



THE RAPES COMMITTED AGAINST THE YAZIDI WOMEN: A GENOCIDE? A STUDY OF THE CRIME OF RAPE AS A FORM OF GENOCIDE IN INTERNATIONAL CRIMINAL LAW

La violación de las mujeres yazidíes: ¿un genocidio? Un estudio acerca del crimen de violación como forma de genocidio en Derecho Penal Internacional

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Rape has been used as a tool of war throughout the history of mankind. With the establishment of the International Criminal Court, rape was included in the Rome Statute, being internationally recognized as a war crime, a crime against humanity and a means to commit genocide. The Islamic State of Iraq and Syria, in its war to establish the caliphate, has carried out a campaign of sexual violence against women of religious minorities such as the Yazidi. This article examines the evolution of the definition of rape in International Criminal Law and applies the current definition to the crimes committed by ISIS against the Yazidi. The study assesses the elements of the actus reus of genocide and considers that the actions carried out by the Islamic State towards the Yazidi could qualify as a genocide by means of rape.



Abstract

Sexual violence; rape; International Criminal Law; ISIS; Yazidi; genocide.

Violencia sexual; violación; Derecho Penal Internacional; EI; Yazidi; genocidio.



Key words

Recibido: 14-11-2019. Aceptado: 19-05-2020



Fechas

La violación ha sido usada como un arma de guerra durante la historia de la humanidad. Con el establecimiento de la Corte Penal Internacional, dicho crimen fue incluido en el Estatuto de Roma, siendo reconocido internacionalmente como un crimen de guerra, de lesa humanidad y un modo de cometer genocidio. El Estado Islámico de Irak y Siria, en su guerra para establecer un califato, ha llevado a cabo una campaña de violencia sexual contra las mujeres de minorías religiosas como los Yazidíes. Este artículo examina la evolución de la definición de violación en Derecho Penal Internacional y aplica la definición actual a los crímenes cometidos por el EI. El estudio analiza los elementos del actus reus de genocidio y considera que las acciones llevadas a cabo por el EI contra los Yazidíes pueden calificarse como genocidio cometido mediante violación.



Resumen

1. Introduction

Sexual violence towards women has existed for as long as there has been conflict (Issue Women, 2000). Rape has been used as a war tool in many disputes throughout history (McDougall, 1998) frequently recognized as an “inevitable reality of conflict” (Issue Women, 2000). However, rape was not expressly set out as a distinct crime in a legal document until the Fourth Geneva Convention¹. The definition of rape and the elements of the crime were developed through the jurisprudence of International Tribunals, which made rape fit inside provisions of International Humanitarian Law instruments such as the Geneva Conventions (Askin, 2003).

Today rape is set out as a crime in the Rome Statute in articles seven and eight, both as a crime against humanity and a war crime. Moreover, the elements of the crime of rape are set out in the corresponding document to the Rome Statute, the Elements of the Crimes (hereinafter EoC) in article seven and eight. While the EoC does not expressly set out rape as a form of genocide, the document recognizes rape as a mean to commit genocide by causing serious bodily and mental harm in article six. In fact, nearly all the actions that amount to genocide can be committed through rape (de Brouwer, 2005).

Prior research conducted in the evolution of rape in International Criminal Law has shown how, in the case of the Balkans and the Rwandan conflict, rape can be used as a means of committing genocide. Scholars such as Anne-Marie de Brouwer have conducted a broad analysis in the field of rape in International Law through the jurisprudence of the ICTY and the ICTR. Moreover, the scholarly work of Kelly Askin and Emily Chertoff are among two of the many academics that have brought to light how genocide can be carried out through rape. Human Rights Watch and other UN reports have been instrumental in providing concrete detail regarding the crimes of ISIS towards Yazidi women. Additionally, we have relied on studies that specifically illustrate the extent of the genocide conducted by ISIS against the Yazidi through rape, namely the work of Eliska Jelinkova or David Sverdlov. The revelations discovered by these authors

¹ See: article 27 of the Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.

regarding the use of rape as a tool to conduct genocide extend beyond the specific conflict of the Yazidi, which is the reason we have decided to draw attention to this specific issue.

This dissertation aims to assess whether the crime of rape committed by the Islamic State of Iraq and Syria (hereinafter ISIS) towards the Yazidi women can qualify as Genocide. The situation of the Yazidi women captive by ISIS is very similar to that suffered by the Tutsi women during the Rwandan civil war and the Bosnian Muslim women in Bosnia-Herzegovina ten years ago. Yazidi women are being victims of rape as genocide, crimes against humanity and sexual slavery. For the purpose of this article we will focus on the analysis of the elements of rape and the commission of rape as a form of genocide by ISIS towards Yazidi women.

This article will examine the jurisprudential evolution of the crime of rape in International Criminal Law (hereinafter ICL), as well as will develop the elements of the crime of Genocide, referring specifically to the *actus reus* of the crime which can be committed by means of rape. Secondly, it will address the evidence of the crimes committed by ISIS against the Yazidi and whether the actions and the intentions of the terrorist group can qualify, firstly as the crime of rape defined in the EoC and secondly as a crime of genocide committed by means of rape. Finally, it will develop the conclusions.

Yazidi women are being victims of rape as genocide, crimes against humanity and sexual slavery

2. The evolution of the definition of rape

The study of crimes in ICL is based in two components of the crime: the *actus reus*, which refers to the material actions that have to be carried out by the criminal; and the *mens rea*, the level of knowledge and willingness of the person committing the *actus reus*.

The elements of the *actus reus* of rape have evolved throughout the history of ICL. There are three lines of thinking concerning the definition of rape in International Law (de Brower, 2005). The first one adheres to a broad conceptual definition²; the second takes a more restrictive and mechanical description of the body parts involved³ and the third one includes the element of non-consent to the crime⁴.

The two critical components (Kinports, 2001) that appear in rape definitions are either force and absence of consent or merely the element of force presuming the non-consent of the victim due to the inherently coercive circumstances (MacKinnon, 2000). One of the elements of the definition over which it has been more discussion throughout the jurisprudence is whether non-consent should be an element of the crime in situations as coercive as wartime scenarios (Weiner, 2013).

The *mens rea* of the crime of rape varies according to its elements. If the definition takes non-consent as an element, Tribunals require that the perpetrator is aware that the intercourse is taking place without the consent of the victim. On the other hand, if the definition takes force or coercion as an element, Tribunals find the *mens rea* in that the perpetrator is aware

2 A broad conceptual definition of rape was used in the *Akayesu*, *Celibici*, *Musema*, *Niyitegeka* and *Muhimana* Judgements.

