



**Universidad Pontificia Comillas**  
Facultad de Ciencias Humanas y Sociales

Grado en Relaciones Internacionales

Trabajo Fin de Grado

**THE RAPES COMMITTED AGAINST THE YAZIDI  
WOMEN: A GENOCIDE?**

*A study of the crime of rape as a form of genocide in International Criminal  
Law.*

Estudiante: **Paula Castellano San José**

Director: Isabel Maravall Buckwalter

Madrid, abril de 2019

## INDEX

List of abbreviations.....	3
1. Introduction .....	4
2. CHAPTER I: THE EVOLUTION OF THE DEFINITION OF RAPE IN INTERNATIONAL CRIMINAL LAW.....	10
2.1.The <i>actus reus</i> of the crime of rape.....	10
a) <i>Akayesu and Furundizja: the focus on coercion</i> .....	11
b) <i>Kovac, Kunarak and Vukovic: the focus on lack of consent</i> .....	18
2.1.The current definition of rape in the ICC.....	25
3. CHAPTER II: THE CRIME OF GENOCIDE COMMITTED THROUGH RAPE.....	34
3.1. The <i>actus reus</i> of genocide.....	34
a) <i>causing serious bodily or mental harm</i> .....	35
b) <i>deliberately inflicting on the group conditions of life calculated to bring about its physical destruction</i> .....	36
c) <i>imposing measures intended to prevent births within the group and forcibly transferring children of the group to another group</i> .....	37
3.2.The <i>mens rea</i> of genocide.....	39
3.3.The feminist debate over genocidal rape.....	41
4. CHAPTER III: THE RAPE OF GHE YAZIDI WOMEN AS GENOCIDE.....	44
4.1. Background.....	44
4.2. The rape of the Yazidi in the ICC definition of rape.....	46
4.3.The rape of the Yazidi as genocide.....	50
a) <i>The cause of serious bodily and mental harm and the deliberate infliction of conditions of life calculated to bring about the physical destruction of the Yazidi</i> ..	52
b) <i>The prevention of births and the forcible transfer of Yazidi children from one group to another</i> .....	53
4.4.The genocidal rape debate applied to the Yazidi.....	53
5. Conclusion.....	56
6. Bibliography.....	58

## ***Abstract***

*Rape has been used as a tool of war throughout the history of mankind. Even though its commission was recognized in some instances of the Tokyo and Nuremberg trials, the jurisprudence of the Ad Hoc Tribunals of Rwanda and Yugoslavia were the first institutions to define rape in International Criminal Law. With the establishment of the ICC, rape was included in the Rome Statute, being internationally recognized as a war crime, a crime against humanity and a means to commit genocide. Rape has also been defined in the correlated document to the Rome Statute, the Elements of the Crimes. The Islamic State of Iraq and Syria in its war to establish the caliphate has carried out a campaign of sexual violence against women of religious minorities such as the Yazidi. The responsible members of the Islamic State should be therefore charged for the crimes being committed against women in the territory of Iraq and Syria. The purpose of this dissertation is, on the one hand, to examine the evolution of the definition of rape in International Criminal Law and apply the current definition to the crimes committed by ISIS against the Yazidi. On the other hand, this study aims to analyze how the elements of the actus reus of Genocide can be committed through rape and considers whether the actions carried out by the Islamic State towards the Yazidi could qualify as a genocide by means of rape.*

*Keywords: Sexual violence, Rape, International Criminal Law, ISIS, Yazidi, Genocide.*

## **LIST OF ABBREVIATIONS**

EoC: Elements of the Crimes.

HRW: Human Rights Watch.

HRC: Human Rights Council.

ICC: International Criminal Court.

ICL: International Criminal Law.

ICTR: International Criminal Tribunal for Rwanda.

ICTY: International Criminal Tribunal for Yugoslavia.

ISIS: Islamic State of Iraq and Syria.

UNAMI: United Nations Assistance Mission for Iraq.

UNHRC: United Nations Human Rights Council.

*Op. cit.*: Previously cited.

## 1. INTRODUCTION

Sexual violence towards women has existed for as long as there has been conflict<sup>1</sup>. Rape has been used as a war tool in many disputes throughout history<sup>2</sup>, frequently recognized as an “inevitable reality of conflict”<sup>3</sup>. Rape of women during war derives from a discrimination based not only on their ethnicity but also on their gender.

