the Iraqi 2005 Constitution, the 2006 Iraqi Nationality Law and the NICA. Some of the national sources, such as Iraqi nationality law and Constitution are available in English, but NICA is only available in Arabic.²⁵ Further, the issue will be assessed in light of provisions given in different relevant international treaties. The provisions of Articles 2 and 7 of the CRC are central source of discussion, but the ICCPR, CERD and CEDAW are also used to illustrate the Iraqi government’s international obligation.

The primary sources will be analyzed through a two-step process. First the content of the sources will be interpreted through the lens of legal positivism in order to secure the most

²¹ Kammerhofer, 2017, p 129

²² Kammerhofer, 2017, p131

²³ VCLT, Art. 31 (1) & (4)

²⁴ Dörr & Schmalenbach, 2012, p 530

²⁵ The writer knows both Kurdish and Arabic and uses her language skills to translate those documents that are not available in English

objective understanding possible. Secondly, if the sources differ in their understanding on an issue, they will be weighed against each other to determine which holds the most legal value. Frequently, in such evaluations these primary sources, whether they are national or international, have inherent weaknesses like vagueness that might distort their content. To remedy this, secondary sources will be used as a supplement. Secondary sources include the documents from Human Rights Committees, academic literature, institutional reports and news articles. Analyzing the primary sources with the help of secondary sources makes it possible to have a better understanding on the discussions surrounding Iraq's legislation and its legal practice and the extent of its compliance with the requirements of international instruments.

1.4 Structure

The thesis proceeds as follows:

Chapter Two (addressing sub-question 1)²⁶ will describe the relevant domestic law of Iraq to illustrate the legal requirements for achieving birth documentations and Iraqi nationality. It will also define what this thesis means when using the term Sharia. Chapter Three (addressing the sub-question 2)²⁷ will highlight the international obligations of the Iraqi government under international law and particularly international human rights law. It will discuss the duties that the ratified international treaties impose on Iraq as regards the right to nationality of children in question. Chapter Four (addressing the sub-question 3)²⁸ investigates the existing tensions in Iraqi domestic law and practice, and discusses how these contradictions affect the Yazidi-ISIL children's right to obtain identity documents and Iraqi nationality. The chapter also discusses if these legal tensions are rooted in Sharia or merely in Iraq's interpretation of Islamic law. Although this chapter aims at discussing the national law and practices of Iraq, there is a reason why it does not follow chapter two. Since the present chapter is using the reports from Human Rights Committees for illustrating state practices in line with international law, chapter four follows chapter three which deals with Iraq's obligations under international law. Chapter Five (addressing sub question 4)²⁹ and the research question) will analyze whether Iraqi national law is compatible with international human rights law standards, or if current Iraqi legislation amounts to violations of international human rights law. Although the chapter

²⁶ **Sub-question # 1** Is addressed through an investigation of the domestic law and relevant legal sources of the country. By using a descriptive approach, it aims to illustrate how Iraqi legislation will answer the nationality rights issue of Yazidi-ISIL children. It will also define what this thesis means when using the term Sharia.

²⁷ **Sub-question # 2** A descriptive approach will highlight the international treaty laws Iraq has ratified to point out the international obligations the country bears.

²⁸ **Sub-question # 3** Through a normative approach will address the contradictions within the Iraq's legal framework and between the legal framework of the country and its practice. It will further discuss whether these contradictions have roots in Sharia or Iraq's interpretation of Sharia.

²⁹ **Sub-Question # 4** Through a normative approach, this section will analyze and discuss how compatible the Iraqi legislation is with the standards of international human rights law.

uses Articles from various international treaties, the chapter's analysis here will mainly be based on the provisions of Articles 7 and 2 of the CRC and the way Iraq interprets treaty norms under the VCLT's general rule of interpretations. Chapter Six provides final remarks and concludes the thesis.

2 The current Iraqi legislation in relation to the Yazidi-ISIL children

This section will briefly give an overview of the Iraqi laws that are relevant for issuing birth documents and giving nationality right to Yazidi-ISIL children. It will first detail the conditions that are required by Iraqi law and at the same time, highlight the extent of the impact of Islamic values on the Iraqi legislation. Further, this section will outline and define a general understanding of Sharia. The purpose of chapter is to provide a necessary domestic legal backdrop for the discussions that are carried out in the subsequent chapters.

2.1 Relevant Iraqi laws and the requirements for birth registration and Iraqi nationality

Iraq vacillates between a secular understanding of its Constitution and an Islamic interpretation. In addition, the wars that country has been through in last decades, have affected both the judiciary and legal system of the country.³⁰ This sub-section will describe the Iraqi Constitution, the Iraqi Nationality Law, the NICA and very shortly the PSC, and the legal results that arise from these laws in relation to these children.

2.1.1 Iraq's 2005 Constitution

In the Constitution, regarding the right to nationality, Article 18 (2nd) stipulates that “anyone who is born to an Iraqi father or to an Iraqi mother” shall be considered an Iraqi. In qualifying this right, Article 18 ends by stating “this shall be regulated by law”. Moreover, if one is an Iraqi citizen through one’s parents, it can be understood that one is a citizen by birth, even outside of the state’s territory. Article 18 (3) states, “An Iraqi citizen by birth may not have his citizenship withdrawn for any reason” and this ends also by “This shall be regulated by law.” When legislation uses the phrase “regulated by law” without clearly referencing a specific law, the procedural and substantive analysis of the text becomes problematic. Such a phrasing can cause a great deal of ambiguity and may weaken a legal system’s ability to decrease arbitrary interpretations or increase certainty of outcomes.

Article 2 of the 2005 Iraqi Constitution establishes an Islamic republic and recognizes Islam as the country’s official religion and a foundational source of Iraqi legislation. It states, “No law may be enacted that contradicts established provisions of Islam.” Article 2 furthermore states that “No law may be enacted that contradicts the principle of democracy.”³¹ The Constitution also emphasizes the importance of the principles of human rights. Nevertheless, the Constitution honours the role and position of Islamic law and endorses its influence on the legislation of the country.

³⁰ Tadjdini, 2011, p 353

³¹ Iraqi 2005 Constitution, Article 2 First & Second

However, despite the Constitution's recognition of Islam as a foundational source, the use of term "a source" and not "the source" means that even though Islam is one of several foundational sources, and although it has a strong power over the state, there are other sources of law in addition to the Islamic sources.³² Understandably, it becomes difficult in practice to balance international and national norms when the Constitution requires the legislation to be in accordance with established provisions of Islam.³³ Thus, the highest law in the land allows space for the influence of legal sources that may create competing claims.³⁴ In Chapter four, the thesis will discuss how this conflict unfolds in domestic law. Turning back to the Constitution, it is important to note that in its preamble and Article 14, it clearly establishes the principle of equality and non-discrimination.³⁵ It also guarantees equal opportunity for all and pays attention to the rights of women, children and their affairs.³⁶

2.1.2 The Nationality Law No. 26 of 2006

The Iraqi Nationality Law in Article 1 (b) defines the term 'an Iraqi' as a person who enjoys Iraqi nationality. Similarly to Article 18 of the Constitution, Article 3 (a) of the Nationality law stipulates that a child born to "an Iraqi father" or "an Iraqi mother" shall be considered Iraqi. Furthermore, Article 3 (b) stipulates if the child is born in Iraq to unknown parents, the child to be considered as a foundling if it is found in Iraq and to have been born therein.³⁷ Article 4 extends the right to an Iraqi nationality to children born to an Iraqi mother and an unknown or stateless father outside Iraq. However, according to Article 4, Iraqi nationality for this category of children falls under Minister of Interior's authority to decide rather than any clear set of legal provisions.

In relation to the provisions of Article 3 and 4 of the Nationality Law, it is important to mention that many of the kidnapped women resided in Sinjar (Shingal) district or other areas in Iraq. Therefore, the right to nationality mentioned in article 3 (a) should be guaranteed for Yazidi-ISIL children. In the case of Yazidi-ISIL children who were born to Iraqi mothers in Syria,³⁸ Article 4 of Nationality law is supposed to be applied to determine nationality of

³² Marshall, Hudson Institute, 30 August 2005

³³ Tadjini, 2011, p 354

³⁴ Iraqi 2005 Constitution, Art. 13

³⁵ Iraqi 2005 Constitution, Preamble, "...so, we sought hand in hand and shoulder to shoulder to create our new Iraq, the Iraq of the future, free from sectarianism, racism, complex of regional attachment, discrimination and exclusion", paragraph 2 & Art. 14

³⁶ Ibid, paragraph 4

³⁷ Iraqi Nationality Law No. 26 of 2006, Art. 3 (1) & (2)

³⁸ Khalid, NAVANTI, 10 July 2019

these children, born to unknown fathers outside Iraq's territory. Chapter four will discuss further the legal contradictions that follows from these differing situations.

2.1.3 National Identity Card Act No. 3 of 2016 (NICA)

This sub-section illustrates the discriminatory provisions and requirements of NICA, which was adopted in 1 February 2016. NICA is a useful example for illustrating how Islamic values may impact Iraqi legislation. The importance of this law is that one must fulfil its conditions in order to obtain Iraqi nationality and the corresponding identity cards. Article 19 of NICA regarding personal status registration, sets out various requirements and procedures for obtaining this ID card.³⁹

According to the first paragraph of Article 19, the registration of new-borns in the civil information system will be based on birth certificates issued by the competent authorities. In the case of Yazidi-ISIL children, born during a time of war, the competent authorities have not been present or available to register the birth of these children due the collapse of the Iraqi state infrastructure. In its second paragraph, the same Article requires the registration of new-borns to contain three names; the child's given name, his/her father's name and the name of the paternal grandfather.⁴⁰ This may seem insignificant, however requiring the name of father and grandfather makes the acquisition of ID cards and Iraqi nationality impossible for Yazidi-ISIL children. Based on these provisions, the Yazidi-ISIL children that cannot supply such documentation are considered foundlings.

Third paragraph of Article 19 further emphasizes that if the name is incomplete, which is contingent on the names of the father and paternal grandfather, the guardian must complete the form in the manner stipulated in other Articles of this law. Islam establishes legitimate filiation and parentage as a legal relationship only between married parents. A child born out of marriage in Iraqi family law is considered illegal and will most likely not have access to many rights afforded to the average Iraqi nationals.⁴¹ Also, the child born to unknown father will be considered a foundling who does not fulfil the requirement of Second paragraph of Article 19. The process of registration of a foundling is addressed in Article 20 of NICA.

The first paragraph of Article 20 stipulates that the Juvenile Court shall have jurisdiction over cases concerning foundlings. According to the procedures therein, the Court will send confidential letters to the institution that found and sheltered the child, and ask for the date and

³⁹ NICA, the law is available only in Arabic (translated by writer) and English version of that is not available.