3 A mechanical definition of rape was carried out in the *Furundizja* Judgement.

4 Non-consent was included as an element of the crime in *Kunarac*, *Kovac and Vukovic*; *Gacumbitsi*; *Kvočka*, *Semanza* and *Kajelijeli* Judgments.

either that the intercourse is taking place by using force or that he/she is taking advantage of a coercive environment where genuine consent is impossible.

The *Akayesu* and *Furundizja* Chambers defined the crime of rape with a focus on coercion.

Akayesu established a broad definition of rape (O'Byrne, 2005; Askin, 2003; de Brouwer, 2005; Copelon, 2000). It is a non-mechanical definition as it does not specifically state body parts and specific actions. It did so by referring to the torture definition, which also used a conceptual approach, carrying out a resemblance of rape and torture as both are committed for the same purposes: humiliation, degradation, punishment and destruction of the victim (*The Prosecutor v Jean-Paul Akayesu*, 1998).

This definition did not include the consent paradigm (Kalosieh, 2003), but instead referred to "under circumstances which are coercive". The Trial Chamber (1998) interpreted "force" in a broad way, stating that "a show of physical force is not necessary to establish coercive circumstances". Coercion may be constituted by "threats, intimidation, extortion and other forms of duress which prey on fear or desperation" and may be inherent in certain circumstances such as armed conflict (*The Prosecutor v Jean-Paul Akayesu*, 1998). One of the most important contributions of the *Akayesu* judgment was the recognition of rape as a mean to commit genocide (de Brouwer, 2005) and as a form of torture (*The Prosecutor v Jean-Paul Akayesu*, 1998).

Following *Akayesu*, the second important judgment in defining the *actus reus* of rape was done by the ICTY in *Prosecutor v Furundizja* in 1998. In *Furundizja* the Trial Chamber retained, following the *Akayesu* definition (de Brouwer, 2005) as central element "coercion or force or threat of force against the victim or a third person". It chose to "look for principles of criminal law common to the major legal systems of the world" so as to find a definition of rape, and established that all jurisdictions surveyed required an element of force, coercion, threat, or acting without the consent of the victim (*The Prosecutor v Anto Furundizja*, 1998). Although the *Furundizja* Trial Chamber studied the definition of rape found in national laws and acknowledged the importance of the element of non-consent, it opted to exclude it from the definition as it found that the consent paradigm would transpose poorly to the international arena (Kalosieh, 2003).

Instead, the Court chose to use the language of force and coercion, which drove the focus away from the behavior of the victim and placed it rightfully in the hands of the perpetrator (Kalosieh, 2003). Moreover, the Trial Judgment established a standard for dealing with rape cases emanating from prison camps or detention facilities, holding that the circumstances surrounding captivity preclude consent (*The Prosecutor v Anto Furundizja*, 1998).

The Trial Chamber noted that while national laws had defined rape as "a non-consensual intercourse", a broader definition was needed and referred to the torture⁵ and genocide (MacKinnon, 2006) definition since neither of them included an element of "lack of consent". Contrary to torture and genocide, the inherent problem with the view of rape is that the act *per se* is regarded as an ordinary act within society: sex, albeit without consent (Chinkin, 1994). The harm inflicted in torture is not a common social behavior, and therefore its elements do not

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5 *Akayesu* Trial Judgment, *op.cit.*, para. 687: "Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when it is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity"; *Furundizja* Trial Judgment, *op.cit.*, para.162, 124, 130., recognizes as torture the rapes committed for the purpose of interrogation, with the goal of humiliating and causing severe pain and suffering to the witnesses.

include “absence of consent”. Because, it is obvious that no one would consent to their own torture (Askin, 2003). The same logic should apply to the crime of rape (Buchhandler, 2010; Buchhandler, 2011). There is no principle or rationale that satisfactorily explains why rape should be understood as requiring proof of the non-consent of the victim, while other violent international crimes committed in identical coercive circumstances do not (O’Byrne, 2011; Schomburg and Paterson, 2007).

Acts of this kind can hardly be conceived of “merely” as undesired sex (de Brouwer, 2005). It seems more appropriate to speak of “sexualized violence” (Schomburg & Paterson, 2007). Therefore, the consent paradigm is inappropriate in conflict situations where rape is used as a weapon of war. The burden to prove non-consent creates the situation of a witness testimony scenario where the victim is subject to the insinuation that she was able to be complicit in the dehumanizing treatment that destroyed her village during a genocidal rape campaign (de Brouwer, 2005; Kalosieh, 2003).

However, the consent paradigm was included in the definition of rape set out in the *Kovac, Kunarac* and *Vokovic* judgement by the ICTY.

The Chamber in *Kunarac* diverged from the approach of the *Akayesu* and *Furundizja* trials that established a narrower definition of rape where the Prosecution had to prove an element of coercion and force (Ellis, 2007), and established “non-consent” as a central element of the crime of rape⁶. The inclusion of “non-consent” as an element was the result of the analysis of the elements of rape in domestic systems, improperly transposing national peacetime rape law norms into the international criminal arena (Kalosieh, 2003). While national rape law definitions might be appropriate if applied to isolated acts of rape committed for the personal gratification of the perpetrators in a domestic scenario, it is inappropriate in a war-crime setting because it fails to recognize the context of violence and torture (Kalosieh, 2003). National laws do not account for the types of atrocities committed in the context of armed conflict, specially where civilians are under attack and sexual violence is used as a war tool⁷. The relevance of consent in domestic criminal law is essentially based on the legal competence and factual ability of the affected individual to dispose of the protected interest under attack (Naffine, 1992)⁸, something that does not always exist under ICL scenarios.

The *Kunarac* decision ignores the fact that rape as a war crime is not merely rape that occurs during a war, but rape that is the war (Chinkin, 1994). And rape crimes are not only committed systematically but also opportunistically, because the atmosphere of war and violence creates that opportunity (Askin, 2003). In such destructive scenarios where rape is used as a tool of massacre, victim consent is legally irrelevant (Kalosieh, 2003; de Brouwer, 2005; O’Byrne, 2011). As MacKinnon explains (2006), if rape is fundamentally an interaction of body parts, it is essentially sex unless something else is wrong with it, which is where non-consent is supposed to come in. The author defends that if sex was being engaged in simply for sexual gratification,

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6 Non consent as the central element of the crime of rape was upheld by the *Kunarac* Appeals Judgment, in 2002: *Prosecutor v. Kunarac et al.*, 12 June 2002, International Criminal Tribunal for the former Yugoslavia, Appeal Judgment, Case Nos. IT-96-23 & IT-96-23/1

7 One should take this idea into account when approaching the next part of the Article, as it is developed over the genocidal campaign of ISIS against the Yazidi.