Massive allegations of rape towards civilian women first arose after the Second World War. While the Tokyo and Nuremberg Charters claimed jurisdiction over “Conventional War Crimes” and “Crimes Against Humanity” without specifically mentioning rape, the Tribunals in some occasions admitted evidence and recognized instances of rape that occurred during the war towards civilian women<sup>4</sup>. However, none of both Trials ended in rape convictions. Rape was not expressly set out as a distinct crime in a legal document until the Fourth Geneva Convention<sup>5</sup>. International Law is a gendered system, this explains why crimes committed against women, such as rape, have been silenced and ignored for many years<sup>6</sup>.

The definition of rape and the elements of the crime were developed through the jurisprudence of International Tribunals, which made rape fit inside provisions of International Humanitarian Law instruments such as the Geneva Conventions<sup>7</sup>. Initially, these legal instruments perceived rape as a crime against the honor of men incapable of

---

<sup>1</sup> United Nations Division for the Advancement of Women, Department of Economic and Social Affairs [Issue Women 2000 from now on] *Sexual Violence and Armed Conflict: United Nations Response*, p. 1.

<sup>2</sup> McDougall, G. *Contemporary Forms of Slavery: Systematic rape, sexual slavery and slavery-like practices during armed conflict*. Report for the Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1998/13 1998, para. 15.

<sup>3</sup> Issue Women 2000, *op. cit.*, p. 4.

<sup>4</sup> Charter of the International Criminal Tribunal for the Far East (1949), article 5; Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (1945), article 6; Viseur Sellers, P. *The Prosecution of Sexual Violence in conflict: The Importance of Human Rights as Means of Interpretation*. OHCHR Documents (2007) p. 8.

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

<sup>6</sup> Charlesworth, H., Chinkin, C. and Wright, S. *Feminist approaches to International Law*. *The American Journal of International Law*, Vol. 85, No. 4, 1991, p. 615; Copelon, R. *Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law*. *McGill Law Journal*, Vol. 46, 2000, p.223.

<sup>7</sup> Askin, K. *Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles*. *Berkeley Journal of International Law*, Vol. 21, Issue 2, Article 4, 2003, p. 312-313.

protecting their women<sup>8</sup>. Rape was then recognized as a form of torture in The *Akayesu* judgment by the International Criminal Tribunal for Rwanda<sup>9</sup> (hereinafter ICTR), which also identified rape as a crime against humanity. The International Criminal Tribunal for Yugoslavia (hereinafter ICTY) considered rape part of an ethnic cleansing campaign committed by the Serbs towards the Bosnian-Muslim population in Bosnia-Herzegovina.

Today rape is set out as a crime in the Rome Statute in articles seven and eight, both as a crime against humanity and a war crime. Moreover, the elements of the crime of rape are set out in the corresponding document to the Rome Statute, the Elements of the Crimes (hereinafter EoC) in article seven and eight. The current definition of rape in the EoC, has been highly influenced by the jurisprudence and feminist scholarship and advocacy. While the EoC does not expressly set out rape as a form of genocide, the document recognizes rape as a mean to commit genocide by causing serious bodily and mental harm in article six. In fact, nearly all the actions that amount to genocide can be committed through rape<sup>10</sup>. Additionally, the prohibition of rape has obtained the status of *ius cogens*<sup>11</sup>.

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

---

<sup>8</sup> Issue Women 2000, *op. cit.*, p. 1; Copelon, R. *Gendered War Crimes: Reconceptualizing Rape in Time of War*, in “Women’s Rights, Human Rights: International Feminist Perspectives” (Julie Peters and Andrea Wolper eds., 1995), p. 201; Askin, K., 2003, *op. cit.*, p. 296.

<sup>9</sup> *The Prosecutor v. Jean-Paul Akayesu (Trial Judgment)*, ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998 [hereinafter *Akayesu Trial Judgment*], para. 597.

<sup>10</sup> de Brower, A. M. *Supranational Criminal Prosecution of Sexual Violence: the ICC and the practice of the ICTY and the ICTR* (2005).