⁴⁰ NICA, Article 19 (1) & (2)

⁴¹ Syed, 1998, pp 374-375

place where the child was found. Then, the Court will make a decision and send a copy of the final decision regarding the name of the foundling (the mother is not considered in matters of descent), the supposed date and place of birth, the institution that sheltered the child, and the date of its finding to the Ministry of Health and the Directorate of Nationality and Civil Information which is responsible for registration of children.⁴² Second paragraph of Article 20 identifies a foundling child as an Iraqi Muslim.

Article 19 does not include the name of child's mother as one of the elements for establishing filiation. Furthermore, Article 20 does not distinguish a foundling from a child who just has an unknown father. Consequently, Articles 19 and 20 of NICA are unable to address the real issues that faces these children in question which is that of the filiation. Neither do these Articles comply with constitutional requirements.

2.1.4 The Personal Status Code of 1959 (PSC)

The PSC in Iraq is inspired by Islamic law and it establishes two ways of recognizing filiation; valid marriage and mother's declaration of filiation, which, as we will see in the next paragraph, must be given in accordance with religious principles. It applies to issues involving a child's status in matters related to birth, filiation, custody and inheritance.⁴³ Article 1 of the PSC stipulates that if there are no legislative provisions that can be applied, then the principles of Islamic Sharia shall be applicable. Furthermore, it states that Iraqi courts shall be guided by the Islamic judiciary and jurisprudence.⁴⁴

The child without legal filiation is entitled to a certain degree of protection with regard to civil status and nationality.⁴⁵ According to Article 52 (2) of the PSC, in absence of the child's father, a child's filiation can be recognized through acknowledgement (*Iqrar*) of the child's mother, if she declares at the Court in front of the judge.⁴⁶ However, filiation of the child is based on the legitimate marriage in the case of Yazidi-ISIL children, mothers are generally unable to offer acceptable documentation of their marriages, if they have any documents at all. In addition, since the mothers of Yazidi-ISIL children are not Muslims, then they are not able to access Islamic court remedies. This renders the provisions of Article 52 inutile.

⁴² NICA, Article 20 (1) & (3)

⁴³ Al-Dabbagh, 2019, p 103

⁴⁴ PSC, Article 1 (2) & (3)

⁴⁵ Al-Dabbagh, 2019, p 104

⁴⁶ PSC, Article 52 (2)

2.2 Iraq's Reparation Bill for Yazidi Female Survivors (2019)

On the 7th April 2019, the Iraqi President (Brahm Salih) made an address to the Iraqi Parliament in which a bill was proposed that identified a national need to bring legal remedy for the Yazidi women who were in ISIL's captivity and the resulting children of these unions and offered a framework for doing so. By acknowledging the crimes committed by ISIL, the aim of the Bill was to compensate the Yazidi female survivors financially and redress some of the harm they suffered.⁴⁷ Article 13 stipulates that this law applies to those females who were involved in Conflict Related Sexual Violence (CRSV) and subjected to enslavement.⁴⁸ Women belonging to other minority communities are not included because although they experienced violence, they have not been subjected to the destruction and genocide that the Yazidis have suffered.⁴⁹

The Bill qualified the crime against the Yazidis as genocide and recommended that the case of Yazidis to be brought to the attention of international bodies.⁵⁰ Despite the majority of Parliament's support of the Bill, many criticized that the Bill has only addressed the Yazidi female survivors as the only group of concern.⁵¹ Therefore, the Bill has still not been approved by the Iraqi Parliament.

The most controversial aspect of the draft Bill is how it regulates the status of the Yazidi-ISIL children. The draft in its Article 5 (Fourth) addresses the legal situation of the Yazidi-ISIL children and request that their status to be regulated "in accordance with the law". Yet again the draft does not refer to any specific law. Despite the Iraqi Constitution's recognition of freedom of religion for minorities, these children cannot be registered based on their mother's religion.⁵² Under Iraqi law, a child born to a Muslim father, or even to an unknown father, must be registered as Muslim, regardless of the mother's religion. In other words, those Yazidi-ISIL children will be registered as Muslims 'in accordance with law', even though they are born to Yazidi mothers. According to the Iraqi PSC, all children born to an unknown father must be registered as Muslim.⁵³ Nevertheless, procedural requirements make it nearly impossible for these children to even be registered as Muslim.

⁴⁷ Bor, 26 April 2019, (LSE), pp 1-2

⁴⁸ Ibid, pp 4-5

⁴⁹ Human Rights Council, 2016, A/HRC/32/CRP.2, para. 162

⁵⁰ Salloum, 25 April 2019, Al-monitor

⁵¹ Kurdistan 24, August 3, 2019

⁵² Salloum, 25 April 2019

⁵³ Fatah, July 10. 2019

Thus far, the Iraqi government has not taken any measures to register the Yazidi-ISIL children, nor given Iraqi nationality to them, although they are born to mothers who carry Iraqi nationality. This is in contradiction with the provisions of Article 16 of the Constitution that guarantees equal opportunities to all Iraqis, and the obligation that the Iraqi State has under the principle of non-discrimination, as stipulated in the preamble and Article 14 of the Iraqi Constitution.

2.3 General understanding of Sharia and Islamic law

According to most Muslim jurists, the most important role of Sharia law is that of social justice and welfare in this ‘earthly’ life. From a normative perspective, any system which implements Islamic Law, is obliged to pursue the fundamental values of Sharia.⁵⁴ The Quran and Sunnah (Prophet Muhammad’s words, actions and advice) are known as the two main sources of the Islamic law. However, the interpretation of classical Islamic jurists of these two main sources have, since the seventh century, developed into a rich Islamic legal jurisprudence which is known as *fiqh*.⁵⁵ There are several schools of law based on Muslim jurists’ interpretation of Qur’an and Sunnah.

Fiqh covers the textual provisions and jurisprudential rulings relating to specific transactions in Islamic laws. Its influence in Iraq is clear in some areas of law, primarily in the Constitution and issues related to family and criminal law.⁵⁶ The Provisions of Islam have enjoyed pre-eminence in Iraqi legislation, as is illustrated in Article 2 of the Constitution, Article 19 and 20 of the NICA and Article 1 of the PSC. The term ‘Sharia’ is used quite liberally to talk about Islamic law, but when this term is used in this thesis, it refers to the concept of *Fiqh*. To be clear, it is vital to distinguish between a lay understanding of Sharia as a set of religious moral norms’ and the doctrinal schools of Islamic jurisprudence. This thesis utilizes the latter.

Islamic jurisprudence has a positive law tradition. This form of law regulates specific aspects of ‘earthly’ transactions, which must be in accordance with Sharia.⁵⁷ The Constitution endorses religious influence, as seen in Article 2. This creates an environment in which it is difficult to employ the application of an interpretive approach to the law.⁵⁸ Although Islamic law in Iraq has been regulated by national legislation to some degree at the same time, the effect of

⁵⁴ Khaled Abou El Fadl, 2001, p 27

⁵⁵ Baderin, 2014, pp 397-398

⁵⁶ Otto, 2008, p 18

⁵⁷ Baderin, 2014, Introduction, p xxxiii

⁵⁸ Joseph Khawam, 2006, “A World of Lessons: The Iraqi Constitutional Experiment in Comparative Perspective”, p 742

Islamic jurisprudence in domestic law is still notable.⁵⁹ It is precisely this influence on domestic law that affects the rights of the children who are the subject of this study.

⁵⁹ Jan Michiel Otto, 2008, pp 5-7

3 Iraq's international obligations approach under relevant international treaties ratified by the Iraqi government

By addressing the second sub-question mentioned in introduction, this chapter will look at Iraq's international obligations under the relevant international human rights instruments Iraq has ratified. It will discuss Iraq's obligation as stipulated in the ICCPR, CERD, CEDAW and CRC. These treaties are selected in order to highlight the Iraqi government's human rights obligations as regards the right to birth registration and nationality of the Yazidi ISIL children under the principle of non-discrimination. The nationality issue of Yazidi-ISIL children can be analyzed through the provisions of all these treaties, but the attention of the thesis for discussion in chapter five will be mainly on the CRC.

3.1 International Covenant on Civil and Political Rights

Iraq ratified this Covenant in 1971.⁶⁰ According to Article 24 (2), "every child shall be registered immediately after birth and shall have a name".⁶¹ Article 24 of the Covenant's requirement is for guaranteeing the protection of children because of their status.⁶² The obligation of immediately registration is owed to 'every child' not merely nationals.⁶³ This provision is designed to promote recognition of a child's legal personality.⁶⁴ It details the importance of immediate registration of a name for every child and equal protection of their rights, based on the principle of non-discrimination as stipulated by Articles 24 (1) and 2. As a State Party to the Covenant, Iraq is required, pursuant to Article 40, to send periodic reports and indicate what the government has done to stop discriminatory practices towards children, no matter whether they are born in or out of wedlock.⁶⁵

Moreover, Article 24 (3) stipulates that 'every child has the right to acquire a nationality'.⁶⁶ Instead of guaranteeing the right to nationality to the child, this provision does only recognize the right to "acquire a nationality". It also leaves open which nationality a child is entitled to acquire.⁶⁷ The wording of Art. 24 (3) raises serious problems of interpretation. By using the phrase that children "shall be registered immediately after birth", it has guaranteed the right to nationality based on the *jus soli* principle. However, one of the problems is that the Article

⁶⁰ UN Treaty Body Database, The Ratification Status of Iraq

⁶¹ ICCPR, Article 24 (2)

⁶² Taylor, 2020, p 678

⁶³ Ibid, p 685

⁶⁴ General Comment No. 17 on Art. 24, para. 7

⁶⁵ Ibid, para 5

⁶⁶ ICCPR Article 24 (3)

⁶⁷ Taylor, 2020, P 686

does not clarify whether the child has the right ‘to acquire nationality’ grounded in *jus soli* or *jus sanguinis*. The other issue is that recognition of the right to nationality is a matter of state’s sovereignty. Therefore, an interpretation of this provision bears in mind the special interplay between the legitimate rights of the child and State sovereignty.⁶⁸ States, according to the ICCPR Committee, are recommended to adopt every appropriate measure to ensure that every child has a nationality when born.⁶⁹

Pursuant to Article 2 (1) of the Covenant, States Parties commit themselves to respect and to ensure the human rights recognized in the present Covenant to all individuals in their territory, without any type of distinction. As a source for the principle of non-discrimination, Article 2 is for preventing discrimination against children, on any ground. In other words, Article 2 provides an additional strand to Article 24 (1), to prevent violation where there is a failure to provide the required measures of protection.⁷⁰ So, although the term nationality is under the domestic legislator of Iraq, Iraq is obliged to respect international human rights standards.

