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Sexual Violence against women in armed conflict : the Yazidi genocide

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Master in Law

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« Impunity is complacency, and words without action inflict the same harm and suffering as the perpetrators of mass atrocities and sexual violence. »

Nadia Murad

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Resumo

A presente dissertação foca-se no estudo de caso do genocídio do povo yazidi levado a cabo pelo Estado Islâmico através de atos de violência sexual contra mulheres e raparigas yazidi, como violação e tráfico sexual e escravatura. Através deste estudo de caso procuramos identificar o papel da violência sexual na destruição do povo yazidi e se o crime de genocídio foi efetivamente cometido através de tais atos. Numa segunda parte procuramos também identificar os possíveis mecanismos de responsabilização do grupo ou dos seus membros pelos atos de violência sexual cometidos contra as mulheres e raparigas que levaram a destruição da minoria étnico-religiosa que são os yazidis.

Palavras-chave: Violência sexual em conflitos armados. Violação. Tráfico sexual. Escravatura. Estado Islâmico. Yazidi. Genocídio.

Abstract

This dissertation focuses on the case study of the Yazidi genocide committed by ISIS through acts of sexual violence against Yazidi women and girls, like rape and sexual slavery and enslavement. Through this case study we intend to identify the role of sexual violence in the destruction of the Yazidi people and if the crime of genocide was indeed committed through such acts. In a second part, we also sought to pinpoint the possible mechanisms of accountability of the group and its members for acts of sexual violence committed against Yazidi women and girls that led to the destruction of the ethno-religious minority that are the Yazidi.

Keywords: Sexual Violence in armed conflict. Rape. Sexual slavery. Enslavement. ISIS. The Yazidi. Genocide.

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Acronyms and Abbreviations

BGH	Bundesgerichtshof [Federal Court of Justice]
Dae'sh	al-Dawlah al-Islāmiyya fi al-‘Irāq wa al-Shām
Doc.	document
ed.	edition
HRC	Human Rights Council
HRW	Human Rights Watch
ICC	International Criminal Court
ICJ	International Court of Justice
ICL	International Criminal Law
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law
IIIM	The International, Impartial, and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011
ILC	International Law Commission
ISIL	Islamic State in Iraq and the Levant
ISIS	Islamic State in Iraq and Syria
no.	number
p.	page
par.	paragraph
pp.	pages
Q & A	Questions and Answers
<i>s.d.</i>	sine data
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNITAD	The United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL
Vol.	Volume

Introduction

Sexual violence against women in armed conflicts has been present since the beginning of times.¹ However, for far too long, it was considered a mere consequence of war. Today, we see a different narrative. Sexual violence against women in armed conflict can be used as a weapon of war and may be considered a crime against humanity, a war crime and even, in some circumstances, genocide. It is particularly the latter that is of interest for our work. Can the “crime of crimes” be accomplished through acts of sexual violence?

There are two particular bodies of International Law that are of interest to our work, these being International Criminal Law (ICL) and International Humanitarian Law (IHL). The intersection between the two is important to understand sexual violence in the context of an armed conflict. The prosecution of sexual violence as an international crime requires the application of both ICL and IHL principles. The application of these two bodies of law ensures that perpetrators are held accountable for their crimes and that victims receive the protection and justice they deserve.

One instance of sexual violence against women in armed conflict is ISIS’s attacks on Yazidi² women and girls. The Yazidi genocide is one of the clearest examples of our times of sexual violence being used as a weapon of war. Nadia Murad³, a Yazidi survivor, was 19 when she was captured by the so-called Islamic State and made a sexual slave. She was lucky enough to escape in 2015. Today, after having published her memoir *“The Last Girl: My Story of Captivity and My Fight Against the Islamic State”*, she fights for the recognition of her people’s genocide and bringing ISIS members to justice. Apart from this, Nadia became the UN Goodwill Ambassador for the Dignity of Survivors of Human Trafficking. Her voice is enabling more and more women and girls to speak about what they faced at the hands of the so-called Islamic State and making it easier and more plausible that members of ISIS are held accountable for the Yazidi genocide.

For the purpose of this work, we will focus on sexual violence during armed conflict through the lens of a specific case-study: the Yazidi genocide. In the first chapter, we will focus on establishing the facts by examining who the Yazidis and ISIS are. Additionally, a closer look at the legal framework regarding sexual violence in armed conflict is necessary. We will

¹ There are many examples of sexual violence and more specifically rape against women across history. In this regard see Christina Lamb, 2021; José Alberto Azeredo Lopes, 2022.

² Also called Yezidi, in this work we will only use the denomination « Yazidi ».

³ Nadia Murad was also awarded in 2018 the Nobel Peace Prize for her efforts to fight impunity and end the use of sexual violence as a weapon of war.

specifically analyze the framework around the crime of genocide and genocidal sexual violence, focusing on the use of rape and sexual slavery and enslavement. Furthermore, we will analyze our facts within our legal framework to determine if ISIS did, in fact, commit genocide against the Yazidi community and if acts of sexual violence played an integral role in such genocide. Finally, we will explore the mechanisms that exist to prosecute ISIS for their actions against the Yazidi community, particularly Yazidi women.

As a disclaimer, this dissertation will only focus on cisgender women and our work's approach will be binary.

1. Case study: The Yazidi women

This case study illustrates well how sexual violence can lead to genocide and be used as a strategic tactic of war. In this chapter we seek to identify who are the Yazidis and why they are targeted by ISIS. Secondly, we must take a closer look at ISIS to comprehend their legal identity and on what grounds they persecuted the Yazidis. Thirdly, it is essential to establish the facts by confirming the Yazidis' persecution by ISIS, followed by examining the specific persecution carried through sexual violence acts against Yazidi women and girls.

1.1 The Yazidis

The Yazidis have faced persecution for centuries⁴. They are a mostly Kurdish speaking ethno-religious minority consisting of around 700'000 people globally.⁵ Until 2014, they were primarily located in northern Iraq, specifically in the Nineveh province, which is claimed by both the Kurdistan regional government and the Iraqi central government.⁶ Yazidis being persecuted is not a new phenomenon and the group has suffered a number of massacres. Their persecution goes back to the 18th and 19th centuries, where they suffered 72 genocidal massacres⁷ under the Ottoman Empire.⁸ The source of their persecution lies in their religious beliefs and practices, including the fact that they are polytheists and have an oral tradition rather than a written one.⁹ Their religion is derived from Zoroastrianism¹⁰, Christianity and Islam, and it is considered one of the world's oldest religions.¹¹ According to Yazidi faith, community

⁴ Raya Jalabi, 2014.

⁵ Samantha Hechler, 2017, p. 599.

⁶ Amy Braushchwieger, 2015.

⁷ Peter Nicolaus / Serkan Yuce, 2017, p. 197.

⁸ Raya Jalabi, 2014.

⁹ Ibidem.

¹⁰ Zoroastrianism is one of the oldest religions in the world. It developed from the ancient Indo-Iranian religion. See Almut Hintze, 2019.

¹¹ Avi Asher-Shapiro, 2014.

members can only marry within the group, and there is no possibility of conversion to Yazidism.¹² However, what makes the Yazidi community a targeted group is their worship of a fallen angel, Melek Tawwus, the peacock angel, which has led them to be seen as devil-worshippers, putting them at greater risk of persecution.¹³ This misunderstanding of their religion has driven them to be at the center of various cycles of persecution and genocide.¹⁴ In 2014, the Yazidi community was once again at the center of persecution as the terrorist group, ISIS, extended to Iraq.¹⁵

1.2 ISIS

They are known under many names, whether we choose to call them ISIS, ISIL, Da'esh or even the Islamic State. Their nature is always the same; we are talking about an insurgent¹⁶ terrorist organization that has proven to be among the most violent the world has ever seen. When the United States invaded Iraq in 2003, most of the soldiers under Saddam's regime were marginalized¹⁷, which led to the former Sunni army creating an outcast rebellion group, calling themselves "al-Qaeda in Iraq".¹⁸ After taking advantage of the ongoing civil war in Syria and expanding themselves there, they extended their action to Iraq in 2014.¹⁹ As of 2014, the group had already taken over more than thirty percent of the territory of Syria and Iraq.²⁰ Abu Bakr al Baghdadi was at the top of the organization and considered it's leader.²¹ After cutting ties with Al Qaeda, he announced the establishment of the "caliphate" in June of 2014 and declared the group's name as "The Islamic State".²² ISIS rules by Sharia Law and uses it as an excuse to execute all those who don't follow it.²³ In reality this use or rather abuse of Sharia Law, is grounded in an archaic conception of Islamic Law and is no longer considered lawful by

¹²HRC, 2016, p. 6.

¹³ Raya Jalabi, 2014.

¹⁴HRC, 2016, p. 6.

¹⁵ Paula Castellano San José, 2020, p.61.

¹⁶ Congressional Research Service, 2022, p. 1.

¹⁷ We can say that a void emerged after the US-led military intervention in Iraq in 2003. The removal of Saddam Hussein's regime destabilized the existing power, security and administrative structures, leading to a vacuum that many attempted to fill. Such destabilization in structures combined with the underlying sectarian tensions and political, economic and social grievances of various groups, led to the rise of insurgent groups, like al-Qaeda in Iraq which later became ISIS. On the military intervention in Iraq in 2003 and the void created by it see: Maria Isabel Tavares, 2013, p. 21, 325 and 326.

¹⁸ Ben Smith, 2015, p. 1.

¹⁹ HRW, 2015.

²⁰ Matthew G. Olsen, 2014.

²¹ Ben Hubbard / Eric Schmitt, 2014.

²² Congressional Research Service, 2022, p. 1.

²³ Samantha Hechler, 2017, p. 604.

countries that also rule by Sharia Law.²⁴ ISIS actually “cherry picks verses of the Qur’an” to justify its violent acts and most definitely does not understand Islamic Law properly.²⁵ The terrorist group is one of the main causes of the migrant crisis in the Middle East due to their violent behaviours and executions, driving thousands of Syrians and Iraqis to flee their homes.²⁶

What is peculiar about this organization is that they function like a pseudo-state with a proper administrative structure, which makes it difficult for the international community to properly identify them.²⁷ Such a structure involves courts, schools, social services and local governance.²⁸ We can really see ISIS as a proper institution. This has been a hard question to solve under international law: is ISIS really *only* a terrorist organization or are we talking about something more? One must begin to say, that there is no consensus on an international definition of terrorism.²⁹ Nevertheless, if we decide to say that terrorism is characterized by the act of deliberating using violence against civilians to achieve political goals, then yes, ISIS is a terrorist organization.³⁰ Simultaneously, due to its structure and nature we cannot say that ISIS is *only* a terrorist organization.³¹ But can it then be considered a State under international law? The Islamic State would undoubtedly benefit from such denomination legally speaking, as States enjoy great protection under international law.³² But with said protection also comes great responsibility and duties.

