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# Rape as Genocide Crime in International Criminal Law – The Case of Yazidi Women in Iraq

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## Abstract

*The study aims to shed light on rape as genocide crime by ISIS in International criminal law while taking Yazidi women in Iraq as a case study. In this study, an attempt has been made to determine the impact of rape as genocide crime. The world has been watching collective horror due to brutal atrocities committed by ISIS. Central to this violence was gender-based and sexual violence, with explicit targeting of girls and women. Sex slavery, rape, torture and forced marriage were used by ISIS as a tool to humiliate indigenous people. In order to conduct this research, both secondary and primary sources such as case law of ad hoc International Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) will be taken under consideration. Furthermore, the study found out those constituent elements of crimes and genocide were used against humanity and war crimes as tools for conversion, recruitment, forced indoctrination, and the destruction of community cohesion. The research is being done to find out whether this mass rape comes under the term “genocide” or not. The first part of this research paper deals with assaults done by ISIS on Yazidi women; while the second part elaborates the natures of such acts. The study concludes with the notion that ISIS is involved in many war crimes such as the rape of Yazidi women as a tool to humiliate the community. While calling such heinous acts Jihad, they exterminate the Yazidis people by systematic and planned violence through gross sexual atrocities on a large scale.*

Keywords: Islamic State of Iraq and Syria, Ethnic and Religious Group, Iraqi Yazidi Women, Genocide Crime.

## Introduction

Sexual violence in armed conflict, particularly rape, is qualified as a “weapon of war” and/or as a “method of war” (Gaggioli, 2014). Throughout history, rape has been used as a tool to terrorize, punish and destroy populations. In some cases, sexual violence is employed by terrorist organizations as a strategy in order to pursue their goals and

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objectives. During wartime, rape is often committed by many terrorists. It also includes gang rape and attacks with weapons and objects that are inserted in the vagina of women. Additionally, conflict-related sexual violence refers to modalities against the individuals, during the international or national warfare or in other situations of organized violence like political conflicts (Kandiyoti, 2007). This includes rape, forced pregnancy, forced sterilization, forced abortion, forced prostitution, sexual exploitation, trafficking, sexual enslavement, forced circumcision, castration, forced nudity etc (United Nations, 2014).

Different UNSC resolutions deal with the sexual violence in armed conflicts. For example, UNSC Resolution 1820 condemned the rape as a war strategy, by stressing that rape and other forms of sexual violence can constitute a war crime, a crime against humanity, or an act of genocide (United Nations, 2008). Different insurgent groups such as the organization of the Islamic State in Iraq and Syria (ISIS) have used the asymmetric weapon of war, against the religious and ethnic minority groups in the areas they were controlled in Iraq and Syria (Stern & Berger, 2015). ISIS has lost so-called ISIS capital of Raqqa and the Iraqi city of Mosul, in 2017 (Zucchini, 2017). On December 19, 2018, U.S. President Donald Trump declared ISIS defeat, after U.S.-backed coalition of Syrian Kurds and Arabs, which was known as the Syrian Democratic Forces (SDF) (Wilson Center, 2019). The declaration by Trump helped to capture the key personnel of ISIS, gradually.

As ISIS defeated in Iraq and Syria, their cruel enslavement system has revealed to the world, which includes the severe sexual violence against the Yazidis. This has prompted many analysts to call for accountability against the ISIS perpetrators (Gibbons, 2018). Till date, no comprehensive study has ever been made in order to know how the prosecution deals with the nature of these atrocities. This study puts emphasis that the proper accounting for these crimes can only be achieved, if the international legal system recognizes these acts of sexual violence, as genocide against Yazidis women.

### **Aims and Research Objectives**

In the present study, the aims and objectives are as follows:

- To investigate the using of mass rape by ISIS against Yazidi women as a tool to humiliate the Yazidi community.
- To determine the nature of such heinous act under International criminal law.
- To determine whether or not mass rape committed by ISIS against the Yazidis comes under the genocide act.

### **Study Problem**

The study will tackle whether the mass rape committed by ISIS against the Yazidis, as a religious and ethnic group, can come under the genocide act. It also further requires examination of the material and mental elements of genocide and the extent to which they can apply to the act of rape committed by ISIS. This will be done with reference to the ICC Statute of 1998 and Genocide Convention of 1948, as well as the case law of ad hoc International Tribunal for the former Yugoslavia (ICTY) of 1993 and the International Criminal Tribunal for Rwanda (ICTR) of 1994.

