



Degree Program in Politics: Philosophy and  
Economics

Course of International Law

# The International Criminalization of Conflict- Related Sexual Violence: Legal Perspectives and the Yazidi Genocide

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## **Introduction**

Sexual violence may be considered the most severe violation of a human's body, a violent breach of their right of privacy, which leaves long lasting scars on its victims, both physically and psychologically. In addition to having a serious impact on the individuals involved, this terrible behavior has other negative effects including destroying communities and prolonging trauma and suffering cycles. Sexual violence has, especially in recent times, crept its way into the uses and customs of warfare, but it has also become a key element of most worldwide crises, inflicting unbelievable pain on countless individuals, particularly children and women. As the international community struggles with the devastating impact of these atrocities, the role of international criminal law in addressing and combating sexual violence has become increasingly relevant.

Being myself a student deeply passionate about human rights and with a keen sensitivity to matters of sexual violence, I approached this research with a dual purpose. First, to broaden my knowledge of the legal frameworks in international criminal law pertaining to sexual violence, driven by a curiosity to uncover the inherent complexities of these practices. Second, to explore the practical implementation of these legal principles in achieving justice and accountability for survivors. This pursuit is motivated by my commitment to advocate for the respect and protection of all individuals in front of the systemic impunity of the perpetrators of these heinous acts.

This thesis aims at shedding a light on the intricate intersection of sexual violence and international criminal law. In particular, it will provide an overview on the classification of this conduct under three main charges, that is to say, 'war crime', 'sexual violence' and the crime of 'genocide'. Through a comprehensive analysis of legal principles and landmark cases, this work will contribute to a deeper understanding of sexual violence in the context of ongoing conflicts, and the challenges to achieve accountability and justice for the survivors.

The methodology employed encompasses a thorough review of the relevant literature, including academic papers, legal documents and reports from international organizations. In particular, various references will be made to courts judgements or opinions, together with international treaties, for the sake of providing the most detailed possible legal research.

Chapter 1 will analyze how sexual violence is defined in international law and how it has been prosecuted as a war crime. It will first dive into the codification of the definition of

such act, drawing from international treaties (such as the Geneva Conventions of 1949 or the Rome Statute of the International Criminal Court (ICC)), organizational studies (referring principally to the World Health Organization), and the *ad hoc* tribunal jurisprudence (including the landmark *Akayesu* case). Successively, this chapter will elucidate the notion of war crime, investigate on the nexus between sexual violence and armed conflict, and outline the challenges in providing the required elements of war crimes. In order to present the relevant case law to illustrate how sexual violence has been recognized as a war crime, and persecuted accordingly, a brief study of the *ad hoc* international criminal tribunals of the former Yugoslavia (ICTY) and Rwanda (ICTR), together with the ICC, will be provided.

In Chapter 2, focus will be shifted to other international crimes, namely crimes against humanity and genocide. It will begin with an outline of crimes against humanity (CAH), tracing its historical evolution and definition under the statutes of the *ad hoc* tribunals and the ICC, and proceed to investigate prosecution of sexual violence as a component of this offense through the relevant case-law. Additionally, it will explore the concept of genocide, referencing to the definition provided in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, and its incorporation into international law statutes. It will examine the concept of genocidal rape and the role of sexual violence in campaigns of ethnic cleansing, together with the jurisdiction of international tribunals in adjudicating cases of sexual violence with genocidal intention.

Chapter 3, the final section of this thesis, will be centered on the genocide of the Yazidis perpetrated by the Islamic State of Iraq and Syria (ISIS) since the 4<sup>th</sup> of August 2014. It will provide the historical background and main cultural aspects of the Yazidi community, establishing how they have been recognized as a protected group under Article II of the 1948 Genocide Convention. It will focus on the illicit conducts unfolded against the Yazidi women and girls, who were subjected to systematic sexual violence, enslavement, and other atrocities at the hand of the terrorist group. A legal analysis will highlight how these align with the definitions of war crimes, CAH and genocide. Lastly, it will evaluate the full scope of the long-term impacts of the violations of human rights endured by the Yazidi community, the battles for justice (also through the principle of universal jurisdiction) and the shortcomings of these actions.

## Chapter 1: Sexual Violence as a War Crime

### 1.0 Introduction

Sexual violence has historically often been used as a tool of war in all continents, in every kind of conflict. Other means and methods of warfare have undergone development and changes during the centuries, some have even disappeared from the practices of armies and parties to armed conflicts. *Au contraire*, sexual violence is still nowadays widely practiced, in some cases even as a strategic tactic to destroy the social fabric of certain communities. It may be the result of various factors, such as the lack of accountability, punishment for certain conducts, the absence of clear orders prohibiting them, and the increasing vulnerability that victims of armed conflict may face. It should be highlighted that, even in situations related to a conflict, this kind of aggression stems from other motivations like power, dominance, and abusing authority rather than sexual desire.

However, recent times have seen these atrocities being recognized for what they are, and thus coming to the attention of the international community to finally being prosecuted. A robust legal framework and the presence of institutions tasked with enforcing these laws are fundamental in order to prevent sexual violence.

This chapter will analyze these elements to provide a clear guide to understand how sexual violence is defined within international law, and how it can be prosecuted as a war crime.

The first section will be dedicated to give an overview of the definition of sexual violence as recognized by the international community. It is not possible to find a complete definition of sexual violence in any international law treaty. However, the Geneva Conventions of 1949 and their Additional Protocols of 1977 make explicit or implicit reference to sexual violence. Furthermore, international organizations such as the World Health Organization (WHO) have studied this conduct in order to give a comprehensive definition. The statutes of ad hoc international criminal tribunals recognize rape and other forms of sexual violence as a crime, and the tribunals have made use of their jurisprudence to develop their own definitions, which shall be covered as well.

The notion of war crimes will be introduced in the second section. For the purpose of providing a most complete overview, a distinction will be made on the concept of war crimes applicable respectively to international armed conflict and non-international armed conflict. The *Tadic* case will be particularly pertinent for this part of the analysis. I will then describe the legal elements of war crimes (that is to say, the *actus reus* and the

*mens rea*), dedicating a final highlight on the requirement of a nexus. The *Kunarac* case is particularly relevant for the identification of the factors necessary to assess if an offence is sufficiently related to an armed conflict in order to constitute a war crime.

In the third section, I will dive into the prosecution of episodes of sexual violence as war crimes. Successively an illustration of the *ad hoc* international criminal tribunals, namely the one for the former Yugoslavia and the one for Rwanda, and the International Criminal, I will proceed to present relevant case law to illustrate how sexual violence has been recognized as a war crime and charged accordingly.

## 1.1 Sexual Violence in International Law

### 1.1.1 Definition and prohibitions to be found in the four Geneva Conventions of 1949

International Humanitarian Law (IHL), also referred to as the law of armed conflicts or the law of war (*jus in bello*), is the branch of international law which regulates the conduct of armed conflicts. Since the beginning of its codification process on the initiative of the Swiss banker Henry Dunant, the body of treaty IHL has grown to include two main sources, namely the “law of the Hague” and the “law of Geneva”<sup>1</sup>. While the former entails restraints on the conduct of hostilities, including the prohibition of certain methods or means of warfare, the latter is most relevant for this analysis since it focuses on the protection of individuals who are not or are no longer taking part in hostilities.

The Geneva law consists of the four Geneva Conventions (GCs) of 1949, supplemented by the two Additional Protocols of 1977, namely Additional Protocol I (API) and Additional Protocol II (APII). All the 196 states have granted ratification to the Geneva Conventions, close to making it a universally ratified body of law<sup>2</sup>.

The ICRC defines sexual violence as “acts of a sexual nature that do not necessarily require penetration”; this description thus encompass a wider range of acts than rape<sup>3</sup>.

It is possible to find articles in IHL treaty law prohibiting rape and other forms of sexual violence in an explicit way, while other provisions do so implicitly<sup>4</sup>.

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<sup>1</sup> Melzer, Nils. *International humanitarian law: A comprehensive introduction*. Geneva, Switzerland: ICRC, International Committee of the Red Cross, 2019, 35

<sup>2</sup> *Ibid*, 36; Paola Gaeta, Jorge E. Vinuales, and Salvatore Zappa, *Cassese's International Law*, Oxford, United Kingdom: Oxford University Press, 2020, 371.

<sup>3</sup> ICRC Advisory Service, “Prevention and Criminal Repression of Rape and Other Forms of Sexual Violence During Armed Conflicts,” ICRC International Committee of the Red Cross, 2015, <https://www.icrc.org/en/document/prevention-and-criminal-repression-rape-and-other-forms-sexual-violence-during-armed>, 2.

<sup>4</sup> ICRC Advisory Service, 2015, 2



Sexual violence is only explicitly mentioned once in the Geneva Conventions, more precisely in the Fourth Convention Relative to The Protection of Civilian Persons in Time Of War of 12 August 1949, under Article 27. In the second paragraph, the article provides *inter alia* that “women shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault”<sup>5</sup>. This concept is further addressed in article 75(2)(b) of API, which in defining the fundamental guarantees of those persons falling under the scope of article 1 of the same Protocol, establishes that “outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault”<sup>6</sup> are prohibited. It can be concluded that the expressions “outrages upon personal dignity” and “any form of indecent assault” refer to any form of sexual violence. This statement is supported by article 76 of API, which outlines the principle of the protection towards women in particular against “rape, forced prostitution and any other form of indecent assault”<sup>7</sup>, while article 77 of API states that children shall be protected against “any form of indecent assault”<sup>8</sup>.

In December 1992, the International Committee of the Red Cross (ICRC) issued an *Aide-memoire* to clarify the content of article 147 of the Fourth Geneva Convention, relating to the prohibition of the grave breaches committed against civilians in international armed conflicts (IACs). The Committee found that the prohibited conducts listed in article 147 and, in particular, the breach of willfully causing great suffering or serious injury to body or health, “obviously covers not only rape, but also any other attack on a woman’s dignity”<sup>9</sup>.

For what regards non-international armed conflicts (NIACs), it is considerably relevant to take into account the text of article 4 of APII. Under comma 2(e), it explicitly prohibits “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault”<sup>10</sup> with regard to any person not or no longer directly participating in hostilities, women and men alike.

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<sup>5</sup> ICRC, Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (GC IV), Geneva, 12 August 1949, Art. 27

<sup>6</sup> ICRC, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I). Geneva, June 8, 1977, Art. 75

<sup>7</sup> *Ibid*, Art. 76

<sup>8</sup> *Ibid*, Art. 77

<sup>9</sup> Sellers, Patricia Viseur. “The Prosecution of Sexual Violence in conflict: The Importance of Human Rights as Means of Interpretation”. OHCHR. Women’s Human Rights and Gender Unit (WRGU), 2007, 9

<sup>10</sup> ICRC, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II). Geneva, June 8, 1977, Art. 4

Furthermore, Common Article 3 to the Geneva Conventions, applicable both in cases of IACs and NIACs since it is now recognized as customary law which reflects “elementary considerations of humanity”<sup>11</sup>, provides a list of acts which, with no derogation, shall remain prohibited “at any time and in any place whatsoever”<sup>12</sup>. This list implicitly refers to rape or other forms of sexual violence, as it forbids “violence to life and person”<sup>13</sup>, including cruel treatment and torture, and outrages upon personal dignity.

### 1.1.2 The ICC definition of Sexual Violence

The Rome Statute of the International Criminal Court (ICC) provides a non-exhaustive list of the most serious conducts of sexual violence, recognized to fall under the jurisdiction of the Court. In particular, the ICC outlaws “rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions”, as stated in Article 8(2)(b)(xxii) of the ICC Statute.

Furthermore, case law and legal writings have contributed to the classification of additional examples of sexual violence, namely “trafficking for sexual exploitation, mutilation of sexual organs, sexual exploitation (such as obtaining sexual services in return for food or protection), forced abortions, enforced contraception, sexual assault, forced marriage, sexual harassment”<sup>14</sup>.

### 1.1.3 The World Health Organization definition

On the 3<sup>rd</sup> of October 2002, after three years of working, the World Health Organization (WHO) launched one of its most ambitious research projects: the 2002 *World Report on Violence and Health*. The report represents the “first comprehensive review of the problem of violence at a global level”<sup>15</sup>: it provides a number of cost-effective interventions to counter some of the top ten risks to human health, together with making key recommendations to help countries develop risk reduction policies which, if

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<sup>11</sup> ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, ICJ Reports (1986), para. 218

<sup>12</sup> ICRC, *The Four Geneva Conventions*. Geneva, August 12, 1949, Common Art. 3

<sup>13</sup> *Ibid*

<sup>14</sup> Gaggioli, Gloria. “Sexual Violence in Armed Conflicts: A Violation of International Humanitarian Law and Human Rights Law.” *International Review of the Red Cross* 96, no. 894 (June 2014): 503–38, 506.

<sup>15</sup> Violence Prevention (PVL), WHO TEAM. “World Report on Violence and Health.” World Health Organization, 2002.

implemented, will result in substantially more years of healthy life for many millions of people.

Chapter 6 of the report focuses entirely on the topic of sexual violence. As stated by the WHO, sexual violence may be defined as “any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed, against a person’s sexuality using coercion, by any person regardless of their relationship to the victim, in any setting, including but not limited to home and work”<sup>16</sup>

The report further delves into an analysis of the coercion element, which essentially entails the use of force. However, in the context of sexual violence, force can manifest itself in different ways, ranging from physical force to psychological intimidation, encompassing situations where consent may not be given freely.

The recognition of the risks that sexual violence may entail in the long term on the victims’ mental and physical health is a fundamental input to further advance the prosecution of this crime both in domestic and international law, together with allocating resources to prevention and response mechanisms, and promoting gender equality.

#### 1.1.4 *Akayesu* and other relevant case law

The most relevant case law which provided a definition of sexual violence is the *Prosecutor v Jean-Paul Akayesu* trial. The accused, Jean-Paul Akayesu, was the highest political official of the *commune* of Taba, in Rwanda. His role as *bourgmestre* entailed duties such as maintaining public order and exercising exclusive control over the local police. However, Akayesu used the powers he was invested with to order and incite the killing of the Tutsi population<sup>17</sup>. On 2 September 1998, Trial Chamber I of the International Criminal Tribunal for Rwanda (ICTR) found him guilty of nine out of fifteen Counts charging him with genocide, crimes against humanity and violations of the Geneva Conventions.

In this occasion, the court held that “Sexual violence, which includes rape, is considered to be any act of sexual nature, which is committed on a person under circumstances which are coercive”<sup>18</sup>. This definition has quite a broad scope, as it establishes that acts of sexual

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<sup>16</sup> Krug, Etienne G., Linda L. Dahlberg, James A. Mercy, Anthony B. Zwi, and Rafael Lozano, eds. *World report on violence and health*. Geneva, Switzerland: World Health Organization, 2002, 149

<sup>17</sup> Sellers, 2007, 19

<sup>18</sup> *Prosecutor v. Jean-Paul Akayesu (Trial Judgement)*, ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), September 2, 1998, para. 688

nature may encompass conducts ranging from physical penetration to verbal remarks with sexual innuendos, up to threats and intimidations<sup>19</sup>.