In order to define a State, it is widely accepted that at least three elements should be present: governmental authority; defined territory; permanent population.³³ Sometimes a fourth element comes into play: the capacity to enter into international relations.³⁴ When looking at ISIS there would eventually be issues in all elements but even if these elements were all present it would still not be enough for the group to be considered a legitimate State under International Law.³⁵ Above all, the systematic foundations of today’s international legal system still have to be respected.³⁶ Needless to say, that an entity who clearly rejects and distances itself from the

²⁴ Anne- Laure Vaurs- Chaumette, 2014, p. 84; Peter Nicolaus / Serkan Yuce, 2017, p.201.

²⁵ Qaem Aulassyahied, 2018, p. 82.

²⁶ Milena Sterio, 2015, p. 325; Nisan Ahmado, 2018.

²⁷ Audrey Kurth Cronin, 2015, p. 87.

²⁸ Cuny School of Law / Madre / OWFI, 2017, p.10.

²⁹ Boaz Ganor, 2015, p. 57.

³⁰ Ackerman Spencher, 2015.

³¹ Boaz Ganor, 2015, p. 58.

³² Christian Tomuschat, 2015, p. 226.

³³ These elements are found on the Convention of Montevideo on the Rights and Duties of States of 1933, an Inter-American treaty that in reality never entered into force ; see article 1 of the Montevideo Convention on the rights and duties of States lies down the essential conditions in order to be considered a State in International Law.

³⁴ Crawford James, 2006, p. 45-49.

³⁵ Christian Tomuschat, 2015, p. 227.

³⁶ Christian Tomuschat, 2015, p. 231.; Marco Longobardo, 2017, p. 214.

binding force of international law, particularly in regards to the regimes of *jus cogens* and obligations *erga omnes*, including the principles of peace and non-use of force and human rights, cannot be accepted as a State.³⁷ Genocide in particular is considered a norm of *jus cogens*.³⁸

In addition, it is not because ISIS calls itself the “Islamic State” and actually occupies a large part of sovereign territories³⁹ that it is an actual sovereign state.⁴⁰ Furthermore, when addressing the group, the UN Security Council, actually uses the name “Islamic State in Iraq and the Levant (ISIL)”, thus not avoiding the word “state”.⁴¹ Once again it is not because the word state is present that it is actually one. So, one question remains, if the so-called Islamic State is not *only* a terrorist organization but it’s also not a State in the legal sense, what is ISIS under International Law? As mentioned before, ISIS members operate in various fields. From warfare operations against other non-state actors but also against Iraqi and Syrian armies, to actually law enforcement among the civilian populations present in the occupied territories.⁴² Under its structure one can also identify healthcare, education and religious services.⁴³ According to Boaz Ganor, ISIS can be considered a “hybrid terrorist organization”, acting like a “sub-state actor” that operates in various fields such as the military, civilian and political.⁴⁴ In other words, we can argue that ISIS can be considered a belligerent armed group that has achieved “de facto authority” with state-like functions.⁴⁵

Another interesting aspect of ISIS would be the women who participated in the organization very much as a part of it. *The Khansaa Brigade*, was a kind of all female police that was instituted by ISIS and operated in Raqqa, Syria.⁴⁶ They would be present in the city’s checkpoints and would enforce strict codes on women, such as dress codes.⁴⁷ Apart from these women, many joined ISIS’s movement after being recruited through social media and online postings.⁴⁸ Women from Europe⁴⁹ but also from other parts of the world joined the movement

³⁷Christian Tomuschat, 2015, p. 231.

³⁸ UN, General Assembly : Report of the International Law Commission from 2019, Chapter V on Peremptory norms of general international law (*jus cogens*), A/74/10, p. 208.

³⁹ Even if ISIS is not a State, we can definitely agree that they are still belligerents’ part of an armed conflict due exactly to the fact that they controlled such sovereign territories in Iraq and Syria. José Alberto Azeredo Lopes, 2020, p. 120, 132.

⁴⁰ Boaz Ganor, 2015, p. 58.

⁴¹ UN, Security Council (2015a), Preamble para. 2.

⁴² Boaz Ganor, 2015, p. 58.

⁴³ Ibidem.

⁴⁴ Boaz Ganor, 2017, p.15.

⁴⁵ Annyssa Bellal, 2016, p. 3.

⁴⁶ Mara Redlich Revkin / Elisabeth Jean Wood, 2020, p. 33.

⁴⁷ Ariel I. Ahran, 2015, p. 69.

⁴⁸Alexandra Bradford, 2015.

⁴⁹ Caroline Fish, 2017, p. 6.

and went to Syria to become ISIS soldiers wives and bear their future children.⁵⁰ Today many of them are stuck in “refugee camps”, most in the Al-Hol camp in Syria⁵¹, because their countries of origin don’t want to take them back, and some countries are even revoking nationalities.⁵²

1.2.1 The Yazidi persecution by ISIS

On August 3rd, 2014, ISIS militants swept into Sinjar, a town located in the Nineveh province of Iraq just 15 kilometers away from the Syrian border, where most of the Yazidi community lived.⁵³ Apart from the predominance of the religious group in the area, there was also a smaller number of Arabs who followed Sunni Islam living in the region. Even though Yazidis don’t usually, and are not supposed to, intermarry with other faiths, the relationship between Arabs and Yazidis was fairly good. However, this situation changed after ISIS attacked the region, making the two groups’ relations to become more distant and nonexistent.⁵⁴

With Sinjar besieged, most Yazidis fled north, seeking refuge in Kurdish territory, others stayed in the Sinjar mountains, waiting for help and to be rescued.⁵⁵ However, they were quickly encircled by ISIS, and were trapped without access to food, water, shelter or medical care. This led to an enormous humanitarian crisis, prompting the Iraqi government to call for help.⁵⁶ In response, on August seventh 2014, President Barack Obama publicly announced that the American military would provide humanitarian aid⁵⁷ to the Yazidis trapped on Mount Sinjar.⁵⁸ American, Iraqi, British, French and Australian forces participated in airdrops of water and essential supplies to tens of thousands of people who were stranded.⁵⁹ Sadly, many lives were lost on Mount Sinjar before a corridor from Syria to Mount Sinjar was created by the Syrian Kurdish forces.⁶⁰ At the time, the Yazidi community in Sinjar had hope that the

⁵⁰ Ariel I. Ahram, 2015, p. 69.

⁵¹ John Saleh, 2021.

⁵² HRW, 2022; BBC, 2023.

⁵³ HRC, 2016, p. 3.

⁵⁴ HRC, 2016, p.6.

⁵⁵ Avi Asher-Shapiro, 2014, p. 1.

⁵⁶ The global coalition against Daesh, in cooperation with Iraq was created in September 2014 to fight and diminish ISIS capacity. See José Alberto Azeredo Lopes, 2020, p. 143.

⁵⁷ This humanitarian aid provided by the United States was also used as a legal justification for its airstrikes. José Alberto Azeredo Lopes, 2020, p. 144.; Michael P. Scharf, 2016, p.41.

⁵⁸ President Obama stated: « They kill children. They enslave, rape and force women into marriage. They threatened a religious minority with genocide. » see at: <https://obamawhitehouse.archives.gov/the-press-office/2014/08/07/statement-president>

⁵⁹ Department of Defense Press Briefing by Rear Adm. Kirby in the Pentagon Briefing Room, 2014.

⁶⁰ HRC, 2016, p. 7.

*Peshmerga*⁶¹ would come to their rescue and protect them from ISIS, as they were the only security force present in the region.⁶² Those who were not fortunate enough to escape and seek protection outside of Sinjar, either died from exposure on Mount Sinjar or were captured and killed *en masse*.⁶³

For those who did not flee to Mount Sinjar, the reality was just as brutal, if not worse. Women and children were taken away from their families, while most of the men were killed.⁶⁴ ISIS considered the Yazidi community “*kuffar*”, meaning infidels, and used this argument to justify all of their actions against the religious minority.⁶⁵ Because of this, the so-called Islamic State decided to include Yazidis in their agenda of mass murder and enslavement.⁶⁶ Most of the men who did not want to convert were killed, and the women and children were taken away to be enslaved and indoctrinated later.⁶⁷

Regarding ISIS’s agenda against the Yazidi community, it can be stated that their purpose was to truly eradicate them. While they also persecuted members of other religions, such as Christians and Shi’ites and Alawites, they were particularly violent and cruel towards the Yazidi community.⁶⁸ Behind such violence and discrimination, was the thought of them being inferior because they were not worshippers of a book, like followers of other religions. ISIS’s justification for the persecution of the Yazidis solely lay in the community’s religious beliefs and on their view of the Yazidi people as “devil-worshippers”.⁶⁹

1.2.2 Sexual violence against Yazidi women

The systematic rape of Yazidi women and girls became a part of the organization as the group had the intention of reviving slavery as an institution.⁷⁰ In fact, ISIS became one of the first groups to create an open public market for human trafficking.⁷¹ As UN investigator Zainab Bangura pointed out, ISIS institutionalized sexual violence.⁷² We are not talking about sexual

⁶¹Peshmerga are the Kurdish military forces of the autonomous region of Kurdistan in Iraq. See <https://thekurdishproject.org/history-and-culture/kurdish-nationalism/kurdish-peshmerga/>.

⁶²HRC, 2016, p. 6.

⁶³ UN, Press Release Security Council, ISIL/Da’esh Committed Genocide of Yazidi, War Crimes against Unarmed Cadets, Military Personnel in Iraq, Investigative Team Head Tells Security Council, 10 May 2021, SC/14514, p. 1.

⁶⁴HRC, 2016, p.7.

⁶⁵ Samantha Hechler, 2017, p. 600.

⁶⁶Ibidem.

⁶⁷HRC, 2015, p.6.

⁶⁸ Vicken Cheterian, 2019, p. 632.

⁶⁹ Paula Castellano San José, 2020, p. 61.

⁷⁰ Rukmini Callimachi, 2015.

⁷¹ Shannon A. Welch, 2017, p. 165,169.

