

Prosecute and punish the perpetrators of sexual violence against Yazidis as a crime against humanity, even the possible genocide committed by ISIS

Dr. Taib Kasnazany

Abstract

On the 3rd of August 2014, ISIS fighters attacked the Sinjar region in northern of Iraq, mostly populated by Yazidis, a religious minority. In almost 3 days, most of the villages in the region were vacated and their residents captured. These events mark the beginning of a campaign of extreme violence that has left men and women apart. Adult men were massacred while girls and women were held for sale as sex slaves. More than 7 years after these events, no prosecution has been brought by International Criminal Court. States are unwilling to try their nationals guilty of crimes of genocide against the Yazidis. This paper aims to analyze the genocide of the Yazidis from the perspective of sexual violence and in particular to determine whether it can be considered to the status of genocide. The origins and legal sources of the genocide are first analyzed. This violence is then examined in the light of certain elements constituting the crime of genocide. Finally, the challenges to be met in the fight against impunity in International Criminal Court are mentioned in the conclusion.

Keywords: Yazidis, Sinjar, Religious Minority, Crime of Sexual Violence, Crime against Humanity, Genocide, ICC, ISIS.

1. Introduction

The Yazidis¹ are originally from northern Iraq and mainly present in Iraq and Syria. They have been the victims of a numbers of genocides and massacres over the past centuries. The main cause of these persecutions is the disbelief that rules around the Yazidi religion. This is mainly due to the fact that the latter is based on very few holy texts and very largely on oral tradition. It can give the impression that its origins and history are unclear. These elements have led to make it one of the most misunderstood and persecuted religions in the Middle East. The Yazidis is a religious minority organized according to a strict background system. Only a child whose father and mother are both Yazidis can also be recognized as such; therefore conversion to Yazidism is excluded. Yazidis are neither Muslims, Jews, nor Christians. However, their religion contains elements from various religious majorities or from Zoroastrianism.²

August 3, 2014 marks a turning point for the Yazidis, whose lives changed instantly. At daybreak, ISIS fighters attacked the Sinjar region from Mosul and Tel Afar in Iraq, and from Al-Shaddadi and the Tel Hamis area in Syria. As most of the Kurdish Peshmerga fighters had withdrawn in the face of the advance of ISIS, leaving the inhabitants of the region defenceless, ISIS fighters did not meet much resistance. Moreover, since the withdrawal of the peshmerga was not announced to them, the inhabitants very quickly found themselves trapped. It should be noted that at the time of the ISIS attack, approximately 300,000 Yazidis were living in the Sinjar region. Those who managed to escape in time took refuge in Iraqi Kurdistan region and in the province of Nineveh.³ Tens of thousands of Yazidis went to seek refuge in the villages of Mount

¹ Yazidi (also known as Yezidi, Ezdi or Eyzidi)

² Asatrian, G. S., & Arakelova, V. (2014). *The Religion of the Peacock Angel: The Yezidis and Their Spirit World*. Routledge.

³ Hafiz, Y. (2014) Yazidi Religious Beliefs: History, Facts, and Traditions of Iraq's Persecuted Minority. *The Huffington Post*, accessed on 20.09.2021 at http://www.huffingtonpost.com/2014/08/13/yazidi-religious-beliefs_n_5671903.html on

Sinjar. On August 8, 2014, the Iraqi and American air forces delivered food and humanitarian aid. On August 14, 2014, Kurdish fighters from the People's Protection Units (YPG) and the Kurdistan Workers' Party (PKK) finally managed to open a corridor between Syria and Mount Sinjar allowing the Yazidis to escape ISIS.

However, hundreds of Yazidis, including infants and young children, had already died.⁴ In less than 3 days after the attack, most of the villages in the region were emptied and their inhabitants captured by ISIS.⁵ These events marked the beginning of a campaign of extreme brutality. The men were separated from the women. Boys who did not reach teenage years were sent to recruitment camps in Syria. The adult men were shot and the girls and women; they were kidnapped and held captive with a view to being sold as sex slaves.⁶

Considering their nature and purpose, the question is can we consider these committed crimes as a genocide? In the context of this work, this paper has chosen to limit the analysis of this potential genocide to the aspect of sexual violence. Once the origins of the concept of genocide and its legal sources have been explained, this study will analyse certain elements constituting the crime of genocide and discuss their application in the light of the above case. Finally, this paper will conclude with the challenges that must be met in the fight against impunity in international criminal justice and the inadequacy, especially for victims, of the response given by the international community so far.⁷

⁴ Ibid.

⁵ With the exception of the village of Kocho - from which Nobel Prize winner Nadia Murad is from , which was not completely emptied until August 15.