<sup>11</sup> Mitchell, D. *The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine*. *Duke Journal of Comparative and International Law*, Vol. 12, 2005, pp. 219-257; O’Byrne, K. *Beyond Consent: Conceptualising Sexual Assault in International Criminal Law*. *International Criminal Law Review* 11 (2011), p. 508; Askin, K. 2003, *op. cit.*, p. 293; Meron, T. *Rape as a Crime Under International Humanitarian Law*. *American Journal of International Law*, Vol. 87, n° 3, pp. 424-428 (1993); Charney, J. *Universal International Law*. 87 *American Journal of International Law* (1993), p. 541.

\*\*\*

In order to address this issue, this study has been divided in the following way. Chapter I examines the jurisprudential evolution of the elements of the crime of rape in International Criminal Law (hereinafter ICL). The Chapter concludes with the analysis of the current definition of rape embedded in the EoC in light of the influence of the previous jurisprudence, and briefly refers to its application in the recent judgment of *Jean Pierre Bemba Gombo*.

Chapter II develops the elements of the crime of Genocide, referring specifically to the actions of the *actus reus* of the crime which can be committed by means of rape. Each element of the *actus reus* has been assessed individually to prove how rape can indirectly constitute genocide. The second Chapter finalizes with a reference to the doctrinal feminist debate over the disappearance of gender in the study of genocidal rape.

Finally, Chapter III addresses the evidence of the crimes committed by ISIS against the Yazidi and whether the actions and the intentions of the terrorist group can qualify, firstly as the crime of rape defined in the EoC and secondly as a crime of genocide committed by means of rape. Lastly, the third Chapter closes with a brief reference to the genocidal rape debate applied to the case of the Yazidi women.

\*\*\*

This dissertation has been conducted with a dogmatic methodology and a critical approach to ICL. It has been developed through the study of the norms and elements of crimes set out in legal documents such as the Rome Statute or the Genocide Convention, each of them being analyzed to comprehend its significance. The definition of rape contained in the EoC has been addressed in light of a previous jurisprudential study to understand how the jurisprudence of the Ad Hoc Tribunals has influenced the current *actus reus* and *mens rea* of the criminal offence.

In this sense, the essay also applies a historical method through the use of several case studies when analyzing the jurisprudence of the Ad Hoc Tribunals to understand the elements of the crime of rape as they are set out today.

Through the study of the *Akayesu*, *Furundizja* and *Kunarac* cases, the composition carries out an inductive method. It uses this method as it draws from specific cases to

create general statements over the elements of the *actus reus* of rape. In addition, the inductive method is also employed when separately examining the different means to commit genocide, to conclude the actions can be committed through rape and therefore rape can indirectly constitute genocide.

The discussion operates from a critical feminist approach as it understands how the gendered system of ICL has evolved in the recognition of rape and the obstacles that feminist advocates have encountered in its Criminalization. The creation of criminal offences in ICL and their prosecution has eminently been carried out and shaped by men, which explains why the Criminalization of rape has endured several obstacles, and violence against women during war has been silenced until not long ago.

The feminist critical approach is specially shown in the essay's reference to the discussion over "lack of consent" and the dissertation's reluctance to its inclusion as an element of the crime of rape. The feminist critical approach is also identified when this composition develops the debate over the possible disappearance of gender in the criminal offence of rape when one studies "genocidal rape".

\*\*\*

The present study has used a variety of bibliography. To start with, Chapter I has been elaborated through the use of the *Akayesu*, *Furundizja* and *Kunarac* Trial and Appeal judgments. The jurisprudence has been combined with the analysis carried out in specialized articles and books by the most relevant authors in the field of ICL who have investigated this jurisprudential evolution. Moreover, important feminist authors who advocated for gender crimes in the ICTR and ICTY have been consulted in order to examine the creation of a victim-friendly rape definition. These authors have also helped to understand the feminist success in the current definition of rape in the EoC, which does not include the element of "non-consent" due to the doctrinal criticism to this element in the *Kunarac* judgment.

In the elaboration of Chapter II, the composition turns to the use of the Genocide Convention, combined with the analysis of psychological studies over the individual and societal consequences of rape that can amount to genocide. Moreover, Chapter II has been written through a jurisprudential study of judgments where the *actus reus* and *mens rea* of genocide have been developed, such as *Kristic*. The jurisprudence has been combined

with the analysis carried out by specialized scholarship articles that study how each element of the *actus reus* of genocide can be satisfied with the consequences of rape.