8 For a discussion of the several domestic scenarios where consent is analyzed, see, for example: Victor Tadros (2006). Rape Without Consent. *Oxford Journal of Legal Studies*, 26(3), 515-543.; Helen Power (2003). Towards a Redefinition of the Mens Rea of Rape. *Oxford Journal of Legal Studies*, 23(3), 379-404.

for instance, it would not be imposed on one ethnic group by another, as it was when inflicted on Tutsi woman in Rwanda or, as this article argues, when it is being carried out towards Yazidi women by ISIS.

In *Kunarac* the Chamber (2002) demonstrated that the victim did not consent because she was captive and selected because of her ethnicity, and it supported the conclusion that the circumstances were so coercive that it showed non-consent (Engle, 2005). For some critics, this argument permits us to presume that the inter-ethnicity of such encounters was evidence of non-consent, when some of the sexual intercourse taking place in Bosnia between the different ethnic groups was consensual (Halley, 2008; Engle, 2005). Janet Halley (2008) states the frequent case that happened in the conflict of Bosnia-Herzegovina, where some women chose to have sex and do house chores for Serbian soldiers to avoid being gang-raped inside the Fôca camps. These authors defend that removing the “lack of consent” weakens complainants by portraying them as helpless victims.

However, introducing the non-consent element under the rationale of respecting the “freedom of choice” of women fails to recognize the complexities that inequality introduces to what members of powerless groups can want or reject (MacKinnon, 2006). Genocide, crimes against humanity and war crimes are not an attack on individual autonomy, for which responsibility depends on the approval or non-approval of one person (Werle, 2005; MacKinnon, 2006). When rape is perpetrated as an integral part of a process of destruction, the injury and suffering inflicted extends beyond the individual to the collective targeted group (Askin, 2003).

This article argues that while it cannot be assumed that any sexual contact occurring in ICL scenarios constitutes a crime, the definition of rape ought to be general, taking into account the general situation and not the exceptions. The more coercive the circumstances are, the less need to include the element of non-consent. Therefore, in the maximum coercive circumstances that are presented in war scenarios, consent must not be an element of the crime of rape in ICL. Rape is a crime of violence (Kalosieh, 2003; O’Byrne, 2001). There is no difference on sticking someone’s fist in the face and sticking it into the genitalia (Buchhandler, 2001).

The evolution of the jurisprudence of the ad hoc tribunals has resulted in the final definition of rape embedded in the EoC of the ICC.

The Rome Statute of the ICC specifically includes rape as a crime against humanity and a war crime in articles seven and eight. Nonetheless, several authors contend that, in order to improve the prosecution of rape and the deterrence of further cases of mass rape during armed conflict, the crime should be regarded as an individual crime and not a subsection of other crimes. The failure to define rape as a separate crime permits sexual violence to be viewed as a “lesser crime” (Ellis, 2007; Copelon, 2000; Mitchell, 2005).

Feminist scholars influenced the creation of the document of the EoC in 2002 to assist with the court’s interpretation of the Statute (O’Byrne, 2011; de Brouwer, 2005). They managed to influence the definition of the criminal offences that were related to sexual violence (Spees, 2003): the *actus reus* of rape and the components of the crimes of genocide, crimes against humanity and war crimes. However, we cannot conclude that the definitions contained in the EoC are universal and binding (Anthony, 2017).

The context of the crime of rape varies, depending on whether it is committed as a Crime Against Humanity or a War Crime, but the elements remain the same. These elements have

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been significantly influenced by the jurisprudence of the ICTY and the ICTR (de Brouwer, 2005). The definition derives mainly from the *Akayesu*, *Furundizja* and *Kunarac* judgments. It uses a mechanical approach, more similar to *Furundizja*, focusing on penetration but not in a restrictive manner (de Brouwer, 2005), departing from a broader definition in *Akayesu*⁹.

The definition departs from *Kunarac* by excluding the element of “non-consent” after most part of the legal and feminist doctrine expressed the inadequacy of that element taking into account the inherently coercive circumstances in which the rape takes place (de Brouwer, 2005; Kirk McDonald, 2000; Haffagee, 2006). The definition adopts a coercion test instead of a focus on consent. It refers to “force, threat of force or coercion” as in the *Furundizja* and *Akayesu* judgments in a broad sense to anticipate the circumstances that occur in wartime (Weiner, 2013) such as violence, duress, detention, psychological oppression or abuse of power (Buchhandler, 2011). The force element is defined broadly enough to encompass the nonphysical coercive circumstances that victims often endure during armed conflict.

Finally, with regard to the *mens rea*, the perpetrator must have the intention to invade the body of the victim knowing it was done by means of force, threat of force or by taking advantage of a coercive environment, or that it was being done to a person incapable of giving genuine consent. The definition does not require that the perpetrator had a knowledge that the victim was not consenting (Weiner, 2013), because it is implicit in the coercive circumstances. Therefore, the only possible defense of the perpetrator is that they did not know that they were taking advantage of a coercive environment or they did not know the person was not able to consent. All in all, we consider this definition to be appropriate as, even though it is not as broad as *Akayesu*, it encompasses many forms of committing rape and endorses the view that non-consent is presumed under coercive circumstances.

The ICC definition is not the final definition of rape in ICL. There is not a definite consensus as to the appropriate definition, but it is suggested that the judges of the ICC should follow the path laid out in the EoC and formulate definitions of sexual crimes based on coercion (O’Byrne, 2011; de Brouwer, 2005). In fact, the ICC has recently applied the definition of rape in the judgment of *Prosecutor v Bemba*. Jean-Pierre Bemba Gombo, the former Congolese vice-president, was accused for his alleged failure to control the Movement for the Liberation of Congo troops, who raped, murdered and looted while deployed in the Central African Republic between October 2002 and 2003 (Wakabi, 2011).