⁷² James Reinl, 2015.

violence as means of seeking self-pleasure, but as a tactic of war, as an institution. With regards to the organization's sex market involving Yazidi women and girls, it was based on a series of instructions provided by the group in October 2014.⁷³ These instructions, titled "Questions and Answers on Taking Captives as Slaves" were published in *Dabiq*, the English version of the Islamic State magazine.⁷⁴ According to this pamphlet, Yazidi women and girls can be raped and sold by ISIS soldiers because they are considered to be their property. Yazidi women and girls are considered as "sabaya", meaning slaves.⁷⁵

There are many testimonies and reports on what Yazidi women and girls went through when held in captivity by ISIS. The first step consisted in separating women and girls from their male relatives aged 12 and above.⁷⁶ Elderly women were considered unfit for the purpose of sexual slavery, as they couldn't serve the objective of bearing future generations of ISIS soldiers and were thus simply killed.⁷⁷ Survivors have told journalists that after their capture in Sinjar, they were brought on buses to Mosul and other Iraqi towns to be placed in a market and sold to soldiers of the so-called Islamic State.⁷⁸ Once these women and girls were placed into this slave market installed by ISIS, they were repeatedly raped, subjected to sexual torture, and forced to perform all the duties imposed by their capturers.⁷⁹ It is important to emphasize that these women and girls were not mass-raped when they were first captured and put into holding sites. In fact, they were "preserved" until sold.⁸⁰ This detail demonstrates well how these women were captured to serve an agenda of sexual trafficking. They were treated like merchandise and sold repeatedly until their "owner" would become fed up and sell them to someone else. One survivor, who was held for 12 months and sold approximately 15 times, stated: "*We were driven into Raqqah city at night and held in a building there. I was there for three weeks before I was sold. Throughout that time, ISIS fighters were coming to buy women and girls. All of us were Yazidi. I think I was sold about 15 times in all. It is hard to remember all those who bought me* ». Many Yazidi women and girls were first held in Iraq and then transferred to Syria.⁸¹

According to the report issued by the the Independent International Commission of Inquiry on the Syrian Arab Republic, in the Human Rights Council in 2016, ISIS categorized

⁷³ Paula Castellano San José, 2020, p. 62.

⁷⁴ Ibidem.

⁷⁵ Ibidem.

⁷⁶HRC, 2016, p. 10.

⁷⁷Global Justice Center, 2016, p. 5.

⁷⁸ Rukmini Callimachi, 2015.

⁷⁹ Ibidem.

⁸⁰HRC, 2016, p. 12.

⁸¹ HRC, 2016, p. 10.

women based on their marital status, and only girls under the age of eight were allowed to remain with their mothers. Those who were unmarried understood that they would be safer if they pretended to have children or to be married, but many were discovered and punished. Others attempted to make themselves look unattractive and undesirable by dirtying and scratching their faces.⁸² Some even attempted suicide as they believed it was better to die than endure such brutality.⁸³ This is a very strong aspect of such brutality, one can only begin to imagine how unbearable these conditions were. Once bought, women and girls endured continuous acts of rape, and if they did not obey, they were confronted with severe beatings or gang rapes.⁸⁴ The person who buys a Yazidi women automatically becomes her owner and can resell, gift, or do whatever they want with their so-called “slave”.⁸⁵ Gang rape was also most of the times the punishment provided when victims tried to escape and were caught doing it.⁸⁶

Apart from the obvious physical trauma that Yazidi women and girls experienced, the mental trauma is equally present, if not more severe.⁸⁷ Furthermore, when these women were able to escape, they had nothing to return to. Most of the men had died, and their places of origin were uninhabitable. One of the questions that arose when these women were freed from months of captivity by ISIS, was whether their families, if any were still alive, and their religious leaders would accept them back into the community.⁸⁸ Thankfully, the religious community accepted them back and clearly stated that these women remained Yazidi even after all that they had endured.⁸⁹ This is particularly relevant and crucial because it enables those who were, for example, unmarried to get married within their faith, and likewise, those who were married can be taken back and accepted by their families and husbands, regardless of the horrific acts of sexual violence they endured. However, Yazidi women still represent a highly traumatized population due to what they experienced.⁹⁰ Most women, even if accepted back into the community, still face a lot of guilt and shame after being raped and enslaved for so long.⁹¹ Moreover, one cannot forget that trauma resulting from sexual violence can have a lot of intergenerational impacts, such as reproductive repercussions.⁹² Additionally, as Yazidis are

⁸² HRC, 2016, p. 10.

⁸³ HRW, 2015.

⁸⁴ HRC, 2016, p. 14.

⁸⁵ *Idem*, p. 13.

⁸⁶ *Idem*, p. 14.

⁸⁷ Global Justice Center, 2016, p. 3.

⁸⁸ HRC, 2016, p. 16.

⁸⁹ UNHCR, 2015.

⁹⁰ Hawakar Ibrahim et al., 2018, p. 8.

⁹¹ Bou Khalil Rami et al, 2018, p. 113.

⁹² Jehan Mohamed, 2021, p. 9. ; On the reproductive violence against the Yazidis see Aldo Zammit Borda, 2022, p.14- 20.

a highly community-oriented population, women who suffered acts of rape and enslavement can still feel very isolated within the group.⁹³ Therefore, although religious leaders have made an effort and accepted these women back into the community, one cannot argue that the genocide did not happen because of said acceptance. These women still feel highly stigmatized, and their identity within the group has been significantly affected by sexual violence.

2. When sexual violence becomes Genocide

In International Criminal Law, sexual violence can amount to crimes against humanity, war crimes, and in some circumstances, genocide. In this chapter, we will study the crime of genocide and how sexual violence can be used to commit such a crime. Secondly, we will focus on the use of rape, sexual slavery, and enslavement as they are the most relevant forms of sexual violence in the context of the Yazidi genocide.

2.1 Genocide: main elements

The definition of the crime of genocide and the acts through which genocide is committed are present in the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).⁹⁴ This convention represents one of the first major human rights instruments adopted by the United Nations.⁹⁵ The events of World War II and the atrocities committed by the Nazis were behind its elaboration.⁹⁶ The term “genocide” was coined by Raphael Lemkin, a Polish attorney, to describe the destruction of a nation or ethnic group.⁹⁷ Lemkin defined genocide as “mass killings of all members of a nation” and “the coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the group themselves.”⁹⁸ What is particularly interesting about the crime of genocide is that, under article 1 of the Genocide Convention, it is considered a crime under International Law both in war and in peacetime.⁹⁹ The crime of genocide differs from other crimes against humanity, such as mass murder, racial and religious persecution because it requires a specific intent, or *dolus specialis*, to exterminate a protected group.¹⁰⁰

⁹³ Hawakar Ibrahim et al., 2018, p. 8.

⁹⁴ Convention on the Prevention and Punishment of the Crime of Genocide (Genocide convention), 1951.

⁹⁵ Carsten Stahn, 2018, p. 34.

⁹⁶ Gerhard Werle / Florian Jessberger, 2020, p. 337.

⁹⁷ Sharon A. Healey, 1995, p. 364.

⁹⁸ Sherrie L. Russell-Brown, 2003, p. 361.

⁹⁹ Art. 1 of the Genocide Convention.

¹⁰⁰ Sharon A. Healey, 1995, p. 365.

The crime of genocide is defined by article 2 of the Genocide Convention. As stated in the convention, there must be an intention to destroy, in whole or in part, a national, ethnic, racial or religious group through the commission of certain acts.¹⁰¹ These acts include: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part ; imposing measures intended to prevent births within the group; and forcibly transferring children of the group to another group. This definition has been precisely transferred to the Rome Statute of the International Criminal Court in its article 6. Upon examining this list, one can quickly conclude that sexual violence is not explicitly mentioned. However, there are cases where sexual violence is used to destroy an entire group. If one can prove the intent to destroy the group through the act of sexual violence, then it amounts to genocide.¹⁰² The concept of “genocidal sexual violence” will be analyzed further in this chapter.

Furthermore, it is important to establish at this stage that many times the ultimate aim of genocide perpetrators is not to seize territory or achieve a particular military objective.¹⁰³ In fact, perpetrators’ objectives may vary depending on the context of the genocide. When the aim stems from ideology, genocide perpetrators absolutely believe that the targeted group needs to be destroyed for the “greater good” of the new society they intend to build.¹⁰⁴ ISIS justifies its acts with religion¹⁰⁵ and believes that its actions are meant to create a better world. They see themselves as the ones who will “purify”¹⁰⁶ society and do so through terrible acts of terror, such as sexual violence, completely dehumanizing their victims. In an article published in the magazine *Dabiq*, ISIS states while citing religious texts “enslaving the families of the kuffār [infidels] and taking their women as concubines is a firm established aspect of the [Shariah]”.¹⁰⁷ If we look at our specific case of the Yazidi genocide, ISIS believes Yazidis are “infidels” and “devil-worshippers”, earlier in history Rwandan Tutsis were seen as “cockroaches” by Rwandan Hutus, or even earlier Armenians were considered “tubercular microbes”.¹⁰⁸ The common denominator of all these genocides, is that the perpetrators truly believed the world was corrupted, and they were the ones who were going to restore the world by purifying it.¹⁰⁹

¹⁰¹ Article 2 of the Genocide Convention.

¹⁰² ICTY, *Prosecutor v. Kupregki*, Case No. IT-95-16, Trial Chamber, Judgement, 14 January 2000, par. 296.

¹⁰³ ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Chamber, Judgement, 2 September 1998, para. 498.

¹⁰⁴ Sareta Ashraph, 2017, p. 16.

¹⁰⁵ Sarah Myers Raben, 2018, p.244.

¹⁰⁶ Pieter Nanninga, 2019, p.137.

¹⁰⁷ *Dabiq*, Issue 14, p. 17 (2014) cit. por Emely Chertoff, 2017, p. 1062.

¹⁰⁸ Sareta Ashraph, 2017, p. 17.

¹⁰⁹ Pieter Nanninga, 2019, p.138.

Thus, we see that we can take any example of genocide in history, and the ones behind it always believe they are doing society a favor by cleansing it of those considered “unworthy”.

Finally, it is important to clarify that genocide is often misunderstood by the public. While genocide is commonly associated with mass killings,¹¹⁰ it is actually a crime of intent rather than scale.¹¹¹ This is why it is often compared to crimes against humanity. However, genocide differs from crimes against humanity in that it must be committed against members of a specific group, whereas crimes against humanity can be committed against any individual or civilian.¹¹² Moreover, the two crimes are also different in terms of the perpetrator’s intent. Genocide requires an intention to destroy a group, whereas such an intent is not required to prove crimes against humanity.¹¹³ Lastly, genocide can occur at any time and does not have to happen during an armed conflict or part of a widespread attack.¹¹⁴ Therefore, the scope of the crime is limited and primarily focuses on the perpetrator’s intent to destroy, a national, racial, or religious group.

2.2. Mental element: the intent to destroy

To begin with, it is necessary to establish that the crime of genocide has two separate mental elements, one being the general intent (*dolus*) and the other the “intent to destroy” (*dolus specialis*).¹¹⁵ The *dolus* in the crime of genocide relates to the fact that the perpetrator must know that their actions are directed towards a protected group.¹¹⁶ On the other hand, the *dolus specialis* goes beyond the objective elements of the crime and thus constitutes an additional subjective requirement that complements the general intent.¹¹⁷ Therefore, genocide is considered a “crime of ulterior intent” or a “goal-oriented crime”.¹¹⁸

Once again, the *Akayesu* case was the first case where this special intent was explained. The ICTR, defined this specific intent as “the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act

¹¹⁰ Sareta Ashraph, 2017, p. 17.

¹¹¹ Robert Coalson, 2013.