## Structure

This first part of this study deals with the introduction and historical background, while the second part sheds light on the ISIS' sexual violence against the Yazidi women in Iraq. The third part elaborates on the nature of such act as a genocide crime under the jurisprudence of the ICTR, ICTY and ICC. Additionally, it also contains the explanation of extent to which each tribunal has prosecuted rape as an act of genocide with the application of rape crimes committed by ISIS against women Yazidis in Iraq.

### *ISIS sexual violence against Yazidi women in Iraq*

The Yazidis are an ethno-religious group. They speak Kurdish and their number about 500,000 to 700,000 people throughout the world (Spencer, 2016). Majority of them live in Nineveh, Iraq, particularly the Mount of Sinjar. They constitute 60% of the people in this region, and represent less than 1.5% of Iraq's population (Callimachi, 2015) Their religion is a mixture of Mithraism, Mazdeism, and Zoroastrianism and also have taken on elements of Christianity and Islam (Pizler, 2009). Further, they have also developed a closed and cohesive community, that accepts no religious converts and forbids any marriage outside of their ethnic and religious group (Schapiro, 2014).

Regarding the atrocities perpetrated by ISIS fighters against Yazidi Group in Iraq, the study will depend on a large number of official and non-official documents, including the major international and non-governmental organizations reports, such as the report of UN Human Rights council, the Office of the UN High Commissioner for Human Rights (OHCHR), Human Rights Watch, Amnesty International, the US Holocaust Memorial Museum and the Global Justice Centre etc. The reports of international media also provide extensive information on the alleged perpetration of crimes by ISIS.

On August 3, 2014, after seizing Iraq's second largest city, Mosul, ISIS fighters immediately invaded into the Sinjar region. Reports of mass executions began to circulate. During these mass murders, ISIL gave Yazidis the option of converting or being killed. In one instance, five hundred Yazidis refused conversion and ISIL buried them alive in a mass grave. Another mass grave in Syria holds the remains of hundreds of bodies from a single tribe, which is now known to have been almost entirely exterminated. As of August 2016, seventy- two mass graves containing fifteen thousand bodies were found in Syria (Sverdlov, 2017). As a result of this brutal violence, almost 170,000 members of the Yazidis left their homes, 130,000 of them fled to the cities of Dohuk and Irbil and other 40,000 took refuge into Mount Sinjar (Chulov, 2014). However, while trying to escape; ISIS militants kidnapped hundreds of Yazidi women (AMNESTY INT'L, 2014). The women were divided into the three parts: first women who were married and with children, second were married without children, and third were unmarried and young girls. Each of those groups was transferred to different areas controlled by ISIS, even some of them were transferred to more than ten different locations, during a four-month time period. These forced transfers were clearly aimed at instilling feelings of fear and insecurity over the victims (Tharoor, 2015).

By October 2014, an estimated 5-7 thousands young women were being held by ISIS in detention centers (Spencer, 2019). They faced one of two difficult options: whether convert to Islam or face horrible sexual assault daily. Those who agree to convert to Islam, they either sold to Islamist fighters for prices as low as \$ 25 and ranging up to \$1000 or

handed over to forced marriage to local or foreign ISIS fighters. While those who refused to convert, they sent them to rest houses where they tortured and suffered multiple rapes by multiple fighters (Ohchr.org, 2019). One year later, in 2015, more than 3000 Yazidi women were slaves according to the reports of the international organizations (Rasheed, 2019).

In June 2016, UN Human Rights Council issued a report, which estimated that 400,000 Yazidi people of Sinjar were completely killed due to ISIS attacks. All of its members were displaced, killed or raped, and no free persons left in their homes, towns and villages (Callimachi, 2015). The following are the testimonies of some female victims, who were fled or who had survived the horrors of sexual violence perpetrated against them by ISIS between 2015 and 2017.

Human Rights Watch conducted research in the town of Dohuk in January and February 2015, including interviewing 20 women and girls who escaped from ISIS, and reviewing ISIS statements about the subject. The organization documented a system of organized rape and sexual assault, sexual slavery, and forced marriage by ISIS forces. According to this report, “ISIS forces have committed organized rape, sexual assault, and other horrific crimes against Yezidi women and girls,” Furthermore, it was said by Liesl Gertholtz, women’s rights director at Human Rights Watch that “Those fortunate enough to have escaped need to be treated for the unimaginable trauma they endured” (Human Rights Watch, 2015). The 11 women and 9 girls Human Rights Watch interviewed had escaped between September 2014 and January 2015. One 20-year-old Yezidi woman told Human Rights Watch that ISIS held her and about 60 other women in a wedding hall in Syria, to be raped at will. They were told to “forget about your relatives, from now on you will marry us, bear our children, God will convert you to Islam and you will pray.” Here’s how she described the scene:

From 9:30 in the morning, men would come to buy girls to rape them. I saw in front of my eyes ISIS soldiers pulling hair, beating girls, and slamming the heads of anyone who resisted. They were like animals.... Once they took the girls out, they would rape them and bring them back to exchange for new girls. The girls’ ages ranged from 8 to 30 years... only 20 girls remained in the end (Human Rights Watch, 2015).