In 2015, in its Concluding Observations on Iraq’s fifth periodic report, the Committee recommended Iraq to adopt measures to effectively prevent discrimination in its legislation⁷¹, and making efforts to raise awareness about the Covenant and its applicability in domestic law among judges, lawyers and prosecutors to ensure that its provisions are taken into account by the national courts.⁷² One can argue that this recommendation illustrates that Iraq has not taken adequate measures to prevent discrimination. It should be noted that Iraq’s fifth report was 13 years overdue.⁷³

The response of Iraq to this, in its sixth periodic report, illustrates how the Iraqi government interpret the Covenant regarding interpretation of treaty provisions. The country noted;

*“the Iraqi courts make their decisions on the basis of relevant domestic legislation, which is based on principles enshrined in the current Iraqi Constitution. It adds that the Iraqi courts apply international treaties including the ICCPR only when they have been integrated into domestic legislation by a specific law to that end, the provisions of which can be applied as a basis for judicial rulings.”*⁷⁴

⁶⁸ Schabas, 2019, P 695

⁶⁹ General Comment 17, para. 8

⁷⁰ Taylor, 2020, P 663

⁷¹ ICCPR Committee, Concluding Observations, CCPR/C/IRQ/CO/5, para. 12 (d)

⁷² Ibid, para. 6

⁷³ Ibid, A. Introduction

⁷⁴ ICCPR Committee, CCPR/C/IRQ/6, on Articles 2-5, para 12

Iraq has also noted that a law of accession is not in itself sufficient for that purpose, and the Iraqi judiciary does constantly seek guidance from the provisions of international human rights treaties in many of its decisions.⁷⁵

Based on Article 31 (1) of the VCLT, Iraq as interpreter must interpret the provision of Article 24 of ICCPR in accordance with the ordinary meaning of these terms in their contexts. Although Article 24 (1) of the Covenant obliges Iraq to register Yazidi-ISIL children immediately, the wording of Article 24 (3) does not guarantee the nationality right for these children. However, Iraq is obliged to implement its domestic law in line with international human rights instruments and follow the principle of non-discrimination.

3.2 The Convention on the Elimination of All Forms of Racial Discrimination (CERD)

Iraq ratified the Convention on the Elimination of All Forms of Racial Discrimination (CERD) in 1970.⁷⁶ The Convention in Article 5 (d)(iii) stipulates that “In compliance with the fundamental obligations laid down in Article 2 of the Convention, State parties undertake to prohibit and to eliminate racial discrimination in all forms and to guarantee the enjoyment of rights for everyone, without distinction as to race, color, national or ethnic origin, to equality before the law, notably in the enjoyment of the following right: [...] (d) other civil rights, in particular: [...] (iii) the right to nationality [...]”.⁷⁷

According to the CERD Committee, all States Parties to the Convention are obliged to protect the enjoyment of human rights against racial discrimination, but it also states that the manner in which these obligations are translated into the legal orders of State parties may differ.⁷⁸ The CERD’s concern with nationality transmission lies with the restrictions on the right of women to pass on their nationality to their children on an equal basis with men.⁷⁹ Here the incompatibility between the universality of human rights law from an international law approach, and an Islamic law approach used in Iraq, becomes more visible. It was discussed in chapter two how every law in Iraqi legislation must be in accordance with the established provisions of Islam. The family law of the country and the requirements of NICA show that the equal rights of men and women is not guaranteed.

⁷⁵ Ibid, para. 12

⁷⁶ UN Treaty Body Database, The Ratification Status of Iraq

⁷⁷ CERD, Article 5 (d) (iii)

⁷⁸ CERD Committee, General Recommendation, HRI/GEN/1/REV.6, Para. 1

⁷⁹ CERD Committee, Concluding Observations on Jordan, CERD/C/JOR/CO/13-17, para. 11

This unequal treatment is what causes the problem for the children who are subject to this thesis. Although the core of international human rights treaties is to protect the rights of everyone regardless of their civil status, at the national level, a person without nationality faces the consequence of the lack of nationality. Persons without nationality cannot get protection and enjoy their rights within country's territory.⁸⁰

In addition to the leeway Iraq has in treaty interpretation, the open-ended formulation of Article 5 (d)(iii) is, according to the Committee, a weakness pointing to its dependency on other legal instruments.⁸¹ Instead of giving definitions, Article 5 (d)(iii) of the Convention describes these rights. The lack of a detailed apparatus of limitation clauses and specifications of permissible and impermissible derogations is one of the weaknesses of this Article, from the viewpoint of proponents of effective human rights protection.⁸² It gives Iraq as State Party a lot of flexibility in interpreting of this Article's provision. In its Concluding Observation on the combined 15th to 21th periodic reports of Iraq, the CERD Committee urges Iraq to ensure that laws and regulations relating to ensure that acquiring, reinstating and transmitting nationality apply to all persons without discrimination.⁸³

In its last periodic report (combined twenty-second to twenty-fifth) to the CERD Committee, in 2017, Iraq points to the guarantee of equality between men and women regarding transferring their nationality, in its Constitution and Nationality law and mentions that a competent census authority registers the birth of Iraqis and non-Iraqis.⁸⁴ Iraq does not address the discriminatory provisions of NICA which was passed a year before its report and how its requirements, based on Islamic establishments, exclude many children, including Yazidi-ISIL children. This is in contrast with the context of this treaty and Article 2 (d) that requires States Parties to prohibit discrimination against any person and group, and requires State to bring discrimination to an end, by all appropriate means, including its legislation. So, although Iraq has the freedom to decide who can become its nationals, this does not mean that Iraq has the freedom to decide the contents of its obligation not to discriminate.

⁸⁰ Hoornick, 2018, P 1

⁸¹ CERD Committee, General Recommendation 20 on Article 1, Sixty-first session, Para. 1

⁸² Thornberry, 2016, P 308

⁸³ Concluding Observation, CERD/C/IRQ/CO/15-21, para.17

⁸⁴ State's Periodic Report, CERD/C/IRQ/22-25, 2017, para 218-219

3.3 The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

Iraq has ratified this Convention since 1986.⁸⁵ The reason for mentioning this convention is that the unequal enjoyment of the rights between men and women has affected the Yazidi-ISIL children's right to nationality and birth registration. This Convention sets out a wide range of provisions that aim to eliminate discrimination against women and to provide equality between men and women.⁸⁶ Article 9 (2) of this Convention stipulates that "State Parties shall grant women equal rights with men with respect to the nationality of their children". According to Article 18 of the Convention, all States Parties are required to submit periodic reports that indicate the measures they have adopted, and the degree of their fulfilment of the relevant obligations. Article 2 (f), requires Iraq to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.

According to Article 28 of the CEDAW, States are not permitted to make reservations that are incompatible with the object and purpose of the CEDAW, which is equality of rights between men and women. However, Iraq has made a reservation on both Articles 9 and 2 and argued:

*"Approval of and accession to this Convention shall not mean that the Republic of Iraq is bound by the provisions of Article 2, Paragraphs (f) and (g), of Article 9, paragraph (1) and (2), ..."*⁸⁷

Iraq's reservation to Article 2 contravenes what Article 29 (3) of the CEDAW requires, namely that all reservations shall be made in accordance to Article 2 of the Convention.⁸⁸ This relates to Article 28 (2) which states that reservations that are "incompatible with the object and purpose of the present Convention shall not be permitted". However, as has been mentioned earlier, family law and the PSC of Iraq are affected by the provisions of Islam. References to Sharia are Iraq's argument for taking reservations in areas where the provisions of its national law contravene the provisions of international human rights law. Therefore, if not impossible, it will be difficult to reform national laws and withdraw reservation from international law.

⁸⁵ UN treaty Body Database

⁸⁶ Saeed, 2018, P 119

⁸⁷ Bayefsky.com, CEDAW – Iraq.

⁸⁸ CEDAW, Article 29 (3)

3.4 The Convention on the Rights of the Child (CRC)

By ratifying this Convention in 1994, Iraq has agreed to be bound by the Articles of this treaty.⁸⁹ In practice this includes every governmental institution of the country. The Convention among other things focuses on the principles of non-discrimination and the best interests of the child. The Preamble of the CRC upholds the importance of protecting children. Furthermore, it recognizes the importance of additional protection of children in exceptional conditions, such as those in emergency and armed conflict.⁹⁰

According to Article 7 (1) of the CRC, “the child shall be registered immediately after birth” and “shall have the right from birth to a name” and “the right to acquire a nationality”.⁹¹ The combination of the right to a name and birth registration gives the child a legal recognition of its existence and this is fundamental for children for having effective enjoyment of all other rights under the Convention.⁹² Furthermore, Article 7 (2) stipulates that States parties shall ensure the implementation of these rights “in accordance with their national law” and” their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless”.⁹³ Thus, despite the recognition of the State’s obligation under this Article, the term “in accordance with national law” makes it difficult to know the extent to which a State can use its domestic law and proceed to constrain the meaning and enjoyment of a child’s rights under Article 7.⁹⁴

So, the interpretation of Article 7 requires a consideration of two broad issues. First, the scope and meaning of the rights, which are protected under first paragraph of Article 7, and second, a determination as to the nature of the obligation of States to ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments.⁹⁵ Furthermore, Article 8 (1) requires States Parties to respect the right of the child to preserve its identity, including nationality, name and family relations. Article 8 (2) states that States must protect the establishment of the child’s identity where a child is illegally deprived of some or all elements of his or her identity’.⁹⁶ Nevertheless, Iraqi laws look at these children as children born out of wedlock (without filiation). So, these children’s deprivation of identity is not illegal, but in accordance with Iraq’s national law, namely the

⁸⁹ UN Treaty Body Database, The Ratification Status of Iraq

⁹⁰ CRC, The Preamble, 10th paragraph.

⁹¹ CRC, Art. 7 (1)

⁹² Tobin & Seow, 2019, p 239

⁹³ CRC, Art. 7 (2)

⁹⁴ Tobin & Seow, 2019, p 240

⁹⁵ Tobin & Seow, 2019, pp 239-240

⁹⁶ CRC Art. 8

PSC and NICA. In international law, the definition of a child's parents is not be limited to a traditional conception of parents.⁹⁷ However, matters of family law and personal status in Iraq' is in accordance with provisions of Islamic law and traditional conception of parents and marriage. Consequently, it affects the rights of Yazidi-ISIL children to both be registered and obtain an Iraqi nationality, and it contravenes the principle of non-discrimination stipulated in Article 2 of the CRC.

According to Article 31 (1) of the VCLT, the interpretation of the terms stipulated in Article 7 of the CRC and Article 24 of the ICCPR must be taken in context. Despite the recognition of immediate registration and the right to a name for a child, Articles 7 (1) of the CRC and 24 (3) of the ICCPR do not guarantee a right to nationality for these children. The ordinary meaning of Article 7 (2), gives Iraq the power to implement these rights of child 'in accordance with its national law'. Moreover, Article 31 (4) of the VCLT allows Iraq to take reservation to the provisions of CEDAW. Nevertheless, Iraq is obliged to ensure that its laws comply with the international human rights standards, and the principle of non-discrimination recognized in these treaties demands the Iraqi government to protect people in its territory against discrimination.