The *Akayesu* case was highly innovative for its time and set a precedent for the dialogue about acts of sexual violence in the context of armed conflicts<sup>20</sup>. The merits of this case will be further analyzed in the following paragraph.

#### 1.1.5 Focus on the concept of rape

The concept of rape is a specific component of sexual violence, with a definition of its own, which shall be addressed by itself.

The aforementioned 2002 Report of Violence and Health presents an exhaustive definition of rape, describing the act as a “physically forced or otherwise coerced penetration – even if slight – of the vulva or anus, using a penis, other body parts or an object”<sup>21</sup>.

Rape has also been defined by the international criminal tribunals in three most prominent cases, which will be cited below in chronological order.

For the first time in the history of humanitarian law, in 1998, the ICTR’s Trial Chamber (and then the Appeals Chamber) defined rape in the *Akayesu* case as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive”<sup>22</sup>.

This judgement does not require victims of sexual assault to have physically or verbally expressed their lack of consent to the perpetrator for the assault to be considered unlawful<sup>23</sup>. Moreover, the Tribunal recognized that coercive circumstances may constitute a component of the crime without requiring evidence of physical force, in particular “[t]hreats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion”<sup>24</sup>. The Tribunal noted that coercion might “be inherent” of certain situations, such as armed conflict<sup>25</sup>.

Four months after the *Akayesu* judgement, the International Criminal Tribunal for the former Yugoslavia (ICTY) gave its own more precise definition of rape during the *Furundzija* Judgement. The Trial Chamber concluded that the elements (*actus reus*) of

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<sup>19</sup> Gaggioli, 2014, 506.

<sup>20</sup> Vito, Daniela de, Damien Short, and Aisha Gill. “Rape Characterised as Genocide” *International Journal on Human Rights* 6, no. 10 (June 2009): 29–51, 44.

<sup>21</sup> See note 16 above

<sup>22</sup> ICTR, *Akayesu* Trial Judgement, para. 598

<sup>23</sup> Sellers, 2007, 20.

<sup>24</sup> Gaggioli, 2014, 506

<sup>25</sup> ICRC Advisory Service, 2015, 1.

rape were: “(i) the sexual penetration, however slight: of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or of the mouth of the victim by the penis of the perpetrator; (ii) by coercion or force or threat of force against a victim or third person”<sup>26</sup>.

This definition takes the distances from the *Akayesu*'s statement under two aspects, namely “its mechanical physiological approach and its inclusion of the gender-neutral use of third persons”<sup>27</sup>. Of particular relevance is the inclusion of oral sex, other than penetrative sex. *Furundzija*'s definition avoided the requirement of the victim's non-consent as a condition for defining rape, just like the *Akayesu* one.

Finally, the third relevant case for this analysis is the *Kunarac* case in 2001, where the ICTY Trial Chamber broadened its previous definition of rape given in the *Furundzija* case. In particular, while it clarified the overly narrow scope of part (ii), while preserving part (i) of the definition<sup>28</sup>. According to the Trial Chamber, if the circumstances of the penetration would make the participation of the victim “non-consensual or non-voluntary”, then the sexual act would be considered rape<sup>29</sup>; that is to say, the scope is not limited to the presence of “coercion or force or threat of force against the victim or a third person”. The Trial Chamber further held that “[i]n practice, the absence of genuine and freely given consent or voluntary participation may be evidenced by the presence of ... various factors ... – such as force, threats of force, or taking advantage of a person who is unable to resist”<sup>30</sup>. The key element, therefore, is the lack of genuine consent or voluntarily participation, of which these elements are evidence.

The Elements of Crimes (EoC) of the International Criminal Court (ICC) integrated the definition of the ICTR and the ICTY in the aforementioned case-law evolution, together with parts of the ICTY/ICTR Rule of Procedure 96<sup>31</sup> to provide an even more refined definition of rape. In fact, according to Article 8(2)(b)(xxii)-1, an act can be considered as rape if:

“1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the

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<sup>26</sup> *Prosecutor v. Anto Furundzija (Trial Judgement)*, IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), December 10, 1998, para. 185.

<sup>27</sup> See note 22 above.

<sup>28</sup> Gaggioli, 2014, 508

<sup>29</sup> *Ibid*

<sup>30</sup> *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Trial Judgement)*, IT-96-23-T & IT-96-23/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), February 22, 2001, para. 458.

<sup>31</sup> Sellers, 2007, 26.

perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.

2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent”<sup>32</sup>.

This definition is widely acknowledged by the international community as the most authoritative, and national legislations have proceeded to include the crime of rape in concordance<sup>33</sup>.

## 1.2 The notion of war crime

### 1.2.1 War crimes: from the Geneva Conventions (1949) to the ruling of the *Tadić* case and the concept of ‘grave breaches’

War crimes can be defined as violations of international humanitarian law, either treaty or of customary nature, which give rise to the criminal responsibility of individuals directly under international law<sup>34</sup>. However, not all violations of the law of armed conflict qualify as war crimes. In order to amount to war crime, a conduct must fall within the scope of a “serious violation” as defined by the ICTY Appeals Chamber in the *Tadic* case. The ICTY decision established that, for a violation to be considered serious, “it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim”<sup>35</sup>. The ICTY also found that, although war crimes have traditionally encompassed only breaches of international rules regulating international armed conflicts, also serious violations of rules applying to non-international armed conflict may amount to war crimes<sup>36</sup>.

It is not possible to find a single document in international law that codifies all war crimes.

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<sup>32</sup> International Criminal Court, *Elements of Crimes*, 2011, Art. 8(2)(b)(xxii)-1.

<sup>33</sup> Gaggioli, 2014, 509.

<sup>34</sup> Gaeta, Vinuales, & Zappalà, 2020, 428

<sup>35</sup> *Prosecutor v. Dusko Tadic aka "Dule" (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)*, IT-94-1, International Criminal Tribunal for the former Yugoslavia (ICTY), October 2, 1995, para. 94.

<sup>36</sup> *Ibid*, para 95.

The Geneva Conventions individuate a number of “grave breaches”<sup>37</sup>, which entails violations of the 1949 Geneva Conventions and Additional Protocol I “committed in the context of an international armed conflict against persons or properties protected under the relevant provisions of the GCs”<sup>38</sup>. The grave breaches regime may only be applied in the context of international armed conflicts. Furthermore, the grave breaches system provides that High Contracting Parties are under the obligation “to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of [the] Convention”<sup>39</sup>. As specified by Article 49 of the First Geneva Convention, article 50 of the Second, article 129 of the Third and article 146 of the Fourth identically, each party to the Conventions must bring alleged perpetrators before its own court regardless of their nationality. That is to say, the grave breaches provisions are not dependent on “any prescriptive nexus of nationality, territoriality, passive personality, or the protective principle”, and thus they give rise to universal criminal jurisdiction over alleged grave breaches<sup>40</sup>. The grave breaches regime also includes serious violations of other provisions contained in the Geneva Conventions. On the other hand, in the context of internal conflicts, war crimes are recognized as serious violations of Common Article 3 to the four 1949 Geneva Conventions. The relevant provision is therefore Common Article 3, which the ICTY recognized in the *Tadic* case to mandate a “minimum mandatory rule” applicable to any armed conflict with no distinction regarding their international or internal nature<sup>41</sup>.

### 1.2.2 The legal elements of war crimes

In order to account as a war crime, an unlawful conduct must be composed of certain legal elements, which I shall address in this section, together with a nexus to an armed conflict, which I shall further develop in the next section.

The legal elements of war crimes are the prohibited physical act (*actus reus*) and the required mental element (*mens rea*).

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<sup>37</sup> Article 50 GCI, Article 51 GCII, Article 130 GCIII, Article 147 GCIV.

<sup>38</sup> Dörmann, Knut. “War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crimes.” *Max Planck Yearbook of United Nations Law Online* 7, no. 1 (2003): 341–407, 356.

<sup>39</sup> Article 49 GCI, Article 50 GCII, Article 129 GCIII, Article 146 GCIV.

<sup>40</sup> O’Keefe, Roger. “The Grave Breaches Regime and Universal Jurisdiction.” *SSRN Electronic Journal* (2009): 811-831, 813.

<sup>41</sup> ICTY, *Tadić*, Appeals Chamber, para 102.

The *actus reus* is constituted by the serious violation of treaty or custom international humanitarian law, in line with the definition given in the *Tadic* case, that is to say “it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim”<sup>42</sup>. The prohibited conduct must give rise to individual criminal responsibility. Furthermore, the victim shall be a protected person under IHL. A violation of the law of armed conflict does not entail criminal liability unless the mental requirement (*mens rea*) is satisfied. Unless rules of international humanitarian law clarify themselves the relevant mental element for corresponding war crimes, article 30 of the Rome Statute acts as the minimum requirement to be applied under the ICC jurisdiction. According to this provision, it is required that the war crime must be committed with intent or knowledge (respectively under paragraph 2 and 3)<sup>43</sup>. In particular, the perpetrator must voluntarily engage in the prohibited conduct, with the intent of causing or aware of the consequences it may entail. Furthermore, the perpetrator must be aware of the factual circumstances surrounding his conduct, and again of the consequences it may incur.

### 1.2.3 The nexus between the actus reus and the armed conflict

A criminal conduct that satisfies the mental and material elements aforementioned only classifies as a war crime if it presents a sufficient nexus with an armed conflict. The requirement of a nexus is fundamental in order to individuate criminal conducts under domestic law committed during an armed conflict which may amount to war crimes, that is to say, which entail individual criminal responsibility under international law.

There is no comprehensive definition of armed conflicts in treaty law<sup>44</sup>. Common Article 2 of the Geneva Conventions provides an exhaustive outline of the scope of application of the Conventions through a clarification of what constitutes an IAC. On the other hand, NIACs are defined by Common Article 3, together with Article 1 of the Additional Protocol II<sup>45</sup>. The temporal scope of the application of IHL encompasses the beginning of the conflict through an official declaration of war (or, in the absence of that, through the actual use of armed force expressing belligerent intent) until the end of the dispute with a peace treaty or equivalent agreement (although, as of today, such means are quite

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<sup>42</sup> See note 31 above.

<sup>43</sup> UN General Assembly. Rome Statute of the International Criminal Court, last amended 2010, 17 July 1998, Art. 30.

<sup>44</sup> Melzer, 2019, 52.

<sup>45</sup> ICRC. "How is the Term "Armed Conflict" Defined in International Humanitarian Law?" March, 2008. <https://www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict.pdf>, 3.



rarely used)<sup>46</sup>. Some of the provisions of IHL may continue to apply even in the aftermath of the end of the conflict, such as the provisions protecting persons deprived of their liberty for reasons related to the armed conflict<sup>47</sup>. For what regards the territorial scope of war crimes, the ICTY has clarified in the *Tadic* sentence that IHL may apply outside the narrow geographical context where combat takes place, but may extend beyond that, encompassing those areas where belligerent States carried out acts related to the conflict<sup>48</sup>.

Merely because IHL applies in a specific timeframe and location, it does not imply that all acts occurring in this context are subjects to IHL regulations; a nexus with an armed conflict must be determined. The case law of international criminal tribunals has greatly worked on developing this notion, whose clear definition cannot be found in treaty IHL<sup>49</sup>.

In the *Kunarac* case, the ICTY Appeals Chamber held that:

“what ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment – the armed conflict – in which it is committed. It need not have been planned or supported by some form of policy. The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator’s ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed. Hence, if it can be established, as in the present case, that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict”<sup>50</sup>.

The ‘under the guise’ criterion has been criticized for being too broad<sup>51</sup>. The opinion that the crime need not have aided or even affected the war effort was supported by the Appeals Chamber. This position would, in fact, entail a scope too narrow to include “dysfunctional war crimes which are committed by soldiers and paramilitaries, such as raping for their own personal gain, ‘under the guise of’ an armed conflict”<sup>52</sup>

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<sup>46</sup> Melzer, 2019, 58.

<sup>47</sup> ICTY, *Tadić*, Appeals Chamber, para 69.

<sup>48</sup> *Ibid*; Melzer, 2019, 59.

<sup>49</sup> Gaggioli, 2014, 514.

<sup>50</sup> *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Appeal Judgment)*, IT-96-23 & IT-96-23/1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 12 June 2002, para 58.

<sup>51</sup> Wilt, Harmen van der. “War Crimes and the Requirement of a Nexus with an Armed Conflict.” *Journal of International Criminal Justice* 10, no. 5 (October 17, 2012): 1113–28, 1125.

<sup>52</sup> *Ibid*, 1128.

The ICTY Appeals Chamber proceeded then with the identification of the parameters necessary to determine if an offence is sufficiently related to an armed conflict in order to constitute a war crime. These factors included that “the perpetrator is a combatant, the victim is a non-combatant, the victim is a member of the opposing party, the act may be said to serve the ultimate goal of a military campaign and that the crime is committed as part, or in the context, of the perpetrator’s official duties”<sup>53</sup>. These factors are neither exhaustive nor cumulative, but only act as examples of what the court could take into consideration while determining the nexus<sup>54</sup>.

### 1.3 The Prosecution of Sexual Violence as War Crimes by the ICC, ICTY and ICTR

#### 1.3.1 Introduction on the ICC, ICTR and ICTY

Before diving into the prosecution and punishment of war crimes, the appropriate tribunals must first be analyzed. In order, I will present in more details the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC). First of all, I will briefly describe the historical context which brought the Security Council to move the first steps towards achieving international criminal justice.

In the aftermath of the end of the Cold War, a new atmosphere of agreement was raised in the Security Council, blocked for many decades due to the discrepancies between the two Permanent Powers involved in the conflict (i.e. the United States of America and Russia). However, new intense disorders emerged worldwide, fostered by nationalism feelings, spiraling into internal armed conflicts<sup>55</sup>. These events invested the Security Council with the power to act based on Chapter VII of the UN Charter, which entrusts it with the responsibility to "determine the existence of any threat to the peace, breach of the peace, or act of aggression"<sup>56</sup> and to take military and nonmilitary action to "restore international peace and security"<sup>57</sup>.

The ICTY was established in 1993 through the Security Council’s Resolution 827 (1993), and closed down on 21 December 2007. It could adjudicate crimes encompassing the time frame between 1991 and 2001 against members of ethnic groups in Croatia, Bosnia and

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<sup>53</sup> *Ibid*, 1118.

<sup>54</sup> Gaggioli, 2014, 516.

<sup>55</sup> Gaeta, Vinuales & Zappalà, 2020, 447.

<sup>56</sup> United Nations, Charter of the United Nations, 26 June 1945, Art. 39.

<sup>57</sup> *Ibid*.