Another 20 years old Jalila, said that during her captivity, seven ISIS fighters “owned” her, and four raped her on multiple occasions: “*Sometimes I was sold. Sometimes I was given as a gift. The last man was the most abusive; he used to tie my hands and legs*” (Human Rights Watch, 2015).

On 2016 a local doctor in the Iraqi city of Dohuk informed Human Rights to watch this genocide. He informed that out of 105 females he examined, 70 appeared to have been raped in ISIS detention centers and in result, they have tried several attempted suicides (Global Justice Centre, 2016). Reports indicate that ISIS doctors performed abortions of women, who were previously pregnant with “infidel” children. One woman described how an ISIS doctor sat on her abdomen, aiming to kill her fetus (Global Justice Centre, 2016).



ISIS, like other Islamic terrorist groups, is based on misleading explanation of the true teachings of Islam and they used them to justify its crimes. As per ISIS, the sexual violence committed against Yazidi women, came from the teachings of Islam, who gives rights to its fighters to enslave defeated people, in the holy war, against the pagans as spoils of war (Syerdlov, 2017). For example, an abducted girl, said that her captor showed her a document published by ISIS that stated that, if 10 different ISIS fighters rape a captured woman, she will become a Muslim (Gutteridge, 2015).

Above mentioned interviews can be regarded as a compelling argument for the notion that rape has a serious negative psychological impact on Yazidi women's mind. For ISIS, the reasons for using sexual violence are multi-layered. They used sexual violence as a warfare strategy to gain political and religious interests and due to misogyny. They aimed to assimilate the caliphate's areas by targeting the Yazidi community, in which Yazidi women suffered a lot. These interviews show fears of Yazidi women that ISIS would continue to use rape as a warfare strategy to the territory's appropriation by wrongly justify it with religion. It has been argued by Benard (1994) that causing psychological drama and trauma is regarded as a way to measure genocide's objectives.

However, in the case of ISIS, it seems to be a method rather than an objective, because they have been quite selective in who they target by using rape as a tool, though such behavior is justified by ISIS through their interpretation of religious documents and texts. It seems that ISIS wants to be recognized through their rape strategy. While analyzing the Bosnian Conflict, Barstow (2000, p. 75) stated that "the persecuted would be less likely to return to their towns and villages if their assailants were local inhabitants rather than men from distant territories". In the case of ISI, it can be considered a reasonable deduction since their aim is to establish a caliphate where they want everyone to be Sunni Muslims. For this purpose, they use many methods including rape to show Yazidi men that how badly they failed to protect their women.

The Independent International Commission of Inquiry on the Syrian Arab Republic by United Nations Human Rights Council investigated the violations committed against Yazidis and stated in its report that ISIS has on mission to destroy the Yazidi community. The UN Human Rights Council and the United States Holocaust Museum Memorial Museum consider such activities, as a genocide crime (Ushmm.org. 2014).

### ***Rape as Genocide crime in International Criminal Law***

In this section, the study examines whether rape can constitute a crime of genocide, by articulate the definition of rape and examining the elements of Genocide. This research will also help to understand whether the act of rape is compatible with the Genocide Convention and ICC Statute besides as well as the jurisprudence of ad hoc tribunals.

### ***Definition of Rape in International Criminal Law***

Before international criminal courts, there was no definition of rape in conventional and customary international law and previous prosecutions of rape that could be used as precedent and guidance. So, the judges of ad hoc tribunals were in a very delicate situation of defining the concept of rape (Schomburg & Peterson, 2007). While, the ICTR was the first one to defined rape, in Akayesu case (Miller, 2013) and listed it as genocide (Çakmak, 2017). The Trial Chamber of the tribunal defined rape as "a physical invasion of a sexual

nature, committed on a person under circumstances which are coercive.” The chamber also added that “[s]exual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact” (ICTR, 1998).