⁶ For a detailed account of the mass killings perpetrated by ISIS and the location of kill sites and mass graves, see Yazda (2016). Mass Graves of Yazidis Killed by the Islamic State Organization or Local Affiliates on or after August, 3rd, 2014. Available at: <http://www.yazda.org/wp-content/uploads/2016/01/Yazda-Report-on-Mass-Graves-Jan-28-2016.pdf>

⁷ United Nations Assistance Mission for Iraq et Office of the United Nations High Commissioner for Human Rights (UNAMI/OHCHR), *A Call for Accountability and Protection: Yazidi Survivors of Atrocities Committed by ISIL*, août 2016, p. 6.

2. The Concept of Genocide

According to Lemkin ⁸, genocide means "a coordinated plan of different actions aimed at destroying essential foundations of the life of national groups, with the aim of exterminating the groups themselves." Such a plan would have as its objectives the disintegration of political and social institutions, culture, language, national sentiments, religion and the economic life of national groups, as well as the suppression of personal security, liberty, health, dignity, even the life of people belonging to these groups. The genocide targets the national group as an entity, and the actions in question are directed against individuals, not in their capacity, but as a member of the national group ". Lemkin's initial definition of genocide is therefore broader than the current definition since it includes the political, biological and cultural dimensions of genocide. The integration of this new legal notion is initially done in a gradual or even "cautious" manner but Lemkin perseveres and leads a lobbying campaign behind the scenes so that this new criminalization is recognized on the international scene⁹.

3. The legal sources of the genocide

At the beginning, genocide is defined in article 4 paragraph 2 of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) of May 25, 1993 and in article 2 paragraph 2 of the Statute of the International Criminal Tribunal for Rwanda (ICTR) of November 8, 1994. These two provisions are identical and repeat both the definition of article 2 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide than that of article 6

⁸ Raphaël Lemkin (1900-1959), polish jurist, he was the first defends the idea of recognizing the crimes of barbarism and vandalism in a report presented in Madrid in 1933 during the Fifth Conference for the Unification of Criminal Law. Then, in his work entitled *Axis Rule in Occupied Europe*, published in 1944, Lemkin made reference for the first time to the term genocide which he created from "genos" (race, nation, tribe in ancient Greek) and "cide" (kill in Latin).

⁹ Marc Klamberg (ed) (2017) *Commentary on the Law of the International Criminal Court* (Torkel Opsahl Academic EPublisher) p. 19.

of the Rome Statute. On December 11, 1946, the United Nations General Assembly adopted Resolution 96 (I), which defined genocide as "the denial of the right to exist to entire human groups, just as homicide is the denial of the right to exist. the right to existence to an individual; such a refusal upsets the human conscience, inflicts great losses on humanity, which is thus deprived of the cultural or other contributions of these groups, and is contrary to the moral law as well as to the spirit and the ends of the Nations United ”¹⁰.

In addition, this resolution affirms for the first time that “genocide is a crime under international law” also eliminate the nexus between genocide and armed conflict which until then had prevailed, the jurisprudence of the The International Military Tribunal only recognized the crime of genocide committed in time of war¹¹. Two years after Resolution 96 (I), on December 9, 1948, the United Nations General Assembly unanimously adopted by Resolution 260 A (III) the Convention on the Prevention and Punishment of the Crime of Genocide. At the time of its adoption, Article 6 of the 1948 Convention already provided that "[t]he persons accused of genocide or any of the other acts listed in Article III shall be brought before the competent courts. of the State in whose territory the act was committed, or before the international criminal court which will have jurisdiction over those of the Contracting Parties which have recognized its jurisdiction ”¹².

The signing of the Rome Statute on July 17, 1998 placed genocide at the head of the four crimes for which the International Criminal Court (ICC) has jurisdiction and is governed by article 6 of the Rome Statute which reproduces exactly the content of article 2 of the 1948 Convention. It provides that the

¹⁰ United Nations, General Assembly, Resolution 96 (I): Confirmation of the principles of international law recognized by the statute of the Nuremberg Court, December 11, 1946, A / RES / 96 (I).

¹¹ Ibid.

¹² Convention on the Prevention and Punishment of the Crime of Genocide, article 6, approved by the General Assembly in its resolution 260 A (III) of December 9, 1948;

crime of genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic or racial or religious group, as such:

- (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.*

The constituent elements of the crime of genocide are composed of an objective and subjective element: the *actus reus*, or material / objective element, i.e. the commission of one of the acts described in section (a) to (e), and the *mens rea*, or genocidal intention, that is, the intention to destroy in whole or in part a national, ethnic, racial or religious group, as such. Unlike the 1948 Convention, the adoption of the Rome Statute did not give rise to much debate over the definition of genocide; further proof of its gradual acceptance. Ultimately, it should be noted that article 2 of the 1948 Convention, and consequently article 6 of the Rome Statute, reflect customary international law.