⁹⁷ Tobin & Seow, 2019, p 248

4 Existing contradictory tendencies in the Iraqi legal framework

This chapter seeks to answer the third sub-question, about contradictory tendencies in the Iraqi legal framework that creates challenges regarding the rights to nationality for Yazidi-ISIL children. Among several such contradictions, this chapter will focus on those that affect the Yazidi-ISIL's right to birth registration, their acquisition of identity documents and Iraqi nationality. The chapter will also illustrate the contradictions between the legal framework of the country and its practice. Furthermore, it will discuss if these contradictions have roots in Sharia or Iraq's interpretation of Sharia. Although the secondary sources such as news articles, reports from international human rights organizations such as Human Rights Watch, and Human Rights Committees are not as valid as primary sources, due to a lack of relevant court decisions, such articles and rapports are used in addition to academic articles and books when discussing the state practice.

4.1 Contradictions between the laws of the country and between country's law and practice

Iraqi legislation applies Islamic law rather than a secular civil code for its family law.⁹⁸ In this respect, a child without legal filiation is nonetheless entitled to a certain degree of protection with regard to civil status and nationality.⁹⁹ This chapter's focus is on the procedural law governing the registration of Yazidi-ISIL children according to national legislation of Iraq. It will expose the requirements that follows from an Islamic law approach to giving Iraqi nationality to individuals born to an Iraqi or born in Iraqi territory. State practices show to what degree Iraq has tried to implement international human rights standards in its domestic law. What this chapter regards as states practice is Iraq's legislative and executive conduct, in addition to state's behavior and to the human rights Committees' concluding observations.¹⁰⁰

4.1.1 Contradictions between relevant laws

As it was illustrated in chapter 2, Article 18 of 2005 Iraqi constitution confers Iraqi nationality to any child born to 'an Iraqi mother' or 'an Iraqi father'. Similarly, Article 3 (A) of 2006 Iraqi Nationality Law confers Iraqi nationality upon every person born to 'an Iraqi mother' or to 'an Iraqi father'. Article 3 (B) of the Nationality Law extends the right to an Iraqi nationality also to a child born 'to unknown parents' in Iraqi territory (*jus soli*). According to Article 3 (B) of 2006 Iraqi Nationality Law, a child born to unknown parents is a foundling. So, the

⁹⁸ Baderin, 2014, p xvii

⁹⁹ Al-Dabbagh, 2019, p 104

¹⁰⁰ Wood & Sender, 2017, p 2, para. 9

exact signification of the concept of the ‘child of unknown filiation’ (*majhul-al-nasab*) in the current legal context remains to be determined. This term covers all cases in which the filiation between the child and one of his/her parents has not been legally established. The term *majhul al-nasab* in Iraqi legislation refers, more specifically, to the child whose father is unknown.¹⁰¹ This is because the relationship between the child and mother is established by the mere fact of childbirth, but the child-father relationship according to Islamic law is in principle established only if the filiation results from marriage.¹⁰²

In addition, according to Iraqi family law, the father has the right to custody over his child and the father’s name and nationality applies for the child. Iraqi procedures do not require the mother to record the maternal family lineage on registration documents unlike those of the paternal lineage. The legislation emphasizes only a paternal vision of biology and this understanding is further linked to the existence of a valid marriage in which the wife takes on the identity of her husband.¹⁰³ The Islamic paternal values have a clear effect on Iraqi legislation, in which the child can only inherit nationality from married fathers.¹⁰⁴

Article 40 (1) of Civil Code No. 40, 1951 recognizes the right to a name, but the child’s surname extends (*de plano*) from a father to his children under Iraqi law. The child’s full name for registration includes the name of its father and the correct name of the paternal grandfather.¹⁰⁵ Similarly, Article 19 (2) of the NICA have same requirements. In addition, the first paragraph of the Article 28 of NICA requires the registration of the marriage status of the parents in the civil information system as a condition to recognition of the child’s right.¹⁰⁶ The NICA requirements for parent’s marriage registration and the names of the father and grandfather for child’s birth registration are generally impossible to fulfil for Yazidi-ISIL children because they were born in war and in a territory lacking the necessary infrastructure.

The situation of these children, born out of rape, slavery and forced marriages in Iraq should be a source of major concern.¹⁰⁷ On the one hand, the law of the country has defined a child born out of wedlock and to an unknown father, as foundling and presumes that the child is to be registered as Muslim.¹⁰⁸ On the other hand, Iraqi legislation requires the marriage registra-

¹⁰¹ Al-Dabbagh, 2019, P 119

¹⁰² Ibid, P 110

¹⁰³ Engelcke and Yassari, 2019, P 333

¹⁰⁴ Hodgkin & Newell, 2007, p 104

¹⁰⁵ Al-Dabbagh, 2019, P 121

¹⁰⁶ NICA, Art. 28

¹⁰⁷ Al-Dabbagh, 2019, P 122

¹⁰⁸ Article 32 (2) of Civil Status Act of 1959 & Article 45 of Juvenile Protection Act of 1983

tion and name of father for registering the name of the child. The sad fate of these children is that their mothers were forced to marry ISIL fighters and as these marriages are not recognized by the Iraqi government. Thus, the children who are born to these unions are deprived of their rights.¹⁰⁹ This is contrary to the provision of Article 14 of the Iraqi constitution that stipulates Iraqis are equal before the law without discrimination on any ground.

Article 13 of the Constitution stipulates that the constitution is the supreme law in Iraq and shall be binding in all parts of Iraq without exception. According to Article 21 of Nationality Law, any text contradictory to the provisions of this law shall be repealed. Recalling that Article 18 of the constitution and Article 3 of Nationality Law provide nationality for any child born to an Iraqi mother, it is striking that the conditions that are required by Articles 19 and 28 of NICA act as a barrier for Yazidi-ISIL children for acquiring birth documentation and Iraqi nationality. The Iraqi legislator passed the NICA in 2016 during the war against ISIL. From a legal perspective NICA is not above the constitution, particularly, not when it is passed long after the constitution and nationality law. It is strange that such a procedural law is designed in a way that violates constitutional principles.

Furthermore, according to Article 20 (1) of NICA, the Juvenile Court shall decide cases of foundlings. Even here the procedural requirements of the Juvenile Court demand that mothers, or the institution that sheltered the child, submit the date and place of the birth, in addition to the marriage contract. In cases where Yazidi women have been forced to convert to Islam and marry, the Iraqi government and courts do not recognize marriage and birth certificates issued by ISIL. Consequently, with or without these birth certificates, these children cannot obtain ID cards.¹¹⁰ So, since the child's father is not present, and the mother cannot prove the father's death, a mother without a marriage certificate would be unable to obtain birth certifications for her child.¹¹¹ These provisions required by the Iraqi NICA and PSC clearly deny Yazidi-ISIL children a legal personality.

Regarding the term filiation, since it is defined as a legal relationship between parent and child, giving a name and identity to children born out of wedlock is one of the most difficult positions to negotiate in the domestic legal systems of Iraq as a Muslim-majority jurisdiction.¹¹² According to the Iraqi PSC which is constructed around norms found in Islamic Law, the illegitimate child with an absent father is entitled to certain degree of protection with re-

¹⁰⁹ Al-Dabbagh, 2019, P 122

¹¹⁰ Wille, 25 February 2018, Human Rights Watch.

¹¹¹ Wille, 25 February 2018, Human Rights Watch.

¹¹² Ali, 2019, P 384

gard to civil status and nationality.¹¹³ However, the provision and requirement of Article 52 (2) of the PSC remains an issue regarding Yazidi-ISIL children because according to this Article, the woman (the mother) must prove her marriage. In addition, the establishment of acknowledgement (*Iqrar*) is required to be in accordance with the Islamic tradition.¹¹⁴ Since mothers of these children with Yazidi faith cannot declare based on Islamic tradition without converting it, it is not possible to fulfil the provision of this Article. This will also affect the right of Yazidi-ISIL children negatively.

4.1.2 Contradiction between legal framework and practice of Iraq

There is much literature on the legal framework of the topic of nationality rights, however when it comes to understanding a state's practice, the methods for identifying such practices are broad and challenging. Most states do not publish their practice and thus researchers have to rely on various other sources. State practice in international law is also embedded in the domestic legal and political situation in any given state. Nevertheless, this section will mention briefly the various categories that one can use to identify state practice of international law.

According to a paper by Sir Richael and Omri Sender, state practice in international law can be defined in many ways. For analyzing the practice of a State, they take a broad approach which includes 'what States do', 'what States say', and 'what States say about what they do' which is their justification. Therefore, state practice according to them includes the actions of a country's branches of government such as legislative, executive, and judicial. Although national laws enacted by legislative organs are an important element of state practice, in addition to the law text, how legislation is interpreted and applied often matters more when identifying state's practice. Therefore, they include state's conduct and even inaction in connection with treaties as state behavior.¹¹⁵

Despite the provisions of Article 20 (1) of the NICA, due to the controversy and sensitivity of the case, the Iraqi Juvenile Court has not made any decision regarding the case of Yazidi-ISIL children's birth registration yet. In this case, Iraq has exhibited a form of *inaction*, where both legislation and the courts have been passive in finding a solution to the situation of Yazidi-ISIL children's birth registration.¹¹⁶ According to a source at the Iraqi Ministry of Interior, the issues of the Yazidi-ISIL children's birth registration and identity certificates are controver-

¹¹³ Al-Dabbagh, 2019, P 104

¹¹⁴ Ibid, p 112

¹¹⁵ Wood & Sender, 2017, pp 2-3, para. 6-11

¹¹⁶ Ibid, p 2, para. 14

sial. The Ministry source claimed that the government is unable to remedy this issue because of its sensitivity and complexity as regards security and Yazidi identity.¹¹⁷ This argument is contrary to the provisions of Article 18 of the Iraqi Constitution and Article 3 of the Iraqi Nationality Law that provides for conferring of nationality on children who are born to Iraqi mothers. The Office of the High Commissioner for Human Rights, in its latest report, noted that unequal transformation of nationality is a cross-cutting issue, and asked Iraq to ensure equal rights for women and men in the acquisition and transfer of nationality to their children.¹¹⁸

Moreover, while the Committee on the Rights of the Child welcomed the adoption of the 2006 Iraqi Nationality Law, it was concerned that children born outside the Iraqi territory obtain their mother's nationality only if the father is unknown or stateless and that obtaining nationality is then object to the discretion of the Minister of Interior. The Committee noted that conferring nationality by the mother based on marriage, leaves children born out of wedlock, or born from a marriage of an Iraqi mother to a foreign national, or in forced marriages to combatants as stateless individuals. The Committee therefore recommended Iraq to amend Article 4 of the Nationality Law with a view to ensuring that children born outside Iraq can obtain their mother's nationality without any restrictions and to ensure that children from non-registered marriages are issued identification.¹¹⁹

The lack of equality has exposed this vulnerable group of children to discrimination. Iraq has not paid attention to the differing situations of these children and other children for taking steps to achieving substantive equality. The obligation of Iraq to ensure the principle of equality and non-discrimination arise from Article 14 of 2005 Iraqi constitution and the international human rights treaties to which the country is a party. However, Iraq does not yet have a special procedure that would allow for the incorporation of the CRC into the national legal order. Instead of integration with these international standards, the Iraqi Parliament passed the NICA on 2016. Treaties are not accorded superiority over domestic law. Therefore, the implementation of the CRC by the Iraqi state and the respect for the child's best interests is far from being fully integrated into Iraqi law.¹²⁰ In other words, the practice of the Iraqi government after several decades shows that it has done very little in this case.¹²¹

¹¹⁷ Al Saleh, 24 April 2019.