Herzegovina, Serbia, Kosovo and the Former Yugoslav Republic of Macedonia<sup>58</sup>. The ICTY was granted jurisdiction over war crimes; in particular, article 2 of the ICTY Statute covers grave breaches of the Geneva Conventions, applicable only in situations of international armed conflict. On the other hand, article 3 of the ICTY Statute empowers the ICTY to prosecute violations of the laws and customs of war. In the *Tadic* case, the Appeal Chambers clarified that this provision “functions as a residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the International Tribunal”<sup>59</sup>, that is to say to include in the tribunal’s jurisdiction also violations of Common Article 3 to the Geneva Conventions, even if it is not explicitly mentioned in the ICTY Statute.

The second ad-hoc tribunal was established by the UN Security Council through Resolution 955 (1994) in 1994, and closed down on 31 December 2015. The ICTR could adjudicate crimes perpetrated in Rwanda from the 1 January to the 31 December 1994. According to article 4 of the ICTR Statute, it was granted jurisdiction over a non-exhaustive list of violations of Common Article 3 and of Additional Protocol II to the Geneva Conventions. The ICTR, adjudicating crimes committed in the eventuality of a non-international armed conflict, was not invested with the power to adjudicate over grave breaches of the Geneva Conventions (as they exclusively apply to IACs)<sup>60</sup>.

The International Criminal Court (ICC) was established in 1998, following the adoption of the Rome Statute by 120 states, and currently seats in the Hague (the Netherlands). Article 5(1) recognizes “the most serious crimes of concern to the international community as a whole” over which the court has jurisdiction; these include genocide, crimes against humanity, the crime of aggression and war crimes. The latter is further addressed in article 8<sup>61</sup>.

Article 8 individuates four categories of war crimes. Article 8(2)(a) prohibits “grave breaches”<sup>62</sup> of the Geneva Conventions of 1949. Article 8(2)(b) pinpoints “other serious violations of the laws and customs applicable in international armed conflict”. It follows an exhaustive list of 26 conducts, which includes *inter alia* sexual violence. These crimes are derived from a wide range of sources, reproducing rules from treaties such as the 1907

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<sup>58</sup> Gaeta, Vinuales, & Zappalà, 2020, 448.

<sup>59</sup> ICTY, *Tadić*, Appeals Chamber, para 91.

<sup>60</sup> Banks, Angela M. “Sexual Violence and International Criminal Law: An Analysis of the Ad Hoc Tribunal’s Jurisprudence & the International Criminal Court’s Elements of Crimes.” *Faculty Publications*, 305. September 2005, 32.

<sup>61</sup> Gaeta, Vinuales & Zappalà, 2020, 449

<sup>62</sup> See paragraph 1.2.1 above for more in-depth discussion on the grave breaches regime.

Hague Conventions respecting the Laws and Customs of War on Land, or the 1977 Protocol I Additional to the Geneva Conventions<sup>63</sup>. Article 8(2)(c) identifies serious violations of Common Article 3 which applies to non-international armed conflict. Moreover, according to article 8(2)(e), war crimes in NIACs consist also of “other serious violations of the laws and customs applicable in armed conflicts not of an international character”, thus including violations of international humanitarian law other than Common Article 3.

It is worth mentioning that the Court may exercise its jurisdiction following the conditions outlined in article 12 of the Rome Statute, i.e. only if: “(a) the state on the territory of which the conduct in question occurred” is a party to the Statute or has accepted the jurisdiction of the Court under article 12(3), or “(b) the person accused of the crime is a national” of a State party to the Statute or of a state that has accepted the jurisdiction of the court according to article 12(3).

The ICC can adjudicate over war crimes only if they are “committed as a part of a plan or policy or as part of a large-scale commission of such crimes”<sup>64</sup>. Where this requirement is not met, one act may constitute a war crime, but it may not pass the gravity threshold established in article 17(1)(d) of the Rome Statute.

### 1.3.2 The prosecution of sexual violence as a war crime

In order for acts of sexual violence to amount to war crimes, the contextual element must be respected. That is to say that the illegal conduct “must be committed “in the context of and associated with” an armed conflict”<sup>65</sup>. Furthermore, in order to amount as a grave breach of the Geneva Conventions, the victims must be protected persons under the Geneva Conventions<sup>66</sup>.

Rape and other forms of sexual violence have been explicitly prohibited under the GCs<sup>67</sup>, but they have not been included in the list of grave breaches. However, these conducts may amount as grave breaches if they are in line with the requirements aforementioned; they may fall subsequently into one (or more) of categories such as “torture or inhuman treatment” or “willfully causing great suffering or serious injury to body or health”<sup>68</sup>.

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<sup>63</sup> Dörmann, 2003, 344.

<sup>64</sup> ICC Statute, Article 8(1)

<sup>65</sup> Gaggioli, 2014, 517

<sup>66</sup> Banks, 2005, 34.

<sup>67</sup> See paragraph 1.1.1 above

<sup>68</sup> Gaggioli, 2014, 526.

In order to better understand the prosecution of acts of sexual violence as a grave breach of the GCs, the case law of the *ad hoc* tribunals will come in hand.

### 1.3.2.1 Torture

Sexual violence, notably rape, has been prosecuted under the grave breaches regime as amounting to torture. It must be noted that, while the ICC has jurisdiction over grave breaches of the Geneva Conventions pursuant to article 8 of the Rome Statute, and the ICTY pursuant to article 2(b) of the ICTY Statute, the ICTR Statute does not invest the court with such jurisprudence since it applies to internal conflicts.

The most significant case is *Čelebići*, where the ICTY convicted the accused Hazim Delić of torture as a grave breach of the 1949 Geneva Conventions<sup>69</sup>; it was the first case in which a rape suspect was convicted of torture<sup>70</sup>. The Trial Chamber found the rape of Grozdana Cecez to constitute an intentional act committed under coercive circumstances with the purpose of “obtaining information about the whereabouts of the victim’s husband”, and of “punishing the victim for failing to provide the requested information”<sup>71</sup>. Other prohibited purposes include gender discrimination, since the specific violent act was performed based on the victim’s gender<sup>72</sup>. These elements, together with the fact that Cecez suffered “severe mental pain and suffering”<sup>73</sup> in the aftermath of the rape, respect the conditions of torture as a grave breach before the ICTY<sup>74</sup>.

The *ad hoc* tribunals also established that rape may account as torture as a serious violation of Common Article 3, when the elements of torture are fulfilled<sup>75</sup>. In this case, the ICTR has jurisdiction based on Article 4(a) of the ICTR Statute, and the ICTY based on Article 3 of the ICTY Statute. Relevant case law includes the *Furundžija* judgement and the *Foca* judgement.

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<sup>69</sup> Manenti, M.R. *Wartime Sexual Violence as an International Crime*. Master's thesis, Università degli Studi di Milano, 2013, 118

<sup>70</sup> Banks, 2005, 36

<sup>71</sup> *Ibid*

<sup>72</sup> *Ibid*

<sup>73</sup> *Prosecutor v. Zdravko Mucic aka "Pavo", Hazim Delic, Esad Landzo aka "Zenga", Zejnil Delalic (Trial Judgement)*, IT-96-21-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 16 November 1998, para 942.

<sup>74</sup> ICTY, *Čelebići, Trial Judgment*, para 494.

<sup>75</sup> ICTY, *Foca Trial Judgment*, para. 497: “(i) The infliction, by act or omission, of severe pain or suffering, whether physical or mental. (ii) The act or omission must be intentional. The act or omission must aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person”.

### 1.3.2.2 Cruel Treatment

Case law of the *ad hoc* tribunals shows that sexual violence has been charged as cruel treatment as a serious violation of Common Article 3.

Cruel treatment is within the ICTY's jurisdiction pursuant to article 3 of the ICTY Statute, and within the ICTR's jurisdiction based on article 4(a) of the ICTR Statute. The ICC has jurisdiction over cruel treatment as a serious violation of Common Article 3 pursuant to Article 8(2)(c)(i) of the Rome Statute.

Cruel treatment is prescribed by the *ad hoc* tribunals as being “an intentional act or omission that is deliberate and not accidental which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity”<sup>76</sup>.

The relevant case law includes the *Čelebići* case; in this occurrence, the accused Mucic was charged under the conduct of cruel treatment for his role in forcing inmates to perform fellatio on one another, together with tying an electric cable around their genitalia<sup>77</sup>. However, these charges were dismissed as Article 3 of the ICTY Statute is residual with respect to Articles 2, 4 and 5 of the ICTY Statute<sup>78</sup>. Mucic was consequently charged for sexual violence only as the grave breaches of inhumane treatment and willfully causing great suffering<sup>79</sup>, which will be further addressed in the following paragraphs<sup>80</sup>.

### 1.3.2.3 Outrages upon personal dignity

The ICC is granted jurisdiction over outrages upon personal dignity, including humiliating and degrading treatment as serious violation of Common Article 3, according to article 8(2)(c)(ii) of the Rome Statute. The ICTY can adjudicate over outrages upon personal dignity based on Article 3 of the ICTY Statute, which prohibits “outrages upon personal dignity, in particular humiliating and degrading treatment”<sup>81</sup>. On the other hand, the ICTR's jurisdiction is based on article 4(e) of the ICTR statute which specifically mentions, *inter alia*, “humiliating and degrading treatment, rape, enforced prostitution

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<sup>76</sup> Banks, 2005, 37.

<sup>77</sup> *Ibid*, 38.

<sup>78</sup> Covering respectively “Grave breaches of the Geneva Conventions of 1949”, “Genocide” and “Crimes against humanity”

<sup>79</sup> Manenti, 2013, 118

<sup>80</sup> ICTY, *Čelebići Trial Judgment*, para 24.

<sup>81</sup> ICTY Statute, 1993, art. 3

and any form of indecent assault”<sup>82</sup>. In order to establish outrages upon personal dignity before the ad hoc tribunals, the following elements must be respected: “(i) that the accused intentionally committed or participated in an act or omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity, and (ii) that he knew that the act or omission could have that effect”<sup>83</sup>.

Great debate has been done on the definition of the effects of the act on the victim. A prior ICTY sentence defined as a minimum requirement that the act “causes real and lasting suffering to the individual arising from the humiliation or ridicule”, concluding then that the “degree of suffering” of the victim would be subjectively based on the victim’s temperament<sup>84</sup>. However, the *Foca* Trial Chamber in disagreeing with the previous statement, defined a new approach, ruling that “as the humiliation or degradation is real and serious, the Trial Chamber can see no reason why it would also have to be “lasting””<sup>85</sup>. The Trial Chamber believes that a victim's recovery or ability to move past the consequences of the offense does not prove that the relevant conduct did not violate the victim's right to personal dignity<sup>86</sup>.

The relevant case law includes the *Furundžija* case, where the ICTY determined that, if the requisite conditions are met, rape may constitute an outrage upon personal dignity and torture, thereby breaching the Article 3 of the ICTY Statute<sup>87</sup>. The accused, a commander of a special unit of the Croatian Defense Council called the “Jokers.” was convicted for aiding and abetting outrages upon personal dignity, including rape<sup>88</sup>, as it was proved that he proceeded to interrogate a woman while she was sexually assaulted by another officer in the “Jokers” headquarters. Furthermore, the Trial Chamber recognized that the sexual assault, being committed publicly in front of other members of the Jokers, caused the victim to suffer from “severe physical and mental pain, along with public humiliation [...] in what amounted to outrages upon her personal dignity and sexual integrity”<sup>89</sup>.

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<sup>82</sup> ICTR Statute, 1994, art. 4

<sup>83</sup> ICTY, *Foca Trial Judgment*, para. 514.

<sup>84</sup> *Prosecutor v. Zlatko Aleksovski (Trial Judgement)*, IT-95-14/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 25 June 1999, para. 56.

<sup>85</sup> ICTY, *Foca Trial Judgment*, para. 501; Banks, 2005, 41

<sup>86</sup> *Ibid*

<sup>87</sup> Manenti, 2013, 117

<sup>88</sup> ICTY, *Furundžija Trial Judgment*, para 274

<sup>89</sup> *Ibid*, para 272; Manenti, 2013, 117

#### 1.3.2.4 Willfully causing great suffering or serious injury to body or health

The ICC is vested with jurisdiction over the willfully causing of great suffering or serious injury to body or health as a grave breach of the Geneva Conventions pursuant to article 8(2)(a)(iii) of the Rome Statute<sup>90</sup>. Similarly, article 2(c) of the ICTY Statute grants jurisdiction to the ICTY over this offence, while the ICTR lacks such jurisdiction on the base that the grave breaches regime only encompasses situations of international armed conflict, where the victim is under the protection of the GCs.

During the *Čelebici* process, the Trial Chamber found that “all acts that constitute torture also constitute willfully causing great suffering or serious injury to body or health”<sup>91</sup>. Pursuant to article 2(c) of the ICTY Statute, Mucic was charged for his role in wrapping with a burning fuse cord the genitals of Vukašin Mrkajic and Duško Bendo during his time as the Commander of the *Čelebici* detention camp<sup>92</sup>.

#### 1.3.2.5 Inhuman treatment

“The ICC has jurisdiction over inhuman treatment as a grave breach pursuant to article 8(2)(a)(ii) of the Rome Statute”<sup>93</sup>. Article 2(b) of the ICTY Statute grants the *ad hoc* tribunal jurisdiction over this offence. The ICTR has no jurisdiction in this case, since inhuman treatment entails a grave breach within the context of an international armed conflict.

Inhuman treatment can be defined as “an intentional act or omission that, when judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity”<sup>94</sup>. As clarified in the *Čelebici* Trial Judgement, “inhuman treatment extends beyond torture and willfully causing great suffering or serious injury to body or health”<sup>95</sup>, since it includes acts that “violate the basic principle of humane treatment, particularly the respect for human dignity”<sup>96</sup>.

The relevant case law includes the *Čelebici* trial. Mucic was accused of forcing two Muslim brothers (namely Vaso Dordic and Veseljko Dordic), prisoners in the camp of

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<sup>90</sup> Banks, 2005, 43

<sup>91</sup> *Ibid*, 44.

<sup>92</sup> *Ibid*

<sup>93</sup> *Ibid*

<sup>94</sup> Banks, 2005, 45.

<sup>95</sup> *Ibid*

<sup>96</sup> *Ibid*; ICTY, *Čelebici Trial Judgment*, para 544



which he was Commander, to perform fellatio on one another in full view of the other detainees<sup>97</sup>. He was charged for inhuman treatment, as the prohibited conduct fell under the scope of article 2 of the ICTY statute since it constituted “a fundamental attack on [the victims’] human dignity”<sup>98</sup>.

#### 1.4 Conclusion

This first chapter was dedicated to the introduction of sexual violence as recognized by the international community. In particular, sexual violence and rape are prohibited conducts under international humanitarian law, applying to both international and non-international armed conflicts, that amount to international crimes. In particular, this section analyzed how sexual violence may be charged as a war crime when the conditions of such offence (including the contextual elements) are met. War crimes are, accordingly, grave breaches or serious violations of the applicable rules of the law of armed conflicts, which give rise to individual criminal liability. The case law of the *ad hoc* tribunals, in particular, shows how sexual violence may be prosecuted under the categories of torture, cruel treatment, outrages upon personal dignity, willfully causing great suffering or serious injury to body or health or inhumane treatment, when the conduct presents the defining factors of such charges.