4. The contribution of the 1993 & 1994 international criminal tribunals in matters of sexual violence

The ICC has rendered relatively few judgments in genocide matters, unlike the ICTY and the ICTR, which played a major role in the evolution of the concept. For the purposes of this analysis, this paper will limit itself to their contribution to rape and sexual violence. Sexual violence was defined by the ICTR in the *Akayesu* case as "any sexual act committed on the person of another under the

empire of coercion". It emerges from this definition that rape is included among sexual violence, but that it covers a broader spectrum¹³. Rape was also defined in the *Akayesu* case as "a physical invasion of a sexual nature committed against another person under duress". This definition was then clarified by the ICTY in the *Furundžija* case, defining the objective elements of rape:

1- Sexual penetration of the victim's vagina or anus through the penis or any other object used by the rapist; or from the victim's mouth through the rapist's penis and;

2- Using force, threat or coercion against the victim or a third person"¹⁴.

Finding this definition also restrictive, the Trial Chamber went further in the *Kunarac* case by specifying that not only does the act of sexual penetration constitute rape if it is accompanied by "the use of force, threat or coercion against the victim or a third person but that it also includes other factors which would make sexual penetration an act non-consensual or unwanted by the victim. The key criterion is therefore the lack of consent or voluntary participation of the victim¹⁵. Taking into account these developments in case law, the ICC elements of crimes contain an even more precise definition of rape:

1. [The] perpetrator has taken possession of a person's body in such a way that there has been penetration, even superficial, of a part of the body of the victim or the perpetrator by a sexual organ, or of the anus or the vagina of the victim by an object or any other part of the body.

¹³ ICTR, The prosecutor against Jean-Paul Akayesu (*Akayesu*), case n ° ICTR-96-4-T, Judgment, Trial Chamber I, September 2, 1998, § 688 and ICTR, The prosecutor against Alfred Musema (*Musema*), Case No. ICTR-96-13-T, Judgment and Sentence, Trial Chamber I, January 27, 2000, § 965.

¹⁴ ICTY, The Prosecutor v Anto Furundžija (*Furundžija*), Case No. IT-95-17 / 1-T, Judgment, Trial Chamber, December 10, 1998, § 185.

¹⁵ ICTY, Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (*Kunarac*), case n ° IT-96-23-T and IT-96-23 / 1-T, Judgment, Trial Chamber, February 22, 2001, § 438.

2. The act was committed by force or by using against said or third persons the threat of force or coercion, such as that caused by the threat of violence, coercion, detention, pressure psychological, abuse of power, or in favour of a coercive environment, or by taking advantage of the inability of the said person to give his free consent¹⁶. The lack of consent of the victim should not be established since it is not a constituent element of the rape or other sexual violence suffered but rather results from the force, the threat to use force or the coercion to which the victim has been subjected. This definition is the most widely accepted by the international community¹⁷. However, according to article 9 para. 1 of the Rome Statute, the elements of crimes are not binding provisions but serve more as a means of interpretation by ICC judges¹⁸.

It should be noted that sexual violence constitutes a crime against humanity insofar as it is enshrined in the topical provisions on the matter. Rape is mentioned in article 3 section g of the ICTR Statute, article 5 section g of the ICTY Statute and article 7 para. 1 section g of the Rome Statute.

Although neither rape nor sexual violence is explicitly included in the provisions governing the crime of genocide, they can be combined under section b, c and d of article 6 of the Rome Statute. Indeed, in the *Akayesu* case, the judges for the first time elevated sexual violence to the rank of genocide acts by declaring that “[s] 'acting [...] with rape and sexual violence, the Chamber insists on the fact, that according to her, they do constitute genocide, just like other acts, if they were committed with the specific intention of destroying, in whole or in part, a specific group, targeted as such. Indeed, rape and sexual violence undoubtedly constitute serious attacks on the physical or mental

¹⁶ See ICC Elements of Crimes, article 7 § 1 letter g-1 and article 7 § 1 letter g-6 (crimes against humanity), article 8 § 2 letter b xxii) -1, 8 § 2 letter b xxii) -6 and 8 § 2 letter e vi) -1 (war crimes), June 11, 2010.

¹⁷ The Genocide Network, Eurojust, The prosecution at national level of sexual and gender-based violence (SGVB) committed by the Islamic State in Iraq and the Levant (ISIL), 2017, pp. 12-13.