This definition of rape established by Akayesu is considered to be groundbreaking. Firstly, the term “invasion” was used for the first time, which recognized rape as a wider sexual assault on the bodily integrity of the victim, than just penile/vaginal penetration. Secondly, it characterized rape as a sexual act occurring in coercive circumstances, which pleased feminist and rape victims’ advocates (Grewal, 2012). Another definition of rape was given by the trial chamber of ICTY in the Furundžija case, which disregarded the definition of Akayesu by stating that;

“[...] the Trial Chamber finds that the following may be accepted as the objective elements of rape:

- (i) the sexual penetration, however slight:
  - a) of the vagina or anus of the victim 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;
- (i) By coercion or force or threat of force against the victim or a third person.

As pointed out above, international criminal rules punish not only rape but also any serious sexual assault falling short of actual penetration.” (United Nations, 1998)

It is clear that the difference between the Akayesu and Furundžija definitions of rape is significant. While the first one does not consider the physical acts of rape as crucial, and the second one focuses almost exclusively on them (International Criminal Court, 2011).

Regarding ICC, rape is not defined in the Rome Statute but explained in the attached Elements of Crimes. The latter define rape as occurring when the perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body. Furthermore, the invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.

The above elements also contain two footnotes, which read: “The concept of invasion is intended to be broad enough to be gender-neutral. It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity. [...]”

This definition heavily relies on the ad hoc tribunal’s jurisprudence and combines elements from the Akayesu and Furundžija definitions (Valerie, 2011). It adopted a part of the Akayesu definition by emphasizing coercive circumstances, but also a part of the more mechanical and narrower of Furundžija definition, which is on the physical acts of rape (MacKinnon & Catharine, 2006). But it seems that ICC definition of rape is closer to Furundžija definition than Akayesu one.

Likewise, the absence of consent of a victim of sexual violence must not be established, as it is not an element of rape or other crimes of sexual violence. The very definition of sexual violence, which is contained in the ICC Elements of Crimes, describes sexual

violence as an 'act of a sexual nature by force, or by the threat of force or coercion' which results in the incapacity of the victim to consent to such act (International Criminal Court, 2000).

In Kunarac Appeals Judgment, the ICTY ruled on the issue of consent. The Chamber stated that:

Force or threat of force provides clear evidence of non-consent, but the force is not an element per se of rape. In particular, the Trial Chamber wished to explain that there are “factors other than force” which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim. A narrow focus on force or threat of force could permit perpetrators to evade liability for sexual activity to which the other party had not consented by taking advantage of coercive circumstances without relying on physical force.

In this case, the Chamber considered that ‘the extreme detention conditions and the intensity and regularity of the rapes committed on the detained women established ‘circumstances that were so coercive as to negate any possibility of consent’. The Chamber added: ‘This finding shows that force or compulsion was used prior to the rape. In this context, the Appeals Chamber further refers back to its finding that the coercive circumstances of this case made consent to the sexual acts by the Appellants impossible.’

### *Elements of Genocide crime*

Article (6) of ICC Rome Statute incorporates the text of article (2) of the Genocide Convention in specifying the legal elements that establish the genocide. The enumerated acts must be committed with a specific intent “to destroy, in part or in whole, a national, ethnic, racial, or religious group, as such.” The five enumerated acts are:

- 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;
- e) Forcibly transferring children of the group to another group.

These acts are exhaustive, which signifies that other acts which are not included in the list do not constitute genocide, even if the perpetrator acted with the intent to destroy a protected group (Jessberger, 2009). At first sight, it might seem that rape does not fit within this definition, but after the genocides in Yugoslavia and Rwanda, International criminal law crystallized the rape as genocide act in the 1990s, and established the ad hoc International Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) in 1993 and 1994, respectively (Chertoff, 2017).

Depending on that the study will examine the material and mental elements of genocide, which can lead to consider whether rape is a genocidal act or not, based on the case law of the ad hoc tribunals and the ICC.

### *The Material element (Actus reus)*

ICTR and ICTY recognize that rape can constitute a genocide under the material act 2(b) of Genocide Convention, which defines as “causing serious bodily or mental harm to

members of the group” (Chinkin, 1994), accompanied with special intent to destroy, in whole or in part, a national, ethnical, racial or religious group as mens rea. Rape may account to an act of genocide if this requisite element of Genocide Crime are met (Brammertz & Michelle, 2010).

Trial Chamber Judgment in Akeyasu case of ICTR, stated that “with regard, particularly, to [...] rape and sexual violence, [...] they constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such. Indeed, rape and sexual violence certainly constitute [...] one of the worst ways of inflicting [ing] harm on the victim as he or she suffers both bodily and mental harm. [...] These rapes are resulted in physical and psychological destruction of [targeted group]”. This position has also been confirmed in the several subsequent cases before the ICTR and ICTY.