However, in the context of an armed conflict, war crimes are not the only violations of international criminal law that may be committed. To ensure a thorough and exhaustive overview, this thesis will address the notions of crimes against humanity and genocide. Sexual violence has, in fact, been demonstrated to fall under the legal framework of crimes against humanity, as well as being a constituent act of genocide.

The following chapter will comprehensively delve into this categorization.

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<sup>97</sup> *Ibid*, para 1065

<sup>98</sup> *Ibid*, para 1066

## Chapter 2: Sexual Violence as Other International Crimes

### 2.0 Introduction

Sexual violence is a despicable act which has been historically used as a weapon of warfare to achieve the goals of enemy armies in internal and international conflicts. Since the international community began to recognize the gravity of such acts, studies have been done on how to develop a legal framework on the matter in international criminal law. The *ad hoc* tribunals' jurisdiction, together with the legal frameworks currently in force, have come to the conclusion that sexual violence, such as rape, may fall under the scope of war crimes. However, further analysis has enlarged such definition to also include crimes against humanity and acts of genocide.

This chapter will dive deeper into the other counts of indictment which encompass the conduct of sexual violence, that is to say the charges used by the jurisprudence of the international courts and tribunals in order to persecute this offence.

A first section will be dedicated to providing an overview of crimes against humanity, through a brief historical overview and the definition under the statutes of the *ad hoc* tribunals and the ICC. Subsequently, I will analyze how sexual violence falls within this charge, providing the most relevant examples from the case law of the aforementioned tribunals.

Genocide will be discussed in the third paragraph, mentioning the relevant Convention of 1948 on the Prevention and Punishment of the Crime of Genocide, and how its definition has been incorporated into other statutes of international law. Through the use of examples such as the conflicts in Rwanda and former Yugoslavia, I will introduce the concept of genocidal rape, and how sexual violence has been used as a mean to carry forward campaigns of ethnic cleansing.

The concepts laid in this chapter will complete the overview of sexual violence in international criminal law as begun in the first chapter. With these exhaustive knowledges, it will be possible then for the reader to approach the third and last section of this thesis, centered around the study of a particular case.

## 2.1 Crimes against humanity

Crimes against humanity are a fundamental component of international criminal law both in times of peace, but also in the context of armed conflicts, which shall be further addressed in this section. Following a brief introduction related to the historical development of the concept of crimes against humanity, the legal elements together with the jurisdiction of the international criminal tribunals will be analyzed in depth.

### 2.1.1 Historical overview of the development of CAH

The notion of crimes against humanity (CAH) originally comes from the protection of “the laws of humanity, and the dictates of public conscience” as referred to by the Martens Clause, contained in the Preamble of the 1907 Hague Convention<sup>99</sup>. The Clause was first adopted in 1899<sup>100</sup> as a residual protection of “populations and belligerents” from all those conducts which may not be expressly prohibited by codified international humanitarian law, but which states shall not partake in<sup>101</sup>. In practice, the provision fills the gaps of such legal framework through a vaguely formulated text which gives rise to the principles of humanity as considerations which shall be taken into account by the judges of international court and subsequently applied in case law. An example is the so-called case of the Corfu Channel, where the ICJ observed that Albania's "obligations [were] based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war”<sup>102</sup>.

The Martens Clause has proven functional for the Nuremberg Trial, a turning point for the recognition of crimes against humanity, particularly regarding the retroactive character of the London Charter. In the aftermath of the Second World War, on the 8<sup>th</sup> of august 1945, the Allied powers tried for the first time to limit the omnipotence of the State with the adoption of the London agreement embodying the International Military Tribunal for the trial of Nazi war criminals. Among its provisions, it outlines the definition of “crimes against humanity”, intended under article 6(c) as:

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<sup>99</sup> ICRC, Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, October 18, 1907, Preamble

<sup>100</sup> Meron, Theodor. “The Martens Clause, Principles of Humanity, and Dictates of Public Conscience.” *American Journal of International Law* 94, no. 1 (January 2000): 78–89, 79

<sup>101</sup> Melzer, Nils. *International humanitarian law: A comprehensive introduction*. Geneva, Switzerland: ICRC, International Committee of the Red Cross, 2019, 24

<sup>102</sup> Corfu Channel (UK v. Alb.) (Merits), 1949 ICJ Rep. 4, 2; Meron, 2000, 82

“Murder, extermination, enslavement, deportation, and other inhuman acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or connexion with any crimes within the jurisdiction of the Tribunal [that is, either ‘crimes against peace’ or ‘war crimes’], whether or not in violation of the domestic law of the country where perpetrated”

This definition presents some shortcomings, mainly due to the fact that at the time the Allied powers “did not feel” entitled to legislate in such a way to limit those inhuman acts with “a merely domestic scope”, and thus required a nexus with an armed conflict<sup>103</sup>.

The United Nations General Assembly subsequently adopted, on 11<sup>th</sup> December 1946, Resolution 95-1, in recognition of the principles of the Charter<sup>104</sup>.

Through the decades, the prohibition of crimes against humanity has been embodied also by the jurisprudence of the *ad hoc* international criminal tribunals, and the International Criminal Court. These institutions have furthered the understanding of such crime and its definition through their rich case law.

Nonetheless, there is a major gap in the international justice system due to the lack of a specific legal instrument dedicated exclusively to CAH (in stark contrast with the codification of war crimes and the crime of genocide). In 2019, the International Law Commission (ILC) put forward the Draft Articles and commentary for a Convention on the Prevention and Punishment of Crimes against Humanity, which reflects the definition contained in the Rome Statute<sup>105</sup> (embodying the latest consensus among the international community, together with providing the most complete list of criminal acts)<sup>106</sup>.

Following this proposition, the General Assembly adopted Resolution 77/249 on 30 December 2022, according to which the GA “takes note once again of the draft articles” and “decides that the Sixth Committee shall resume its session” from 1 to 5 April and on 11 April 2024, in order to exchange considerations on all aspects of the draft articles (labelled under agenda item 80, Crimes against humanity)<sup>107</sup>.

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<sup>103</sup> Paola Gaeta, Jorge E. Vinuales, and Salvatore Zappa, *Cassese’s International Law*, Oxford, United Kingdom: Oxford University Press, 2020, 432

<sup>104</sup> *Ibid*, 433

<sup>105</sup> *Ibid*

<sup>106</sup> “Crimes Against Humanity.” United Nations Office on Genocide Prevention and the Responsibility to Protect. <https://www.un.org/en/genocideprevention/crimes-against-humanity.shtml>.

<sup>107</sup>UN General Assembly. "Crimes against Humanity (Resolution 77/249)." U.N. Doc. A/77/416 (2022); "Sixth Committee, Legal, United Nations, Main Body, Main Organs, General Assembly." United Nations. Last modified 2024. <https://www.un.org/en/ga/sixth/78/cah.shtml>.

### 2.1.2 Crimes against humanity according to the ICTY, the ICTR and the ICC

The first definition of crimes against humanity as enshrined in the London Charter has undergone a progressive evolution through the decades under customary law, and due to the jurisdiction of the international criminal tribunals, which recognize this offence in their statutes.

The International Criminal Tribunal for the former Yugoslavia (ICTY), set up by the Security Council in 1993, embodies in its Statute the definition of CAH provided by the 1945 London Charter, under article 5, mirroring the armed conflict requirement. However, it states that no distinction shall be made on the character of the conflict, that is to say, whether it is international or internal in nature. The prohibition thus can be applied to acts or omissions listed in the provision committed “closely related to the hostilities”<sup>108</sup>.

In *Tadic*, the ICTY Appeals Chamber recognized that customary international law does not prescribe for a nexus between crimes against humanity and an armed conflict anymore, as Control Council Law No.10 of December 1945 eliminated such linkage. Consequently, it can be concluded that article 5 of the ICTY Statute introduces such requirement as a unique case, in order to put a limit the Tribunal’s jurisdiction<sup>109</sup>.

The nexus component is absent from the Statute of the International Criminal Tribunal for Rwanda (ICTR). Article 3 of the ICTR Statute provides an identical list of conducts to the one in article 5 of the ICTY Statute, falling under the scope of crimes against humanity. However, it is important to note that the ICTR Statute includes some discriminatory grounds, to be understood as a characterization of the nature of the attack<sup>110</sup>. This restrictive requirement is peculiar of the ICTR, and outlines that the Tribunal has jurisdiction over the crimes listed in the provision when committed “on national, political, ethnic, racial or religious grounds”<sup>111</sup>.

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<sup>108</sup> *Prosecutor v. Dusko Tadic aka "Dule" (Opinion and Judgment)*, IT-94-1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), May 7, 1997, para. 632

<sup>109</sup> *Ibid*, para 627

<sup>110</sup> *Prosecutor v. Ignace Bagilishema (Trial Judgment)*, ICTR-95-1A-T, International Criminal Tribunal for Rwanda (ICTR), June 7, 2001, para. 81; Manenti, 2013, 94

<sup>111</sup> ICTR Statute, article 3

It is fundamental for the purpose of this thesis to note that both article 5 of the ICTY Statute, and article 3 of the ICTR Statute, have included among the list of conducts amounting as crimes against humanity the illicit conduct of rape<sup>112</sup>.

The Rome Statute of the International Criminal Court (ICC) provides the most extensive and comprehensive codification of a list of crimes against humanity. Following customary international law, and in accordance with the ICTR Statute, the Rome Statute too does not require for CAH to be linked to an armed conflict<sup>113</sup>. Furthermore, Article 7 provides quite a broad scope since it could encompass other acts than the ones already listed under point “(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health”<sup>114</sup>.

For the purpose of this analysis, it is crucial to mention that the ICC Statute “explicitly recognizes that crimes of a sexual nature can constitute crimes against humanity”, and in particular it does so under Art. 7(1)(g)<sup>115</sup>.

### 2.1.3 Elements of crimes against humanity

The contextual element of crimes against humanity, as already discussed in the previous paragraph, can first be individuated in the London Charter, which required for the illicit conducts to have a link with an armed conflict. This linkage is not mandatory anymore according to customary international law, although the ICTY Statute kept it as a peculiar case of jurisdictional limitation.

A more in-depth analysis must be done, however, on the legal elements of CAH. In particular, through the examination of the definitions provided by the statutes of the *ad hoc* tribunals and the ICC, it is possible to derive some common features of crimes against humanity.

The prohibited conducts listed in the aforementioned articles may amount to a CAH when they are committed as “part of a widespread or systematic attack against any civilian population”<sup>116</sup>. Taking into account this definition, it can be concluded that no discriminatory grounds are normally required (except for the ICTR Statute). The key

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<sup>112</sup> ICTY Statute, article 5(g); ICTR Statute, article 3(g)

<sup>113</sup> ICC Statute, article 7(1)

<sup>114</sup> *Ibid*, article 7(1)(k);

<sup>115</sup> ICRC Advisory Service, 2015, 3

<sup>116</sup> *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Appeal Judgment)*, IT-96-23 & IT-96-23/1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), June 12, 2002, paras. 85-86; *Prosecutor v. Jean-Paul Akayesu (Trial Judgment)*, ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), September 2, 1998, para 578

factor here is the term “attack”, which shall be distinguished from the element of “armed conflict”. In fact, as the ICTY found, “[a]n attack can “precede, outlast, or continue during the armed conflict, but it need not be part of it”, and “is not limited to the use of armed force; it encompasses any mistreatment of the civilian population””<sup>117</sup>. An exhaustive definition of the term “attack” may be also found in article 7(2) of the ICC Statute.

The attack is not required to be directed against a specific group, but it simply must target any civilian population.

The attack shall be characterized in two ways, that is to say, it must be “widespread and systematic”. These fundamental elements have been defined by the case law of the international tribunals, as none of the statutes of international courts provides a comprehensive definition. In particular, the *Akayesu* Trial Judgement prescribes that “[t]he concept of widespread’ may be defined as massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims”<sup>118</sup>.

On the other hand, the same stated that “[t]he concept of systematic’ may be defined as thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources”<sup>119</sup>. Thus, in order to be considered systematic, the attack shall be actively promoted by a State or organization, without the mandatory adoption of a formal policy of a state.

It must be noticed that an isolated or random violation may not account to a crime against humanity, despite being a violation of human rights or a war crime<sup>120</sup>, as the term “systematic” implies “the improbability of [its] random occurrence”<sup>121</sup>

The *mens rea* of crimes against humanity is not limited to the criminal intent to commit the offence. In fact, it is required that the perpetrator must have acted with the knowledge of the broader context in which the offence was going to occur, that is to say, an attack against a civilian population, and that “his acts comprise part of that attack, or at least that he took the risk that his acts were part of the attack”<sup>122</sup>.

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<sup>117</sup> *Prosecutor v. Milomir Stakic (Trial Judgment)*, IT-97-24-T, International Criminal Tribunal for the former Yugoslavia (ICTY), July 31, 2003, para 623; Manenti, 2013, 95

<sup>118</sup> ICTR, *Akayesu* Trial Judgement, para. 580

<sup>119</sup> *Ibid*

<sup>120</sup> Gaeta, Vinuales, & Zappalà, 2020, 433

<sup>121</sup> ICTY, *Kurnarac* Appeal Judgement, para. 94

<sup>122</sup> *Ibid*, para. 102; Manenti, 2013, 97

The only exception is the crime against humanity of persecution, which requires the additional element of a persecutory or discriminatory animus, also called special intent or *dolus specialis*<sup>123</sup>.

Crimes against humanity are recognized to give rise to universal jurisdiction, since it is “in the interests of the entire international community to suppress”<sup>124</sup> these abhorrent conducts, which violate the fundamental principles of humanity.

## 2.2 The prosecution of sexual violence as CAH

Sexual violence has been recognized to not only amount as a war crime, as already discussed in Chapter 1, but also to be a crime against humanity when the distinctive elements are respected. In the case of CAH, these elements include that the sexual crime must be “part of a widespread or systematic attack directed against any civilian population”

In particular, Control Council Law No. 10 was the first legal instrument<sup>125</sup> to include sexual violence, and more specifically rape, in the list of crimes against humanity, in the aftermath of the Second World War. Following this primary recognition, sexual violence has appeared in the statutes of the two *ad hoc* tribunals, respectively in article 5(g) of the ICTY and article 3(g) of the ICTR, together with being mentioned in the Rome Statute of the ICC under article 7(1)(g), which lists “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity” as illicit conducts amounting to CAH<sup>126</sup>.

However, sexual conducts may be persecuted also under other charges, which will be discussed in the following sections.