The ICC acknowledged in *Bemba* that circumstances under which rape occurs are coercive and inherent in certain scenarios such as armed conflict or military presence, referring to the *Akayesu* judgment in order to define such environment (*The Prosecutor v Jean Pierre Bemba Gombo*, 2016). Therefore, the ICC has addressed the *actus reus* of rape leaving out the element of non-consent and stating that “rape under the Statute does not require proof of a victim’s lack of consent” and noted that “drafters purposively excluded that requirement due to the practical hurdle it presents for prosecuting potential offenders”. Similarly, the Court concluded that “proving a victim’s lack of consent is unnecessary if the prosecution proves the elements regarding force, coercion, or taking advantage of coercive circumstances”.

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⁹ Where the Chamber (para. 597 Trial Judgment) stated that “elements of the crime of rape cannot be captured in a mechanical description of objects and body parts”.

Through *Bemba* the ICC has reaffirmed that the International Community wants rape to stand equally among the world's most condemned crimes and the decision shows the recent increased acceptance of rape as a heinous tool of war (Anthony, 2017).

Bearing in mind the evolution of the criminalization of rape in ICL and the evolution of its elements throughout the jurisprudence, we are recently witnessing another conflict where rape is being used as a weapon of war, crimes against humanity and genocide. We refer to the ongoing conflict in Iraq where ISIS is carrying out a campaign of sexual violence against the Yazidi women. In this campaign, one can distinguish the elements of rape set out in the current ICC Statute.

Rape is being committed against the Yazidi women as a crime against humanity and genocide. It is also being carried out as part of a bigger sexual slavery campaign that resembles to that carried out by the Serbians towards the Bosnian-Muslim women in the rape camps of Fôca, in the Former Yugoslavia. It will be important to analyze the elements of sexual slavery and crimes against humanity towards the Yazidi in subsequent studies. However, for the purpose of this article we will focus on demonstrating that ISIS is committing rape as a form of genocide towards the Yazidi.

3. The crime of genocide committed through rape

The crime of genocide is, as stated in the crime of rape, composed by an *actus reus* and a *mens rea*.

Genocide is defined by the Genocide Convention¹⁰ as “any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group”. Rape was acknowledged as a form of genocide for the first time by the *Akayesu* Trial Judgment¹¹. The Judgment recognized the intersectionality of the crime: it happened to certain women because of their ethnicity (Russel-Brown, 2003; Copelon, 2000). Genocidal sexual assaults seek to destroy the targeted group's biological and cultural identity (Sharlach, 2000).

The underlying acts of genocide cover a conduct that has the potential to destroy a protected group (Schomburg & Paterson, 2007; Ellis, 2007). The 1820 UN Security Council Resolution states the fact that women and girls are “particularly targeted by the use of sexual violence, including as a tactic of war to humiliate, dominate, instill fear in, disperse and/or forcibly relocate civilian members of a community or ethnic group” and that rape and other forms of sexual violence “can constitute a war crime, a crime against humanity, or a constitutive act

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10 Convention on the Prevention and Punishment of the Crime of Genocide. Approved and proposed for signature and ratification or accession by General Assembly resolution 260 A (III) of 9 December 1948 Entry into force: 12 January 1951, in accordance with article XIII.

11 *Akayesu* Trial Judgment, *op.cit.*, para. 731: “[...] rape and sexual violence, the Chamber wishes to underscore the fact that in its opinion, 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 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. In light of all the evidence before it, the Chamber is satisfied that the acts of rape and sexual violence described above, were committed solely against Tutsi women, many of whom were subjected to the worst public humiliation, mutilated, and raped several times, often in public, in the Bureau Communal premises or in other public places, and often by more than one assailant. These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. 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”.

with respect to genocide”¹² (Stephens, 1999; Maravilla, 2001). The genocide provision covers rape indirectly but not directly. Within the list of acts that constitute genocide by the Convention, four of them can be committed by rape (Askin, 2003; Vandenberg and Askin, 2003; Askin and Dorean, 1999).

Firstly, “causing serious bodily and mental harm”. Rape causes serious bodily or mental harm to members of the group (Russel-Brown, 2009; Reid-Cunningham, 2008; Sharlach, 2000; Boon, 2001; Chinkin, 1994)¹³, not only to the individual victim but also to their families and their community (Askin, 2003). The *Akayesu* judgment viewed rape as a tool of war with the intent to destroy a group and defined rape as a form of aggression and violation of personal dignity (Russel-Brown, 2009). It caused body and mental harm through the physical and psychological destruction of the women, their families and communities (Russel-Brown, 2009; Reid-Cunningham, 2008).

As stated in the jurisprudence, the harm does not have to be permanent or irremediable, but it must be so serious as to cause a threat of the destruction of the group in whole or in part (*The Prosecutor v Athanase Seromba*, 2001). The injury must result in a grave and long-term disadvantage to a person’s ability to lead a normal life (*The Prosecutor v Radislav Krstic*, 2001). This is the situation that victims of rape face after the crime due to the trauma it creates to them, which impedes them from continuing a normal life or having normal social relations afterwards.

Rape, as an act of violence, causes bodily distress in the physical pain that the action *per se* inflicts and the pain that victims endure after the rape if it has caused them internal or external injuries. Survivors experience abdominal cramps, internal bleeding, and their reproductive capacity may also be damaged by physical injuries received during rape (Reid-Cunningham, 2008; Rogers, 2016). It also causes serious mental harms to the victim, their families and their community¹⁴. Sexual violence often leads to posttraumatic stress disorder, depression, anxiety disorders, and other adverse conditions amongst victims (Yüksel et al., 2018).

Secondly, rape is a means to “deliberately inflict on the group conditions of life calculated to bring about its physical destruction”. The jurisprudence has stated that the inflictions of conditions of life do not need to be through the use of method that would lead to an immediate death (*The Prosecutor v Kayishema and Ruzindana*, 1999), and Tribunals have accepted that “slow death” measures would fulfill the requirement (*The Prosecutor v Kayishema and Ruzindana*, 1999). Other methods of inflicting conditions of life recognized by the jurisprudence are the subjection of members of the group to a subsistence diet or their systematic expulsion of homes (*The Prosecutor v Jean-Paul Akayesu*, 1998). Under the mentioned rubric, we can also consider actions that bring about a slow death such as the infection of HIV/AIDS through rape, as was done in Rwanda (de Brouwer, 2005). Transmission of HIV through mass rape may be used as a strategy of population reduction (Reid-Cunningham, 2008).