Finally, Chapter III has been conducted with the information obtained in the documentation from several Human Rights reports of the United Nations and non-governmental Organizations, over the crimes committed by ISIS towards the Yazidi. Moreover, the study has had recourse to important newspapers in an on-line format to obtain information over ISIS campaigns and movements and their mode of operation.

Once the actions carried out by ISIS towards the Yazidi women become clear, drawing from the facts, the dissertation conducts a research to prove whether those actions are adequate to fit into the current EoC definition of rape and whether genocide is being committed to the Yazidi women by means of rape.



## 2. CHAPTER I:

### THE EVOLUTION OF THE DEFINITION OF RAPE.

In this first Chapter, the dissertation will carry out an analysis of the jurisprudential evolution of the crime of rape through the *Akayesu*, *Furundizja* and *Kunarac* judgments. The Chapter will set out the elements of the *actus reus* of the criminal offence, which vary in each definition, not only with regard to the factual actions but also with regard to the inclusion of a “lack of consent” element. The Chapter will conclude with an assessment of the current definition of rape in the EoC and its application by the International Criminal Court (hereinafter ICC) in the case of *Jean Pierre Bemba Gombo*.

#### 2.1 The *actus reus* of the crime of rape.

The elements of the *actus reus* of rape have evolved throughout the history of ICL. The jurisprudence of the International Tribunals of Rwanda, Yugoslavia and the ICC have defined the elements of the crime of rape in several cases of sexual violence during armed conflict. There are three lines of thinking concerning the definition of rape in International Law<sup>12</sup>. The first one adheres to a broad conceptual definition<sup>13</sup>; the second takes a more restrictive and mechanical description of the body parts involved<sup>14</sup> and the third one includes the element of non-consent to the crime<sup>15</sup>.

The *actus reus* of rape is the specific actions the perpetrator carries out and are constituent of the crime. The two critical components<sup>16</sup> that appear in rape definitions are either force and absence of consent or merely the element of force presuming the non-consent of the victim due to the inherently coercive circumstances<sup>17</sup>. One of the elements of the definition over which it has been more discussion throughout the jurisprudence is

---

<sup>12</sup> de Brouwer, A. M. 2005, *op. cit*, p. 107.

<sup>13</sup> A broad conceptual definition of rape was used in the *Akayesu*, *Celibici*, *Musema*, *Niyitegeka* and *Muhimana* Judgements.

<sup>14</sup> A mechanical definition of rape was carried out in the *Furundizja* Judgement.

<sup>15</sup> Non-consent was included as an element of the crime in *Kunarac*, *Kovac and Vukovic*; *Gacumbitsi*; *Kvočka*, *Semanza* and *Kajelijeli* Judgments.

<sup>16</sup> Kinports, K. *Rape and Force: The Forgotten Mens Rea*. Penn State Law Journal Article. Buffalo Criminal Law Review, Vol. 4, 2001, p 755; O’Byrne, K. 2011, *op. cit*, p. 497.

<sup>17</sup> MacKinnon, C. *Defining Rape Internationally: A Comment on Akayesu*. 44 Columbia Journal of Transnational Law, 2006, p.940-941; McDonald, G. *Crimes of Sexual Violence: The Experience of the International Criminal Tribunal*, 39 Columbia Journal of Transnational Law, Vol. 1, n°3, 2000, p. 16.

whether non-consent should be an element of the crime in situations as coercive as wartime scenarios<sup>18</sup>.

The *mens rea* of the crime of rape varies according to its elements. If the definition takes non-consent as an element, Tribunals require that the perpetrator is aware that the intercourse is taking place without the consent of the victim. On the other hand, if the definition takes force or coercion as an element, Tribunals find the *mens rea* in that the perpetrator is aware either that the intercourse is taking place by using force or that he/she is taking advantage of a coercive environment where genuine consent is impossible.

**a) *Akayesu and Furundizja: The focus on coercion.***

The first time a Tribunal had to determine the actions which amounted to rape was in the *Prosecutor v Akayesu* judgment, in 1998. This case was prosecuted before the *ad hoc* ICTR in line with the crimes committed during the Rwandan genocide. *Akayesu* was the bourgmestre of the Taba commune and responsible for maintaining law and public order in that territory<sup>19</sup>. However, while seeking refuge at the bureau communal, female displaced civilians were regularly taken by armed local militia and communal police and subjected to sexual violence<sup>20</sup>.