### 2.2.1 Enslavement

The crime of enslavement is a crime against humanity under article 7(1)(c) of the Rome Statute. The *ad hoc* tribunals also have jurisdiction over this offence according to article

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<sup>123</sup> Gaeta, Vinuales, & Zappalà, 2020, 433

<sup>124</sup> “Sexual Violence as International Crime”. Human Rights Watch.

<https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://www.hrw.org/legacy/campaigns/kosovo98/seviolence.shtml%23::~:~:text=%3DRape%2520and%2520other%2520forms%2520of,based%2520on%2520discrimination%2520of%2520any&ved=2ahUKEwiN2dib17-FAxXX0wIHHZ2JDN4QFnoECA4QAw&usq=AOvVaw2paA6e7AA3Fs8f0gYIkPMD>

<sup>125</sup> Gaggioli, Gloria. “Sexual Violence in Armed Conflicts: A Violation of International Humanitarian Law and Human Rights Law.” *International Review of the Red Cross* 96, no. 894 (June 2014): 503–38, 530

<sup>126</sup> *Ibid*



5(c) of the ICTY Statute, and article 3(c) of the ICTR Statute. The *actus rea* of this illicit conduct is the “exercise of any or all of the powers attaching to the right of ownership” which, in the case of sexual slavery, also includes “exercising sexual control over a person or depriving a person of sexual autonomy”<sup>127</sup>. These conclusions are derived from the work of the Tokyo Tribunal.

The Women’s International War Crimes Tribunal for the Trial of Japan’s Military Sexual Slavery (the “Tokyo Tribunal”), in December 2001, issued a judgement finding “Emperor Hirohito and other high-ranking officials guilty of rape and sexual slavery as crimes against humanity based on individual and command responsibility”<sup>128</sup>. Although it is not a legally binding legal instrument, since it is issued by a people’s tribunal, it still is a turning point for the analysis of cases of sexual slavery<sup>129</sup>.

A case in particular which is worth mentioning is the *Kunarac* example, where the ICTY found Kunarac and Kovać guilty of enslavement as a crime against humanity. This conduct was principally sexual in nature due to the way the acts of ownership was carried on. The Prosecutor stated that “the main characteristic of the enslavement exercised by the accused Kunarac and Kovać was the sexual exploitation of the girls and women. All the controls exerted served that purpose. Repeated violations of the victim’s sexual integrity, through rape and other sexual violence, were some of the most obvious exercises of the powers of ownership by the accused”<sup>130</sup>.

### 2.2.2 Torture

The international Criminal Court has jurisdiction over this illicit conduct pursuant to article 7(1)(f) of the Rome Statute. Torture is also a CAH under the ICTY Statute, pursuant to article 5(f), and article 3(f) of the ICTR Statute.

Rape and other acts of sexual violence may be charged as crimes of torture when the elements of torture are met. A difference must be drawn between the jurisdiction of international tribunals over this charge as, while the *ad hoc* tribunals require for torture to be inflicted with a specific purpose (which may be punishment, intimidation,

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<sup>127</sup> Banks, Angela M. “Sexual Violence and International Criminal Law: An Analysis of the Ad Hoc Tribunal’s Jurisprudence & the International Criminal Court’s Elements of Crimes.” College of William & Mary Law School Faculty Publications 305 (September 2005), 14

<sup>128</sup> *Ibid*

<sup>129</sup> *Ibid*

<sup>130</sup> *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Trial Judgment)*, IT-96-23-T & IT-96-23/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), February 22, 2001, para. 554; Manenti, 2013, 122

humiliation, the achievement of a confession, etc.), this element is not present in the ICC's Elements of Crimes<sup>131</sup>.

*Kurnarac* is an exemplar case of sexual violence committed under the prohibited purpose of discriminating on the ground of ethnicity, as his actions against Bosniak women had the ulterior motive to send a message to the Muslim forces<sup>132</sup>. On the other hand, Kurnarac's co-accused, Vukovic, raised an interesting point since he argued that the rape committed against witness FSW-50 was only "done out of sexual urge"<sup>133</sup>. This motion was successively rejected by the Trial Chamber, as "[t]he prohibited purpose need only be part of the motivation behind the conduct and need not be the predominant or sole purpose"<sup>134</sup>. The Appeals Chamber in *Foca* upheld such holding, providing that "even if the perpetrator's motivation is entirely sexual, it does not follow that the perpetrator does not have the intent to commit an act of torture or that his conduct does not cause severe pain or suffering".

One of the arguments raised during this trial was that, for the rape to amount as a crime of torture, the pain and suffering of the victim shall be visible, even long after the commission of the crime. The Appeals Chamber proceeded to dismiss this motion as "[t]he pain and suffering requirement for torture is satisfied once rape has been proven because rape "necessarily implies such pain or suffering"<sup>135</sup>.

### 2.2.3 Rape

Rape<sup>136</sup> is recognized as a crime against humanity under article 7(g) of the Rome Statute. It also falls under the jurisdiction of the ICTY (article 5(g)) and of the ICTR (article 3(g)). While the former also includes "sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity"<sup>137</sup> under the same provision, the latter two address these acts under the "other inhuman acts"<sup>138</sup> category of crimes against humanity<sup>139</sup>.

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<sup>131</sup> Banks, 2005, 16

<sup>132</sup> ICTY, *Kurnarac* Trial Judgment, para. 654 ("The treatment reserved by Dragoljub Kunarac for his victims was motivated by their being Muslims, as is evidenced by the occasions when the accused told women, that they would give birth to Serb babies, or that they should 'enjoy being fucked by a Serb.'"); Banks, 2005, 17

<sup>133</sup> Banks, 2005, 17

<sup>134</sup> ICTY, *Kurnarac* Trial Judgement, para. 816.

<sup>135</sup> Banks, 2005, 20; ICTY, *Kurnarac* Appeal Judgement, para. 151

<sup>136</sup> See chapter 1.1.5

<sup>137</sup> ICTY, Statute, 1993, art. 5(g)

<sup>138</sup> ICTR, Statute, 1994, art. 3(g)

<sup>139</sup> This category of CAH will be further addressed in chapter 2.2.4

The inherent case law includes the *Akayesu* case which, other than providing a comprehensive definition of rape, finds for the first time in history that it constitutes a crime against humanity. According to the ICTR, the mistreatment perpetrated by the commander of the Taba *commune* towards the Tutsi women seeking refugee there may be tried as a crime of rape under article 3(g) of the ICTR Statute<sup>140</sup>.

#### 2.2.4 Persecution

The ICC is granted jurisdiction over this category of illicit conduct pursuant to article 7(1)(h) of the Rome Statute. The ICTY enjoys the same powers according to article 5(h) of the ICTY Statute, and the ICTR too, pursuant to article 3(h) of the ICTR Statute. As previously stated, this is the only act enumerated under the list of CAH which requires for the perpetrator to commit the violation with a special intent, that is to say the intent to discriminate on political, racial, or religious grounds. While this applies to the jurisdiction of the ICTY and ICTR, the ICC does not require this additional element, as stated in article 7(1)(h)(4) n.22 of the Elements of Crimes<sup>141</sup>.

The case law for this particular charge includes *Krstić*, *Stakic*, *Nikolic*, *Kvočka* and *Todorović*. All of them were responsible for committing despicable acts such as beating and killing, food and water deprivation, but also sexual assault and rape, with a discriminatory intent, for example against Bosnian Croats and Bosnian Muslims<sup>142</sup>

#### 2.2.5 Other inhuman acts

Other inhuman acts fall within the jurisdiction of the ICC and the *ad hoc* tribunals according to article 7(1)(k) of the Rome Statute, article 5(i) of the ICTY Statute and article 3(i) of the ICTR Statute<sup>143</sup>.

The most relevant example of sexual violence episodes tried under this charge is in the *Akayesu* trial, when the *ad hoc* tribunal for Rwanda recognized that the accused was criminally responsible for inhuman acts such as the forced undressing of a number of detained Tutsi women<sup>144</sup>.

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<sup>140</sup> ICTR, *Akayesu* Trial Judgement, para. 696

<sup>141</sup> Banks, 2005, 26

<sup>142</sup> As seen in *Todorović* or *Krstić*

<sup>143</sup> Banks, 2005, 27

<sup>144</sup> ICTR, *Akayesu* Trial Judgement, para. 697

## 2.3 Genocide

In his work “Axis Rule in Occupied Europe” of 1941, the Polish jurist Raphael Lemkin coined the term “genocide”. This illicit conduct was never tried before the Military Tribunals of Nuremberg or Tokyo, since the courts had no jurisdiction over it at the time. In particular, during the Nuremberg trials, the Tribunal started to vest the term “genocide” with a certain legal value through its inclusion under the scope of crimes against humanity<sup>145</sup>. It only became a separate criminal offence later, with the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide in 1948 by the United Nations General Assembly<sup>146</sup>.

### 2.3.1 The Convention on Genocide

The most relevant document for the prevention and persecution of the crime of genocide was adopted by the UN in 1948 as a response to the atrocities committed during World War II. It followed Resolution 180(II) of 21 December 1947 from the GA, according to which the UN recognized that "genocide is an international crime, which entails the national and international responsibility of individual persons and states"<sup>147</sup>. Successively the drafting and adoption of the text by the UN's Sixth Committee<sup>148</sup>, the majority of states in the international community has proceeded to ratify it.

The Convention has the merits of providing a precise definition of this crime under article II, which states:

“In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, 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;

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<sup>145</sup> “Genocide, the Tribunal argued, was “the prime illustration of a crime against humanity”.” Strandberg Hassellind, Filip. “Groups Defined by Gender and the Genocide Convention.” *Genocide Studies and Prevention* 14, no. 1 (May 7, 2020): 60–75, 62.

<sup>146</sup> Gaeta, Vinuales, & Zappalà, 2020, 434

<sup>147</sup> UN General Assembly. “Draft Convention on Genocide” (Resolution 180(II)), UN GAOR, 2nd Sess., Supp. No. 1, UN Doc. A/519 (1947).

<sup>148</sup> Hassellind, 2020, 63

(e) Forcibly transferring children of the group to another group.”<sup>149</sup>

The definition provided above is considered to reflect customary international law<sup>150</sup>. It makes the illicit conducts enumerated punishable both in times of peace and war.

### 2.3.2 Genocide according to the ICTY, ICC and ICTR

The definition provided by the 1948 Convention on Genocide has been “reproduced verbatim in the statutes of the ICTY, ICTR and ICC”<sup>151</sup>. It has been enshrined by the ICTY Statute and the ICTR Statute, providing the *ad hoc* tribunals with the jurisdiction over the crime, respectively under article 4 and article 2. For what regards the ICC, the Rome Statute criminalizes genocide under article 6.

Furthermore, genocide (like war crimes and crimes against humanity) is a crime of universal jurisdiction<sup>152</sup>.

### 2.3.3 Elements of genocide

The physical element of the crime of genocide is the commission of the enumerated acts in the definition under article II. The closed list provided noticeably lacks the conduct of ‘ethnic cleansing’, that is to say, the “forcible expulsion of civilians belonging to a particular group from an area, a village, a town”<sup>153</sup>. In fact, it mainly focuses on the biological destruction of the group.

The mental element of the crime of genocide is the necessary intent to destroy the group as such, which may also be referred to as special intent or *dolus specialis*. This particular *mens rea* defines an aggravated criminal intention, where the perpetrator (for example) not only seeks the murder of the victim but also the accomplishment of the final goal, which is the destruction of the national ethnical, racial or religious group, either in whole or in part, to which the victim belongs. The Convention does not provide a definition of the four protected groups.

It must be underlined that the definition outlined by the 1948 Convention (and successively by the statutes of the international criminal tribunals and courts) does not

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<sup>149</sup> Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277.

<sup>150</sup> Gaeta, Vinuales, & Zappalà, 2020, 434

<sup>151</sup> Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277.

<sup>152</sup> “Sexual Violence as International Crime”. Human Rights Watch.

<sup>153</sup> Gaeta, Vinuales & Zappalà, 2020, 435

encompass political, economic, social, gender and other groups. This limited protection is dictated by a precise assessment of objective criteria, together with the social perception of the distinctive groups. It shall be added that the first adoption of the definition of genocide can be traced back to an historical period characterized by a fragile diplomatic balance; in this context, the concept of the protected groups under the Convention was set on a quite restrictive scope due to political compromise<sup>154</sup>.

The “in whole or in part” element encompasses two possibilities. It is either the “extermination of a very large number of the members of the group”, understood then in terms of quantity, or the “destruction of a more limited number of persons, selected for the impact their disappearance would have upon the survival of the group”<sup>155</sup>, understood then in terms of quality.

The *dolus specialis* element is not easy to be proved in front of a tribunal or court, if not impossible in the eventuality of a lack of confession from the accused. The case law of the ICTR has offered a solution to this problem in the *Akayesu* Trial Judgment, where it concluded that the genocidal intent of a particular misconduct may be deduced “from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others”<sup>156</sup>. Furthermore, it individuates as other useful factors “the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups”<sup>157</sup>.

It is recognized that the crime of genocide is committed even in the eventuality that the final goal is not actually achieved.

The final element of the crime of genocide is the contextual one. The original definition provided by the Convention on Genocide does not require this component, and such interpretation has been followed by the case law of the ICTY and ICTR, who present in their statutes the same definition. The ICC displays an exception since, while incorporating the text of the Convention in a similar way to the *ad hoc* tribunals, it specifies in the ICC Elements of Crimes that in order for the court to have jurisdiction over the enumerated acts of genocide, they must take place “in the context of a manifest

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<sup>154</sup> Hassellind, 2020, 63

<sup>155</sup> Jaffal, Zeyad. “Rape as Genocide Crime in International Criminal Law – The Case of Yazidi Women in Iraq.” *International Journal of Criminal Justice Sciences (IJCJS)* 15, no. 2 (2020): 230-247, 242.

<sup>156</sup> ICTR, *Akayesu* Trial Judgement, para. 523

<sup>157</sup> *Ibid*

pattern of similar conduct directed against that group or was conduct that could itself effect such destruction”<sup>158</sup>. The ICC thus restricts the scope of the crime of genocide as outlined in the Convention on Genocide.

### 2.3.3 The prosecution of sexual violence as a crime of genocide

Sexual violence has been recognized to include illicit conducts, such as forced sterilization, forced abortion and forced pregnancy, which may fall under the scope of genocidal acts. These actions are, in fact, not driven by carnal desire, but from calculated intentions; to cite one, the intent to destroy the group’s capacity to reproduce<sup>159</sup>. It is therefore a violence both against women as individuals, and against national, ethnical, racial or religious groups as such. It can be concluded then that acts of sexual violence may be included in the definition of genocide.

The 1990s saw the occurrence of two major wars, which changed the way the international community regarded sexual violence and urged to develop how to deal with such conduct, especially when used as a weapon of war to achieve the objectives of one of the parts in the course of the hostilities. In particular, in both the wars which will be cited thereafter, the aim was not only to terrorize civilians, but also to compel them to flee permanently due to fear; this conduct falls under the definition of ethnic cleansing<sup>160</sup>.