¹⁸ Antonio Cassese “Chapter 11.1 Genocide” in Antonio Cassese, Paola Gaeta and John RWD Jones (eds), The Rome Statute of the International Criminal Court: A Commentary (Oxford University Press 2002) p. 348.

integrity of victims and are even, according to the Chamber, one of the worst means of attack on the integrity of the victim, since the latter is attacked twice: in its physical integrity and in its mental integrity”¹⁹.

This case-law is supplemented by the *Rutaganda* judgment which specifies that Article 2 para. 2 of the ICTR Statute and in the *Stakić* judgment of the ICTY include rape and sexual violence²⁰. The ICC elements of crimes have also incorporated this case law since they indicate in a footnote that the behaviour referred to in Article 6 para. 1 section b of the Rome Statute "may include, but is not necessarily limited to, acts of torture, rape, sexual violence or inhuman or degrading treatment"²¹.

Finally, it should be specified here that sexual slavery constitutes a crime against humanity according to Article 7 para. 1 section g of the Rome Statute. The ICC elements of crimes specify the two material elements of sexual slavery:

1. [The] perpetrator has exercised any or all of the powers arising from the right to property over one or more persons, for example by buying, selling, lending or bartering said person or persons, or by imposing a similar deprivation of liberty on them.

2. The perpetrator forced the said person or persons to perform one or more acts of a sexual nature²². In the *Katanga* judgment, the ICC, for its part indicated that “by power associated with the right to property, we must in reality understand the possibility of using, enjoying and disposing of a person,

¹⁹ Ibid.

²⁰ ICTR, The prosecutor against Georges Anderson Nderubumwe Rutaganda (Rutaganda), case n ° ICTR-2001-64- T, Judgment and sentence, Trial Chamber I, December 6, 1999, § 51.

²¹ Ibid.

²² ICC, The prosecutor v Germain Katanga, case n ° ICC-01 / 04-01 / 07, Judgment, Trial Chamber II, March 7, 2014, § 975.

assimilated to a well, by placing it in a situation of dependence resulting in depriving it of all autonomy”²³.

In view of recent events and in the context of this paper, it seemed important to come back to these historical aspects in order to better understand the current situation and grasp the issues linked to the qualification and recognition of sexual crimes as genocide. This paper also found it interesting to mention the abandonment of political and cultural genocide since in the case of the Yazidis, as the objective building blocks of these two types of genocide would likely have been fulfilled.

5. The essential elements of the genocide in the light of sexual violence against the Yazidies

For the purposes of this work, this study deliberately limited the scope of analysis to section **b** and **c** of article **6** of the Rome Statute for the objective elements of genocide. Regarding the subjective element, we have analyzed the genocide intention under its two aspects of destruction of the group in whole or in part and of destruction of the group as such, as well as the difficulty of proving this intention.

A. The *actus reus* / objective element

As discussed previously, the International Criminal Tribunals (ICTY and ICTR) have consistently recognized that the concept of serious injury to physical or mental integrity includes rape and sexual violence²⁴. Regarding the seriousness of the breach, this must be assessed on a case-by-case basis and having regard

²³ It should also be mentioned that, already at the time of the IMT, Lemkin was working with judges to include among the acts of genocide forced abortion, child abduction and the use of rape as a means of procreation forced. On August 26, 1946, he wrote a letter to prosecutor Sir David Maxwell Fyfe arguing for the recognition of sexual crimes and rape as genocidal acts. Moreover, Lemkin did not see the sexual assault as a violation of a woman's "honor". Rather, he saw it both as a violation of women as an individual and as a means of committing genocide against a group.

²⁴ ICTY, Prosecutor versus Radislav Krstić (Krstić), Case No. IT-98-33-T, Judgment, Trial Chamber, August 2, 2001, § 513.

to all the circumstances. The mental damage should not be permanent or irreversible but should go beyond grief, embarrassment or temporary humiliation. It must therefore seriously impact the victim's ability to lead a normal life²⁵.

With regard to serious damage to physical health, this must be interpreted as an act seriously damaging the victim's health or having the effect of disfiguring or causing serious damage to the external or internal organs or sensory²⁶. It should be noted, however, that neither the case law of the ICTY nor the elements of crimes provide a clear and precise definition of mental harm. Rather, they simply indicate, in each case and on the basis of various elements, whether such an infringement has been committed or not²⁷. Moreover, although the terms “serious bodily or mental harm” are grouped together under section *b* of article 6 of the Rome Statute, physical harm on the one hand, and mental harm on the other hand, there are nonetheless two distinct criminal acts. It is therefore sufficient that only one of these attacks has been committed for the offense to be consummated. In addition, victims must belong to the target group, be it national, ethnic, religious or racial²⁸.