Examples of the atrocious acts committed against women during the Rwanda genocide are extracted from several witnesses' testimonies. Allegations of rape started spontaneously, when a witness, a Tutsi woman, testified that her six-year old daughter had been raped by the Interahamwe<sup>21</sup>. Other witnesses stated they lost count of the number of times they were raped because every time they encountered the attackers, they would rape them<sup>22</sup>. The acts the witnesses described involve the penetration of their vagina by the penis of the perpetrator<sup>23</sup>, but specifically one witness described the event where a woman who was agonizing to death, had a piece of wood introduced in her "sexual organs" while she was still breathing<sup>24</sup>. One of the witnesses also stated that when during the rape she started to shout the perpetrator warned her that others might

---

<sup>18</sup> Weiner, P. *The Evolving Jurisprudence of the Crime of Rape in International Criminal Law*. Boston College Law Review, Vol. 54, Issue 3, Article 14, 2013, p. 1214.

<sup>19</sup> *Akayesu* Trial Judgment, para.12.

<sup>20</sup> *Ibid*, para.12A.

<sup>21</sup> *Ibid*, para. 416.

<sup>22</sup> *Ibid*, para. 421.

<sup>23</sup> *Ibid*, para. 424, 430.

<sup>24</sup> *Ibid*, para. 429.

come and kill her<sup>25</sup>. The Interahamwe's also gang raped a pregnant woman by taking her by the neck, shoulders and thighs and the women went into premature delivery during the rape<sup>26</sup>. Finally, another witness testified that some women had to "sacrifice themselves" in order to survive, meaning they had to submit to rape<sup>27</sup>.

*Akayesu* established a broad definition of rape<sup>28</sup>, criticized for possibly violating the legality principle<sup>29</sup>. It is a non-mechanical definition as it does not specifically state body parts and specific actions. In fact, the Chamber in *Akayesu* stated that "rape cannot be summarized in a mechanical description of objects and body parts"<sup>30</sup>. It did so by referring to the torture definition, which also used a conceptual approach, carrying out a resemblance of rape and torture as both are committed for the same purposes: humiliation, degradation, punishment and destruction of the victim<sup>31</sup>.

The Chamber established the elements that constituted the first definition of rape<sup>32</sup>: "*A physical invasion of a sexual nature committed on a person under circumstances which are coercive*". The Chamber specifically stated as an example "the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual"<sup>33</sup>. The Chamber established rape as an act of sexual violence, but different from sexual violence in general because it includes acts with no penetration or even with physical contact<sup>34</sup>. The definition is gender neutral, as the Chamber refers to "committed against a person".

This definition did not include the consent paradigm<sup>35</sup>, but instead referred to "*under circumstances which are coercive*". The Trial Chamber interpreted "force" in a broad way, stating that "*a show of physical force is not necessary to establish coercive circumstances*"<sup>36</sup>. Coercion may be constituted by "*threats, intimidation, extortion and other forms of duress which prey on fear or desperation*" and may be inherent in certain

---

<sup>25</sup> *Akayesu* Trial Judgment, *op.cit.*, para. 424.

<sup>26</sup> *Ibid.*, *op.cit.*, para.437.

<sup>27</sup> *Ibid.*, *op.cit.*, para. 438.

<sup>28</sup> O'Byrne, K. 2011, *op.cit.*, p. 501; Askin, K. 2003, *op. cit.*, p. 319; de Brouwer, A. M, 2005, *op.cit.*, p. 108; Copelon, R. 2000, *op.cit.*, p. 227.

<sup>29</sup> de Brouwer, A. M, 2005, *op.cit.*, p. 108.

<sup>30</sup> *Akayesu* Trial Judgment, *op.cit.*, para. 597.

<sup>31</sup> *Ibid.*, *op.cit.*, para. 597.

<sup>32</sup> *Ibid.*, *op.cit.*, para 598.

<sup>33</sup> *Ibid.*, *op.cit.*, para. 596.

<sup>34</sup> *Ibid.*, *op.cit.*, para. 688.