¹¹⁸ UN Human Rights Council, UPR, Letter by the HC to Foreign Minister of Iraq, 13 May 2020, p 4

¹¹⁹ CRC Committee, Concluding Observations, CRC/C/IRQ/CO/2-4, Para. 31 & 32

¹²⁰ Al-Dabbagh, 2019. pp 88 & 89

¹²¹ Ahmed Al Samaraie, 2007, pp 929 & 930

In its combined second to fourth periodic report to the Committee on the CRC, regarding right to nationality stipulated in article 7 of the CRC, Iraq noted that the 2006 Iraqi Nationality Law ensures the rights of the newborn child to nationality and also deals with children of unknown parents and stateless children. In its statement, the Iraqi government referred to Article 3 of the Nationality Law and Article 4 which opens for recognizing the nationality of child born outside Iraq to an Iraqi mother and an unknown or stateless father, is under consideration of Ministry of the Interior.¹²² This statement at an international level does not reflect the reality. However, The Committee, in its concluding remarks to Iraq's report, showed its concern about the persistent discrimination against children born out of wedlock and children belonging to ethnic and/or religious minority groups, especially concerning their access to identification documents and social services. The Committee recommended Iraq to ensure full protection against discrimination on any ground, and adopt and implement a comprehensive strategy addressing all forms of discrimination against all groups of children in vulnerable situations. The Committee also recommended Iraq to strengthen its efforts to ensure that the best interests of the child are consistently applied in all legislative, administrative and judicial proceedings and decisions as well as in policies, programs and projects that are relevant to and have an impact on children.¹²³ The country has not submitted any report to the CRC Committee since 2013.

Moreover, the 2019 Universal Periodic Review (UPR) under the Human Rights Council tells about the lack of commitment by Iraq to implement the recommendations issued by the various treaty bodies. It illustrates the discriminatory provisions of some laws of country, and people's lack of the necessary environment to enjoy their civil and political rights which is the result of state's failure to adopt policies and measures that promote respect for human rights. The Human Rights Council also noted that the Iraqi judiciary generally have not acted in accordance with the spirit of these conventions in their decisions. The UPR members recommend that Iraq work hard to review all the laws and legislation in force in Iraq. Thus, Iraq has been encouraged to adapt its laws to international conventions on human rights and ensure that no legal provision contradict the content and spirit of international human rights conventions. They also recommended judges to act in the spirit of the Articles contained in international human rights conventions when reviewing Iraqi law and cases that appear before them.¹²⁴

Based on Wood's and Sender's article, one can identify certain features of Iraq's state practice. These are inaction in the judicial system and legislation of the country, conflicting state-

¹²² CRC Committee, Consideration of reports; Iraq, CRC/C/IRQ/2-4, 2, p 34, Para. 130

¹²³ CRC Committee, Concluding Observations, CRC/C/IRQ/CO/2-4, Para. 19 & 20 & 22

¹²⁴ UN Human Rights Council, Universal Periodic Review, "Forty-Second Session, Iraq, pp 2-4

ments such as the way State justifies its treatment of internal matters in its periodic reports with the lack of presentation of its laws and legislation for review.

4.2 What creates these contradictions

The legal framework of Iraq is in some part compatible with international standards of human rights, however in areas related to the subject of this thesis, the lack of such compatibility is visible. There may be several factors that affect the structure of Iraqi legislation, but this thesis proposes that one of the most influential factors that has created barriers for implementing human rights norms is the interpretation of Islamic law in Iraq's legal system.¹²⁵

4.2.1 Iraq's incompatible use of modern and traditional law

Iraq has tried to combine the international standards of human rights and the provisions of Islam in its legal system and Constitution. This often gives rise to conflicting norms. In the case of this study one can identify this sort of normative competition. On the one hand, Article 2 of the Constitution stipulates that Islam is a fundamental source of Iraqi law. On the other hand, the same article recognizes the importance of the principles of human rights and democracy. Despite the Constitution's recognition of equality between men and women in article 18 regarding the transferring of Iraqi nationality, the rights that regulate marriage, divorce, custody of children, inheritance and other matters of personal status are based on religious interpretations.¹²⁶

While Article 18 of the constitution and Article 3 of the Nationality Law remain the secular provisions of law, Article 2 of the Constitution, Article 19 of the NICA and Article 1 of the PSC constitute the traditional religiously based provisions of Iraqi law. Article 1 of the PSC stipulates that in the absence of a written provision of the law, the judge will rule 'according to the principle of Islamic Sharia'. Yet this provision does not identify which school or doctrine of Sharia is to be considered.¹²⁷ Even though, based on Article 1 of the PSC, judicial decisions are a source of a country's legislation, due to the controversial state of Article 2 of the Constitution, which is closely related to the nationality issue of Yazidi-ISIL children, the Iraq's Supreme Court has not made public any decision based on this Article to date.¹²⁸

¹²⁵ Otto, 2008, p 16

¹²⁶ Efrati, 2005, p 577

¹²⁷ Al-Dabbagh, 2019, pp 106-107

¹²⁸ Federal Supreme Court- Iraq, The writer after a proper research and reading all published Supreme Court judgment since 2005, found out that since the topic is controversial, there is no single case judged by the Supreme Court based on the Article 2.

The provisions regarding the rights of children are fragmented among various Iraqi laws, and in the case of Yazidi-ISIL children the relevant laws reflect a variety of contradictions. While NICA and PSC in matters of related to birth and filiation remains largely dependent on religious principles, the other legal provisions are more modern and often inspired by French Laws.¹²⁹

4.2.2 Sharia law or interpretation of Sharia

As was mentioned above, Article 2 of the Constitution recognizes Islam as ‘a foundation source’ of Iraqi legislation where all laws of the country must be in accordance with the Islamic provisions. Although Sharia and Islamic law are often used synonymously, as explained in chapter two, it is important to distinguish between Sharia that refers to the totality of Islamic moral and ethical guidance, and Islamic jurisprudence that is the understanding and interpretation of the Qur’an and the Sunnah developed by early Muslim jurists.¹³⁰ Despite the undeniable position of these two primary sources of Islamic law, they could not meet all needs of a society for all times and situations. Therefore, Muslim jurists developed different methods that constitute legal doctrine (fiqh). They interpreted the basic sources of Sharia, namely the Quran and Sunnah and debated the principles and methods of Islamic law.¹³¹ These different methods of interpretation created different schools of law.

There is a different definition of the concept of justice between the classical fiqh texts that underpin Muslim family law and the international human rights instruments, when it comes to the rights of children. Based on the provisions required by international human rights law, Iraq has obligations to take adequate measures to guarantee the principle of equality instead of denying this in the name of Islam and Sharia.¹³² Some argue that although the two primary sources of Islamic law do not directly speak about children’s rights, Islamic law provides for the importance of child’s protection and development, right to proper nutrition, health care, education and inheritance. Disagreements regarding children’s rights in Muslim countries, are due to different schools and interpretations.¹³³ These different schools give the religious authorities great power over the definition and implementation of certain rights.¹³⁴ In its law,

¹²⁹ Al-Dabbagh, 2019, pp 107-108

¹³⁰ Saeed, 2018, P 14

¹³¹ Emon, 2012, P 56

¹³² Mir-Hosseini, 2012, P 299

¹³³ Giladi, 2014, p 591

¹³⁴ Moosa, 2000, p 197

Iraq does not identify which school of Islamic legal interpretation is applied to family law or law in general.

Islamic law scholars have a rich history of debates on issues of interpretation, from ancient to modern times. Al-Mutairi argues:¹³⁵

“Islamic law as a comprehensive system takes accounts of the ever-changing conditions that has a set of principles and rules which are believed to tackle every aspects of life, whether devotional or secular. In Islamic law, certain principles are by Muslim jurists stipulated as principles of necessity. In this order it prohibits changes in some areas of the Islamic law, while for other conditions adopting legal solution during the time of constraint is permitted.”

So, this principle is recognized for times of need for legalizing matters and issues that are related to modern life. For issues that are not named in basic sourced of Islamic law, Muslim jurists are allowed to use the principle of necessity as justification for finding a solution linked to modern issues.

Abdullah Saeed also confirms that Muslim jurists are allowed to depart from an established legal ruling in exceptional circumstances, as long as the result does not go against the fundamental objectives of Sharia. This concept helps Muslim majority countries respond to the international human rights discourse today, when difficulties or tensions arise in certain areas and can be applied to reduce hardship.¹³⁶ Other scholars like M.I Sarwar puts forward that Sharia law is similar to international human rights law, as in essence, it argues for social justice and fairness preserving the dignity of individuals and their conscience.¹³⁷ He argues that the politicization of Islam rather than Islam as a matter of theology is the source of difficulties related to equality and freedom of individuals recognized under Islamic law.¹³⁸

There are significant differences and contradictory positions within the realm of Islamic jurisprudence and Qur’anic exegesis. It is therefore too simplistic to speak of one “Islamic law” because the Islamic rules to a large extent are the product of humans and are less difficult to reform than one may think.¹³⁹ Saeed argues that the Qur’an aims to improve the condition of weaker groups in a society, including orphans, for establishing a society based on the princi-

¹³⁵ Al-Mutairi, 1997, P 1

¹³⁶ Saeed, 2018, p18

¹³⁷ Sarwar, 2012, p 254

¹³⁸ Sarwar, 2012, p 249

¹³⁹ Ali, 2010, p 3

ples of social justice. Historically, the Prophet's teachings were known come into conflict with the discriminatory treatments found in early Islamic society and he thus made reforms which later were not put into practice due to misinterpretation of some early jurists.¹⁴⁰ It is because of this precedent that many scholars hold the position that there is no difficulty in harmonizing international human rights norms and Islamic norms.¹⁴¹

According to this group of scholars, slavery was practiced earlier, and Muslim jurists and societies had accepted this notion in earlier Islamic legal tradition until the modern period. Today all Muslim scholars argue that this does not have any authority and is abolished in all Muslim societies. This indicates that even though there may have been consensus by Muslim jurists on certain issues in the past, such consensus can be challenged in the modern era because of the significant differences between the contexts of the modern period and of the past.¹⁴² Thus, there is a precedent for reform within the Iraqi legal system, whilst still using Sharia as a source of law. As these scholars have pointed to, it is not the source material that is being questioned but rather the multiple interpretations of sharia that are important. As interpretation is a human endeavor, it is both flexible and imperfect. Therefore, Sharia does not need to be some inflexible standard that cannot ensure greater legal and social justice for the Iraqi children in question.