### *Definition and Characteristics of Serious Bodily or Mental Harm*

Serious bodily or mental harm is not defined in the Genocide Convention or the Statutes of ad hoc tribunals and ICC. But the case law of ad hoc tribunals stated that serious bodily or mental harm are those that goes beyond temporary unhappiness, embarrassment or humiliation, and results in a grave and long-term disadvantage to a person’s ability to lead a normal and constructive life (ICTY, 2001).

However, ICTY jurisprudence conflates two distinct concepts; the inability to lead a normal and constructive life and the physical destruction of the group. For instance, the Tolimir Appeals Chamber reasoned that the trauma and financial and emotional consequences caused to the Bosnian Muslim women, children, and elderly because of acts by the Bosnian Serb forces in and around Srebrenica was such that it prevented them from leading a normal and constructive life. The Appeals Chamber added that the inability of leading a peaceful and normal life of members of protected groups will harm the whole group or in part, result in their physical destruction.

### *Bodily Harm*

Concerning the definition of bodily harm ICTR in Kayishema and Ruzindana case, which defined the term “this phrase could be construed to mean harm that seriously injures the health, causes disfigurement or causes any serious injury to the external, internal organs or senses” (ICTY, 1999). The court stated in Ntagerura Case that “ the term serious bodily harm refers to acts of physical violence that fall short of killing and that seriously injure the health, cause disfigurement, or cause any serious injury to the body” (United Nations, 2006).

### *Mental Harm*

Regarding the mental harm, ICTR Seromba Appeal Judgment defined it by stating; “serious mental harm includes “more than minor or temporary impairment of mental faculties such as the infliction of strong fear or terror, intimidation or threat” (International Residual Mechanism for Criminal Tribunals A, 2008). However, ICTY in Tolimir Appeal Judgment clarified that this definition “does not center around the question of the duration of the harm, but the nature of the harm that is inflicted and whether it is such as to instill strong fear, terror, intimidation or threat [...].” This is true that the

jurisprudence of the ad hoc tribunals focused on the character of the harm and its effect on the victim, not its duration.

Regarding rape, ad hoc tribunals asserted that the rape causes serious bodily and mental harm. The trial Chamber of ICTY in Mucić et al case stated that “[r]ape causes severe pain and suffering, both physical and psychological. The psychological suffering [...] may be exacerbated by social and cultural conditions and can be particularly acute and long-lasting” (ICTY, 1998).

### ***Characteristics of bodily and mental harm***

For the serious bodily and mental harms to constitute actus reus genocidal rape it should have certain requirements;

I. The ad hoc tribunals hold that bodily and mental harm need not be permanent or irremediable and is understood to mean more than the minor or temporary impairment of mental faculties. The Trial Chamber of ICTY in Krstić case Judgment was the first one to admit that, as stated “serious harm need not cause permanent and irremediable harm, [...]”. This was endorsed by ICTR in Akayesu case which it was stated that “Causing serious bodily or mental harm to members of the group does not necessarily mean that the harm is permanent and irremediable” (International Residual Mechanism for Criminal Tribunals, 2001).

II. Not all acts causing bodily or mental harm fulfill the requirements of Article II (b) of the Genocide Convention, but only those acts causing "serious" bodily or mental harm" are acts of genocide. It is that threshold "seriousness".

The ad hoc tribunals avoided defining the term “seriously” precisely opting instead to take a case-by-case approach. What “serious” means only, recently became the subject of litigation and judicial interpretation? The Tolimir Appeals Chamber noted that this definition of “serious” was “consistent with the case law of the ad hoc tribunals and aligned with the message and spirit of the Genocide Convention” (IRMCT, 2012). By stated that the harm “must be of such a serious nature as to contribute or tend to contribute to the destruction of all or part of the group” (The Hague, 2019).

Regarding rape, the ad hoc tribunals asserted that rape can cause serious bodily and mental harm for the victim. The approach was confirmed by the ICTR, in the Semanza case. The accused, Laurent Semanza was convicted for instigating a crowd to rape Tutsi women before killing them. The Trial Chamber stated that [...] Noting, in particular, the extreme level of fear occasioned by the circumstances surrounding the event and the nature of the rape of Victim A, the Chamber found that the perpetrator inflicted a severe mental damage on Victim A. It was, therefore, unnecessary to determine whether this rape also inflicted severe physical pain or suffering [...]. The Chamber found that by encouraging a crowd to rape women because of their ethnicity, the accused was encouraging the crowd to inflict severe physical or mental pain or suffering for discriminatory purposes. Therefore, he was instigating not only rape but rape for a discriminatory purpose, which legally constitutes torture. [...]."