In the present case, both the testimonies collected by the Office of the United Nations High Commissioner for Human Rights (UNHCR) and those drawn up by non-governmental organizations (NGOs) such as Amnesty International (Amnesty) and the Federation International for Human Rights (FIDH) show that

²⁵ Akayesu (n 70) § 502; Krstić (n 92) § 513; Musema (no.70) § 156 and Rutaganda (no.83) § 51;

²⁶ ICTR, The prosecutor against Clément Kayishema and Obed Ruzindana (Kayishema), case n ° ICTR-95-1-T, Judgment, Trial Chamber II, May 21, 1999, § 109.

²⁷ Lars Berster, “Article II” in Lars Berster, Björn Schiffbauer and Christian J. Tams (eds.), *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (CH Beck 2014) N 70, p. 120.

²⁸ Kayishema (n 96) § 112; Musema (n 70) § 154; Rutaganda (n 83) § 49 and ICTR, The prosecutor against Laurent Semanza (Semanza), case n ° ICTR-97-20-T, Judgment and sentence, Trial Chamber III, May 15, 2003, § 323.

Yazidi women have been subjected to systematic acts of sexual violence²⁹. Those who managed to escape all say they were raped, sold and used as sex slaves. Moreover, the sex slave trade system they describe is corroborated by an IS brochure entitled "Questions and answers on captive women" which specifies the rules governing the treatment of non-Muslim slaves³⁰.

These testimonies show the psychological effects of these repeated rapes, including a state of post-traumatic stress and permanent anxiety, insomnia, depression and finally suicide. Many Yazidi women and girls attempted suicide during their captivity while others committed suicide or attempted to do so after their escape. It should be mentioned here that it is among the victims of rape and sexual violence that we find the highest rate of post-traumatic stress disorder³¹. In the light of the principles established by the case law, we conclude from our analysis that a serious attack on the integrity, both physical and mental, of Yazidi women has been committed.

In addition, is the above sexual violence as "the intentional submission of the group to conditions of life calculated to bring about its physical destruction in whole or in part"? According to ICTR case law, this expression refers to "means of destruction by which the perpetrator does not necessarily seek to immediately kill the members of the group, but, in the long term, aims at their physical destruction³²". In its *Kayishema* judgment, the ICTR specified that "the living conditions referred to include, in particular, rape, deprivation of food, systematic eviction of housing since these measures are likely to lead to

²⁹ United Nations, Human Rights Council, OHCHR Report on the Human Rights Situation in Iraq in Light of the Violations Committed by the Organization known as the "Islamic State of Iraq and the Levant" and Groups partners, March 27, 2015, A / HRC / 28/18, N 35, pp. 9-10.

³⁰ Among the most appalling testimonies is that of a 19-year-old married and pregnant woman who was repeatedly raped by a supposed ISIS "doctor" who lacerated her chest and sat on her stomach to kill her unborn child declaring: "this baby must die because he is an infidel". Another witness told OHCHR investigators that the same "doctor" allegedly raped girls as young as 11 and 16.

³¹ Amnesty International, *Escape from Hell: Torture, Sexual Slavery in Islamic State Captivity in Iraq*, 22 December 2014, p. 8.

³² *Akayesu* (n 70) § 505; *Musema* (n 70) § 157 and *Rutaganda* (n 83) § 52.

the destruction of the group, in whole or in part ”³³. As for the ICTY, it has recognized in its case law that sexual violence could lead to the physical destruction of the group³⁴.

Indeed, according to the Elements of Crimes for this offense to be carried out, it is not necessary to subject the whole group to such conditions of existence: it is sufficient that “[the] author has submitted one or more persons under certain conditions of existence”³⁵. With regard to rape and sexual violence, it should be noted that their consequences go beyond the attack on the physical and mental integrity of the individual. Indeed, it is not only the individual but also the family, the community; the group and more generally the entire social structure in which evolves that are shaken. It is neither new nor recent that rape is used in the context of armed conflict as a weapon of war. However, in the context of genocide, sexual violence and gang rape are used because of their ability to destroy the group by desecrating the women.

These systematic and widespread attacks on women represent aggression against the group itself. Women are used as a means of territorial conquest through the forced penetration of bodies. The attacker chooses to attack the women because of their role as a pillar of the group. By attacking them, it aims to deprive them of their capacity to give life, and that of the group to reproduce and renew them. These rapes also send a strong message to men: that they are not able to protect their wives. By attacking women as a vector of life, rape and sexual violence subject the group to conditions of existence that ultimately lead to its destruction and even extermination³⁶.

³³ Kayishema (n 96) § 116

³⁴ ICTY, Prosecutor v Ratko Mladić (Mladić), Case No. IT-95-5 / 18-I, Amended Indictment, 10 October 2002, § 34, section c).