<sup>35</sup> Kalosieh, A. *Consent to Genocide: The ICTY's Improper Use of the Consent Paradigm to Prosecute Genocidal Rape in Foca*. 24 *Women's Rts. L. Rep.* 121, 2003, p. 128.

<sup>36</sup> *Akayesu* Trial Judgment, *op.cit.*, para. 688.

circumstances such as armed conflict itself or the presence of soldiers among refugees<sup>37</sup>. Situations such as fear created by a gang of people can cause the victim to submit to whatever the perpetrators want to do with him/her. In those cases, coercion is implicit in the atmosphere, which in a situation of armed conflict and being part of a group being persecuted, is coercive enough to consider the assault as rape. Hence, the definition considered as coercion not only the use of force to prove it was rape.

The Chamber considered the horrifying nature of the factual allegations presented in the case<sup>38</sup>. When rape is framed in this manner, the notion of “lack of consent” has to disappear taking into account the atrocities carried out towards women by the soldiers as a means of dehumanizing their enemies during a war effort<sup>39</sup>. One of the most important contributions of the *Akayesu* judgment is not only the recognition of rape as a mean to commit genocide<sup>40</sup> and as a form of torture<sup>41</sup>, but also as one of the worst ways to inflict bodily and mental harm upon an individual. Rape was considered to be worse than death<sup>42</sup>.

While the rapes committed in Rwanda did not receive much feminist attention, the mass rapes and the rape camps in the conflict of Bosnia gained media attention and evoked public outrage<sup>43</sup>. Following *Akayesu*, the second important judgment in defining the *actus reus* of rape was done by the ICTY in *Prosecutor v Furundizja* in 1998. With the establishment of the ICTY there was a lot of feminist activists making efforts to affect the statute and the rules under which rape had to be prosecuted<sup>44</sup>, minimizing the evidentiary requirements for proof of rape by eliminating or modifying the defense of consent<sup>45</sup>. In part due to the work of feminists, the Statute of the ICTY lists the crime of rape as a crime against humanity<sup>46</sup>.

---

<sup>37</sup> Ibid, *op.cit*, para. 688.

<sup>38</sup> Kalosieh, A. 2003, *op.cit*, p. 128.

<sup>39</sup> Schomburg, W. and Paterson, I. *Genuine Consent to Sexual Violence under International Criminal Law*. 101 Am. J. Int'l L. 121, 2007, p.26.

<sup>40</sup> de Brouwer, A. M, 2005, *op.cit*, p. 115.

<sup>41</sup> *Akayesu* Trial Judgment, *op.cit*, para. 597.

<sup>42</sup> de Brouwer, A. M, 2005, *op.cit*, p. 115.

<sup>43</sup> Russel-Brown, S. *Rape as an Act of Genocide*. Berkeley Journal of International Law, Vol. 21, Issue 2, Article 5, 2003, p. 351; Copelon, R. 2000, *op.cit*, p. 224.

<sup>44</sup> Engle, K. *Feminism and its (dis)contents: criminalizing wartime rape in Bosnia and Herzegovina*. 99 American Journal of International Law, 2005, p. 778.

<sup>45</sup> Halley, J. *Rape in Berlin: Reconsidering the Criminalization of Rape in the International Law of Armed Conflict*. Melbourne Journal of International Law, Vol. 9, 2008, p. 88.

<sup>46</sup> Engle, K. 2005, *op.cit*, p. 778.

The definition of rape developed by the *Furundizja* Trial Chamber was more specific due to of the criticisms addressed at the broad definition in *Akayesu*<sup>47</sup>. Some of the evidence presented and described by the Chamber indicated that victims were forced to have vaginal and oral sexual intercourse with the perpetrator<sup>48</sup>. In other parts of the indictment, the Chamber describes how victims were forced to perform oral sex and were raped vaginally and anally<sup>49</sup>. The judgment explicitly stated that forcible oral sex was considered rape<sup>50</sup>. The *actus reus* of rape given by the Chamber in the *Furundizja* case is the following: *The sexual penetration, however slight: a) Of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; b) Of the mouth of the victim by the penis of the perpetrator. By coercion or force or threat of force against the victim or a third person*<sup>51</sup>.