### ***Rape against Yazidi women as an act of “serious bodily and mental harm”***

Rape consistently causes both bodily and mental harm to those who are victimized on multiple levels. Even beyond any other physical assault that may accompany the attack on

Yazidis, rape is grievous bodily and mental harm unto itself (McCausland, 2017). ICTRY consider Rape as “a despicable act which strikes at the very core of human dignity and physical integrity [...] [It] causes severe pain and suffering, both physical and psychological. The psychological suffering of persons upon whom rape is inflicted may be exacerbated by social and cultural conditions and can be particularly acute and long-lasting” (ICTY, 1998). Physically, rape can also lead victims of rape to suicide and to be at risk of sexually transmitted disease. It can destroy reproductive functions, and in some cases, lead to infertility or even prevent normal sexual relations with other male members of their group

As regards serious mental harm, victims of rape commonly suffer with community rejection. In patriarchal societies, such as Yazidis, it renders female victims of rape socially infertile, unmarriageable or untouchable, as they are often isolated from society and seen as “damaged goods” (Rosalind, 2002). Rapists in these circumstances may know or believe that by raping their victim, that person will be kept from being accepted by their community or procreating with others. An expert in trauma psychology involved in the treatment of captured Yazidi females held that “[the Yazidi females being treated] do not trust those around them, particularly men (Saleh, 2013). There is real anxiety around any contact with men. This, in turn, has resulted in sexual dysfunction, which is to say, a disinterest in sexual relationships, in any contact with men. For the younger girls, where rape was their first experience of sex, and where the traumatic sexual violence was extended over a long time at the hands of multiple men, would expect difficulty in future sexual relationships and anxiety around sex (UN Human Rights Council, 2019).

Furthermore, rape, in some circumstances, can be used as a birth prevention tactic. Since the Yazidis are a closed ethno-religious group, marrying and procreating only within their own community, rape and impregnation by non-Yazidi ISIS militants can be seen as preventing the birth of fully Yazidi offspring. The trial Chamber Akayesu noted that “measures intended to prevent births within the group may be physical, but could also be mental. For instance, rape can be a measure intended to prevent births, when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate” (United Nations, 2001).

The more forced rape and impregnation ISIS fighters subject Yazidi women too, the lower the birth-rate of legitimate Yazidis becomes. These results, coupled with the intention of boosting their caliphate's birth rates, appears to be the direct goal of ISIS extremists: “It has been stated that the conquests of the lands of kufr, multiply as well as enslavement, and thereby concubines increase in numbers, until the slave women give birth to their masters, this is because the child of the master has the status of the master [meaning he is a free man like his father], and thereby she has given birth to her master from this angle” (Dabiq, 2014). Such circumstances enhanced the confidence, with which ISIS's conduct systematically serious bodily and mental harm leading to an act of genocide accordance with article 2(b) of the Genocide Convention and article 6(b) of the Rome Statute.

### *The Mental Element (Mens rea)*

The genocide offence has two separate mental elements (*mens rea*), namely a general one that could be called ‘general intent’ or *dolus*, and an additional ‘intent to destroy’ or *dolus specialist* (Ambos, 2001). Both elements are integral in the determination of

whether legal genocide has been committed and set it apart from other international crimes.

### ***The General Intent (Knowledge threshold)***

A general intent normally relates to all objective elements of the offence definition and has now been defined in international criminal law by Article 30 of the Statute of the International Criminal Court (ICC) as basically encompassing a volitional (intent) and/or a cognitive or intellectual (knowledge) element.

Knowledge means awareness that circumstances exist or consequences will occur in the ordinary course of the actions taken by the defendant (Schabas, 2009). Regarding genocide, the perpetrator needs to know that his actions will lead to the destruction in whole or in part of a group. The Trial Chamber of Prosecutor v Goran Jelisi Case claims that it suffices that he knows that his acts will inevitably, or even only probably, result in the destruction of the group concerned, even if the determination is not achieved ((ICTY) & Chamber, 1999). In application to the broad scale of the crime of genocide, the knowledge threshold for specific intent immediately implies a requirement for the organization, bureaucracy, or systematic planning against the protected group, in whole or in part.