³⁵ ICC Elements of Crimes, article 6 section c-1

³⁶ In this case, according to figures reported by UNAMI in 2016 and 2017, around 6,000 Yazidis were abducted during and after the August 2014 attack. 3,500 are believed to be women and 2,800 men. As of July 2017, the number of Yazidis who escaped was estimated at around 3,000, including 1,000 women and 800 girls. At the

Moreover, the scale of the violence and the doctrinal justifications given to it show that the purpose of ISIS is to physically and mentally destroy these women by dehumanizing them. According to Yazidi customs, marriages and sexual relations with people of other religious beliefs are in principle excluded, these practices being considered shameful for the family and the community. In the past, women who had such relationships were killed for honor killings. However, the destructive social impact of these crimes is nonetheless real and the return of abused women to their communities remains difficult. Nevertheless, in view of all the circumstances described, this count of criminalization is, therefore, fulfilled.

B. *Mens rea* / genocide intent

For the crime of genocide to be carried out, in addition to the objective elements which must be fulfilled and committed intentionally with the intention of seriously harming the physical or mental integrity of one or more members of the group, a subjective element must also be given. This subjective element is called *mens rea* or genocide intent.

The aim of destroying the group in whole or in part as a preliminary matter, the ICTR had the opportunity to clarify these notions in the *Akayesu* judgment, which defines the ethnic group as "a group whose members share a common language or culture" and the religious group as "a group whose members share the same same religion, denomination or practice of worship"³⁷. In its *Kayishema* judgment, the ICTR added that for the ethnic group, its admission may result from a process of self-identification; the group is distinguished by

time of writing their latest report, UNAMI and OHCHR estimated that around 3,000 Yazidis, including 1,500 women, were still held captive by ISIS.

See UNAMI / OHCHR 2016 (n 20) p. 7 and UNAMI / OHCHR, *Promotion and Protection of Rights of Victims of Sexual Violence Captured by ISIL / or in Areas Controlled by ISIL in Iraq*, 22 August 2017, N 9, p. 2.

³⁷ *Akayesu* (n 70) § 513; also *Kayishema* (n 96) § 98.

itself as such, or by identification by third parties, when the group is recognized as such by others, including the perpetrator. The ICTY, for its part, clarified in its *Krstić* judgment that stigmatization by the perpetrator can be used as a criterion for identifying the target group³⁸.

In this case, the question of whether the Yazidis constitute a distinct ethnic group is controversial. The Yazidi communities present in Syria and Iraq, with the exception of the Yazidis of Armenia, consider themselves ethnically Kurdish, because of their mother tongue, but followers of Yazidism. In contrast, in the context of their persecution and discrimination by neighbouring Muslim communities, the Yazidis identify themselves as a distinct ethnic group. We can, however, leave this question open since the identity of the Yazidis as a distinct religious group is neither discussed nor questioned. This observation is further confirmed by the attitude of ISIS, which has always mentioned the Yazidi faith as the basis of their attack and as a justification for the sexual slavery of Yazidi women. In view of these elements, the Yazidis as a distinct religious group are therefore, as such, protected by the aforementioned provisions.

Regarding the aim of destroying the group in whole or in part, the ICTY stated in its *Jelisić* judgment "[...] that the destruction sought need not necessarily concern the whole group"³⁹. According to the case law, although there is no fixed minimum threshold, the acts committed must nevertheless target a substantial part of the group and thus affect it as a whole. This criterion can be assessed from both a quantitative and qualitative point of view. A "substantial part" means, from a quantitative point of view, a high proportion of the group, while from a qualitative point of view, a representative fraction of the group

³⁸ *Krstić* (no.92), § 557.

³⁹ ICTY, *Prosecutor v Goran Jelisić (Jelisić)*, Case No.IT-95-10-T, Judgment, Trial Chamber I, December 14, 1999, para 80.

should be targeted. In the *Krstić* judgment, the ICTY Appeals Chamber clarified that although the "numerical importance of the target group" must be taken into account, this criterion must nevertheless be put into perspective. The number of people targeted should be understood in relation to the size of the group as a whole. We must also take into account the place of these people within the group and ask in particular whether they are "representative [s] of the whole group, or essential [s] to its survival". If this is the case, then the condition of substantiality will be fulfilled. Case law has also admitted that this destruction could take place in a limited geographical area.