¹¹² Jonathan M.H. Short, 2003, p.508.

¹¹³ Ibidem.

¹¹⁴ Ibidem.

¹¹⁵ Kai Ambos, 2009, p. 834.

¹¹⁶ Ibidem.

¹¹⁷ Kai Ambos, 2009, p. 835.

¹¹⁸ Ibidem.

charged.”¹¹⁹ This reasoning was followed by most of the case-law of the ICTR.¹²⁰ When it comes to the ICTY, the same approach presented in *Akayesu* was used. In particular, there are two cases where one can identify how important and extreme this *dolus specialis* is. One of them is the *Jelusic*¹²¹ case, where this specific intent was not proved and that the actions of Jelusic were only random and not “motivated by the *dolus specialis* of the crime”.¹²² The *Krstić*¹²³ case is also particularly relevant when it comes to properly explain the notion of “intent to destroy”. The removal of a military threat was at stake in this case, where mass killings of Bosnian Muslims by Serb forces occurred in Srebrenica.¹²⁴ In this case, General Krstić was not convicted of genocide because it was not possible to prove the specific intent. He was indeed convicted of aiding and abetting to genocide because he actually knew that some of his subordinates had a genocidal intent.¹²⁵ What came out clearly from this case is that each individual must have the required intent in order for genocide to be accomplished.¹²⁶ This approach taken by the ICTY and most international tribunals such as the International Court of Justice (ICJ) and the International Criminal Court (ICC) is a “intent-based approach” which suggests that one individual must have the intent to destroy the group through his own conduct.¹²⁷ Similarly, the Darfur Commission of Inquiry also follows the approach that a specific intent “implies that the perpetrator consciously desired the prohibited acts he committed to result in the destruction of a protected group”.¹²⁸ Even if this “intent-based approach” is mostly accepted and followed by the doctrine, some authors criticize it and believe it too unrealistic.¹²⁹

A “knowledge-based approach” is defended as it makes it possible for genocide to be proven even if the perpetrator only had knowledge that he was acting according to a genocidal

¹¹⁹ ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Chamber, Judgement, 2 September 1998, para. 498.

¹²⁰ICTR, *Prosecutor v. Georges Rutaganda*, Case No. ICTR-96-3-T, Trial Chamber, Judgement, 6 December 1999, para. 61 ; ICTR, *Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-T, Trial Chamber I, Judgement, 7 June 2001, para. 62 ; ICTR, *Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-T, Trial Chamber I, Judgement, 27 January 2000, para. 164.

¹²¹ ICTY, *Prosecutor v. Goran Jelusic*, Case No. IT-95-10-T, Trial Chamber, judgement, 14 December 1999.

¹²²ICTY, *Prosecutor v. Goran Jelusic*, Case No. IT-95-10-T, Trial Chamber, judgement, 14 December 1999, para. 108.

¹²³ ICTY, *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T, Trial Chamber, Judgement, 2 August 2001.

¹²⁴ Douglas Guilfoyle, 2016, p.282.

¹²⁵ Ibidem.

¹²⁶ICTY, *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T, Trial Chamber, Judgement, 2 August 2001, para 549.

¹²⁷ Elizabeth Wilmshurst, 2010, p. 223.

¹²⁸ Kai Ambos, 2009, p. 839.

¹²⁹ Ibidem.

campaign.¹³⁰ This approach was also proposed by the prosecutor in the *Jelisić* case, however it was dismissed by the trial chamber.¹³¹

Furthermore, this specific intent is what differentiates genocide from other international crimes such as crimes against humanity, creating a hierarchy between crimes and making genocide “the crimes of all crimes”¹³². In fact, the UN International Law Commission (ILC) in 1996 commented that a general intent would not be sufficient to prove the crime of genocide.¹³³ A more specific intent is required, and genocide “requires a particular state of mind or a specific intent with respect to the overall consequence of the prohibited act”.¹³⁴ However, the difficulty that arises with this specific intent is that it is challenging to prove in practice.¹³⁵ It is highly unlikely to find evidence that someone acted with such intent to destroy in part or in whole a protected group.¹³⁶ This difficulty stems from the fact that intent is part of someone’s state of mind, making it very hard to prove.¹³⁷ In most cases, this intent is only proven if the perpetrator acted within a proper genocidal plan or policy.¹³⁸ However, the presence of a genocidal campaign or policy does not necessarily prove an individual's intent to destroy.¹³⁹ As we can see what makes it extremely difficult to prove the specific intent to destroy is the fact that the intent is based on the individual rather than the group. If we take an approach of the intent to destroy as being institutionalized, we can see that it becomes much easier to prove it. This is why the “knowledge-based” approach is the key to solve this difficulty in proving the intent to destroy. By combining the institutionalized intent to destroy and the “knowledge-based” approach of the intent to destroy of the individual, it becomes enough to prove the international crime of genocide.

From our point of view, on one hand, it is understandable that such a high level of intent is required for the crime of genocide to be committed. Indeed, if a similar level of intent was not required, genocide would become a common crime, and many acts would fall under its scope. On the other hand, making the intent requirement so specific makes it difficult to convict

¹³⁰ Katherine Goldsmith, 2010, p.238.

¹³¹ ICTY, *Prosecutor v. Goran Jelisić*, Case No. IT-95-10-T, Trial Chamber, judgement, 14 December 1999, para. 52.

¹³² Katherine Goldsmith, 2010, p. 241.

¹³³ *Ibidem*.

¹³⁴ Yearbook of the International Law Commission, 1996, p. 44 (para.5).

¹³⁵ Werle / Jessberger, 2020, p. 366.

¹³⁶ Katherine Goldsmith, 2010, p.242.

¹³⁷ *Ibidem*.

¹³⁸ ICTY, *Prosecutor v. Goran Jelisić*, Case No. IT-95-10-T, Trial Chamber, judgement, 14 December 1999, para. 48.

¹³⁹ ICTY, *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T, Trial Chamber, Judgement, 2 August 2001, para. 549.

people who have clearly carried out genocidal campaigns. In this regard, as we have already stated, a “knowledge-based” approach would be preferred so that the ones who act with the knowledge that they may bring about the destruction of a protected group may be convicted of genocide as well.

2.3 Sexual violence as a mean to commit genocide

Sexual violence against women in armed conflict used to be seen as a mere spoil of war, something that would happen as a consequence, not as a tactic of war. For this reason, the international community closed its eyes to prosecuting acts of sexual violence during any armed conflict for a large part of history. As Kristen Boon has noted, such acts were for a very long time considered as “moral crimes and outrages on honor”, putting the emphasis on the honor of the victim rather than on the physical abuse and trauma that came from the act.¹⁴⁰ In fact, Article 27 of the IV Geneva Convention¹⁴¹ states exactly that. However, history changed with the implementation of both the international Tribunal for Rwanda (ICTR) and the International Tribunal for former Yugoslavia (ICTY), where finally the international community recognized the importance of these crimes.¹⁴² In Bosnia, there are records of up to 60’000 women and girls who were raped as part of an “ethnic cleansing campaign”.¹⁴³ As for Rwanda, between 250’000 and 500’000 women and girls were raped as a strategic weapon installed to eradicate Tutsis during the 100-day genocide¹⁴⁴.¹⁴⁵ Sexual violence went from being considered a simple consequence of war to a full strategic weapon of war that could amount to crimes of war, crimes against humanity and in the most severe cases genocide. For the purposes of our work, we will mainly focus on the analysis of the latter.

When sexual violence is part of a strategic tactic of war and viewed as a true weapon of war, in some circumstances one can talk about genocidal sexual violence.¹⁴⁶ It is interesting because it is a crime that involves both gender and ethnicity elements, and it is important to understand that some women are not targeted randomly; they are targeted by certain men because they belong to a certain group.¹⁴⁷ Instead of viewing sexual violence as an act that

¹⁴⁰ Kristen Boon, 2001, p. 625,627.

¹⁴¹ Fourth Geneva Convention, 1949.

¹⁴² Jonathan M.H., 2003, p. 508.

¹⁴³ Kerry F. Crawford, 2017, p. 42.

¹⁴⁴ Between April 7th and July 15th, 1994, during the Rwandan Civil War, about 800’000 people were slaughtered by Hutu extremists, they were mainly targeting the Tutsi community. See BBC, 2019.

¹⁴⁵ Kerry F. Crawford, 2017, p. 42.

¹⁴⁶ Sherrie L. Russell-Brown, 2003, p. 2.

¹⁴⁷ Catharine A. MacKinnon, 1993, p. 59.

occurs out of control during an armed conflict, we should rather talk about sexual violence that is under control.¹⁴⁸ In other words, when acts of sexual violence are accompanied with the intention to truly destroy, in whole or in part, a national, ethnic, or religious group, then these acts are considered to be part of a strategy of genocide.¹⁴⁹

Sexual violence as a means of committing genocide is mostly, but not only, directed at the women of the protected group. One must think that sexual violence is not a very effective way of destroying a group, maybe thinking that mass killing would be way more effective for the purpose of destroying the group.¹⁵⁰ However, through sexual violence, the perpetrators not only destroy the individual victim (in this case, women), but they also completely dismantle the community they belong to.¹⁵¹ This was clearly established in the landmark case of *Jean-Paul Akayesu* : “Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.”¹⁵² Furthermore, one can argue that sexual violence, when carried out in a genocidal campaign, can be considered a step to ultimately annihilate the protected group.¹⁵³ Ultimately, sexual violence is both an attack on the victim and on the identity and existence of the entire group.

Going back to the genocide Convention, we have already established that sexual violence is not explicitly listed as an act of genocide. However, sexual violence often falls under the category of “causing serious bodily or mental harm to members of the group”, which is included in the list of acts in Article 2 of the Convention.¹⁵⁴ In fact, acts of sexual violence, such as rape, can certainly fit into this category for obvious reasons. In addition, it was also through this reasoning that rape was considered genocide in the case of *Jean Paul Akayesu*.¹⁵⁵ In this landmark case held by the International tribunal for Rwanda, an individual was declared guilty of genocide for the first time ever on the basis of, among other things, of acts of rape and other forms of sexual violence.¹⁵⁶

¹⁴⁸ Catharine A. MacKinnon, 1993, p. 66.

¹⁴⁹ Sareta Ashraph, 2017, p. 20.

¹⁵⁰ Ibidem.

¹⁵¹ Ibidem.

¹⁵² ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Chamber, Judgement, 2 September 1998, para. 731.

¹⁵³ Sareta Ashraph, 2017, p. 20.

¹⁵⁴ Chile Eboe-Osuji, 2012, p.160.

¹⁵⁵ Ibidem.

¹⁵⁶ Sherrie L. Russell-Brown, 2003, p. 2.