In *Furundizja* the Trial Chamber retained, following and refraining the *Akayesu* definition<sup>52</sup>, as central element “*coercion or force or threat of force against the victim or a third person*”. It chose to “look for principles of criminal law common to the major legal systems of the world” so as to find a definition of rape<sup>53</sup>. The Trial Chamber emphasized that whenever international criminal rules do not define a notion of criminal law, reliance upon national legislation is justified, subject to certain conditions<sup>54</sup>. The Chamber was aware of the problems of transposing national legal norms onto an international system whose circumstances greatly differ from any national scenario<sup>55</sup>.

The Chamber established that all jurisdictions surveyed required an element of force, coercion, threat, or acting without the consent of the victim<sup>56</sup>. Additionally, the Chamber found that “force was given a broad interpretation that included rendering the victim helpless”<sup>57</sup>. Although the *Furundizja* Trial Chamber studied the definition of rape found in national laws and acknowledged the importance of the element of non-consent,

---

<sup>47</sup> de Brouwer, A. M, 2005, *op.cit.*, p. 112.

<sup>48</sup> *Prosecutor v. Furundizja*. IT-95-17/1-T, 10 December 1998 [hereinafter *Furundizja* Trial Judgment], para. 38.

<sup>49</sup> *Furundizja* Trial Judgment, *op.cit.*, para. 87.

<sup>50</sup> *Ibid.*, para. 184.

<sup>51</sup> *Ibid.*, para.185.

<sup>52</sup> de Brouwer, A. M, 2005, *op.cit.*, p. 112.

<sup>53</sup> *Furundizja* Trial Judgment, *op.cit.*, para. 177.

<sup>54</sup> *Ibid.*, para. 177.

<sup>55</sup> Schomburg, W. and Paterson, I. 2007, *op.cit.*, p.26; L. Haffagee, R. *Prosecuting Crimes of Rape and Sexual Violence At The ICTR: The Application Of Joint Criminal Enterprise Theory*. Harvard Journal of Law & Gender, Vol. 29 2006, p.8.

<sup>56</sup> *Furundizja* Trial Judgment, *op.cit.*, para. 180.

<sup>57</sup> *Ibid.*, para. 180.

it opted to exclude it from the definition<sup>58</sup>. Therefore, although the Trial Court was aware that “consent” was one theory used by major world legal systems, it opted to omit such a standard from its definition of rape<sup>59</sup>. The Court found that it was not bound to include a consent paradigm because a consent paradigm would transpose poorly to the international arena<sup>60</sup>.

Instead, the Court chose to use the language of force and coercion, which drove the focus away from the behavior of the victim and placed it rightfully in the hands of the perpetrator<sup>61</sup>. Under this method, a defendant who allegedly rapes a victim could defend himself against factual allegations by showing that he did not, in fact, use force or coercion, but not by holding the witness accountable for her action or inaction when confronted with the sexual assault of her enemy in the larger conflict<sup>62</sup>. Force can be either express or implied, what is crucial is that it places the victim under a reasonable fear that she, he or a third person will be subjected to violence, duress, detention or psychological oppression<sup>63</sup>. The Trial Chamber also endorsed a gender-neutral approach to the definition<sup>64</sup>.

Moreover, the Trial Judgment established a standard for dealing with rape cases emanating from prison camps or detention facilities, holding that the circumstances surrounding captivity preclude consent<sup>65</sup>.

Several authors aligned with the definition posed in *Akayesu* and *Furundizja*. The Chambers focused on an element of group force and not the absence of individual consent<sup>66</sup>. The Trial Chamber noted that while national laws had defined rape as “a non-

---

<sup>58</sup> Ibid, para. 180.

<sup>59</sup> de Brouwer, A. M, 2005, *op.cit*, p. 113.

<sup>60</sup> Kalosieh, A. 2003, *op.cit*, p. 130.

<sup>61</sup> Kalosieh, A. 2003, *op.cit*, p. 130; Michal Buchhandler has developed a theory, “*Sexual Abuse of Power*”, in which he states the mistake of conceptualizing rape as an act of “sex without consent”, because it fails to recognize the harms that the offense inflicts on its victims and fails to capture the wrongdoing of the perpetrator’s conduct, who should bear the shame and guilt and not the victim. See: Buchhandler-Raphael, M. *The Failure of Consent: Re-Conceptualizing Rape as Sexual Abuse of Power* (2011). Michigan Journal of Gender and Law. Volume 18, Issue 1. Pages 147-228.