### ***Special intent (dolus specialist)***

Special intent (*dolus specialist*) distinguishes the crime of genocide from ordinary crime and many other crimes against international humanitarian law. Due to this, genocide is known as the “crime of crimes” (Turku, 2018). Special intent doesn’t focus on mere performance of the general intent *actus reus* (i.e., a general intent), since it puts great emphasis upon the acts committed against a specifically targeted group. It supposes that the alleged perpetrator of the crime selects his victims, because they are part of a group which he is seeking to destroy. Where the goal of the perpetrators of the crime is to destroy all or part of a group, it is the “membership of the individual in a particular group rather than the identity of the individual that is the decisive criterion in determining the immediate victims of the crime of genocide” (Greenawalt, 1999).

### ***Proof of genocidal intent (mens rea)***

*Mens rea* is not readily susceptible to direct proof. “Only the accused himself has first-hand knowledge of his own mental state, and he is unlikely to testify to his own genocidal intent” (Mettraux, 2019). Criminal law generally presumes that an individual intends the consequences of his or her actions. Thus, proof of intent is inferred indirectly from the logical deduction based on the evidence of the material acts. *Mens rea* of Genocide should not be compartmentalized by the separate genocidal acts, but rather based on all available evidence. The ICTR Trial Chamber of Kayishema acknowledged that “it may be difficult to find explicit manifestations of intent by the perpetrators. The perpetrator's actions, including circumstantial evidence, however, may provide sufficient evidence of intent. [...] The Chamber found that the intent could be inferred either from words or deeds and might be demonstrated by a pattern of purposeful action. In particular, the Chamber considered evidences, such as the physical targeting of the group or their property; the use of derogatory language toward members of the targeted group; the weapons employed

and the extent of bodily injury; the methodical way of planning and the systematic manner of killing. Furthermore, the number of victims from the group was also important (International Residual Mechanism for Criminal Tribunals, 2001).

Similarly, in Akayesu, the ICTR's holding specified relevant factors include the "general context" of the acts, such as their scale, nature, location, plan or system, and manner of exclusion. ICTY jurisprudence also permits the inference of genocidal intent based on an overall assessment of the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, and the repetition of destructive and discriminatory acts (ICTY, 2001).

ISIS's propaganda is also to hold the key towards prosecuting the group by providing the specific genocidal intent. The ISIS had sought to determine how the Yazidis should be treated under their ideology. Unlike the Jews and the Christians, there was no room for the jizyah payment [a tax to be paid to avoid conversion or death]. Also, their women could be enslaved unlike the female apostates whom the majority of the fuqaha say cannot be enslaved and can only be given an ultimatum to repent or face the sword" (Dabiq, 2014).

### *"To Destroy"*

The legal definition of genocide indicates that it is an act committed by perpetrators with intent to destroy in whole or part of a protected group as such. Accordingly, what is required is intent to destroy but not necessarily actual destruction of the group. Genocide might be committed without even killing a single person as far as the individual criminal acts are perpetrated against a protected group with genocidal intent. Similarly, the killing of a single member of a protected group would amount to genocide as long as the genocidal intent exists (Behrens & Henham, 2013)

The ICTR Prosecution vs Kayishema and Ruzindana case, suggests that the term should be broadly interpreted and encompass acts, that are undertaken not only with the intent to cause death but also includes acts which may fall short of causing death. In the Akayesu Judgment, acts of sexual violence, occurred in Taba Commune, were found to form an integral part of the process of destruction, specifically, targeting Tutsi women and contributing to their destruction and the destruction of the Tutsi as a group. The Trial Chamber concurred with this view and then International Law Commission (ILC) stated that "it is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe." Furthermore, one of the main goals of ISIS is to target religious minorities in Syria and Iraq, including the Yazidis, as it specifically wants to establish a purely Islamic state and to abolish the religious pluralism in the region.

### *"In Whole or in Part"*

To find legal genocide, the acts committed must be intended to destroy a specific group, "in whole or part." The Prosecution of Jelisi Case accepted the phrase, "in whole or in part", and thought it must be understood to mean the destruction of a significant portion of the group. The intention demonstrated by the accused to destroy a part of the group would, therefore, had to affect either a major part of the group or a representative fraction thereof, such as its leaders. In a letter addressed to the United States Senate during



the debate on Article II of the Convention on genocide, Raphaël Lemkin explained, in the same way, that the intent to destroy "in part" must be interpreted as a desire for destruction which "must be of a substantial nature [...] so as to affect the entirety" (Sluiter & Klip, 2001).