2.3.1 Use of women to destroy a protected group

The Genocide Convention makes it very clear that in order to prove genocide, the material element of the existence of a protected group is crucial. It is important to note that the Genocide Convention only applies when dealing with the destruction, in whole or in part, of a national, ethnic, racial, or religious group. Therefore, for the purpose of this work, it is crucial to establish how gender, specifically women, are used to annihilate or destroy a protected group under the Genocide Convention. Although gender is not explicitly listed as a protected group in article 2 of the Genocide Convention, the jurisprudence established by International Tribunals has shown that acts of sexual violence can still amount to the annihilation of a protected group.¹⁵⁷

As it was established by jurisprudence, “the prohibited act must be committed against a person based on that person’s membership in a specific group and specifically because of the person belonged to this group, such that the real victim is not merely the person but the group itself”¹⁵⁸. Here we can clearly see that if we take the example of women being targeted by acts of sexual violence, they are only targeted because they are part of a certain group and not because they are women as individuals. Yazidi women and girls are being raped and enslaved because they are Yazidi women and not because they are *only* women.

In certain cultures, such as more patriarchal ones, women and girls often carry the burden of their family’s honor.¹⁵⁹ Consequently, attacking this said honor through acts of sexual violence is particularly effective in carrying out the annihilation of the victim’s group.¹⁶⁰ Typically, these women are cast out of their communities, left unable to marry, abandoned by their husbands, and in extreme cases, even killed. Using women as a means to annihilate the protected group is extremely perverse. The intention is not to attack women, ultimately the aim of such acts is to attack the entire group. From our point of view, this leads to an extreme double dehumanization of women, as they suffer from both the attacks and the outcasting by their communities. In genocidal campaigns, women are used to humiliate and eventually destroy the entire group. Hilmi Zawati stated: “National and racial motives were the central elements in the

¹⁵⁷ Sareta Ashraph, 2017, p. 17.

¹⁵⁸ ICTR, *Prosecutor v. Muhimana*, Case No. ICTR-95-1B-T, Trial chamber III, Judgment, 28 April 2005, para. 500 ; ICTR, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, Trial Chamber II, Judgment, 1 December 2003, para. 813.

¹⁵⁹ Sareta Ashraph, 2017, p. 20.

¹⁶⁰ *Ibidem*.

dehumanization process of Bosnian, Kosovar, and Tutsi women by making their bodies the battlefield where warriors displayed their hatred systematically and systematically”.¹⁶¹

Furthermore, another aspect of sexual violence when carried out in a genocidal campaign is that many times it is used to prevent births. For example, during the Bosnian conflict, Muslim women were raped and mostly became pregnant with “Serbian” babies. This was deliberately done by Serbian forces so women wouldn’t carry another generation of Bosnian Muslims but of Serbians. In fact, there were proper rape camps where women would be raped on repeatedly and held for months.¹⁶² Similarly, ISIS, even though it didn’t carry out a forced impregnation campaign, any resulting child from a Yazidi woman or any woman would become Muslim “Child of the Islamic State”.¹⁶³ This is also true because in many cultures, the ethnicity and religious identity of a child is passed down by their father¹⁶⁴, so if you kill all the male members of the group and rape the women with the intention of impregnating them, then the objective of creating a new generation of Serbians or in our case, ISIS members, is definitely attained. Actually, in the case of the Yazidis, as mentioned before, it is impossible to convert to Yazidism. The only way to be part of the religious group is to be born into it, thus the only possible way is to have Yazidi parents. If women and men are separated and eventually male members are killed, this makes it impossible for a new generation of Yazidis to be born.¹⁶⁵

2.3.2 Rape

Rape gained visibility and its first definition in international law in the context of the Rwandan conflict, and more specifically in the landmark case of *Jean-Paul Akayesu*. Essentially, there are three lines of thinking when it comes to the elements that define the crime of rape: one that focus itself on a “broad conceptual definition”, one that specifically focuses on the body parts involved, thus being more restrictive, and finally one that involves the element of non-consent.¹⁶⁶

¹⁶¹ Hilmi M. Zawati, 2010, p. 173.

¹⁶² During the Bosnian War, Bosnian Serb forces while carrying a campaign of ethnic cleansing against Bosniaks and Croats set up rape camps in detention centers, schools, or other public buildings, where women and girls were forcibly taken and subjected to sexual violence. Such use of rape camps was acknowledged in a few cases of the ICTY. See for example ICTY, *The Prosecutor v. Kunarac, Kovac & Vokovic*, Case No. IT-96-23-T & IT-96-23/1-T, Trial Chamber, Judgment, 22 February 2001, para. 576.

¹⁶³ Sareta Ashraph, 2017, p. 23.

¹⁶⁴ Idem, p. 19.

¹⁶⁵ Sareta Ashraph, 2017, p. 19.

¹⁶⁶ Paula Castellano San José, 2020, p. 52.

The ICTR defined rape as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.”¹⁶⁷ By glancing at this definition, one can see that there are no elements of consent present in it. In fact, in *Akayesu*, the trial explicitly explained that the lack of consent expressed by the victim is not a prerequisite for rape.¹⁶⁸ Furthermore, according to this definition, « invasion of a sexual nature » must be understood in a broader way, which may include acts from ranging from penetration to acts that don’t involve any touching of the body.¹⁶⁹ Therefore, this definition could also include acts that simply have a sexual connotation.¹⁷⁰ The definition changed and evolved with the ICTY, which provided other elements to define rape at international level. In 1998, in the *Prosecutor v. Furundzija*¹⁷¹ case, rape was defined in a much more specific and restrictive way: “ i) the sexual penetration, however slight: a) of the vagina or anus by the penis of the perpetrator or any other object used by the perpetrator, or b) of the mouth of the victim by the penis of the perpetrator; ii) by coercion or force or threat of force against the victim or third person”¹⁷² Some believe that the tribunal, with this definition, did not completely deviate from the definition given by the ICTR but rather specified the elements of rape.¹⁷³ In this definition, the tribunal focuses much more on the physical aspects of rape by mentioning the precise facts that can motivate rape, as well as the specific parts of the human body involved in rape and the instruments used in rape.¹⁷⁴ Still, in the *Prosecutor v. Kunarac, Kovac & Vokovic* (also *Foca* case)¹⁷⁵, the ICTY trial chamber did not entirely deviate from the *Furundzija* definition but instead adopted the concept of lack of consent, deviating from the concept of coercion.¹⁷⁶ These are the main examples of the three lines of thinking regarding the definition of rape; however, as of today, there is still not consensus regarding an appropriate definition of rape in international law.¹⁷⁷

¹⁶⁷ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Chamber, Judgement, 2 September 1998, para. 598.

¹⁶⁸ Fraciah Njoroge, 2016. p.10.

¹⁶⁹ ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Chamber, Judgement, 2 September 1998, para. 688.

¹⁷⁰ Gloria Gaggioli, 2014, p. 506. See also the Pauline Nyiramasuhuko case, where a woman was convicted of charges of rape and genocide although she never raped anyone. ICTR, *The prosecutor v. Nyiramasuhuko*, Case No. ICTR-98-42-T, Trial Chamber, Judgement, 24 June 2011.

¹⁷¹ ICTY, *The Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-T, Trial Chamber, Judgement, 10 December 1998.

¹⁷² ICTY, *The Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-T, Trial Chamber, Judgement, 10 December 1998, para. 185.

¹⁷³ ICTR, *Prosecutor v. Muhimana*, Case No. ICTR-95-1B-T, Trial chamber III, Judgment, 28 April 2005, paras 547–551.; Gloria Gaggioli, 2014, p.507.

¹⁷⁴ Filipe Augusto Lopes Carvalho, 2021, p. 811.

¹⁷⁵ ICTY, *The Prosecutor v. Kunarac, Kovac & Vokovic*, Case No. IT-96-23-T & IT-96-23/1-T, Trial Chamber, Judgment, 22 February 2001.

¹⁷⁶ ICTY, *The Prosecutor v. Kunarac, Kovac & Vokovic*, Case No. IT-96-23-T & IT-96-23/1-T, Trial Chamber, Judgment, 22 February 2001, para. 460.

¹⁷⁷ Phillip Weiner, 2013, p. 1207, 1223.

In International Humanitarian Law (IHL), rape when committed in an international or non-international armed conflict constitutes a violation of IHL. However, the Geneva Conventions describe rape through the lens of an attack on women's honor and not really associate it with a crime of violence.¹⁷⁸ Article 27 of the IV Geneva Convention states "Women shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault". One might think this is somewhat old-fashioned and not really doing much justice to what rape actually is. But we cannot forget that the Geneva Conventions were written in the 40s and the context was definitely different at the time.

In International Criminal Law, Rape can fall under the categories of crimes against humanity, war crimes and in some circumstances, it may amount to genocide. Article 6 of the Rome Statute defines the crime of genocide and what acts fall under this crime. As for article 7 (1)(g) of the Rome Statute, rape may amount to crimes against humanity if part of a widespread or systematic attack directed at a civilian population. Under article 8 (2) (b) [xxii], rape and other forms of sexual violence are considered a war crime. The fact that rape often included under the chapeau of another crime is somewhat criticized by some. By always associating rape with another crime, it makes the crime of rape appear as a lesser offense, as if it is not as severe.¹⁷⁹ Nevertheless, even if Rape would not be specifically prohibited by IHL or ICL, it would still be considered as a peremptory norm of International Law.¹⁸⁰

Rape, when committed with the intention of destroying or annihilating a group, is understood by its perpetrators as necessary and effective to humiliate and isolate not only women but also men from the same community.¹⁸¹ Most of the time, rape completely destroys relations between women and men. In some cultures, women are no longer considered pure, thus deemed unfit to marry. Rape inflicts irreversible trauma, which may prevent women from procreating or having active sexual lives in their future. When institutionalized rape can destroy an entire community, as seen in the Yazidi genocide.

¹⁷⁸ Daniela De Vito /Aisha Gill /Damien Short, 2009, p. 29.

¹⁷⁹ Mark Ellis, 2007, p. 225, 246.

¹⁸⁰ José Alberto Azeredo Lopes, 2022.

¹⁸¹ Sarnata Reynolds, 1998, p. 601.

2.3.3 Sexual slavery and enslavement

Prior to the 1990s, sexual slavery was not considered a serious or important issue, much like other forms of sexual violence against women.¹⁸² The lack of prosecution for the “Comfort Women”¹⁸³ during the Tokyo Trials serves as one of the most shocking examples of this.¹⁸⁴ It was only with the Rome Statute that sexual slavery was recognized as a separate crime, although it had previously been intertwined with forced marriage, rape and forced labour.¹⁸⁵ Nonetheless, even if sexual slavery had not been specifically prohibited by any convention (which it is), it would still be part of the core of international law, known as *ius cogens*.¹⁸⁶

In IHL, sexual slavery and enslavement are implicitly prohibited by common article 3 /1 (1) (c) of the Geneva Conventions, as it establishes an obligation of humane treatment.¹⁸⁷ Article 75/2 (b) of Additional Protocol I¹⁸⁸ also implicitly prohibits sexual slavery, by prohibiting acts such as "outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution, and any form of indecent assault.". Finally, article 4 of Additional Protocol II¹⁸⁹, also prohibits such acts.