In the present case, as we have seen previously, nearly 3,500 Yazidi women were sex slaves of ISIS in a region that numbered approximately 300,000 Yazidis. If the proportion may seem modest, let us remember that both the ICTY and the ICJ recognized the Srebrenica massacre as constituting genocide even though the 40,000 Bosnian Muslims killed represented "only" 2.9% of the total Bosnian Muslim population at the time. Moreover, in qualitative terms, women are here essential to the survival of the group and the sexual violence suffered is directed against a substantial part of the Yazidis. In addition, this destruction is here limited to the region of Sinjar.

This research is limited to the issue of sexual violence. However, in the context of a possible judgment of these acts, all the crimes and violence committed by ISIS would be taken into account in their entirety, which would probably have the effect of increasing the number of victims to be taken into account. In the light of the elements developed, this paper considers that the sexual violence committed against Yazidi women was indeed aimed at the extermination of the Yazidis because of the essential function performed by the women of this community. This sexual violence aimed in particular at the physical destruction

of the Yazidis by depriving them of their capacity to renew themselves through the destruction of the reproductive capacities of women.

In addition, the individual's membership of a particular group and not his personal identity that is the decisive criterion, determining the choice of immediate victims of the crime of genocide. It is therefore the group, and not the individual, that is targeted. Acts committed against individuals are only one means of achieving the goal of destroying the group. The perpetrator's intention must therefore be to destroy the group as a separate entity, and not just a few individuals because of their membership in this group. The perpetrator must also choose his victims according to the group he seeks to destroy.

A distinction must also be made between the perpetrator's motive and whether or not he has genocide intent. As the ICTY has recalled in its case law, motive does not matter and these two elements are not mutually exclusive. This means that "the existence of a personal motive does not prevent the perpetrator from also having a specific intention to perpetrate genocide"⁴⁰.

In this case, a range of evidence shows that the Yazidis were specifically targeted by ISIS as a distinct religious group. First, ISIS has always referred to the Yazidi religion to justify its attack and abuse. In their language, ISIS members called the Yazidis "dirty kuffars", infidels and devil worshipers.

Unlike other perpetrators of genocide who, in the past, sought to conceal their genocide intent and never assert it in public, ISIS has always loudly proclaimed its intention to destroy the Yazidis. In an article published in the English version of its propaganda magazine *Dabiq*, for example, ISIS calls the Yazidis, among other things, devil worshipers whose women are to be enslaved. The fact that their motives are based on a desire for territorial conquest or even on the sexual

⁴⁰ ICTY, *Prosecutor v Goran Jelisić (Jelisić Appeal)*, Case No. IT-95-10-A, Judgment, Appeals Chamber, July 5, 2001, § 49. 172 ICJ 2007

satisfaction born of the sexual slavery of Yazidi women does not exclude the presence among ISIS fighters of genocide intent at the time of committing these crimes.

Another element that clearly indicates the genocide intent of ISIS members against the Yazidis is their unique presence in the various places of ISIS detention in Iraq and Syria. In addition, only Yazidi women and girls were sold in slave markets. The other religious groups present in the ISIS controlled areas of Iraq and Syria have not been subjected to the same treatment as the Yazidis. Although their living conditions are rather precarious, neither the Arab communities, nor the Christian communities present in the region have been captured, killed and enslaved like the Yazidis. This difference in treatment also tends to demonstrate ISIS's desire to specifically eliminate the Yazidis on the basis of their religion. In short, all of these elements lead us to conclude that ISIS committed these rapes and sexual violence with the intention of destroying the Yazidis as a religious group.

As this paper have already mentioned, ISIS did not seek to conceal its intention to eliminate the Yazidis. They publicly affirmed it, notably in his propaganda magazine Dabiq where the Yazidis are treated as "mushrikīn", or polytheists, and orders to kill the mushrikīn wherever you find them, and capture them, and besiege them, and sit in wait for them at every place of ambush⁴¹.

ISIS's deliberate choice of Yazidi women only, to the exclusion of members of other groups, is also explicitly stated in a later passage in this article. ISIS attempts to religiously justify the sexual slavery of Yazidi women labelled "kuffar" infidels.

⁴¹ Dabiq 2014 (n 174) p. 14, personal translation: then wait for the polytheists wherever you find them and capture them, and besiege them, and wait for them in all ambush places.

The use of degrading terms and discriminatory language against the Yazidis is therefore an indication of the genocide intent of its perpetrators. The captured Yazidis also relate that they were openly called "*sabaya*" or slaves by their owners. With regard to attacking group property, the ICTY recalls, in the *Krstić* judgment, that although the definition of genocide only includes acts aimed at the physical or biological destruction of the group - genocide cultural and religious property / symbols of the group may be used to prove *mens rea*⁴².