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12 Women and peace and security, UN Security Council Resolution 1820, UN Doc. S/RES/1820 (19 June 2008)

13 This is the only action which is clarified in a footnote of the Elements of the Crimes of the Rome Statute as including rape. See: Elements of the Crimes of the Rome Statute, Article 6(b), footnote 3.

14 For more information about the mental harm that rape produces, see, for example: Quina, K. & Carlson, N. (1989). *Rape, Incest, & Sexual Harassment — A Guide for helping Survivors* 86, 143. Resick, P. A. (1993). *The Psychological Impact of Rape*, 8 J. Interpersonal Violence, pp. 223-55; Folnegovi-Smalc, V. (1994). *Psychiatric Aspects of the Rapes in the War Against the Republics of Croatia and in Bosnia-Herzegovina*, in “Mass Rape: The War Against Women In Bosnia-Herzegovina” p. 174 (Alexandra Stiglmayer ed.).

Thirdly, rape can qualify as “imposing measures to prevent births within the group and forcibly transferring children of the group to another group”. The forcible transfer of children of the group to another group is applicable only when those transferred are part of the protected group and below the age of 18¹⁵. The transfer needs to be carried out in a forcible manner but not restricted to physical force as acts of threats would qualify as a coercive transfer (*The Prosecutor v Jean-Paul Akayesu*, 1998).

Lastly, within “imposing measures intended to prevent births within the group and forcibly transferring children of the group to another group”, one can consider forced abortion or miscarriage, forced impregnation, sexual mutilation, or rape by a different ethnic group when custom dictates that the father determines the ethnicity of the child (Chinkin, 1994; MacKinnon, 1993; Askin, 1997; Goldstein, 1993; Russel-Brown, 2009; Rogers, 2016; Copelon, 2000).

As the *Akayesu* Trial Chamber stated (1998), in patriarchal societies where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother’s group. The Tribunal in *Akayesu* (1998) also found that the “prevention of births” in a particular protected group can be done through physical and mental means if a woman who has been raped subsequently refuses to have children because of her trauma or she cannot have more children because of the damage done to her reproductive system (Ellis, 2007; Copelon, 2000). The ICTY also made a connection between forced pregnancy and genocide and found that forced impregnation may constitute evidence of genocidal intent through ethnic cleansing (Ellis, 2007).

Many ethnic communities believe that the survivor has been inflected by the enemy and the child born is an enemy too (Reid-Cunningham, 2008). Children who are born as a consequence of rape and their mothers are stigmatized and socially punished within their own communities because in the view of their community they represent their humiliation (Campanaro, 2000; Lee, 2007). Siobhán Fisher (1996) argues that forced impregnation, not rape *per se*, constitutes genocide. Forcing females of a targeted ethnic group to conceive is genocidal because those so “impregnated” cannot carry the babies of men of their own ethnic group while their wombs are so “occupied” (Fisher, 1996; Chertoff, 2017).

Rape is also an instrument to force the exile of population and to destroy a group (Russel-Brown, 2009). Doctors Without Borders describe rape as a “weapon used to destabilize or even break a particular ethnic, national, or religious group or to ‘ethnically cleanse’ a whole society” (Dusauchoit, 2003). Survivors, family members and witnesses tend to avoid the trauma by leaving the areas where the events took place (Reid-Cunningham, 2008). Moreover, when rape is committed against a community which has marked religious and ethnic features, women also face greater stigmatization and fear of rejection because of their beliefs. Women from minorities often face reprisals by their own communities and their families because of cultural reasons (Campanaro, 2000; Scholz, 2007). This is why an adequate and sensitive treatment of victims is very important to achieve women to come forward and denounce the abuses (Spees, 2003).

Rapes have the intention to ostracize women due to the cultural values and stigma around rape (Scholz, 2007; Russel-Brown, 2009), as rape survivors and their children born from rape are a

Forcing females of a targeted ethnic group to conceive is genocidal because those so “impregnated” cannot carry the babies of men of their own ethnic group while their wombs are so “occupied”

15 See Article 6 of the EoC, elements 1, 2, 4 and 5.

daily reminder of the horrors committed, the group has the desire to exclude them from society (Reid-Cunningham, 2008; Ahram, 2015). Rape taking place in certain ethnic communities with strong cultural values produces an immense trauma to women and fear of rejection. These societies often value the virginity of women until marriage and punish sexual relations outside the marital sphere with ostracism (Campanaro, 2000; Scholz, 2007). The societal consequences for a raped woman are tremendous, as women face the vulnerability of being rejected by their family and society (de Brouwer, 2005; Rogers, 2016).

With regard to the *mens rea* of genocide, the specific intent of the crime is “to destroy, in whole or in part, a protected group as such”¹⁶. In essence, genocide can be committed through rape¹⁷ when committed with this specific genocidal intent (EUROJUST, 2017). If the intent is to destroy, in whole or in part a member of the protected group by any of the aforementioned methods, targeted as such because of their membership in the group, that should constitute genocide (Askin, 2003; *The Prosecutor v Niyitegeka*, 2003; Mettraux, 2005).

The threshold for the genocidal intent has been subject to a profound doctrinal controversy. What the Chambers normally require is that the perpetrator “seeks to achieve” or has the “goal” of destroying the group (*The Prosecutor v Goran Jelisić*, 2001). It is sufficient that the perpetrator knows that his acts are destroying, in whole or in part, the group as such (*The Prosecutor v Goran Jelisić*, 2001). The intent has to be referred to the material destruction of the group either by physical or biological means (*Prosecutor v Seromba*, 2006). The intended destruction must refer at least to a “substantial part” of the protected group (*The Prosecutor v Radoslav Brđanin*, 2004), not only by referring to the number of victims but also to the importance of the size of the group in relation to the overall community size (*The Prosecutor v Kristić* Trial Judgement, 2001) or the possible “prominence” or leadership or the targeted part (*The Prosecutor v Radoslav Brđanin*, 2004). The Tribunals have also stated that the part of the group can be limited to a specific region or geographical location, or even a municipality (*The Prosecutor v Kristić* Trial Judgement, 2001).

Finally, as the victim must belong to a particular “national, ethnical, racial or religious group”¹⁸, the perpetrator must have the intent to destroy in whole or in part a community of this kind.