Under ICL, sexual slavery is nowadays specifically considered a separate war crime in article 8 (2)(e)[vi] and a crime against humanity in article 7 (1) (g) of the Rome Statute of the ICC. Its material elements are : 1) the perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty; and 2) the perpetrator caused such person or persons to engage in one or more acts of a sexual nature. In reality, sexual slavery is defined as slavery only if it has a sexual nature.¹⁹⁰ In

¹⁸² Samar El-Masri, 2018, p.1049.

¹⁸³The expression « Comfort Women » refers to an estimated of hundreds of thousands of women and girls from occupied territories including Korea, China, the Philippines, among other parts of Asia, that were recruited and forced to provide sexual services to Japanese soldiers during World War II. Despite extensive evidence of this forced prostitution system, the Japanese government has not acknowledged it and has not provided proper reparations or compensation to the surviving comfort women. See Jimin Kim / Berly Milner (Lee) Bisland / Sunghee Shin, 2019, p. 58.

¹⁸⁴ Patricia Viseur Sellers / Jocelyn Getgen Kestenbaum, 2020, p. 10.

¹⁸⁵ Samar El-Masri, 2018, p.1050.

¹⁸⁶ David S. Mitchell, 2005, p. 231-232. ; Slavery is considered a peremptory norm of general international law by the International Law Commission. See ILC 2022 report at : <https://legal.un.org/ilc/reports/2022/english/chp4.pdf>

¹⁸⁷ ICRC, Commentary of 2016 of the I Geneva Convention, para. 696.

¹⁸⁸ Protocol I, 1977.

¹⁸⁹ Protocol II, 1977.

¹⁹⁰ Samar El-Masri, 2018, p. 1051.

addition, sexual slavery is also considered a continuing crime as it can be achieved over a period of time and across different geographic places.¹⁹¹

Like rape, the ICC and most international tribunals don't accept the concept of consent in the case of sexual slavery, since its expression is impossible due to the conditions under which the victim is placed.¹⁹² In the context of sexual slavery, if the perpetrator exercised any powers of ownership over the victim, the element of consent is automatically irrelevant as no person would agree to be a slave.¹⁹³ In addition, sexual enslavement is an act of sexual violence recognized in *Akayesu* and in most cases both from the ICTY and ICTR as constituting serious and mental harm to the victims within the understanding of article 2 of the Genocide Convention.¹⁹⁴

On the other hand, enslavement is defined as a crime against humanity in article 7(1)(c) of the Rome Statute. It is different from sexual slavery and it requires the perpetrator to have “exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.”¹⁹⁵ However, in reality, enslavement includes sexual slavery if the act of ownership includes any act of sexual nature.¹⁹⁶ Detention in rape camps, forced marriage, gang rape and other acts are part of such acts.¹⁹⁷

In the context of our case study, sexual slavery was taken to an extreme level as the enslavement of Yazidi Women was deeply institutionalized within ISIS.¹⁹⁸ ISIS was able to implement a slave trade that had not been seen for centuries, where Yazidi women were treated as chattel and traded as such.¹⁹⁹ What is particularly interesting about sexual slavery and ISIS is that they never tried to hide their slavery policy. In fact, they proudly announced and described their slave sex market in *Dabiq*, the Islamic State magazine.²⁰⁰ ISIS was not ashamed or fearful of admitting that they had a policy of sexual slavery because they truly believed it was justified religiously, at least according to their interpretation of Islamic Law. According to one of ISIS articles, the enslavement of Yazidi women was not meant to bring sexual pleasure

¹⁹¹ Samar El-Masri, 2018, p. 1051.

¹⁹² Agnieszka Szpak, 2013, p. 322.

¹⁹³ Samar El-Masri, 2018, p.1051.

¹⁹⁴ HRC, 2016, p.24.

¹⁹⁵ HRC, 2016, p.24.

¹⁹⁶ ICTY, *The Prosecutor v. Kunarac, Kovac & Vokovic*, Case No. IT-96-23-T & IT-96-23/1-T, Trial Chamber, Judgment, 22 February 2001, para. 541, 573-74.

¹⁹⁷ Gay J. McDougall, 1998, para. 8

¹⁹⁸ Samar El-Masri, 2018, p.1052.

¹⁹⁹ Samar El-Masri, 2018, p.1052.

²⁰⁰ Global Network of Women Peacebuilders, 2020, p. 5.

to their fighters but rather to “help slaves embrace Islam and break free of their chains”.²⁰¹ It is rather ironic from our point of view, that one would put someone in chains to break them from their supposed chains. Furthermore, ISIS also used sexual slavery against Yazidi women to further their institutional and organizational goals. Yazidi Women were seen as offers²⁰² to ISIS fighters so they would be more motivated to bring about the objectives of the Caliphate. Finally, ISIS also was able to make a profit and income from the trade of Yazidi women, as some of them would be sold repeatedly from one fighter to the other.²⁰³ All this aspects show well how ISIS institutionalized sexual slavery and enslavement of Yazidi women.

3. Legal analysis : Genocide of the Yazidis including through acts of sexual violence against women and girls

After establishing the facts and laying down the legal framework, we have reached the stage where we must analyze whether ISIS can be prosecuted for the Genocide of the Yazidi community, based on the sexual violence committed against Yazidi women and girls. In the first instance, we will conduct a legal analysis to determine if ISIS’s actions amounted to the genocide of the Yazidi community, including through acts of sexual violence. We will first assess if the Yazidi community is considered a protected group under the Genocide Convention, then establish if any of the prohibited acts by the Convention were committed by ISIS, and finally analyze the specific intent to destroy the Yazidi community.

A question that arose multiple times during discussions about the qualification of ISIS’s acts towards the Yazidi community was why it is important to label what ISIS did as genocide? Does it trigger new obligations for States to intervene? The reality is that labelling ISIS’s acts against the Yazidi community as genocide acknowledges a few things. Firstly, it acknowledges that ISIS is much more than just a terrorist organization; they are, indeed, belligerents. We have already established this, but by designating ISIS’s actions as genocide, one can reinforce this thought. Secondly, from our perspective, it is calling things by their rightful names. By acknowledging that it was indeed genocide, the suffering of a whole community who lost everything is also recognized.

²⁰¹ Foundation Scelles, 2016.

²⁰² Global Network of Women Peacebuilders, 2020, p. 6.

²⁰³ Ibidem.

In the context of our case-study it has already been declared by the United Nations but, also by some States that ISIS's actions did, in fact, amount to genocide. The International Commission of Inquiry on the Syrian Arab Republic has established in a report presented in the thirty-second session of the Human Rights Council in 2016²⁰⁴, that ISIS committed genocide based on facts from Syria. Similarly, The United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL (UNITAD) has also recognized that ISIS acts in Iraq amounted to the genocide of the Yazidi community.²⁰⁵ Furthermore, regarding States, a number of them have considered ISIS's acts towards the Yazidi community as genocide, including The United States of America in 2016²⁰⁶ and more recently the German Parliament²⁰⁷.

3.1. Are Yazidis a protected group?

As we have established in the previous chapter, for the crime of genocide to be committed, the prohibited acts must be committed against a protected group. The protected groups under article II of Genocide Convention or article 6 of the Rome Statute are any national, ethnic, racial, or religious group as such. The Yazidis can fit two of these categories of protected group: they can potentially be considered an ethnic group and are most definitely a religious group. Ethnic groups are defined as groups "whose members share a common language or culture"²⁰⁸ and religious groups as groups "whose members share the same religion, denomination or mode of worship"²⁰⁹.

Regarding the classification of Yazidis as an ethnic group, there are divergent opinions even within the community itself. Yazidis are particularly present in Syria, Iraq, Armenia, and Turkey, and all share the same language, Kurdish. Most view themselves as ethnically Kurdish, with the exception of those in Armenia, but as followers of the Yazidi religion.²¹⁰ Furthermore,

²⁰⁴ HRC, 2016.

²⁰⁵ UN, Security Council : letter of 1 may 2021. U.N.Doc. S/2021/419 (2021)

²⁰⁶ On March 17 2016, Secretary of State John Kerry on a Press Briefing stated « My purpose in appearing before you today is to assert that, in my judgment, Daesh is responsible for genocide against groups in areas under its control, including Yezidis, Christians, and Shia Muslims ». See at : <https://2009-2017.state.gov/secretary/remarks/2016/03/254782.htm>.

²⁰⁷ Le Monde, 2023.

²⁰⁸ ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Chamber, Judgement, 2 September 1998, para. 513.

²⁰⁹ *Idem*, para. 515.

²¹⁰ HRC, 2016, p.20.

especially in the context of discrimination and segregation from the surrounding Muslim communities, the Yazidi community views itself as a distinct ethnic group.²¹¹

When it comes to classifying Yazidis as a religious group, there is little to no debate around it. As previously explained, Yazidis follow a very ancient religion that has existed for thousands of years. While Yazidism has absorbed elements of other religions, they continue to follow specific traditions and methods of worship. Additionally, members of the community view themselves as a distinct religious group with very specific beliefs. Furthermore, membership of a religious group under the Genocide Convention can also be determined through the lens of the perpetrator, as the jurisprudence of the ICTY and ICTR has suggested.²¹² In fact, ISIS has stated multiple times that they attack the Yazidis because of their religious beliefs, as they consider them devil worshippers. Moreover, ISIS refers to Yazidis as “dirty *kuffars*” and infidels. Through these few examples, one can see that ISIS considers Yazidis as part of a religious group.

To sum up, when looking at the specificities of the Yazidi community, one can say without much opposition that the Yazidis are considered as a religious group under article II of the genocide convention.

3.2 Prohibited acts against Yazidi women

For the purpose of our specific theme throughout this work, we will only focus on the prohibited acts that were committed through sexual violence against Yazidi women. As mentioned before, the following are considered prohibited acts under article 2 of the genocide convention : a) killing members of the group ; b) causing serious bodily or mental harm to members of the group; c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part ; d) imposing measures intended to prevent births within the group. When it comes to sexual violence perpetrated by ISIS against Yazidi women and girls, and these prohibited acts that amount to genocide, letters b) c) and d) are notably relevant.

To begin with, in the *Akayesu* Trial judgement it was established that behavior that amounts to serious bodily or mental harm “may include, but is not necessarily restricted to, acts

²¹¹ HRC, 2016, p.20.