In this case, as reported by the Commission of Inquiry in Syria, the IS fighters destroyed the temples and tombs of the Yazidis, and marked their houses with a symbol, making it possible to distinguish them from other houses of Arab villagers, and then loot them. When it comes to the systematic nature of these crimes and the methodical aspect of their planning, ISIS has created a very well-established bureaucracy organizing and regulating the sex slave trade⁴³.

5. Conclusion

Throughout this work, this research has analyzed the sexual violence suffered by Yazidi women in the light of the elements constituting the crime of genocide and their recent development by international criminal tribunals. This analysis cannot therefore claim to be exhaustive, since we have instead sought to focus on the aspects that seemed to us to be the most crucial. In the current state of

⁴² Ibid

⁴³ ISIS Islamic courts notably notary concluded sales contracts. In addition, the established Yazidi sex slave trade includes a large network of warehouses and schools where they are held captive. Before being placed in viewing rooms for inspection and then sold, various information is recorded such as their name, town of origin, marital status and number of children. Buses are used to transport them from one place to another. Those deemed to be the prettiest are sent to the headquarters of the caliphate in Raqqa, while the others are sent to the slave markets, or "souk sabaya", spread throughout ISIS territory, between Iraq and Syria. ISIS also published a document listing the prices for these slaves: 300,000 Iraqi dinars for girls aged one to nine, 150,000 up to 20, 100,000 aged 20 and 30, 75,000 from 30 to 40 years and finally 50,000 for women from 40 to 50 years. It is specified that only combatants coming from Turkey, Syria and the Gulf countries are authorized to buy more than three captives. Once purchased, the fighter has full ownership rights over the slave. Several online marketplaces have also emerged by ISIS fighters; for example, use the encrypted Telegram application to exchange photos of Yazidies for sale, along with information such as their age, marital status, virginity, location and price.

our research, and provided that genocide intent is demonstrated, this research consider this violence to constitute genocide. The evidence exists, especially through the victims and their testimonies. Reports from NGOs and United Nations bodies, coupled with the abundant jurisprudence of the two ICTs, provide clues that genocide has been committed.

In addition, seven years after the attack of August 3, 2014, the international community is content with a response that we believe is insufficient. Many states, including the UK, France, Austria, Canada, and the US in particular, have made political statements acknowledging the atrocities committed by ISIS against the Yazidis as constituting genocide. Yet no actual prosecution has been brought by international criminal justice and no one has been convicted of the crime of genocide. This research do not deny the difficulties this would entail, and do not claim to have an absolute solution to a question of such complexity. However, even if it is certain that the political recognition of the genocide of the Yazidis constitutes a first step, the recognition of the suffering endured by these women and their desire for justice cannot be satisfied only through declarations without binding legal value. In 1993 and 1994, two ICTs were established to try and convict criminals guilty of core crimes in the context of the Rwandan genocide and the war in the former Yugoslavia. In 1998, in an effort to fight impunity, the ICC was established and today has 122 state parties. In each of these situations, international justice has been able to reinvent itself; this paper sincerely hopes that it will be able to do the same here.

In conclusion, there are many ways to overcome the obstacles to the ICC's exercise of jurisdiction over crimes committed by ISIS. First, Syria and / or Iraq accept the jurisdiction of the ICC; second, the Security Council refers the situation to the ICC prosecutor; and, third, the prosecutor decides to open an investigation into crimes committed by nationals of a state party to the Rome

Statute or who have accepted the jurisdiction of the ICC. The other way to ensure that justice is done could be the creation of an ad hoc tribunal. The general political recognition of the commission of genocide by ISIS would make it possible to achieve this. The courts are at present unable to rule definitively on the issue, due to lack of jurisdiction or evidence; but in the absence of such a decision, many States do not respect their positive obligations under the 1948 Genocide Convention. Recognition of genocide by States following concerted action by them in accordance with their obligations could give the ICC in particular the possibility and the means to bring ISIS members to justice. The allegation of genocide is of course of particular gravity and should not be formulated lightly, but there is now more than sufficient evidence to justify the political use of this term, as shown by the positions taken by one growing number of national and international bodies.

Furthermore, the fact of designating the acts committed by ISIS using the general political qualification of genocide, while having legal consequences for the international community, would in no way be detrimental to the initiation of criminal proceedings against ISIS. Even if this qualification may be essential in the event that the perpetrators of these acts should be brought to justice.

In the meantime, the international community must ensure that the evidence essential to the initiation of possible prosecutions against ISIS members, whether before national or international courts, is gathered and kept in safe custody meeting the required admissibility criteria. Similar to Nazi war criminals are still prosecuted today for their hate crimes, it is important that justice does not find rest until ISIS perpetrators, whether they are the main actors or their accomplices, answer for their crimes and be condemned for the crime they committed.

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