In the context of the war in former Yugoslavia, rape and other forms of sexual violence have been exploited as weapons in the campaigns perpetrated especially against the Bosnian Muslims by Bosnian Serbs. This context of violence attracted great media attention worldwide, mobilizing scholars and activists (especially from the feminist community) to advocate for the conceptualization of the crime of genocidal rape<sup>161</sup>.

The Rwandan scenario saw the unfolding of similar atrocities, through the contraposition of the Hutu, representing the majority of the population and covering high position of powers, against the Tutsi minority. Again, there was evidence of women attacked as part of a genocidal campaign, therefore representing “an intersection between ethnic violence and sexualized violence” (that is to say, of gendered nature)<sup>162</sup>. It was only with the

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<sup>158</sup>ICC. "Elements of Crimes." 2011, Article 6; Manenti, 2013, 107

<sup>159</sup> “Sexual Violence as International Crime”. Human Rights Watch.

<sup>160</sup> “Ethnic Cleansing”. United Nations Office on Genocide Prevention and the Responsibility to Protect. <https://www.un.org/en/genocideprevention/ethnic-cleansing.shtml>

<sup>161</sup> Van Schaack, Beth. *Engendering genocide the Akayesu case before the International Criminal Tribunal for Rwanda*. Santa Clara, United States: SSRN, 2014, 16

<sup>162</sup> Ibid, 18

*Akayesu* judgement that the notion of genocidal rape was “ultimately grounded in the jurisprudence of international criminal law”<sup>163</sup>.

#### 2.3.4.1 The concept of genocidal rape

Although not expressly indicated in the definition of genocide from the 1948 Convention, and thus in the statutes of the international courts and tribunals, the jurisdiction of these legal actors has exhaustively filled this gap.

In particular, in the *Akayesu* judgment, the ICTR formally recognized that:

With regard, particularly, to ... 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 inflict[ing] 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. The rape of Tutsi women was systematic and was perpetrated against all Tutsi women and solely against them.<sup>164</sup>

This is an historic judgment concerning sexual violence, and more in details, rape as recognized by international criminal law. The ICTR, in this sentence, is acknowledging how acts of sexual violence fall within the list in the definition of genocide as recognized in the 1948 Convention, but also from the statutes of the *ad hoc* tribunals and the ICC, when committed with the *dolus specialis* intent.

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<sup>163</sup> Ibid

<sup>164</sup> ICTR, *Akayesu* Trial Judgement, paras 731-732



In particular, these were committed with the intention to kill the victims (clause a), but also to defile women while destabilizing the whole community, including men (clause c). It is intrinsic in the definition of rape that it will inflict both bodily and mental harm on the victim (clause b); to cite some, sexual transmitted diseases (STD) and post-traumatic disorders (PTSD), if they survive the attack. Furthermore, under certain policies of ethnic cleansing, forms of sexual mutilation were carried out with the intent to prevent women from certain groups to give birth (clause d). Finally, the perpetration of forced pregnancy favored the ethnic cleansing campaigns as according to a number of ethnic groups' believes, the child carries the ethnicity of the father; thus, women impregnated by the "enemy" (either consentingly or not) would eventually give birth to children automatically belonging to the other ethnicity. This conduct (clause e) would entail among its consequences the stigmatization of the women considered to be spoiled by the enemy. In order to avoid such shame, many women even resorted to primitive methods to give themselves abortion, with the risk on incurring in severe injuries or even death<sup>165</sup>.

## 2.4 Conclusion

This chapter aimed at providing a complete overview of the crime of sexual violence in international criminal law, in particular when the offence falls under the scope of charges such as crimes against humanity and genocide. The study of these counts of indictment through the statutes of the *ad hoc* tribunals and the ICC, together with the relevant case law, has provided the necessary knowledges for the reader to tackle the next (and final) section of this thesis. The third chapter will, in fact, be dedicated to the analysis of a case study. In particular, it will address the case of the Yazidi women and the targeting perpetrated in their regards by the Islamic State in Iraq and Syria (ISIS). These atrocities have captured international attention and raised significant legal and humanitarian concerns, which shall be soon further addressed.

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<sup>165</sup> Rajandran, Malaika. "Sexual Violence and International Law." *Refugee Survey Quarterly* 23, no. 4 (2004): 58-73, 68.

## **Chapter 3: The case of the Yazidi Women**

### **3.0 Introduction**

The third and final chapter of this thesis delves into a case study: the genocide of the Yazidis perpetrated by the Islamic State of Iraq and Syria (also referred to as ISIS) starting from August 2014. This chapter will focus on the multifaceted dimensions of the atrocities committed against the Yazidi community, with a particular emphasis on the plight of Yazidi women and girls aged above 9 who endured horrific violence and enslavement at the hands of ISIS militants.

The first section will present an overview of the Yazidi community, providing the necessary information to understand their recognition as a protected group under Article II of the 1948 Genocide Convention. This includes the essential historical context, together with the unique religious and cultural elements of the Yazidi identity. The events of August 2014 will then be reported in detail, highlighting ISIS's treatment of women and girls aged above 9, and underscoring the deliberate use of systematic rape, sexual slavery, and other forms of gender-based violence during the ISIS onslaught.

The second paragraph will be dedicated to the legal analysis of the illicit conducts which unfolded both during and after the invasion of the Sinjar region, with a division between war crimes, crimes against humanity and genocide. These international crimes are to be understood based on the definitions provided in the previous chapters.

To conclude, the long-term impact of the attack will be analyzed with the aim of shedding a light on the full scope of the violations of human rights endured by the Yazidi community. While this analysis will encompass measures implemented to advocate for justice and accountability for survivors, it will also address the inherent shortcomings of such actions.

### **3.1 Historical background and context**

The Yazidi may be considered as a separate ethnic and religious group according to article II of the 1948 Genocide Convention, based on their distinctive characteristics.

The definition enshrined in the Convention defines ethnic groups as those “whose members share a common language or culture” and religious groups as those “whose members share the same religion, denomination or mode of worship”<sup>166</sup>.

In the following section, I will dive deeper into describing the main features of Yazidism, in order to evidence how this population fits these requirements.

### 3.1.1 The Yazidi as a protected group

The Yazidis represent an ethno-religious group<sup>167</sup>. Counting 500k to 700k souls<sup>168</sup>, they inhabit an area spanning among Syria, Iraq, Armenia and Turkey<sup>169</sup>. Their official language is Kurdish<sup>170</sup>.

Not every member of the community identifies as Kurdish. This choice comes from the complex relationship between the Yazidis and the Kurdish population, vis-à-vis the events of 2014, which exacerbated the feelings of resentment already rising among the population. In particular, the Sinjar region (in the northern side of Iraq, around 15 kilometers from the Syrian border, “home to the majority of the world’s Yazidis”<sup>171</sup>) only came under the Kurdish zone since 2007: at the time, a division of Kurdish fighters (the so called *peshmerga*) was invested with the role of protecting the area, “following party policy of discouraging local Yazidis from moving into the more prosperous Kurdish zone”<sup>172</sup>. This security task was not duly respected when ISIS attacked the civilian population.

Yezidism, a non-Abrahamic religion<sup>173</sup>, has been described as “a mixture of Mithraism, Mazdeism and Zoroastrianism ... [also taking] on elements of Christianity and Islam”<sup>174</sup>. It has been traditionally orally passed on. The lack of religious privileges coming from the absence of sacred scriptures (revealed by God, which would have entitled the group to the “People of the Book” status) has historically exposed the Yazidis to campaigns of

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<sup>166</sup> Human Rights Council. “They came to destroy: ISIS crimes against the Yazidis”. New York, United States of America: United Nations, 2016, 20

<sup>167</sup> Jaffal, Zeyad. “Rape as Genocide Crime in International Criminal Law – The Case of Yazidi Women in Iraq.” *International Journal of Criminal Justice Sciences (IJCJS)* 15, no. 2 (2020): 230-247, 232.

<sup>168</sup> *Ibid*

<sup>169</sup> Human Rights Council, 2016, 20

<sup>170</sup> Jaffal, 2020, 232

<sup>171</sup> Human Rights Council, 2016, 3

<sup>172</sup> Allison, Christine. “The Yazidis.” *Oxford Research Encyclopedia of Religion*, January 25, 2017, 5

<sup>173</sup> Allison, 2017, 5

<sup>174</sup> Jaffal, 2020, 232

forced conversions from both the Ottoman State and Catholic or Protestant missionaries<sup>175</sup>.

Despite being greatly influential in the politics of the area in between the 14<sup>th</sup> and 17<sup>th</sup> century, the ascendance of the tribe began to decline due to the Ottoman *Tanzimat* reforms, which heightened the region's vulnerability to political instabilities from the 19<sup>th</sup> century onward<sup>176</sup>.

Since the beginning of the 20<sup>th</sup> century, the Yazidis have shifted towards an attitude “rather isolated, with few living in the towns alongside those of other faiths”<sup>177</sup> (for example through the establishment of friendly and business relationships with Arabs followers of Sunni Islam<sup>178</sup>).

It must be noticed that the Yazidis are a closed religious group, that is to say it is forbidden for their members to convert or marry into other religions. At the same time, they do not accept converted outsiders to join the community<sup>179</sup>. Briefly, “all Yazidis should be Yazidis from birth”<sup>180</sup>.

This detachment from other religious groups, together with their distinctive identity characterized by complex feelings towards those neighboring populations which discriminated them in the past, are the reasons why it can be confidently established that the Yazidis are a protected ethnic and religious group, as recognized by article II of the 1948 Genocide Convention.

### 3.1.2 ISIS attack on the 3rd of August 2014

The third day of the month of August of 2014 marks the moment everything changed for the Yazidi population.

Following the conquest of Mosul in June 2014, ISIS shifted its focus towards the Yazidi population living in the Sinjar region<sup>181</sup>. These actions were dictated by ISIS's ambitious of establishing a caliphate of only Sunny Muslims<sup>182</sup> in the area, and its consideration of

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<sup>175</sup> See the ‘Umar Wehbi Pasha’ episode in 1892 (Allison, 2017, 3)

<sup>176</sup> Allison, 2017, 2

<sup>177</sup> Allison, 2017, 4

<sup>178</sup> Human Rights Council, 2016, 6

<sup>179</sup> Hamadamin, Roza Omer, Nor Anita Abdullah, and Mohd Zakhiri Md. Nor. “The Applied State of Violation of Women’s Rights in Armed Conflicts: Yazidi Women during the Isis War in Iraq.” *Journal of Liberty and International Affairs*, Institute for Research and European Studies - Bitola 8, no. 3 (December 10, 2022): 272–94, 281

<sup>180</sup> Hamadamin, Abdullah, e Zakhiri Md. Nor, 2022, 281

<sup>181</sup> Human Rights Council, 2016, 6

<sup>182</sup> Jaffal, 2020, 234

Yazidis as *mushrik* (that is to say, “judged not to believe in God as worshipped by *Ahl Al-Kitab*, or the People of the Book”)<sup>183</sup>.

Sweptwing across Sinjar, the ISIS forces conquered city after city relentlessly since the early hours of the day, with attacks directed from the command center based in Mosul. The *peshmerga*, the aforementioned Kurdish forces responsible for maintaining the security of the region, withdrew from their bases and checkpoints in front of the advancing threat, leaving the majority of the territory undefended<sup>184</sup>. As the news of the retreat of the *peshmerga* reached the civilian population, although no evacuation order was issued, handfults of men of some villages orchestrated defensive bodies to provide more time to their families to escape towards the city of Duhok, which proved to be of little efficiency<sup>185</sup>. According to the data, on that day 170 thousands of Yazidis left their homes<sup>186</sup>.

When ISIS came, its main object was to capture as much of the population as possible, focusing particularly on women to be forcibly transferred to areas under ISIS’s control. Those kidnapped were then divided into three groups: “men and boys aged approximately 12 and above; women and children; and later, drawn from the pool of male children who had remained with the women, boys aged seven and above”<sup>187</sup>.

The next section will focus on the treatment reserved to Yazidi women and girls aged 9 and above. The atrocities perpetrated against the other two categories, despite being sadly noteworthy, will not be analyzed in depth for the moment.

### 3.1.3 The ill treatment of Yazidi Women

It is estimated that three months after the attack, an amount of 5 to 7 thousands of young Yazidi women were being held in detention centers controlled by ISIS<sup>188</sup>.

Once the victims were captured by ISIS fighters during the raids to the various targeted cities, they were forcibly taken to holding sites, where they would be divided in three categories: women who were married and with children, women married without children, and unmarried and young girls<sup>189</sup>. In order not to be placed under the ‘unmarried

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<sup>183</sup> Human Rights Council, 29

<sup>184</sup> *Ibid*, 6

<sup>185</sup> *Ibid*, 7

<sup>186</sup> Jaffal, 2020, 232

<sup>187</sup> Human Rights Council, 2016, 8

<sup>188</sup> Jaffal, 2020, 232

<sup>189</sup> Human Rights Council, 2016, 10

women' category, intended to be the most dangerous to figure under, unmarried women and married women with no children to prove their status pretended that younger siblings, nephews, or nieces were their sons and daughters. In some cases, they succeeded in misleading the ISIS forces, in others they were exposed by the members of the Sinjar's Arab community summoned to assist the enemy in the identification and sorting phase<sup>190</sup>. Furthermore, in a number of structures, ISIS made use of gynecologists to verify that women had not lied when declaring of being married<sup>191</sup>.

The kidnapped were held in the primary holding site for an average of 24 hours before being transferred to other centers in ISIS-controlled territory spanning across Syria and Iraq, such as Tel Afar or Mosul, strictly encircled by armed ISIS militants<sup>192</sup>. Each of them had a capacity of hundreds, even thousands, of women and children, who were detained with little food or water, and without any kind of medical care. As spoil of wars or *sabaya* (slaves)<sup>193</sup>, consequence of the teachings of Isla, which entitles ISIS combatants to "enslave defeated people, in the holy war, against the pagans"<sup>194</sup>, the prisoner women were completely at the mercy of their tormentors, who could at any moment come to the holding centers and take one of them to do as he pleased. It goes without saying that terrible treatment would come to those selected by one of the soldiers: the fear was such that some girls started to disfigure themselves through scratching and bleeding, in order to appear less attractive. In this highly traumatizing situation, some even committed suicide<sup>195</sup>.