Abdullah Saeed emphasizes that Muslim scholars should have enough room to creatively engage with international human rights law for coming up with new ideas and developing relevant new Islamic understandings.¹⁴³ He argues that the Muslim jurists' task is to interpret sources in a way that is suitable for society's needs. So, it's the state's responsibility to interpret and practice these rules to resolve issues and prevent tensions between international human rights law and Islamic law.¹⁴⁴ There is enough Islamic scholarship to show that there are ways to make the interpretation of Islam compatible with human rights standards. From the evidence drawn from NICA, this does not seem to be the case. In addition, as has been mentioned earlier, the Iraqi judicial system can neither have an interpretive role regarding provisions of Islam, nor adopt the spirit of treaties in their decisions.

¹⁴⁰ Saeed, 2018, Pp 127 & 130

¹⁴¹ Saeed, 2018, P 127

¹⁴² Saeed, 2018, pp 12 & 13

¹⁴³ Saeed, 2018, Pp 20-21

¹⁴⁴ Saeed, 2018, pp 133 & 134

5 The extent of Iraqi legislation's compatibility with the standards found in international law

The goal of this chapter is to address the main research question and to establish whether the current Iraqi legal framework and practice violate international human rights law regarding the identity documentation and nationality status of Yazidi-ISIL children. In order to do so, the chapter will first look at the fourth sub-question and discuss the extent of Iraqi legislation's compatibility with international human rights standards. Articles 7 and 2 of the CRC will be central in this chapter's discussion. In addition, other relevant treaties may be consulted in order to analyze of these issues and formulate a conclusion.

5.1 Iraq's international obligations, human rights requirements and their significance in legal practice of Iraq

The ratification of the CRC and other international instruments are important commitments for Iraq to follow, so that it can demonstrate how the country fulfills its international duty and comply with international requirements. This sub-section will analyze the responsibilities Iraq has towards Yazidi-ISIL children.

5.1.1 Rights to be registered and right to acquire nationality

Regarding the 'right to immediate registration after birth' stipulated in Article 7 of the CRC, a State Party is required to take immediate measures to ensure the effective registration of a child's birth as soon as it is practicable for the State, without discrimination.¹⁴⁵ The right "to acquire a nationality" mentioned in Article 7 (1) implies a right to all the benefits obtained from nationality.¹⁴⁶ further, Article 7 (2) requires Iraq, as State Party to ensure the implementation of the rights named in 7 (1) in accordance with its national law and its obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless. So, the first clause is not clear or precise enough to guarantee the rights to birth registration and nationality for these children. Similarly, the latter clause does not make it an obligation for Iraq to give its nationality to these children as the procedural part of the national law contradicts the constitution.

In connection to what has been discussed above, the right to nationality based on adoption of the principle of *jus solis*, which gives nationality to children born in the country's territory, is recognized in Article 7 (1), but sometimes a state adopts the principle of *jus sanguinis*, which

¹⁴⁵ Tobin & Seow, 2019, p 241

¹⁴⁶ Hodgkin & Newell, 2007, p 103

means that the nationality of a child is determined based on the child's biological parentage. The Iraqi Constitution and the country's Nationality Law are examples of how both rules are at work for determining Iraqi nationality (Article 18 of the Constitution and Article 3 of the Nationality Law). However, it is important to note that in the case of Iraq, there are restrictions to these rules flowing from the gender of the parent which prohibit, for example, a child from taking the nationality of its mother.¹⁴⁷ In other words, although the recognition of gender equality, and principles of *jus soli* and *jus sanguinis* are guaranteed in Article 18 of the Iraqi Constitution and Article 3 of the Iraqi Nationality law, the provisions of Article 19 of NICA and Article 40 of Iraqi Civil Code Act require a *de plano* rule, which is that a child's status is recognized through a father-child relationship based on a registered marriage.¹⁴⁸ In addition, where Article 4 of the Iraqi Nationality Law stipulates that the child of unknown or stateless father born outside Iraqi territory has a right to Iraqi nationality, procedural obstacles prevent these children from obtaining nationality through their mother.

In March 2015, the CRC Committee expressed concern regarding the risk that children of mixed couples face by not receiving IDs as a result of the PSC of 1959. The Committee referred to the case of children born to an Iraqi mother and unknown or stateless father outside Iraq which is stipulated in Article 4 of the 2006 Nationality Law. In such cases, the mother can confer her Iraqi nationality under the Minister of Interior's discretion, otherwise the child will be stateless.¹⁴⁹ In this regard, the CRC Committee recommended Iraq to repeal Article 4 to ensure that children can obtain their mother's nationality without any restriction.¹⁵⁰ The CRC Committee found the provision of Article 4 contradictory to prioritizing of the child's best interests as stipulated in Article 3 of the CRC which should be a primary consideration in all matters related to children.¹⁵¹

Iraqi family law creates a significant barrier for these children for accessing the right to have a nationality. The law follows a traditional model which is based on how marriage defines filiation. Children that are born outside marriage will not benefit from care or inheritance.¹⁵² According to the CRC Committee, in the light of Articles 2 and 3 the continued use of the term "illegitimate children" to refer to children born out of wedlock has been a subject of concern which could lead to discriminatory practice against these children.¹⁵³ The Committee recom-

¹⁴⁷ Tobin & Seow, 2019, pp 254-255

¹⁴⁸ NICA, Art. 28

¹⁴⁹ CRC Committee, Concluding Observation; Iraq, CRC/C/IRQ/CO/2-4, para 31 (a) & 32

¹⁵⁰ Ibid, para 32

¹⁵¹ CRC Committee, List of Issues, Sixty-eight Session, CRC/C/IRQ/Q/2-4, para. 7

¹⁵² Al-Dabbagh, 2019, p 105

¹⁵³ CRC Committee, Concluding Observation, Libya Arab Jamahiriya, CRC/C/15/Add.84, para 12

mended that the legislation explicitly prohibit discrimination on any grounds, including [...] National and birth status. The Committee also recommended that domestic legislation be reformed to guarantee the right to nationality to every child in the light of Article 7 of the convention.¹⁵⁴

From a human rights point of view, children cannot be deprived of their nationality or the right to acquire nationality because of the legal status of their parents. Because the granting of nationality to children is not a matter that falls exclusively within the domestic affairs of State In relation to this, Article 7 of the CRC allows for the elaboration of domestic procedures with the aim of implementing the rights under consideration. It also states that to the extent that there are applicable international obligations, domestic procedures have to comply with the obligations.¹⁵⁵ Nevertheless, taking Article 31 (1) of the VCLT as a starting point, Iraq's interpretation of Article 7 of the CRC is in accordance with the ordinary meaning of this Article in context. This will be discussed later in section 5.2.

The CRC Committee is concerned about the situation that religious affiliation in Iraq is indicated on IDs, because it could intensify the discrimination suffered by children belonging to religious minorities.¹⁵⁶ This issue is notable in the case of Yazidi-ISIL children because their mothers cannot declare the filiation of their children in Court, which is required by Article 52 (2) of the PSC.¹⁵⁷ The Committee has therefore recommended Iraq to strengthen its efforts and to ensure that the child's best interests are applied in all legislative, administrative and judicial proceeding and decisions in all policies and programs that affect children.¹⁵⁸ However, in addition to a high degree of corruption and political pressures on the Iraqi judiciary, there is a lack of judicial independence that affect the judicial practices of Iraq.¹⁵⁹ It was also mentioned in chapter three (3.1) that the Iraqi national courts make their decisions on the basis of relevant domestic laws, and do not apply the international treaties in their rulings.

Moreover, the effect of the Islamic provisions and values on Iraqi laws in matters of family law and filiation, becomes notorious regarding the equal right of men and women for transmitting nationality stipulated in Article 9 of the CEDAW. Iraq's reservation to this Article stands in contrast to provisions of the Iraqi Constitution and Nationality Law. Article 9 of CEDAW is in fact almost identical to Article 18 of the Iraqi Constitution and Article 3 of the

¹⁵⁴ Ibid, para 18

¹⁵⁵ Ziemele, 2007, pp 24-25

¹⁵⁶ CRC Committee, Concluding Observation; Iraq, CRC/C/IRQ/CO/2-4, para. 34

¹⁵⁷ See chapter two, Sub-section 2.1.4

¹⁵⁸ CEC Committee, Concluding Observations, CRC/C/IRQ/CO/2-4, 3 March 2015, para.22

¹⁵⁹ Roberts, 2006, pp 3-4

Nationality law. In other words, this reservation can be taken to mean a reservation against the country's own Constitution and Nationality Law. In addition, through the use of reservations and domestic laws that act as derogations from international norms, Iraq is actively working against international norms that require States to protect individuals from deprivation of rights, and to aid the deprived.¹⁶⁰ However, Iraq cannot be accused of human rights violation, because having a special clause and making reservation on some parts of a treaty at the time of ratification is recognized as valid by Article 31 (4) of the VCLT.

Despite the use of the phrase "in accordance with their national law" in Article 7 (2), and the right to make reservation, the provisions of human rights treaties are meant to be applied to every human being, so that they can fully enjoy their right.¹⁶¹ As stipulated in Article 7 (2), Iraq is also obliged to ensure that the implementation of the rights given in Article 7 (1) are 'in accordance with its obligations under the relevant international instruments in this field'. In addition, the principle of non-discrimination also restricts Iraq's freedom to treat its people in a discriminatory manner.

5.1.2 The principle of equality and non-discrimination

A lack of equality is often at the heart of human rights violations, as those discriminated against are often more vulnerable to abuse.¹⁶² The principle of non-discrimination is recognized in Article 2 of the CRC, Article 2 of the ICCPR, Article 1 of the CERD, and Article 2 of the CEDAW. Iraq, as a State Party, is therefore obliged to take all necessary and adequate measures to protect the rights of these children against discrimination. So, in addition to respect these children's right as its negative obligation, Iraq has a positive obligation to protect these children against discriminatory treatment.¹⁶³ This section will focus on the CRC, whilst drawing on examples from other international and domestic legal texts.

Article 2 of the CRC acts as a restriction on Iraq's power, and requires State to behave in accordance with the principle of non-discrimination. According to Article 2 of the CRC, Iraq is obliged to protect the children within its territory against all forms of discrimination. The principles of equality and non-discrimination do not just demand a negative obligation to not discriminate, but it also obliges Iraq to recognize differences between individuals and then take steps to achieve substantive equality.¹⁶⁴ Therefore, based on this principle, Iraq is re-

¹⁶⁰ De Schutter, 2014, P 280

¹⁶¹ Besson & Kleber, 2019, p 47

¹⁶² Bantekas and Oette, 2016, p 76

¹⁶³ Besson & Kleber, 2019, p 51

¹⁶⁴ Sepúlveda Carmona, 2017, p 16

quired to take immediate measures to ensure the effective registration of these children's birth, without discrimination.¹⁶⁵ Article 3 of the CRC also states that the best interest of the child is to have priority in any decision and action undertaken by governmental authorities.