²¹² ICTY, *The Prosecutor v. Stakić*, Case No. IT-97-24-A, Appeals Chamber, Appeals Judgment, 22 March 2006, para. 25 ; ICTR, *The Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64-T, Trial Chamber III, Judgment, 17 June 2004, para. 255 ; ICTR, *Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-T, Trial Chamber I, Judgment, 27 January 2000, para. 161.

of torture, rape, sexual violence or inhuman or degrading treatment”.²¹³ This prohibited act was especially committed through the acts of rape and enslavement of Yazidi women. As it was mentioned before, Yazidi women were part of a sex market institutionalized by ISIS and were sold and raped numerous times. ISIS did not hide their intentions towards Yazidi Women, as they even published publicly in one of their issues of *Dabiq* that enslavement of Yazidi women was permitted. There are hundreds of testimonies from Yazidi women and girls stating that they were raped and sold repeatedly by ISIS fighters. Once again, the *Akayesu* case clearly stated that “rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflicting harm on the victim as he or she suffers both bodily and mental harm... »²¹⁴. Rape causes serious bodily and mental harm on the victim. On one hand, it obviously has a direct impact on the victim, but on the other hand, it also has an impact on the victim’s family or community.²¹⁵ When ISIS rapes Yazidi women and girls as young as nine, they are not only harming them, they are harming the whole community. In this regard we can say that ISIS clearly caused serious bodily and mental harm through the commission of rape against Yazidi women and girls. When it comes to the use of sexual slavery and the harm caused by it, Yazidi women were enslaved by ISIS and made their property. Once bought or gifted by fighters, they become their personal property. Before being sold, Yazidi women and girls are put through a registration process²¹⁶ so their monetary value can be determined.²¹⁷ They are truly treated like chattel, like merchandise. Throughout this registration process one can see how Yazidi women are dehumanized by ISIS. Once their value is determined they are ready to incorporate the sex market which operates both in person and online.²¹⁸ If a woman or girl dares opposing being sold or if she opposes another woman or girl being sold, the consequence is severe beatings and violence. Furthermore, if Yazidi women and girls attempt to escape their “owners”, they risk facing death, gang rapes, and severe physical violence. Once sold, they are forced to perform any task or duty demanded by their “owner” or their family.²¹⁹ They are treated without any dignity or respect and this is justified by their status of “dirty infidels”. Either through rape or

²¹³ ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Chamber, Judgement, 2 September 1998, para. 504.

²¹⁴ *Idem*, para. 731.

²¹⁵ Kelly Askin D., 2003, p. 320.

²¹⁶ Eurojust, 2017, p. 6.

²¹⁷ HRC, 2016, p. 23.

²¹⁸ Eurojust, 2017, p. 6.

²¹⁹ *Ibidem*.

sexual slavery and enslavement ISIS definitely caused serious bodily and mental harm to Yazidi Women but also the Yazidi community as a whole.

In addition, sexual violence against Yazidi women, and more specifically the sexual slavery committed by ISIS, also constitutes the prohibited act of deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part. Indeed, this prohibited act refers, to the fact that the perpetrator “does not immediately kill the members of the group, but which, ultimately, seeks their physical destruction”.²²⁰ Rape fits into this category of prohibited acts, as in the long term, it may seek the physical destruction of the group. However, in the more immediate term, it does not lead to the death of the members of the group. As we have already mentioned several times, Yazidi women and girls are subjected to acts of rape repeatedly, were put through a sex market and sold numerous times, becoming mere property.

Furthermore, another prohibited act under Article 2 of the Genocide Convention is imposing measures intended to prevent births within the group. These measures can include sexual violence, and more specifically, rape. According to the *Akayesu* case, rape can be used as a measure to prevent births “when the person raped subsequently refuses to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate”.²²¹ Following the enslavement and repeatedly acts of rape, Yazidi women are bound to not trust anyone around them, particularly men, as many of them experienced their first sexual experience by being raped. Many believe they have lost their honor and are unworthy to marry. While others simply cannot imagine any future relationships with men, due to the trauma endured during their captivity. In this regard, one can say that sexual violence against Yazidi women and girls was used as a measure to prevent births within the group.

In conclusion, through the use of sexual violence, namely rape, sexual slavery and enslavement, ISIS committed the prohibited acts of causing serious bodily and mental harm to the victims. They deliberately inflicted on the group conditions of life calculated to bring about its physical destruction in whole or in part and imposed measures intended to prevent births within the group.

²²⁰ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Chamber, Judgement, 2 September 1998, para. 505.

²²¹ *Idem*, para. 508.

3.3 Intent to destroy the Yazidis

The prohibited acts having been committed, we still need to analyze whether ISIS committed them with the intent to destroy, in whole or in part, the Yazidis. This intent can usually be determined not only through the conduct of the perpetrators but also through statements. In our case study, this intent is clearly seen through ISIS's justification for attacking the Yazidis, specifically when it comes to the rape and enslavement of Yazidi women. ISIS's justification of their acts through religion and stating that Yazidis are targeted because they are Yazidis is the first indication that there is a specific intent to destroy the community.

The intent to destroy in whole or in part a protected group can be determined from the perpetrator's "deeds and utterances considered together, as well as from the general context of the perpetration of other culpable acts systematically directed against the group".²²² ISIS has published multiple statements expressing their intentions towards the Yazidis, including towards women and girls, especially in their articles published in *Dabiq*. In an article entitled "the Revival of Slavery Before the Hour", ISIS explains how the Yazidis are a specific group that has existed for thousands of years and needs to be "dealt with". Furthermore, ISIS's intent to destroy the Yazidis can also be seen through the fact that they are not given the opportunity to pay the *jizya*²²³, which other religious groups such as Catholics or Jews can. This gives them the only choice of conversion or death.

In the case of Yazidi women, sexual slavery is permitted by their version of the Shariah, and ISIS states "Their women can be taken as slaves and their property can be seized. They are apostate heretics whose repentance cannot be accepted. Rather they are to be killed wherever they are found (...)"²²⁴ From the day they set foot in Sinjar, there is no doubt regarding ISIS's intent to destroy the Yazidi community, as they attacked the Yazidis because they were Yazidis. They raped and enslaved Yazidi women because they were Yazidi. Even if ISIS did in fact target other groups, nothing is comparable to the attacks on the Yazidis. There were no other women who were sexually enslaved and sold in their sex markets. Others could continue to live their lives by paying a tax, probably not very pleasant ones, but they weren't persecuted on the same scale as Yazidis. As "infidels" and "devil-worshippers" Yazidis were not worthy of sharing the same land as ISIS and live under their control.

²²²ICTR, The Prosecutor v. Gacumbitsi, Case No. ICTR-2001-64-T, Trial Chamber III, Judgment, 17 June 2004, para. 252.

²²³ Tax to be paid to avoid conversion or death, see HRC, 2016, p. 29.

²²⁴ *Dabiq*, Issue 10 (June 2015), p.49 cit. por. Christian Tomushact, 2015, p. 225.

Ultimately, there is no doubt regarding ISIS's intent to destroy the Yazidis. This intent can be seen through ISIS's religious justification for their actions, communications and publications, and finally through institutionalized acts such as rape and a system of sexual slavery of Yazidi women. ISIS's institutionalized intent to destroy the Yazidis was evident in the way they systematically targeted Yazidi villages, separated men from women and children, and subjected them to brutal violence and inhumane conditions. One can say that ISIS did in fact commit the prohibited acts against the Yazidis with the intent to destroy them in whole or in part.

4. Accountability and Prosecution of ISIS members

Having confronted our findings with the legal framework and concluding that ISIS did commit genocide through acts of sexual violence against Yazidi women and girls, it is time to explore the possible avenues for holding ISIS accountable for their actions. In this chapter, we will examine the following mechanisms: prosecution of ISIS members in domestic courts in Iraq and Syria; Prosecution of ISIS members in foreign national courts on the basis of the principle of universal jurisdiction, and finally the possibility of prosecuting ISIS at the ICC.

When it comes to accountability for the Yazidi genocide, there are three possible degrees: accountability of ISIS as a non-stated armed group (NSAG)²²⁵, accountability of States²²⁶, and finally accountability of ISIS members. For the purpose of our work, we will only explore accountability of ISIS members.

4.1 National prosecution

One of the most obvious mechanisms to prosecute ISIS members for their actions is to do so directly in the territories where they committed those actions. As Courts in Iraq and Syria have jurisdiction over where most of the crimes were committed, they are the first ones to prosecute ISIS members, regardless of whether fighters are nationals or not²²⁷. Additionally, both Iraq and Syria have an obligation under customary law, independent of treaty ratification,

²²⁵ We could argue that when a NSAG is highly organized and exercises long-term control over territory and has developed proper institutions could be bound by rules on international responsibility. See Ezequiel Heffes and Brian E. Frenkel, 2017, p. 70

²²⁶ Under the Genocide Convention, States have not only the obligation to prosecute those committing genocide but also to prevent genocide. In the case of the Yazidi genocide, Syria, Iraq and Turkey could eventually be held accountable because they didn't take all measures necessary to prevent it. See Jennifer Venis, *Report calls for ICJ case over state failure to prevent Yazidi Genocide*, 2022.

²²⁷ Samantha Hechler, 2017, p. 609.

to investigate and prosecute those who have committed international crimes on their territories.²²⁸

Regarding Iraq, in 2017, the Iraqi government and the Kurdistan Regional Government, with the assistance of international partners, launched a military campaign against ISIS. During this campaign, thousands of suspected ISIS fighters and affiliates, including children, were detained and tried under Iraq's counterterrorism laws.²²⁹ Complementarily, also in 2017, came about the Investigative Team to Promote Accountability for Crimes Committed by ISIL/Da'esh (UNITAD). UNITAD was established by resolution 2379 which tasked the Secretary-General had to create an investigative team to reinforce Iraqi domestic courts in prosecuting and investigating ISIS members.²³⁰ Their mandate was extended until September 17, 2023, by Resolution 2651²³¹.

Despite thousands of ISIS members being prosecuted in Iraq, victims have not received proper justice. One reason for this lack of justice is that ISIS members, although having committed systematic rape and sexual slavery against Yazidi women, have not been prosecuted for these crimes.²³² Instead, Iraqi courts have only prosecuted them based on their ISIS affiliation²³³, completely disregarding the specific crimes that were committed, which amount to the genocide of the Yazidi community. On the same note, there has not been a single prosecution recognizing the commission of crimes against humanity, war crimes, or genocide by the group's fighters, despite overwhelming evidence of these crimes.²³⁴

What is curious is that on March 1st, 2021, a significant step was taken when the Iraqi parliament passed a law recognizing that crimes such as rape, sexual slavery, and forced pregnancy were committed against Yazidi women.²³⁵ The Yazidi survivors Law provides reparations to survivors in the form of a monthly salary, a plot of land, and access to healthcare, employment, and education.²³⁶ Despite the necessary regulations being passed by parliament, little to no progress has been made in actually implementing the law.²³⁷

When it comes to Syria, the situation is much more complex. In fact, prosecution at the national level requires state cooperation and institutional capacity, which unfortunately is not

²²⁸ Elizabeth Chamblee Bruch, 2004, p. 12 ; Annika Jones, 2013, p. 802.