The captured women were considered as rightful property of ISIS and, as so, ISIS could sell the Yazidi slaves as with any other good. A central Committee for the Buying and Selling of Slaves<sup>196</sup> was set up in order to organize the Yazidi slave markets, also called *souk sabaya*<sup>197</sup>. The girls would be transferred against their will from Iraq to Syria by bus<sup>198</sup> to be sold to the ISIS soldiers there, although they were not the only buyers present at this kind of auctions. Victims have reported being traded to men who came "from Iraq, Syria, Saudi Arabia, Turkey, Morocco, Algeria, Tunisia, Libya, Egypt, and

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<sup>190</sup> *Ibid*

<sup>191</sup> *Ibid*, 11

<sup>192</sup> *Ibid*, 10

<sup>193</sup> *Ibid*, 12

<sup>194</sup> Jaffal, 2020, 234

<sup>195</sup> Human Rights Council, 2016, 11

<sup>196</sup> *Ibid*, 13

<sup>197</sup> *Ibid*, 12

<sup>198</sup> *Ibid*

Kazakhstan”<sup>199</sup>. Once purchased by one ISIS fighter, the man received “complete rights of ownership” over the woman, and could “resell, gift, or will his slave” how he preferred<sup>200</sup>.

The captured Yazidis were victims of the worst offences possible: treated as mere property, they were subjected to daily rapes and beatings by their buyers. They had no control over their ability of having sexual intercourses, and neither over their body: some were obliged to take birth control by their owners, either in pills or through injections<sup>201</sup>. However, the risk of pregnancies was not always avoided: in such cases, Yazidi women delivered the babies in captivity, or gave the child away under unclear circumstances<sup>202</sup>. House chores came together with their role as sexual slaves: the girls were forced to work, cook, clean, and do other mansions while enduring the harsh treatment inflicted to them by the ISIS families they served<sup>203</sup>. Severe punishment awaited those who tried to resist the rapes from their patrons, or who attempted to escape (despite the lack of *abayas*, the traditional vestment “all females over the age of 10 are obliged to wear in public in ISIS-controlled territories”<sup>204</sup>, which prevented fleeing). Disciplinary consequences of this kind included harsh beatings, starvation, violent rapes and even the murder of the women’s children<sup>205</sup>.

### 3.2 Legal analysis

The 2016 report of the UN Commission of Inquiry on Syria meticulously reports the violations of international law perpetrated by ISIS during the attack against the Yazidis. This section will swiftly provide an overview of the war crimes and crimes against humanity committed, based on the aforementioned report. Particular attention will be deserved for the crimes related to sexual violence. A study on the genocidal intentions of ISIS will follow, with a focus on the fate of Yazidi women and girls, used as instruments of such aim.

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<sup>199</sup> *Ibid*, 13

<sup>200</sup> *Ibid*

<sup>201</sup> *Ibid*, 15

<sup>202</sup> *Ibid*

<sup>203</sup> *Ibid*

<sup>204</sup> *Ibid*, 14

<sup>205</sup> *Ibid*

### 3.2.1 War Crimes

#### 3.2.1.1 Attacks against civilian population

One if not the most fundamental provision of international humanitarian law (IHL) is the protection of the civilian population, as recognized in customary IHL (Rule 1)<sup>206</sup> and codified in the Geneva Conventions (Additional Protocol I, article 51)<sup>207</sup>. Humanitarian law prohibits direct attacks against the civilian population, but also indiscriminate attacks: when in “doubt about a person’s civilian status, that person must be considered a civilian”<sup>208</sup>. The Yazidis, as of the 3rd of August 2014, were a civilian population not taking part in any hostility. The actions of ISIS amount thus to the war crime of attack against civilian population.

#### 3.2.1.2 Rape, sexual violence and sexual slavery

When ISIS perpetrated its onslaught on the Yazidi population, it deprived thousands of individuals (particularly women and young girls) of their liberty. The individuals were forcibly transferred for the sole purpose of being traded between ISIS members and their allies. These militants would acquire them for the sole purpose of exploiting the Yazidis women for sexual services, which would happen without mutual consent in the majority of times, or to sell them again for the same reason. Sexual violence was continuous, repeated and highly violent, as it was deemed to come together with the full rights of ownership exercised by the owners.

It can be concluded that, in the context of the ongoing armed conflict at the time, ISIS perpetrated the war crimes of rape, sexual violence and sexual slavery against the captured Yazidi women<sup>209</sup>.

#### 3.2.1.3 Torture, cruel treatment and outrages upon personal liberty

The kidnapped women have been victims to the most dehumanizing treatment possible to conceive. Together with the repeated rapes, the Yazidi women would be “beaten, sold ..., insulted and humiliated”<sup>210</sup> by their patrons. Their value as individuals would come

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<sup>206</sup> International Committee of the Red Cross (ICRC). “Rule 1. The Principle of Distinction between Civilians and Combatants.” In *Customary International Humanitarian Law*

<sup>207</sup> ICRC, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I). Geneva, 8 June 1977, Art. 51

<sup>208</sup> Melzer, Nils. *International humanitarian law: A comprehensive introduction*. Geneva, Switzerland: ICRC, International Committee of the Red Cross, 2019, 85

<sup>209</sup> Human Rights Council, 2016, 32

<sup>210</sup> *Ibid*



down to a monetary quantity established upon their capture<sup>211</sup>, while pictures of them would be taken even without the veil, despite the girls' opposition<sup>212</sup>.

These conducts amount to the war crimes of torture, cruel treatment and outrages upon personal liberty that ISIS committed against civilian Yazidi women. These crimes are evidenced by their visible consequences on the survivors, who have yet to recover from both the physical and mental pain they had to endure when in captivity, and are still suffering from traumas that have irrevocably signed the rest of their lives.

### 3.2.2 Crimes against Humanity

#### 3.2.2.1 Widespread and systemic act

As mentioned before<sup>213</sup>, crimes against humanity (CAH) are those illicit conducts perpetrated in a widespread and systematic way, both characteristics intrinsic of their definition. The actions of ISIS against the Yazidi women amount to CAH, since they mirror these fundamental features.

In particular, the attacks of the 3<sup>rd</sup> of August 2014 may be considered widespread as they encompassed quite a broad geographical zone, namely the Sinjar region.

Furthermore, they were systematic as meticulously planned and identically applied to all the targeted area. They were based on the ISIS's policies of establishing an extremist Islamic rule based on their interpretation of the Islamic religion as "purifying force"<sup>214</sup> against miscreants inhabiting the caliphate's territory, such as the Yazidi community.

#### 3.2.2.2 Sexual slavery, rape, sexual violence, enslavement, torture, other inhumane acts, and severe deprivation of liberty

ISIS has committed a great number of CAH towards the Yazidi women. It must be underlined that these crimes were perpetrated with a discriminatory intent towards the Yazidi population on the grounds of their religion.

The list includes persecution, sexual slavery, rape, sexual violence, enslavement, torture, other inhumane acts, and severe deprivation of liberty<sup>215</sup>.

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<sup>211</sup> *Ibid*, 23

<sup>212</sup> *Ibid*, 10

<sup>213</sup> See Chapter 2.1.3 for reference

<sup>214</sup> Human Rights Council, 2016, 30

<sup>215</sup> *Ibid*, 31

### 3.2.3 Crime of genocide

In their quest to cleanse the caliphate territory of those populations that did not align with ISIS's interpretation of the Muslim religion, ISIS has committed the crime of genocide against the Yazidi population of the Sinjar region. Specifically, it employed repeated sexual violence in order to achieve this aim, against the members of a protected group (the Yazidi community), deemed to meet the criteria outlined in Article II of the 1948 Genocide Convention since they practice a wholly distinct religious belief from other neighboring religions<sup>216</sup>.

#### 3.2.3.1 *Actus reus*

It is relevant to underline how the conducts of ISIS align with the definition of genocide provided in Article II and, in particular, with all of its clauses, as also described in the Human Rights Council's report of 2016.

Clause (a) Killing members of the group is fulfilled as, although there have not been direct murders as a consequence of the rapes, the coercive measures enacted tragically led some of the detained women and girls to take their lives. Such actions align with the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY), which recognizes situations where individuals are driven to suicide due to the deliberate actions or omissions of others, thus equating such circumstances to murder<sup>217</sup>.

The illicit conducts previously described comply with Clause (b) Causing serious bodily or mental harm, too. Sexual violence in the form of rape produces disastrous effects on the victims. From a physical point of view, rape was perpetrated by ISIS fighters with the intention of causing critical injuries and genital mutilations, together with sexually transmitted diseases, for which women were often denied medical care during their time in captivity. These conditions may have long-term impacts on the female body, on the ability of having sexual intercourses and, in extreme cases, lead to infertility<sup>218</sup>. On the other hand, mental trauma has been caused by the degrading and humiliating conditions to which women have been subject after being enslaved: as "dirty *kuffar*"<sup>219</sup>, they were reserved dehumanizing treatment by their ISIS owners and his family, which evolved in

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<sup>216</sup> Jaffal, 2020, 243

<sup>217</sup> Human Rights Council, 2016, 21

<sup>218</sup> Biral, Martina. "Rape as Cultural Genocide: The Case of the Yazidi Women." *Deportate, esuli, profughi* 15 (December 2023), 3

<sup>219</sup> "Kuffar" may be translated as "infidels". Human Rights Council, 2016, 20

Post-Traumatic Stress Disorder (PTSD). Furthermore, female survivors have proved to be so scarred that they present difficulties in having relationships with a male individual<sup>220</sup>. Lastly, mental harm is also caused by the possible rejection of the Yazidi community: as a traditionally patriarchal society, women who have been victims of rape shall be isolated from the rest of the community, as they are considered “damaged goods”<sup>221</sup>. Thus, the sexual violence suffered by the Yazidi women, with the physical and mental harm it caused, may be considered as a “step in the process of destruction of the ... group – destruction of the spirit, of the will to live, and of life itself”<sup>222</sup>.

The physical destruction of the group has been advanced through the kidnapping, enslavement and sale of Yazidi women, as it purposefully created unbearable conditions of life in the long term (Clause (c))<sup>223</sup>. Reference must be made to the lack of medical care provided to Yazidi women during their time in captivity, despite the necessity for it rising from the repeated rapes and beatings they were subjected to.

The measures implemented by the IS terrorist group, which included the impregnation of the captured Yazidis as a consequence of the mentioned sexual assaults, fall within the definition provided in Clause (d), that is to say, intended to prevent births within the group. The Iraqi national law recognizes that the children will inherit the Muslim religion from the parents<sup>224</sup>. This provision clashes with the Yazidis’ traditions and rules since offspring not coming from two parents who are both members of the community would not be recognized as part of this closed ethno-religious group. In other words, “the more forced rape and impregnation ISIS fighters subject Yazidi women to, the lower the birth-rate of legitimate Yazidis becomes”<sup>225</sup>.

Finally, ISIS’s actions met Clause (e) Forcibly transferring children of the group to another group since girls as young as 9 years old have been kidnapped and separated from their families, in order to be sold as sex slaves in the *souk sabaya*, which were held not only in the territory of Iraq but also in Syria. Once acquired by a militant of the IS group, the treatment the girls were subjected to would indirectly cause the detachment with the Yazidi religion, as they were prohibited from practicing it and humiliated for their origins.

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<sup>220</sup> Biral, 2023, 3

<sup>221</sup> Jaffal, 2020,239

<sup>222</sup> Human Rights Council, 2016, 24

<sup>223</sup> *Ibid*, 26

<sup>224</sup> Hamadamin, Abdullah, e Zakhiri Md. Nor, 2022, 286

<sup>225</sup> Jaffal, 2020, 239

### 3.2.3.2 *Mens rea*

It has been concluded in the previous section that sexual violence has been the key element in the perpetration of the Yazidi genocide from August 2014 onwards. The *actus reus* of such crime have been analyzed in depth. However, as mentioned in Chapter 2.3.3, the elements of genocide also include the *dolus specialis*, that is to say, the intent to destroy the targeted group (in whole or in part).

The *mens rea* may be derived from the available evidence, from “the physical targeting of the group or their property, the use of derogatory language towards members of the targeted group, the weapons employed and the extent of bodily injury, the methodical way of killing and the systematic manner”<sup>226</sup>. Furthermore, the general context such as the illicit conducts’ “scale, nature, location, plan or system”<sup>227</sup>, must be taken into consideration, too.

On this basis, it is possible to confidently assert that ISIS presented the mental element necessary to commit the genocidal act against the Yazidi population. This position has been upheld by the Human Rights Council, in their 2016 report on the Yazidi case<sup>228</sup>.

In particular, ISIS propaganda provides the grounds for this statement: the Muslim religion is seen as a tool of war, a purifying force against the miscreants which has been directed specifically against the Yazidi population<sup>229</sup>. As reported by a respondent in the legal study conducted by the researchers of Universiti Utara Malaysia’s School of Law, “In Sinjar, where there were all sorts of religious and denominational diversity, no other women were kidnapped, only the Yazidi women, which is clear evidence. The goal of ISIS was to erase the Yazidi religion, rape and enslave the women of the Yazidi community, sell them in slave markets, and violate their dignity”<sup>230</sup>.

Since the Yazidi embodied an extraordinary case, common ISIS rules did not apply during their conquest: unlike with Jews and Christians, the *jizyah* payment (“a tax to avoid conversion or death”<sup>231</sup>) was denied for members of this community, and the women and girls could be enslaved unlike the female apostates of the other faiths<sup>232</sup>.

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<sup>226</sup> *Ibid*, 240

<sup>227</sup> *Ibid*, 241

<sup>228</sup> Human Rights Council, 2016, 29

<sup>229</sup> *Ibid*, 30

<sup>230</sup> Hamadamin, Abdullah, e Zakhiri Md. Nor, 2022, 276

<sup>231</sup> Human Rights Council, 2016, 29

<sup>232</sup> *Ibid*

### 3.3 Justice for the Yazidi population

#### 3.3.1 The embracement of the Yazidi women back into the population

The captured Yazidi women were often bought from one fighter to the other for as little as a pack of cigarette, which corresponds to just a couple US dollars<sup>233</sup>. There is a stark contrast, thus, with the amount of money paid by the families to buy the kidnapped woman or girl back. Figures hover around thousands of dollars<sup>234</sup>. It is not always the case, however, that the families who survived the invasion of August 2014 could find the disappeared member in under-the-radar markets.

The Yazidi community shocked the world regarding the treatment deserved to those who were bought back. Looking past gender norms and traditional values, which would consider the victims of rape as “socially infertile, unmarriageable or untouchable”<sup>235</sup>, thus to be isolated from the rest of the community because seen as “damaged goods”<sup>236</sup>, the Yazidi population showed a surprising support to the female survivors of sexual slavery. The spiritual leader Baba Sheikh himself called for “followers not to punish or ostracize victims”<sup>237</sup>: a groundbreaking religious statement for a closed patriarchal society such as the Yazidis one. In particular, the community has shown a great open-mindedness by “embracing psychosocial support for male survivors, welcoming female survivors of sexual slavery and encouraging victims to speak out”<sup>238</sup>.

The safe space established by the high authorities of the Yazidi community in order to facilitate the return of the displaced population, however, did not grant their complete repatriation. It must be taken into consideration that the kidnapped Yazidis have endured unimaginable trauma, which is deeply rooted in the forced displacement from their homes. Consequently, despite the recapture of the Sinjar region at the end of 2015<sup>239</sup>, many Yazidis are still reluctant about returning to their cities of origin.