As John Tobin and Florence Seow argue;¹⁶⁶

“...it is true that states enjoy a level of discretion about measures they adopt for this purpose. However, they must be effective and consistent with the other provisions under the Convention”.

As was mentioned above, the provision of Article 2 (1) of the CRC imposes obligations on States in its Article 7 (2). It imposes the obligation on the State to respect, protect and fulfil the rights under the convention. In other words, Iraq is required to ensure that State actors and non-state actors do not deprive a child of his or her rights unreasonably, and fulfil its obligation by taking appropriate measures to ensure the effective enjoyment of a child's rights.¹⁶⁷ State measures are therefore required to be effective and in accordance with the provisions of Article 2 of the CRC, which prohibits discrimination.¹⁶⁸

Similarly, Article 2 (1) of the ICCPR also states that all state parties are obliged to respect and to ensure all individual within their territories and their jurisdiction the rights recognized in the Covenant without distinction on any ground.¹⁶⁹ Even though there are other similar Articles of international instruments, Article 2 of the CRC is unique in several ways. On the one hand, Article 2 (1) protects the child in all her or his specifics and not only as any other human being. On the other, Article 2 (2) protects children not only against discrimination directly targeted at them, but also against discrimination based on the attributes of their parents, legal guardian or family members.¹⁷⁰ This is an additional child-specific dimension of the principle of non-discrimination in the CRC. It focuses on the fact that children are often discriminated in ways that match their specific position in human society, and therefore become the victims of human rights violations.¹⁷¹

¹⁶⁵ Tobin & Seow, 2019, p 241

¹⁶⁶ Tobin & Seow, 2015, p 274

¹⁶⁷ Tobin & Seow, 2019, p 274

¹⁶⁸ Tobin & Seow, 2019, pp 242-243

¹⁶⁹ ICCPR, Article 2 (1)

¹⁷⁰ Besson & Kleber, 2019, p 49

¹⁷¹ Besson & Kleber, 2019, p 61

Regarding the importance of the principle of equality and non-discrimination, Samantha Besson and Eleonor Kleber point out,¹⁷²

“Equality before the law is related to the status of a person when the law applies to her/him. This equality will be in question when the legal subject-hood is unequally distributed”.

The Iraqi constitution in Article 14 recognizes all Iraqis as equal before the law without discrimination. However, as mentioned in chapter four, other parts of the Iraqi legal framework, especially laws related to family matters, require marriage and legally accepted filiation for obtaining the right to birth registration, acquisition of ID cards and Iraqi nationality. Requirements based on an interpretation of Islamic values deprives Yazidi-ISIL children from the rights mentioned above. These values are the insistence on marriage and the emphasis on paternal lines. If a child does not fill these criteria, it is considered a foundling and its fate is then given over to the Court. These values when translated into procedural action, contradict Article 2 of CRC and what other international human rights instruments require based on the principle of non-discrimination.

General Comment No. 17 on Article 24 of the ICCPR demands the protection of children against discrimination. It requires State Parties to submit their periodic reports and inform how their legislation and practice ensure that measures of protection of children against discriminations in every field are taken. Particularly, the General Comment deals with the different treatment between children who are legitimate and those who are born out of wedlock. The Committee’s interpretation of the right of the child to be registered immediately and have a name, is closely linked to the provision of Art 24, concerning the right to special measures of protection and to promote recognition of the child’s legal personality.¹⁷³

The CRC Committee has made several remarks about the rights of the Child in comparison with other Islamic countries that also could be applied to Iraq. In commenting similar cases coming from Lebanon, the Committee express its concern regarding discrimination in the granting of nationality to a child of parents of mixed nationality, and unmarried parents.¹⁷⁴ The Committee also expressed its concern regarding the inequality between the sexes which affect the rights of the child to acquire nationality in similar cases coming from Jordan.¹⁷⁵ The State Party is therefore required to eliminate discriminatory attitudes or prejudice and, particu-

¹⁷² Besson & Kleber, 2019, p 58

¹⁷³ ICCPR, General Comment No. 17 on Article 24, para 5 & 7

¹⁷⁴ CRC Committee, Concluding Observations, Lebanon, CRC/C/15/Add.54, para. 15

¹⁷⁵ CRC Committee, Concluding Observations, Jordan, CRC/C/15/Add.21, para 11

larly with regard to the children born out of wedlock, ensure effective protection against discrimination, as well as any differentiation resulting from the status of parents.¹⁷⁶

The discussion and analyses so far have showed that while parts of the Iraqi 2006 Nationality Law and the 2005 Iraqi Constitution are compatible with international human rights standards, the provisions of 2016 NICA and the 1959 PSC as well as their procedure and legal framework remain incompatible with international human rights standards. In its last Concluding Observations, the CRC Committee recommended Iraq to ensure full implementation of the Committee's recommendations under the Convention, especially those relating to [...] non-discrimination.¹⁷⁷ The Committee's concern points to the lack of implementation of the non-discrimination principle by Iraq regarding the rights of children with unknown filiation.¹⁷⁸

In its last periodic report to the ICCPR Committee, Iraq noted that the context of Article 18 (2) of the Iraqi 2005 Constitution is in accordance with what international instruments stipulate. The report also mentions Article 3 of the Iraqi 2006 Nationality Law that gives effect to the principle of equality between men and women to pass on their nationality to their children as a matter of legal course, without needing to make a special application. Iraq noted that the Constitution and Nationality Law impose no controls on the transfer of the mother's Iraqi nationality to her children.¹⁷⁹ Even though the report was submitted in 2019, Iraq has not named Yazidi-ISIL children and their status in its response to the Committee, and just mentioned policies to prioritize the protection and rehabilitation of children/orphans in areas of displacement and areas liberated from ISIL control.¹⁸⁰ Moreover, the government did not mention anything about the issues NICA and PSC provisions raise regarding the discriminatory requirements and procedures for acquisition of ID card and Iraqi nationality.

5.2 Iraq's interpretation of the international human rights treaties and challenges

This section will take a critical look at the way Article 7 of the CRC is formulated. It will also discuss the challenges the interpretation of international treaties may create. Iraq is obliged to respect and ensure the principle non-discrimination as stipulated in Article 2 of the CRC as well as other international instruments. However, as was discussed in chapter four, despite the

¹⁷⁶ Ibid, 1994, para 22

¹⁷⁷ CRC Committee, Concluding Observations, CRC/C/OPSC/IRQ/CO/1, 2015, para 17 (a)

¹⁷⁸ CRC Committee, Concluding Observations on the Combined Second to fourth periodic Reports, Iraq, CRC/C/IRQ/CO/2-4, para 19

¹⁷⁹ ICCPR Committee, Sixth Periodic Reports Submitted by Iraq, Due in 2018, CCPR/C/IRQ/6, 2019, para. 272

¹⁸⁰ Ibid, 2019, para. 273-274

recognition of the principle of equality and non-discrimination in Article 14 of the Constitution, Iraqi laws do not protect the rights of the Yazidi-ISIL children as it would be expected from an international human rights approach. Most parts of the Iraqi legal framework and procedures deny right to birth registration and Iraqi nationality to this category of children. According to Ineta Ziemele, whatever the situation is, the national law should provide adequate ways to ensure registration of a child required by the CRC. As for the right to name, again national law will reflect the particularities of the language and culture but also take into consideration the limitations imposed by international law. She also argues that a margin of discretion is considerably wider concerning the right to a name.¹⁸¹

Article 7 of the CRC confirms the right to a name and birth registration which is well established. However, the term “right to acquire a nationality” could be problematic in certain environments. Simply, the word “acquire” indicates the right to engage in a nationalization process but does not give clarity as to the outcome of that process. Although this Article demands that States take all reasonable measures within the scope of their available resources to ensure that this is possible, as has been mentioned earlier, recognizing the right to acquiring a nationality does not guarantee the right of the child against statelessness. It gives power to Iraq whom it chooses to confer its nationality upon.¹⁸²

Furthermore, the use of the phrase “in accordance with national law” in Article 7 of the CRC is intended to protect the power of states to determine the basis upon which they grant nationality to a child. This provision gives a state the authority to use its national law to deny nationality to a child under the principles of nationality adopted by the state. Such an approach would allow a state like Iraq to defeat the object and purpose of article 7 by relying on a domestic law that establishes a restrictive interpretation of the nature and content of the various rights.¹⁸³

It is argued that, at the national level, the obligation of the state party to implement the CRC must be controlled through the monitoring of national courts. Internationally this happens through the CRC Committee and the periodic reports of those countries.¹⁸⁴ On the one hand, according to the CRC Committee, any interpretation of “best interests” must be consistent with the spirit of the entire Convention. State parties cannot interpret this concept in an overly culturally relativist way and cannot use their own interpretation.¹⁸⁵ On the other hand, Iraq as

¹⁸¹ Ziemele, 2007, p 28

¹⁸² Tobin & Seow, 2019, pp 278-279

¹⁸³ Tobin & Seow, 2019, p 275

¹⁸⁴ Besson & Kleber, 2019, p 66

¹⁸⁵ Hodgkin & Newell, 2007, p 38

an independent actor of international law has the freedom to choose the degree of implementation of treaty provisions in its domestic law. All of these elements, taken together, in this case, act as barriers to the rights under discussion.

Ziemele argues that;¹⁸⁶

“There are agreed international standards regarding nationality law and states have become parties to international treaties containing specific rules regarding this right”. She admits however that “nationality continues to be determined primarily in accordance with national law”.

The treaty-norms are potentially changed by combating them with rules of interpretation.¹⁸⁷ The wording of Article 7 of the CRC gives a lot of space and freedom to Iraq to interpret this provision, and this carries unforeseen consequences. From this study, one can see how such complicated issues might arise. This Article in its first clause authorizes the right to be registered and have a name, but leaves the child’s right to nationality unclear by phrasing it as a right “to acquire a nationality”. The second clause of this Article also obliges Iraq to implement rights mentioned in first clause “in accordance with its national law”. So, even though Iraq’s legal framework and practice shows that the country has not interpreted the provisions and requirements in a manner compatible with the international human rights standards, part of the barrier also has its origins in the way Article 7 of the CRC has been formulated. Based on Article 31 (1) of the VCLT, Article 7 must be interpreted in accordance with the ordinary meaning given to the terms of this Article in its context. So, although the Iraqi government has not carried out its responsibility to protect the nationality right of Yazidi-ISIL children, Iraq cannot be accused of violating the rights of these children.