A national group was defined in *Akayesu* (1998) as that whose members are seen as sharing a legal bond, based on common citizenship, coupled with reciprocity of rights and duties and an ethnic group as that whose members share a common language or culture. The same Chamber (1998) defined a racial group as one where their hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors and

The threshold for the genocidal intent has been subject to a profound doctrinal controversy

16 Article 6 of the Rome Statute.

17 This idea has been developed by several authors, see for example: MacKinnon, C. “*Rape, Genocide, and Women’s Human Rights*,” extracted from the book “*Violence Against Women: Philosophical Perspectives*”, ed. Stanley G. French, Wanda Teays, and Laura M. Purdy, 43-54 (Ithaca, NY: Cornell University Press, 1994); Viseur Sellers, P. *The ‘appeal’ of sexual violence: The Akayesu/Gacumbitsi cases*, n.d. p. 51-104.; Buss, D. *Rethinking ‘Rape as a Weapon of War’* Feminist Legal Studies (2009); MacKinnon, C., 2006, *op. cit.*; Ellis, M. (2007); Askin, K., *A Decade of the Development of Gender Crimes in International Courts and Tribunals: 1993 to 2003*, 3 Human Rights Brief vol. 16, n° 17 (2004); Rebecca L. Halfajee. *Prosecuting Crimes of Rape and Sexual Violence at the ICTR: The Application of Joint Criminal Enterprise Theory*. Harvard Journal of Law & Gender, Vol. 29. 2006; Askin, K., *War Crimes Against Women: Prosecutions in International War Crimes Tribunals* (1997); Askin, K., *Prosecuting Wartime Rape and other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 Berkeley Journal of International Law 288 (2003); Mitchell, D. *The Prohibition of Rape in International Humanitarian Law as a norm of Jus Cogens: Clarifying the Doctrine*. Duke Journal of Comparative & International Law, Vol 15, 2005.

18 Article 6 of the EoC.

members of a religious group those who share the same religion, denomination or mode of worship. An ethnic group has also been identified when the community distinguishes itself as such or identified as such by others (*The Prosecutor v Clément Kayishema and Obed Ruzindana*, 1999). For the purpose of the *mens rea*, the perpetrator has to subjectively perceive the victim as belonged to the group targeted for destruction (*The Prosecutor v Seromba*, 2006).

4. The rapes of the Yazidi women by ISIS

ISIS is a terrorist group¹⁹ that emerged from the widely known Al Qaeda in Iraq. After its expansion over Syria by taking advantage of the ongoing civil war in the country, ISIS extended to Iraq during the summer of 2014 (Human Rights Watch, 2015). On August third, 2014, ISIS launched attacks on villages across the region of Sinjar, close to the Iraqi-Syrian border targeting the Yazidi population (Human Rights Council, 2016; Office of the UNHCHR, 2016; Murad, 2017; Callimacchi, 2015; Sverdlov, 2017; Henne & Hackett, 2014; Cooper & Shear, 2014).

The aim of ISIS is to give an end to the Yazidi community and its religion (Counter Extremism Project Report, 2017). Yazidis are a closed community with a long history of being persecuted and first faced accusations of devil worship by Muslims in the late 16th and early 17th centuries (Yüksel et al., 2018). ISIS incorrectly considers Yazidi population “*kufar*” or infidels due to the view of the Yazidi faith as a religion of “devil-worshippers” (Spencer, 2013; Murad, 2017; YAZDA, 2017; Ahmado, 2018). ISIS has seized Yazidi towns carrying out massacres against men and elderly women and subjecting Yazidi women and girls to a system of organized rape in an attempt to ‘purify’ the region from the non-Islamic influences (Callimachi, 2015; Ahram, 2016; HRW, 2017; Murad, 2017; Yüksel et al., 2018).

Their mode of operation consists on separating men and women, men being asked to convert or die, and women directly sent to the organized sexual market (EUROJUST, 2017). Women are forcibly transferred to the different “sexual market points” throughout Iraq and Syria to be sold, mostly schools and prisons where they are collectively held until an ISIS member bought them (Ahram, 2015; HRC, 2016; Murad, 2017). They are sold as sexual slaves²⁰ (UNAMI Report, 2016; Murad, 2017) to ISIS fighters and held captive in common buildings and military bases in order to be raped by the soldiers on a daily basis (Callimachi, 2015; Murad, 2017; EUROJUST, 2017; Chertoff, 2017). ISIS records their names and takes photos of them in order to keep a record and be able to capture them back if they manage to escape (HRC, 2016; Murad, 2017). In 2016, it was estimated that at least 3,200 Yazidi women and girls remained captives of ISIS (Callimachi, 2015; HRC, 2016, Chan & Sengupta, 2016).

It is important to mention the strong ideology that governs the sexual organized market of ISIS. The terrorist group delivered in October 2014 a series of instructions to ISIS soldiers and affiliates who buy women in the market to carry out intercourse with them in *Dabiq*²¹, the Islamic State Magazine. The pamphlet’s title was “Questions and Answers on taking captives as slaves” and stated a series of rules for ISIS fighters of what is acceptable or not acceptable to do with

It is important to mention the strong ideology that governs the sexual organized market of ISIS

19 As established by the United Nations Security Council in its 1267 Resolution (1999) S/RES/1267.

20 Even though as Nadia Murad itself has declared they prefer the term “survivor” and not “sex slaves”.

21 As an example, *Dabiq* states that soldiers cannot have intercourse with the girls during her period, or that brothers cannot sell the girls between them.

the Yazidi girls (Withnall, 2014; MEMHRI JIHAD, 2014; Landay et al., 2015; REUTERS, 2015; UNAMI, 2016; EUROJUST, 2017). The captured women are considered ISIS property and termed openly as “*sabaya*” or slaves (Murad, 2017). ISIS defends in *Dabiq* that “enslaving the families of the non-believers and taking their women as concubines is a firmly established aspect of sharia (Spencer, 2013; Ahram, 2015; Jelinkova, 2017; EUROJUST, 2017; Chertoff, 2017). However, a majority of Muslim clerics disagree with the mentioned ISIS ideas and condemn their actions (Goodstein, 2016).

In light of the ICC definition of rape, one can affirm that the actions being carried out by ISIS towards the Yazidi women amount to the crime of rape. The *actus reus* can be derived from the testimonies of the witness set out in several reports. Once a girl is bought, she is subjected to continuous rape by his raptor and some are handcuffed behind their backs during rapes while others had their hands and legs tied to the corners of the beds (HRC, 2016; UNAMI, 2016). If the girls do not submit, they are severely beaten or threatened with gang rape, death or the death of their children (HRC, 2016). Fighters order and supervise gang rapes of Yazidi women and girls who have tried to escape (HRC, 2016).