A flow of migration towards Western countries, especially Germany, can be noticed<sup>240</sup>. This diaspora is actually supported by humanitarian projects aimed at providing a new house to those in need of special protection. The ‘Special Quota’ established by the

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<sup>233</sup> Hamadamin, Abdullah, e Zakhiri Md. Nor, 2022, 280

<sup>234</sup> Human Rights Council, 2016, 15

<sup>235</sup> Jaffal, 2020, 239

<sup>236</sup> *Ibid*

<sup>237</sup> Hamadamin, Abdullah, e Zakhiri Md. Nor, 2022, 281

<sup>238</sup> Venis, Jennifer. “Justice for the Yazidis.” *International Bar Association*, September 27, 2022.

<https://www.ibanet.org/Justice-for-the-Yazidis>.

<sup>239</sup> Allison, 2017, 11

<sup>240</sup> *Ibid*

German Federal State of Baden-Württemberg from 2015 is an example of such programmes; it is set to relocate in Germany up to 1000 women and children of any ethnic or religious group, “who met the criteria of having experienced severely traumatizing experiences, especially sexual violence in the context of the violent conflict in Syria and northern Iraq, and of having spent time in internal displacement camps in the Kurdistan Region of Iraq”<sup>241</sup>. It can be easily concluded that the majority of the applicants came from the Yazidi community.

### 3.3.2 The principle of universal jurisdiction and Germany’s role in persecuting ISIS

November 2021 marks the first time in history a court’s ruling establishes that the atrocities committed against the Yazidi community constitute a genocide. It must be denoted that, while another significant conviction has been delivered in July 2022<sup>242</sup> by the Hamburg’s Higher Regional Court, against German ISIS member Jalda A.<sup>243</sup>, the one of November 30<sup>th</sup> is most relevant for its peculiar features.

On that day, former IS armed group’s member Taha Al J., an Iraqi national extradited to Germany from Greece<sup>244</sup> was convicted to life imprisonment by the Higher Regional Court in Frankfurt, Germany, for war crimes, crimes against humanity and genocide<sup>245</sup>. The illicit conduct in question was the “purchasing of a Yazidi woman and her five-year-old daughter as slaves”<sup>246</sup> at a slave market in Raqqa during the summer of 2015<sup>247</sup>. The defendant proceeded then to murder the girl by “cuffing her to a window in the scorching heat, unprotected from the sun and letting her die in front of her mother”<sup>248</sup>.

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<sup>241</sup> Pham, Phuong, Niamh Gibbons, Jana Katharina Denking, Florian Junne, and Patrick Vinck. “Justice Not Forgiveness: Perspectives on Justice and Reconciliation among Yazidi Women Refugees in Germany.” *Journal of Human Rights Practice* 11, no. 3 (November 1, 2019): 530–53, 535

<sup>242</sup> Resulting in German ISIS member Jalda A. being found guilty of aiding and abetting genocide, as well as crimes against humanity and war crimes for the enslavement and abuse of a young Yazidi woman, M, for which she was sentenced to five years and six months in prison. Clooney, Amal, Sonka Menhir, Natalie Von Wistinghausen, Yazda NGO, and Nadia Murad. “German Court Hands down Second Genocide Conviction against ISIS Member.” *Nadia’s Initiative*, August 31, 2023. <https://www.nadiainitiative.org/news/german-court-hands-down-second-genocide-conviction-against-isis-member-following-enslavement-and-abuse-of-yazidi-woman-in-syria>.

<sup>243</sup> Venis, 2022.

<sup>244</sup> *Ibid*

<sup>245</sup> Kather, Alexandra Lily, and Johanna Groß. “Truly Historic: The World’s First Conviction for Genocide Against the Yazidi.” *Völkerrechtsblog*, December 17, 2021. <https://voelkerrechtsblog.org/truly-historic/>.

<sup>246</sup> Amnesty International. “Germany/Iraq: World’s First Judgment on Crime of Genocide against the Yazidis.” *Amnesty International*, August 16, 2022. <https://www.amnesty.org/en/latest/news/2021/11/germany-iraq-worlds-first-judgment-on-crime-of-genocide-against-the-yazidis/>

<sup>247</sup> Kather & Groß, 2022

<sup>248</sup> Amnesty International, 2022

Invoking the Code of Crimes against International Law (CCAIL, “*Völkerstrafgesetzbuch*”), the Higher Regional Court found the defendant guilty as the direct perpetrator of the crime of genocide (Section 6(1)2. CCAIL), based on the underlying conduct of causing serious bodily or mental harm to a member of the group<sup>249</sup>. However, since it was impossible to determine whether there was a genocidal intent to kill, the murder of the young daughter was excluded from the allegations. For what regards the charges of committing CAHs, Al J. was judged responsible of enslavement, torture, severe physical and mental harm, and deprivation of liberty, as codified in Section 7 (1) 3., 5, 8, and 9 of the CCAIL<sup>250</sup>. Additionally, Section 8(1)3 of the CCAIL holds the accused accountable for the war crime of torture of persons protected under international humanitarian law (IHL), while Section 27(1) of the German Criminal Code (GCC) is appealed for the aiding of the war crime of deporting or forcibly transferring, by expulsion or other coercive acts, persons to be protected under international humanitarian law and lawfully present in an area to another State or another area in contravention of a general rule of international law, as enshrined in Section 8(1)6<sup>251</sup>.

The most groundbreaking element about this sentence is that it did not come from Iraq, the state whose territory saw the unfolding of the judged atrocities, but from Germany, through the principle of universal jurisdiction, which mandates that national tribunals may prosecute certain international crimes (such as war crimes, CAH and genocide) even if committed in another country, and even if neither the victim nor the suspect have ties with the prosecuting country<sup>252</sup>.

This judgment is particularly relevant since it sent a powerful message to the other survivors. To cite the words of Natia Navrouzov, a Georgian Yazidi and the Legal Advocacy Director at Yazda (the NGO which provides humanitarian and advocacy assistance to the Yazidi community, and particularly to those affected by the 2014 genocide): “what’s so strong here is how the testimony of just one survivor could lead to such a conviction. It brings so much hope for other Yazidi survivors, but also survivors from other places. To see that your own testimony can have such an impact is so empowering and powerful”<sup>253</sup>. In a study conducted by the Harvard Humanitarian Initiative through interviews to some of the Yazidi women enrolled in the ‘Special Quota’

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<sup>249</sup> Kather & Groß, 2022

<sup>250</sup> *Ibid*

<sup>251</sup> *Ibid*

<sup>252</sup> Venis, 2022

<sup>253</sup> *Ibid*

project, the participants expressed uncertainty about the possibility of ever achieving justice for the atrocities perpetrated by the IS group<sup>254</sup>. That is why cases such as the aforementioned one are fundamental. They send off the signal that even a single testimony coming from a survivor may have immense consequences on advancing the accountability of former members of the terrorist association.

### 3.3.3 Other measures to make justice

At the international level, Germany alone is prosecuting ISIS for its crimes in the genocide against the Yazidi community, since other countries are rather focused on convicting those responsible for terrorism<sup>255</sup>. A further effort must be done by other states, too, to bring justice to the Yazidi women. The members of the Security Council shall exercise the right to refer a situation where genocide, war crimes and crimes against humanity have been committed to the International Criminal Court (ICC), just as they are empowered to do under article 13 of the Rome Statute<sup>256</sup>.

The Yazidi Justice Committee (YJC) published in July 2022 a report on the matter of state responsibility for the events of 2014. Entitled “State Responsibility and the Genocide of the Yazidis”, it urges Iraq, Syria and Turkey to face prosecution before the International Court of Justice for “allegedly failing to meet binding legal obligations imposed by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide”<sup>257</sup>, as these states purportedly neglected to take action in preventing the genocide perpetrated by ISIS.

Moreover, the Iraqi government shall enact reforms to give concrete support to the Yazidi community, especially after having recognized the genocide and called upon the UN to do the same<sup>258</sup>. Among these measures, there must figure a revision of the Yazidi Female Survivors law, which while providing many benefits such as a monthly salary, a plot of land or dwelling unit, support for re-entering school and access to psychological and other health treatments<sup>259</sup>, still needs further development. Published in 2021 to provide “material and spiritual compensation”<sup>260</sup> to the female victims of ISIS, it has been harshly

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<sup>254</sup> Phuong Pham et al., 2019, 543

<sup>255</sup> Venis, 2022

<sup>256</sup> Hamadamin, Abdullah, e Zakhiri Md. Nor, 2022, 287

<sup>257</sup> Venis, 2022

<sup>258</sup> *Ibid*

<sup>259</sup> Hamadamin, Abdullah, e Zakhiri Md. Nor, 2022, 285

<sup>260</sup> *Ibid*



criticized by legal experts as presenting significant deficiencies such as insufficient connections with other instruments of transitional justice, or the lack of mentioning of children born from the sexual violences perpetrated. These babies are in fact prevented from obtaining legal recognition and documents under Article 19 para 2 of Iraq's National Identity Card Law, No. 3 of 2016, together with Article 26 para 2 of the same Law, which establishes that they shall inherit the Muslim religion from their parents<sup>261</sup>. As previously mentioned, Yazidis only accept in their community children born from two Yazidi parents, thus making mixed ones incapable of access. It can be concluded that the Iraqi legal framework too shall undergone a number of improvements in order to address its negative effects on the human rights of those who have already suffered enough in the hands of the invaders.

### 3.4 Conclusion

The attack launched by ISIS in August 2014 had, and still has nowadays, catastrophic consequences on the Yazidis, a protected group as recognized by Article II of the 1948 Genocide Convention, inhabiting the Sinjar region in northern Iraq. Targeted because considered miscreants against the terrorist group's interpretation of the Muslim religion, the violent invasion saw the death of 400 thousands of members of the community, as estimated by the UN Human Rights Council's report in 2016<sup>262</sup>.

This chapter has been dedicated to an in-depth legal analysis of the illegal conducts of ISIS, particularly against the Yazidi women and girls aged above 9. The violations of war crimes and crimes against humanity have been addressed first, followed by an explanation on how sexual violence has been used as an instrument of genocide. In particular, it has been underlined how the enslavement of the Yazidi women and their recurrent rape by ISIS fighters and owners, which sometimes resulted in their impregnation, has not only been driven by carnal desire or the impetus of the conquest, but also from pre-meditated genocidal aims. The soldiers knew that their actions would not only inflict serious mental and physical harm on the victims, but also have repercussions on the possibility of Yazidi women of being reintegrated into their community, if they were ever to be bought back. To conclude, a section on the aftermath of the attack has been presented. The consequences of the ISIS genocide against the Yazidi may be defined "as gendered as [the

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<sup>261</sup> *Ibid*, 286

<sup>262</sup> Jaffal, 2020, 233

genocidal acts'] commission"<sup>263</sup> since, in the long-term, the female survivors face a number of difficulties which in part stem from the loss of male individuals such as father or husbands. Liberated Yazidi women have been embraced back into their community of origin due to a surprising flexibility of the major religious authorities. However, without a male figure by their side, their ability to survive is seriously at risk due to their lack of personal and financial independence<sup>264</sup>. Many of them have a limited education, and face troubles in leaving the country both for limited economic resources, but also for a lack of identification documents which were either destroyed when left behind during the 2014 attack, or which require the signature of a male relative still dispersed or deceased<sup>265</sup>. Yazidi women shall thus be provided the necessary support in order not to enter marriages out of necessity rather than choice.

The Yazidi community has gone through a great deal of sufferance, which has sparked negative sentiments of anger and disappointment towards the international community, guilty of not having mobilized itself to make justice. As mentioned in this chapter, Germany has been the only country to exercise the right of universal jurisdiction and convict former members of ISIS, on the basis of the testimonies of female survivors. It is hoped that the future will see a greater effort from both the international community and the state of Iraq to prosecute those responsible of the atrocities perpetrated, and that justice will be made for the Yazidi survivors.

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<sup>263</sup> Venis, 2022

<sup>264</sup> Human Rights Council, 2016, 33

<sup>265</sup> *Ibid*

## Conclusion

*“Every time I tell my story, I feel that I am taking some power away from the terrorists.”*

*“My story, told honestly and matter-of-factly, is the best weapon I have against terrorism, and I plan on using it until those terrorists are put on trial. There is still so much that needs to be done. World leaders and particularly Muslim religious leaders need to stand up and protect the oppressed.”*

— Nadia Murad, *The Last Girl: My Story of Captivity, and My Fight Against the Islamic State*

Sexual violence is one of the most severe violations of an individual’s human rights. It catastrophically impacts the life of the victim due to its physical (sexually transmitted diseases, unwanted pregnancies, long-term reproductive issues) and psychological (post-traumatic stress disorder (PTSD), anxiety, and suicidal tendencies) consequences. Furthermore, it permanently damages the social fabric of a community, since survivors may face societal ostracization and discrimination. Sexual violence thus accounts for various violations of human rights, such as the right to dignity, to privacy, to health. Historically, sexual violence has always been present in conflicts, but its recognition and documentation as a systematic and strategic tool of war have grown only in recent times. It is used to intimidate and exert control on the civilian population, but also to promote campaigns of ethnic cleansing and displacement, targeting those recognized as the most vulnerable, like women and children. Addressing and combating sexual violence, especially in conflict settings, is crucial for upholding human rights, fostering justice, and aiding in the recovery and stability of affected societies.

The first section of this thesis provided the definition of sexual violence as codified in international treaties and courts ruling, with a particular focus on the landmark *Akayesu* case. It proceeded to establish how this conduct may fall under the charge of war crime which, as explained, thereby breaching the 1949 Geneva Conventions, for which the *ad hoc* tribunals for former Yugoslavia (ICTY) and Rwanda, as well as the International Criminal Court (ICC), have jurisdiction. The second section explored other accounts, namely crimes against humanity (CAH) and the crime of genocide, which may

encompass the conduct of sexual violence. The third section dived into the legal analysis of the Yazidi women case, exploring the events unfolding since August 2014, with a particular focus on the conducts of genocidal rape and sexual slavery perpetrated by the ISIS militants towards women and girls aged upon 9.

This thesis was aimed at providing the most accurate and detailed possible overview of how the atrocious conduct of sexual violence may intersect with international criminal law, and how it has been persecuted according to its principles. Through a review of principles stemming from international treaties, and the relevant case law, it has explored how these norms are applied in framing sexual violence as a war crime, crimes against humanity and genocide. There are still numerous challenges in prosecuting sexual violence in international courts, such as the lack of resources, the impunity of the perpetrators and the social stigma faced by the victim, which continue to pose a significant obstacle, and which shall be further addressed by academic literature.

This work emphasized how the act itself may not only have profound consequences on the victim, both on a psychological and physical level, but also impact entire communities in the context of warfare and global crises. It raised awareness and promoted human rights protection by underlining the importance of continued advocacy, legal reforms and ongoing commitment from the international community. The analysis of the Yazidi genocide and other atrocities serves to illustrate the urgency of concrete actions to support victims and prevent future violations.

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