The numeric size of the part of the targeted group in both absolute terms, relative to the overall group size, "is the necessary and important starting point in assessing whether the part targeted is substantial enough - but is not in all cases the ending point of the inquiry" (ICTY, 2010). Based on the above, genocidal intent may, therefore, be manifest in two forms. It may consist of desiring the extermination of a very large number of the members of the group, which would constitute an intention to destroy a group en masse. However, it may also consist of the desired destruction of a more limited number of persons, selected for the impact that their disappearance would have upon the survival of the group as such. This would then constitute an intention to destroy the group "selectively (ICTY, 1999).

In an application, this inference required more proof, when there had been fewer victims, based on a proportion of the targeted group. This is because of an intent to destroy an individual member of the group, rather than the group itself, constitutes a hate crime (racially motivated murder), rather than genocide. However, "No acceptable rationale can justify why an individual murder [with the requisite intent] ... should not be ... genocide" (United Nations, 1982). This element is satisfied also, if a substantial part of the group is targeted and destroyed, such as in a specific geographically limited area (Kreß, 2007). The Trial Chamber of ICTY Jelisi Case noted that it is accepted that genocide might be perpetrated in a limited geographic zone.

### ***No Premeditation Required***

Premeditation means a plan or preparation, prior to the commission of the crime. In domestic criminal law, many penal systems consider it, an aggravating factor, especially with respect to sentencing (YGO, Nd). However, the ICTR trial chamber of Akayesu noted that the travaux préparatoires of the Genocide Convention show that the proposal by certain delegations that premeditation be made a necessary condition for there to be genocide, was rejected. Because some delegates deemed it unnecessary for premeditation to be made a requirement; in their opinion, by seeing its constitutive physical elements (ICTY, 1998, 501)

In the same context, Jelisi Trial Judgment clarified that, the preparatory work of the Convention of 1948 brings out that premeditation was not selected as a legal ingredient of the crime of genocide, as it seemed superfluous given the special intention already required by the text and that such precision would only make the burden of proof even greater (ICTY, 1999, 100). Nevertheless, premeditation must be distinguished from proof of a systematic plan, without which a conviction of genocide would be extremely unlikely. In application, this allows for the guilt of an individual who acts without premeditation, but with full knowledge of a systematic plan, especially in the capacity of an inferior subordinate.

## A protected Group

Generally, one of the first steps in evaluating a genocide claim is to determine, whether the victims are the part of a protected group or not. The language describing intent in Article 2 of the Genocide Convention suggests that the victims of genocide must be members of a national, ethnical, racial or religious group (Straus, 2001). While the crime of genocide is characterized by intent to destroy a group, so it is complicated to know who are protected in this condition. Indeed, it has been claimed that the “major problem with the convention is its narrow definition of what constitutes a victim group” (Chalk & Jonassohn, 1990)

Both subjective and objective approaches have been used by ad hoc tribunals to determine, what constitutes a protected group under the Genocide Convention. Depending on the objective approach, ICTR in Akayesu Case defined the ethnic group, as a group whose members share a common language or culture” and religious group as “one whose members share the same religion, denomination or mode of worship”. The Yazidis constitute a protected group by both objective and subjective standards; The Yazidis devoutly practice a distinct religious belief, which is wholly distinct from neighboring religions. The dominant religion in Kurdistan is Sunni Islam, while the majority of all Iraqis practice Shia Islam. Furthermore, the Yazidis are forbidden to convert or marry into other religions and do not accept converts into their faith. This total exclusion of outside religions distinguishes their religious community from all others (YGO, Nd). There is little to no debate surrounding the Yazidis' identity as distinct protected groups within the meaning of article 2 of the Genocide Convention.

## Conclusion

This research concludes that a massive rape crime against the Yazidis women comes under the genocide. ISIS has pre-requisite intent to destroy the whole or part of Yazidis group. As discussed in the part of this research paper that planned terrorist activities, discriminated attacks against Yazidis, targeted destructions of Yazidis communities, massive rapes of women and killings of children are all part of ISIS's motive as per the Genocide Convention and the standards of the Rome Statute. They called them a jihad against the Yazidis. They have tried every possible way of violence and abuse to make the Yazidis leave Iraq. However, in light of the notable shortcomings of the provisions of the Genocide Convention and the Rome Statute, it is required to develop and utilize legal tools to criminalize the sexual violence against the women in armed conflicts as a genocide crime. A consensus of the international community to conclude a specific international Treaty on sexual violence against women in armed conflicts, would constitute further and an exceptional contribution in this area, under the auspices of the United Nations, or an additional protocol to Geneva conventions of 1949.

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