In addition, with respect to the meaning of the rights recognized in Article 7 of the CRC, the CRC Committee has neither adopted a General Comment on the issues that arise under Article 7,¹⁸⁸ nor on Article 2 regarding the principle of non-discrimination in the context of children’s rights.¹⁸⁹ The criticism that should be noted regarding Article 2 of the CRC is that it does not guarantee the principle of equality. It only prohibits discrimination. The lack of meaning the term ‘equality’ may have consequences regarding the implementation of Article 2 of the CRC.¹⁹⁰ It gives freedom to the Convention’s State Parties to exploit their power and

¹⁸⁶ Ziemele, 2007, p 28

¹⁸⁷ Kammerhofer, 2017, p 147

¹⁸⁸ Tobin & Seow, 2019, pp 239-240

¹⁸⁹ Besson & Elenor Kleber, 2019, p 71

¹⁹⁰ Besson & Kleber, 2019, p 57

interpret this Article in the way that suit their own interest and national legislation. This Article does not mention birth out of wedlock as a ground of discrimination even if this ground is often used in practice to differentiate between children.¹⁹¹

In concluding this chapter, it is important to note that, although the practice and contradictory legal framework of Iraq indicate that discriminatory treatment of Yazidi-ISIL children can continue in domestic law is only a part of the problem. At an international level, Article 7 of the CRC is also worded in a way that gives States much leeway on interpreting and assume that States will act in accordance with the principle of good faith in their application of national law. The problem arises when a State, for whatever reason, may not be able to act in good faith. It may then perceive the phrase “to acquire a nationality” in the CRC, as a choice rather than an obligation. Furthermore, it may use the phrase ‘in accordance with national law’ to subjugate the principles of the Convention under national laws that in turn may be in conflict with the principles of non-discrimination and best interests of the child.

In addition, according to the principle of restrictive interpretation, treaties are to be interpreted in favour of State sovereignty where a treaty’s provisions are open to doubt i.e., the interpretation that entails the lesser obligation for sovereign States should be selected.¹⁹² Iraq has a legal system where the national Constitution is harmonized with the Islamic law and the rules of Islam play a dominant and influential role in certain areas of national law.¹⁹³ Although the provisions of Article 7 of the CRC and other relevant Articles named in this thesis work very well and are thoughtfully designed, they are, perhaps unintentionally, more easily compatible with the legal philosophy and values of Western countries where their interpretation may take place in an independent secular, judiciary. When we apply these rules of interpretation to a country like Iraq, with a layered and unfree legal system and a different legal tradition philosophy, it is clear that these rules create a conflict with local judicial approaches and that are highly challenging to harmonize with human rights law. Therefore, Iraq cannot be accused of human right violation towards Yazidi-ISIL children.

What Article 31 (1) of the VCLT stipulates is that State Parties shall interpret their interpretation in accordance with the ordinary meaning of the terms used in the treaty, and in its context. Since, the ordinary meaning must be determined in their context, therefore the first and second paragraphs of the Article 7 of the CRC, Article 24 of the ICCPR must be interpreted together in their contexts. However, Article 31 (1) of the VCLT requires State Parties to inter-

¹⁹¹ Besson & Kleber, 2019, p 62

¹⁹² Dörr & Schmalenbach, 2012, p 538

¹⁹³ Otto, 2008, p 8

pret these provisions in good faith. Although the matter of nationality is under State's sovereignty, the recommendations from various Human Rights Committees on Iraq illustrate that State's practice has not been compatible with the principle of good faith. In addition, even though Article 31 (4) gives a large discretion to Iraq to have a special meaning, the reservations Iraq has made on the provisions of Article 2 and 9 of the CEDAW regarding the principle of equality and non-discrimination, passing NICA in 2016, and not passing the 2019 Bill of the Rights of Survivors take Iraq's good intention in question.

6 Conclusion

Through an analytical approach, this thesis has outlined the legal challenges that Yazidi-ISIL children are faced in contemporary Iraq, specifically the right to nationality and birth registration. In doing so, this research has focused on specific pieces of Iraqi legislation to illustrate the way Iraq treats its international legal obligations. From the perspective of human rights law, this thesis has sought to explore the right to nationality under the principle of non-discrimination. In order to answer the main research question, the thesis has analyzed the relevant Iraqi laws, the role of Islamic law in the country's legislation and the international human rights treaties that Iraq is a party to. The analysis has critically discussed Iraq's interpretation of these treaties and set out in the general rule of interpretation contained in Articles 31 and 32 of the VCLT.

It was noted that even though the right to nationality is not an absolute right, the lack of nationality profoundly affects other rights. This is clearly the case in relation to the subject of this thesis' discussion, which is the status of Yazidi-ISIL children. A person without identity and nationality is vulnerable and often denied access to education, medical care, housing and other legal and social benefits. According to international law, the right to a nationality is a human right and human rights are universal for every individual and they should be applied without discrimination on any ground. Recalling thesis' analysis based on the provisions of Article 18 of the 2005 Iraqi constitution and Article 3 of the 2006 Iraqi Nationality Law, it is clear that the nationality rights to children born to an Iraqi mother are guaranteed and that the rights assured therein, should be accessible to any Iraqi mother and her child. However, the requirement of Article 19 of the NICA is not compatible with the provisions of the former laws. Based on the implementation of the PSC, those who have been affected by war would be able to be reintegrate into Iraqi society if the mothers of these children could testify and show their marriage certificate, or declare their child's filiation in the Juvenile Court, which works in accordance with religious principles. The analysis has shown that the provisions of NICA and PSC make it nearly impossible for Yazidi-ISIL children to obtain IDs and Iraqi nationality.

The combination of the right to a name and birth registration gives the child a legal recognition of its existence and this is fundamental for Yazidi-ISIL children for having effective enjoyment of all other rights. The traditional law of the country regarding family matters does not recognize the legal personality of these children who are born to unknown fathers and are seen as children born out of wedlock. This practice is contradictory to Iraq's international obligations which should apply the same rules without exception to Yazidi-ISIL children and any other Iraqi child. In general, the relevant international treaty bodies, except for the CRC, have not mentioned the rights of children born out of wedlock. Nevertheless, they

point towards a lack of uniformity in the application of the principle of non-discrimination by Iraq. This is especially poignant in light of Article 14 of the Iraqi Constitution which stipulates that all Iraqis are equal before the law without discrimination on any ground.

The paper has explored how the Constitution of the country defined Iraq as a democratic state, establishing the principles of human rights and democracy, and at the same time, provides Islamic as a foundational source of the country. Regarding Iraq's interpretations of Islamic law, it was pointed out in chapter four how Iraq's interpretation of Islamic law is compatible with the open nature of Islamic law, because Iraq has not mentioned which school of Sharia is in use in the government matters. The arguments from Muslim scholars shows that Iraq should have the power to make some reforms regarding the birth registration of Yazidi-ISIL children who are born into the destabilizing environment of terrorism and war. Many of them are undocumented from their birth and for some who have birth registration issued by ISIL, Iraqi institutions do not recognize these documents. Furthermore, in relation to these children, they may not even see a day in Juvenile Court as Article 4 of the Nationality Law gives the Iraqi Ministry of Interior jurisdiction over the registration of the child born out of wedlock or from a marriage of an Iraqi mother to a foreign national, unknown father, or forced marriage.

As was explained in chapter four, no step has been taken yet, to alter the status of these children. The government claims it is unable to remedy this situation due to its 'sensitivity' and 'complexity'. After several years the Iraqi government has not recognized the crime of ISIL as a genocide in relation to the Yazidis. The Iraqi Parliament has not yet approved the 2019 Reparation Bill announced by the Iraqi president. If the government was willing to do so, it could act as a catalyst towards addressing these problems. The analysis has also shown how inflexible the structure of Iraqi laws are in relation to this wartime situation, adding yet another barrier for Yazidi-ISIL children to obtain identity documents and Iraqi nationality. Analysis in chapter four shows that the requirement of the *de plano* rule in the name of Sharia acts as a convenient smoke screen for country's lack of political interests to develop a remedy. Years after the Constitution and Nationality Law were ratified, Iraq passed NICA in 2016 during the war against ISIL. From a legal perspective NICA's provisions should not be above the provisions of Constitution and Nationality Law. This inflexibility stands in contrast with Iraq's obligation to fulfill its negative obligation to respect these children's right, and also its positive obligation to protect these children against discriminatory treatments.

It is true that as a sovereign State, Iraq has the power to determine who can become its national are under its domestic law. However, the State is bound by restriction arising from international law. The principle and rules established by treaties defines how Iraq as State Party may allocate nationality to individuals in its territory. The principle of non-

discrimination is one these principles that is recognized in all international treaties. The thesis detailed how a country engages with its international obligations by offering periodic reports to treaty bodies. This is a way to show the measures the State has adopted to ensure, in this case, that children have a nationality. It was illustrated in chapters four and five that despite the recommendations of the CERD, CRC and ICCPR Committees, Iraq has been slow in actively implementing certain human rights norms in its domestic law. The State has not submitted any report to the CRC Committee since 2013. Its fifth report to the ICCPR Committee was also 13 years overdue. In its periodic report to the ICCPR Committee, Iraq argued that although the principles of the domestic legislation do not conflict with the provisions of international human rights treaties, the national courts do not apply the provisions of international human rights treaties in their rulings. From the evidence and analysis, including recommendations and Concluding Observations from several Human Rights Committees, the State practice of Iraq reveals that it has been inactive in promoting and implementing international human rights standards. The poor human rights record of Iraq explains that the legal framework and practice of Iraq is discriminatory and incompatible with the purposes of specific international human rights treaties, which aim to protect children's rights.

However, in answering the research question, the analyzes in chapter five showed that the wording of relevant international treaties and documents are typically vague in order to enable States to retain the regulation of nationality as far as possible within their respective domestic spheres. It should also be concluded that the lack of nationality of Yazidi-ISIL children is an issue which is rooted in the principles of State sovereignty and the limitations of international law. Based on this principle, matters of nationality fall within the domestic law of the country. Iraq's interpretation of Article 7 of the CRC and Article 24 of the ICCPR is compatible with the general rules of interpretation stipulated in Article 31 (1) of the VCLT. The interpretation of these Articles should be based on the ordinary meaning of these terms in their context. Although Article 7 (1) recognizes the right to immediate registration and the right to have a name for children, it does not guarantee the child's right to obtain a nationality. Similarly, Article 24 (3) only recognizes the right 'to acquire a nationality'. Furthermore, Article 7 (2) obliges Iraq to implement these rights 'in accordance with its national law'.

Even Iraq's reservation on Article 9 (2) of the CEDAW that directly affect the rights of these children is recognized in Article 31 (4) of the VCLT. The recognition of the interpretation based on ordinary meaning in Article 31 (1), and recognition of giving a special meaning to the terms, in Article 31 (4), gives Iraq the necessary freedom to interpret treaty provisions in a way that suits its national law and interests. Therefore, despite Iraq's discriminatory legal practice and treatment of Yazidi-ISIL children, Iraq cannot be accused of violations of international human rights law in the mentioned treaties, because of the architecture of these gen-

eral rules of treaty interpretation currently governing the international system. Consequently, the Yazid-ISIL children's fate still hangs in the balance without remedy.

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