With regard to the circumstances in which the rapes take place, the environment can be classified as inherently coercive. This environment derives from the facts that ISIS sold women on a market, subjected them to a registration system and carried out a widespread slaughter of Yazidi men (Sverdlov, 2017). One should recall the jurisprudence set out in *Kunarac* (2002), where the Appeals Chamber elucidates the lack of consent under captivity. ISIS fighters have full power over the Yazidi captives, subject them to abuses and prevent them from leaving their home (HRC, 2016). Girls and women are abducted against their will and forced to stay collectively in buildings until they are bought. Testimonies show how they try to resist being sold and if they resist, they are severely beaten. They either forced to marry a fighter or forced to live in ISIS military bases to be raped by many soldiers.

The Yazidi women suffer from psychological oppression by being constantly threatened and verbally abused by their captors. They might finally submit to the rapes in order to avoid the consequences either to their own life or that of their families. The environment is that of violence, where women are unable to decide about their freedom and under the fear of punishment, they submit to any action committed to them. ISIS victims come forward with a testimony of being abducted, separated from her family, her male relatives being killed, being forced to stay with a fighter that has bought her and taken her against her will, has forced her to live with him and raped her every day despite her crying and praying him to stop²².

Turning to the debated issue of the element of “non-consent”, in this inherently coercive scenario we can understand the factual atmosphere of violence over which ICL operates. In these scenarios, as we have assessed previously, it must be understood that the definition of rape is incompatible with an element of “non-consent” on the part of the victim. Therefore, the absence of consent of a victim of sexual violence does not need to be established and is presumed under the described circumstances. ISIS fighters also carry out rapes against girls as young as six who we argue are incapable of giving genuine consent due to their age as established in the ICC definition, because children are incapable to voluntarily consent to the intercourse (La Haye, 2001; Tchan & Shorts, 2003; Weiner, 2013). The rapes carried out by ISIS towards the Yazidi

Testimonies show how they try to resist being sold and if they resist, they are severely beaten

22 These examples have been inspired in the testimony of Nadia Murad.

women are part of a genocidal campaign against the Yazidi community. Such facts establish the presence of circumstances that are extremely coercive and rule out any possibility of genuine consent (Schomburg and Paterson, 2007).

With respect to the *mens rea* of the crime of rape, ISIS fighters know they are committing the crime with force or threat of force, or that they are taking advantage of a coercive environment. Ammar Hamid Mahmoud Hussein, known as Abu Yasser, gave an interview in 2017 speaking about the multiple rapes he perpetrated, stating that “At first, it was an order,” [...] “We were young, we were not married, and we needed that.” The women often resisted. “We would tell them, ‘O.K., I am your husband, I am the owner of you’”. “Sometimes they needed to be beaten to make them comply” (Wright, 2017).

The coercive environment they take advantage of is proved since women are kidnapped against their will and kept captive. ISIS fighters exploit their abuse of power towards the Yazidi women they have kidnapped and dispose of them as they wish. Cultural knowledge as well as gender stereotypes that ISIS holds about the Yazidis and Yazidi women especially are the root causes of the sexual violence by which ISIS thinks that they can exert complete power over the Yazidis (Jelinkova, 2017).

As the Human Rights Council (2016) states in their reports, “the view of females as objects, not specific to ISIS, when backed by radical religious interpretation and territorial control affording dominance over women and girls, finds horrific though logical extreme in the terrorist’s group conduct. It is the common thread that links ISIS forcing Sunni women and girls to remove themselves from the male gaze by having them remain indoors or covering themselves entirely in public, and the trade of Yazidi women and girls as sex slaves. Care must be paid to the fact that Yazidi women and girls have been doubly victimized, on the basis of their religion and their sex”.

Cultural knowledge as well as gender stereotypes that ISIS holds about the Yazidis and Yazidi women especially are the root causes of the sexual violence

5. The rapes of the Yazidi women as genocide

In the third part of this article, we assessed how four of the *actus reus* of genocide can be committed through rape. Those four acts are being carried out towards the Yazidi women.

For the purpose of this study, we consider the Yazidi as one of the protected groups of the Genocide Convention: either a racial, ethnic or religious group, or the three of them. ISIS bears the genocidal intent²³, the “*mens rea*” of genocide, which is embedded in the Genocide Convention. Rape is, inside genocide, a violent act perpetrated with intent to destroy a group (Sharlach, 2000; de Brouwer, 2005; MacKinnon, 2006; Russel-Brown, 2009; Maier, 2011). The intent of ISIS is to destroy an ethnic, racial or religious group, which are the Yazidi²⁴. ISIS leaders have the intent to cause serious bodily suffering and mental harm to the Yazidi people under Article 2(b) of the Genocide Convention through the use of rape and the specific intent to destroy the Yazidi people, in whole or in part, through such rape (Sverdlov, 2017).

23 For a wider analysis of the *dolus specialis* of the crime of genocide, see: Schabas, W. (2000). *Genocide in International Law*, pp. 217-228.

24 In further articles, it would be interesting to assess the features of the Yazidi community that determine it is included as a protected group in the Genocide Convention. However, for the purpose of this article we assume that the Yazidi are a protected group within the Genocide Convention, and we will focus on explaining why the rape of the Yazidi can be regarded as genocide.

This affirmation is drawn from the fact that militants gave the Yazidis a choice to convert to Islam, and there is a punishment for refusing such conversion (Kikoler, n.d.). A general intent to cause serious bodily and mental harm to the Yazidis exists (Sverdlov, 2017). This intent can be drawn from the propaganda that ISIS carries out in *Dabiq* and has been commented on the previous section.

The Yazidi are the sole group targeted by ISIS for mass killings and rape²⁵, which is perpetrated as part of a genocidal campaign against the protected group. The atrocities committed against the Yazidis became recognized by the UN Security Council as Genocide in 2017²⁶, following the 2016 UN Human Rights Council report titled “They came to destroy: ISIS crimes against the Yazidis” that stated: “ISIL has sought to destroy the Yazidis through killings; sexual slavery, enslavement, torture and inhuman and degrading treatment and forcible transfer causing serious bodily and mental harm; the infliction of conditions of life that bring about a slow death; the imposition of measures to prevent Yazidi children from being born, including forced conversion of adults, the separation of Yazidi men and women, and mental trauma; and the transfer of Yazidi children from their own families and placing them with ISIL fighters, thereby cutting them off from beliefs and practices of their own religious community, and erasing their identity as Yazidis”.