²²⁹HRW, 2017.

²³⁰ Resolution 2379, 2017, para. 2.

²³¹ Resolution 2651, 2022.

²³² HRW, 2021.

²³³ Ibidem.

²³⁴ Ibidem.

²³⁵HRW, 2021.

²³⁶ Jennifer Venis, 2022.

²³⁷ HRW, 2021.

the case for Syria or Syrian domestic courts.²³⁸ Behind Syrian's inability to properly prosecute and investigate ISIS crimes is the ongoing conflict and the lack of cooperation of Syrian authorities, which are both fundamental elements to properly prosecute actors of international crimes.²³⁹ Like in Iraq, the United Nations has also implemented an investigative team, the International, Impartial, and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 (IIIM). The IIIM was established by resolution A/71/248 adopted by the United Nations General Assembly in 2016.²⁴⁰ What is particularly interesting about the IIIM is that it was instituted and implemented without the consent of Syria to both its creation and operation.²⁴¹ Making it quite different from UNITAD, as Iraq actually sought assistance from the Security Council to better ensure the prosecution and accountability of ISIS members.²⁴² In addition, UNITAD's mandate's limits itself to only investigating ISIS crimes, whereas IIIM can investigate all crimes committed in Syria.

Although national prosecution by domestic courts in Syria and Iraq seems to be the most obvious first step in seeking accountability for ISIS actions, we can see that in this specific case, it is not very effective. Indeed, in the case of Iraq, by only prosecuting ISIS fighters on the grounds of their affiliation to the terrorist group, a large part of the crimes they committed is left out. In the case of acts of sexual violence, the lack of prosecution or even acknowledgement of such acts brings no justice to the victims whatsoever. As Saretha Ashraph well said: "We fail to understand the crimes being committed, the reasons why these crimes are being committed, when we take a gender-blind approach ».²⁴³ In reality, these prosecutions from our point of view do not actually help in the fight for accountability of ISIS members because they do not acknowledge the proper international crimes that were committed by the group and the specificities of such crimes that clearly had a gender context. In the end, it's not only about putting people behind bars; it's about properly investigating and prosecuting these people and acknowledging the proper acts that were committed that brought about the destruction of the group.

²³⁸ Samantha Hechler, 2017, p. 611.

²³⁹ Annika Jones, 2013, p. 805.

²⁴⁰ Resolution A/71/248, 2016.

²⁴¹ Beth Van Schaack, 2018, p. 114.

²⁴² Yuriy Vitrenko, Letter dated 14 August 2017 from the Charge d'affaires a.i. of the Permanent Mission of Iraq to the UN addressed to the President of the Security Council, UN Doc. S/710/2017, 16 August 2017.

²⁴³ Jennifer Venis, 2022.

4.1.1 Universal jurisdiction

In light of the lack of effectiveness of national prosecution by domestic courts in Iraq and Syria, an alternative could be prosecution by domestic courts in foreign countries.²⁴⁴ Indeed, foreign countries can prosecute acts committed outside of their territory and by non-nationals through the use of what we call the universal jurisdiction principle. When it comes to crimes against humanity, war crimes, and genocide, in particular, universal jurisdiction provides the possibility for domestic courts from foreign countries to try actors of such crimes, even if these weren't committed under their jurisdiction.²⁴⁵ These crimes, amongst others, are considered so "heinous" that any country in the world can exercise its judicial power to stop them.²⁴⁶ The use of universal jurisdiction is a crucial tool, particularly in cases where prosecution is not feasible, and it also helps perpetrators be held accountable regardless of their countries' capacity to do so. Ultimately, it is also a way of recognizing that some crimes are so important that they will not be tolerated by the international community.

In the case of crimes committed by ISIS and accountability for such crimes, universal jurisdiction is particularly useful and important, especially given the lack of possibility or conditions to prosecute ISIS fighters in Syria. As of today, there have been two prosecutions of ISIS fighters for genocide through the lens of universal jurisdiction in Germany.²⁴⁷

For the first time ever, in November 2021, the regional Court of Frankfurt convicted Taha A.-J., an Iraqi national and ISIS member, of genocide, crimes against humanity and war crimes based on the enslavement and abuse of Yazidis.²⁴⁸ Taha A.-J. and his wife enslaved a five-year-old Yazidi girl and her mother, subjecting them to slavery and other abuses. He was sentenced to life imprisonment. This case was the first-ever conviction for the Yazidi genocide, including on the grounds of sexual violence.

The second case was handled by the Higher Regional court of Hamburg in July 2022, where Jalda A., a German ISIS member, was convicted of aiding and abetting genocide as well as crimes against humanity and war crimes for the enslavement and abuse of a young Yazidi woman.²⁴⁹ The defendant was sentenced to five years and six months in prison.

²⁴⁴ Samantha Hechler, 2017, p. 619.

²⁴⁵ Elizabeth Chamblee Bruch, 2004, p. 26.

²⁴⁶ Samantha Hechler, 2017, p. 619.

²⁴⁷ Flavia Togni, 2022.

²⁴⁸Taha A.-J. case, Bundesgerichtshof [BGH] [Federal Court of Justice] November 30, 2022.; Doughty street chambers, 2021.

²⁴⁹ Doughty street chambers, 2022.

As we can see, universal jurisdiction represents the best solution to prosecute ISIS members, even though there are only two cases as of today. In addition, the use of universal jurisdiction sends a clear message to the Islamic State that the international community is committed²⁵⁰ to bringing justice to the Yazidis, particularly Yazidi women and girls. Moreover, it is also a proper way to acknowledge what Yazidi women and girls endured in the hands of ISIS and that a genocide was indeed committed. It is crucial that the survivors receive justice, and the full scope of attacks on Yazidis is taken into account when prosecuting ISIS affiliates.²⁵¹ Unfortunately, only Germany has prosecuted ISIS members for genocide under the principle of the universal jurisdiction. We hope that in the future, more countries will make use of the principle of universal jurisdiction and help in the fight to bring justice to the Yazidi survivors.

4.2. Prosecution by the ICC

The international Criminal Court might seem like the most obvious second step in the pursuit of accountability for ISIS members. However, prosecution by the ICC is actually not a possibility for crimes committed by ISIS, including genocide.

Article 13 of the Rome Statute specifies the circumstances under which the International Court exercises jurisdiction. These circumstances include when : 1) A state party refers the situation to the Court (...), 2) The UN Security council refers the situation to the Court under Chapter VII of the UN Charter, and 3) the Prosecutor opens an investigation *proprio motu* under Article 15 on the basis of information on crimes within the jurisdiction of the Court.

Therefore, apart from the case of referral by the UN Security Council, the ICC only has jurisdiction over crimes that have been committed on the territory or by nationals of a State that is a signatory of the Rome Statute.²⁵² Hence, in order for the ICC to prosecute ISIS members, Iraq and Syria should have been signatories of the Rome Statue, which they are not. Besides, both Iraq and Syria have not accepted the court's jurisdiction, which could have been a remedy to the situation.²⁵³

A ratification of the statute is unlikely in the case of Syria, as ratifying the Statute would also grant the Court jurisdiction over the crimes committed by the government.²⁵⁴ In the case of Iraq, the European Union and the UN Human Rights Office have urged the country to accept the ICC jurisdiction. However, no openness has been shown by the country, mainly because

²⁵⁰ Mark Lattimer / Shabnam Mojtahedi / Anna Lee Tucker, 2015, p. 20.

²⁵¹ Jennifer Venis, 2022.

²⁵² Samantha Hechler, 2017, p. 612.

²⁵³ Samantha Hechler, 2017, p. 612.

²⁵⁴ Ibidem.

the court would also have jurisdiction over the crimes committed by high-ranking Iraqi Officials. (encontrar fontes)

Regarding a possible referral of the case by the UN Security Council (UNSC), it is also highly unlikely. especially because a 2014 resolution of the UNSC referring the situation in Syria was vetoed by China and Russia.²⁵⁵ Consequently, no draft resolution has been proposed since then, making this possibility unviable.

On the one hand, another possibility of prosecuting ISIS individuals at the ICC is to prosecute ISIS affiliates who are nationals of States signatories of the Rome Statute. On the other hand, the ICC has a policy of focusing on the prosecution of those individuals who have committed the most mass crimes, which for the most part, are individuals from Iraq and Syria.

Therefore, for the time being, the ICC does not seem to be a possibility for the prosecution of ISIS members for their actions against Yazidi women and girls.

5. Conclusion

If we go back to the beginning of our work, we wanted to know if « the crime of crimes » could be accomplished through acts of sexual violence. The Yazidi genocide is a clear example of this. Sexual violence, such as rape and sexual slavery, played an integral role in the destruction of the group. ISIS acted following precise guidelines and a specific agenda when it came to raping and enslaving Yazidi women and girls. On one hand, they were raped and enslaved because they were women, and on the other hand, because they were Yazidi. We assist to a double dehumanization of women : once because they suffer heinous acts of sexual violence that are done to them because they are women part of a certain group, and twice because, most of the time, they are cast out of their community because of what they have endured; they are no longer fit for purpose, and also suffer with undeniable trauma.

However, one thing is also clear: the Yazidi genocide could not have been accomplished only through acts of sexual violence. Theoretically speaking it could have been possible in the long-term, but in practical terms, or at least in the short-term, it was not really feasible. The killings of older men and the conversion of children played the most important part in the genocide of the group. Nonetheless, there is no question about the important role that sexual violence played in the genocide. If there is one example of widespread sexual violence being

²⁵⁵ Mark Lattimer / Shabnam Mojtahedi / Anna Lee Tucker, 2015, p. 12.

used against women in modern times as a tool of war, it is definitely the ISIS attacks against Yazidi women and girls.

Furthermore, it is deceiving that proper justice has not been attained for victims. Although Germany has prosecuted ISIS members for genocide on the grounds of acts of sexual violence through the use of the universal jurisdiction principle, the journey for proper justice is still far away. The international community must further its efforts in holding ISIS members accountable, and not only by prosecuting their nationals for terrorism or ISIS affiliation but also for international crimes, specifically genocide. This is of utmost importance for the victims because without properly acknowledging what they endured, they can never find some sort of peace where they know that their perpetrators have been held accountable for their actions. Taking a gender-blind approach to the issue is not the answer when it comes to prosecuting ISIS members, given that gender played such an important role in their way of conducting hostilities.

Finally, there are still more than 200.000 Yazidi people internally displaced in camps around Duhok in northern Iraq, and more than 2.700 women and children are still under ISIS captivity. These people deserve to return to their places of origin. They deserve to have their lives back, and this begins with properly prosecuting ISIS members for the genocide of the Yazidis and recognizing in these prosecutions how rape, sexual slavery, and enslavement were crucial in the commission of such crime. Like many survivors state, if it was so easy for foreigners to join ISIS in Syria and Iraq, why is it so difficult to prosecute ISIS members for their atrocities?

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