Drawing from the facts, this article affirms that ISIS is committing genocide concerning the Yazidi by means of the rape of the Yazidi women, causing them serious bodily and mental harm, deliberately inflicting on them conditions of life calculated to bring about the physical destruction of the group in whole or in part, imposing measures to prevent the birth of Yazidi children and forcibly transferring children from one group to another.

Yazidi women are targeted both on the base of ethnicity and gender. The intention of ISIS is to destroy the Yazidi and genocidal rape is a way to specifically harm the Yazidi woman (Sverdlov, 2017) to advance it. When ISIS targets the Yazidi women, they also target the Yazidi community as a whole to destroy it (Sverdlov, 2017), to make it escape from the territories the terrorist group has conquered and to eliminate their religion by subjugating them. 300,000 Yazidis fled as ISIS killed and kidnapped women and girls living in Mount Sinjar in 2014, and more than 6,000 women and children were subjugated under systematic mass rape (Cetorelli, Sasson, Shabila & Burnham, 2017; Amnesty International, 2017).

Referring to the specific four actions of the *actus reus* of genocide against the Yazidi being committed by rape, there is proof of causation of serious bodily and mental harm and the deliberate infliction of conditions of life calculated to bring about the physical destruction of the Yazidi.

Besides the clear physical harm that Yazidi women endure during the rapes as shown in the Human Rights Reports testimonies, which are common to all victims of rape during armed conflict, Yazidi women and the whole community also suffer a specific mental harm, characteristic of closed religious communities. Hundreds of Yazidis are being treated in Europe for physical and mental conditions (Sverdlov, 2017).

The Yazidi are the sole group targeted by ISIS for mass killings and rape, which is perpetrated as part of a genocidal campaign against the protected group

25 This is declared by the Report of the U.S. Holocaust Memorial Museum, which singles out the Yazidi as the only victims of genocide by ISIS.

26 Security Council resolution 2379 (2017) on the establishment of an Investigative Team to Support Domestic Efforts to Hold the Islamic State in Iraq and the Levant Accountable for Its Actions in Iraq.

Yazidis social structure follows a caste social stratification system where, as often observed in the Middle East, there is a large family model and a strict system of patriarchy (Ahram, 2015). Marrying or having sex with a non-Yazidi is a reason for excommunication and sexual intercourse before marriage is forbidden for women (Kizilhan, 2018; Jelinkova, 2017). Normally, if a Yazidi woman is raped or has intercourse with a non-Yazidi, she will be rejected from her family and community, and her family will retain the stigma and dishonor inside the whole community.

ISIS planned to achieve their genocidal goal relying on the consequences of trespassing on the integrity of women's bodies and deeply entrenched notions about honor and marriage held by the Yazidis (Jelinkova, 2017). However, the main religious leaders of the Yazidi community have stated that women who return from ISIS captivity should be taken care of and not marginalized, not considered to be dishonorable and the community should embrace and accept them (HRC, 2016).

Regarding the prevention of births and forcible transfer of Yazidi children from one group to another, Yazidi women, as most survivors of rape, face a trauma that will probably impede them from having a normal sexual intercourse again, and therefore will not become pregnant in the future. They could also be marginalized and, when seen as unmarriageable, be rejected by the surviving male Yazidi and become incapable of having children. Moreover, the physical wounds some of them suffer have probably led to their incapacity to reproduce themselves ever again. All these consequences of the rape of the Yazidi women amount to the prevention of births within the community.

In addition, ISIS counts on the cultural impact of rape and forcefully impregnating Yazidi women to work in their favor to make sure that future generations of Yazidi would not be born (Jelinkova, 2017), similar to the intention that Serbian soldiers had when raping Bosnian Muslim women in Bosnia-Herzegovina. ISIS rapes Yazidi women in order to make them bear a child with the ethnicity of the father, which qualifies as the forcible transfer of children from one group to another. However, religious leaders have stated that Yazidi women should educate their newborns in the Yazidi faith and the community should embrace them as Yazidi (HRC, 2016).

The physical wounds some of them suffer have probably led to their incapacity to reproduce themselves ever again

6. Conclusion

The definition of rape in ICL presents a positive evolution. Rape has progressed from a lack of recognition and prosecution by the International Community to being explicitly set out in the Rome Statute as a crime against humanity, a war crime and a means to commit genocide in the document of the EoC.

Most of the positive progress in the criminalization of rape has been achieved through the work of feminist advocates and scholars, who have succeeded in that the definition of rape in the ICC does not include "lack of consent" in the *actus reus* of the crime. There is broad consensus on the fact that, during wartime situations or within a context of an ongoing genocide or crimes against humanity, where rape is used as a tool of war, the criminal offence does not beg the question of lack of consent on the part of the victim, who is a member of a group which is systematically enduring violence.

This article has aimed to show both the evolution of the definition of rape in ICL and how the crimes perpetrated by the ISIS fighters towards the Yazidi women qualify as rape as defined in the EoC, the current rape definition for the ICC. More specifically, this study has pursued to

show that the actions executed by ISIS qualify as a genocide being committed regarding the Yazidi by means of rape.

The genocide towards the Yazidi, the destruction of this ethnic, racial or religious group, is being carried out by specific activities which involve the *actus reus* of genocide, four of which can be conducted by means of rape. The rape of the Yazidi as part of the genocidal campaign of ISIS against the Yazidi causes Yazidi women serious bodily and mental harm, inflicts on them conditions of life calculated to bring about their physical destruction in whole or in part, prevents them from giving more births and forcibly transfers Yazidi children from one group to another.

Although we have witnessed a positive evolution of ICL when acknowledging the seriousness of the sexual violence that women endure during armed conflict and genocidal campaigns, there are further improvements that can be carried out. Several authors have stated that, to further advance the effectivity of rape prosecutions and the deterrence of further rape instances in future intrastate or interstate conflicts, rape should be prosecuted as a crime, in and of itself and not only as a subsection of crimes against humanity and war crimes.

In conclusion, the definition of rape embedded in the Elements of the Crimes of the Rome Statute applies to the crimes committed by ISIS against the Yazidi women. Taking into consideration that the *actus reus* of genocide can be satisfied through rape, one can assume that, in the ongoing genocide of the Yazidi by ISIS, rape is being used as a means to carry out the genocidal campaign.

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