<sup>62</sup> Kalosieh, A. 2003, *op.cit*, p. 130.

<sup>63</sup> Furundizja Trial Judgment, *op.cit*, para.174.

<sup>64</sup> de Brouwer, A. M, 2005, *op.cit*, p. 115.

<sup>65</sup> Furundizja Trial Judgment, *op.cit*, para. 271.

<sup>66</sup> MacKinnon, C., 2006, *op.cit*, p.959.

consensual intercourse”, a broader definition was needed and referred to the torture<sup>67</sup> and genocide<sup>68</sup> definition since neither of them included an element of “lack of consent”<sup>69</sup>.

Contrary to torture and genocide, the inherent problem with the view of rape is that the act *per se* is regarded as an ordinary act within society: sex, albeit without consent<sup>70</sup>. The harm inflicted in torture is not a common social behavior, and therefore its elements do not include “absence of consent”. Because, it is obvious that no one would consent to their own torture<sup>71</sup>, and even if the victim did, it would not serve as a defense for the perpetrator. The same logic should apply to the crime of rape<sup>72</sup>. There is no principle or rationale that satisfactorily explains why rape should be understood as requiring proof of the non-consent of the victim, while other violent international crimes committed in identical coercive circumstances do not<sup>73</sup>.

As MacKinnon puts it, “with sex, it seems, women can consent to what would otherwise be a crime against their humanity, making it not one”<sup>74</sup>. The rapes committed

---

<sup>67</sup> Akayesu Trial Judgment, *op.cit.*, para. 687: *Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when it is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.*; Furundzija Trial Judgment, *op.cit.*, para.162, 124, 130., recognizes as torture the rapes committed for the purpose of interrogation, with the goal of humiliating and causing severe pain and suffering to the witnesses.

<sup>68</sup> MacKinnon, C., 2006, *op.cit.*, p.944.; Kalosieh, A. 2003, *op.cit.*, p.128.

<sup>69</sup> The definition of Genocide is embedded in Article II of the UN Convention on the Prevention and Punishment of the crime of Genocide: *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; (e) Forcibly transferring children of the group to another group.*; The definition of torture is embedded in Article I of the Convention Against Torture: *For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.*

<sup>70</sup>Chinkin, C. Symposium. *The Yugoslav Crisis: New International Law Issues*

*Rape and Sexual Abuse of Women in International Law.* 5 European Journal of International Law, 1994, p.328.

<sup>71</sup>Askin, K., 2003, *op.cit.*, p.340 (foot note 276); de Brouwer, A. M, 2005, *op.cit.*, p. 115; Kalosieh, A. 2003, *op.cit.*, p.133.

<sup>72</sup> Buhandler-Raphael, M. *Sexual Abuse of Power.* University of Florida Journal of Law & Public Policy, Vol. 21, 2010, p. 89; Buchhandler-Raphael, M. *The Failure of Consent: Re-Conceptualizing Rape as Sexual Abuse of Power.* Michigan Journal of Gender and Law, Vol. 18, Issue 1, 2011, p. 150.

<sup>73</sup> O’Byrne, K., 2011, *op.cit.*, p. 510; Schomburg, W. and Paterson, I. 2007, *op.cit.*, p. 126.

<sup>74</sup> MacKinnon, C., 2006, *op.cit.*, p.952.

in the rape camps in Fôca, for example, are crimes of violence and torture on a mass scale to which duress is central and consent is irrelevant. Questioning whether the victim freely agreed to the commission of any of these acts is illogical and repugnant<sup>75</sup>. The mere fact that they are constituted by acts targeting sexual organs, sexuality or women should not beg the question of consent<sup>76</sup>. Acts of this kind can hardly be conceived of "merely" as undesired sex<sup>77</sup>. It seems more appropriate to speak of "sexualized violence"<sup>78</sup>. Therefore, the consent paradigm is inappropriate in conflict situations where rape is used as a weapon of war<sup>79</sup>.

The burden to prove non-consent is often deemed as "the second rape" by feminist scholars<sup>80</sup>. It can further traumatize and humiliate victims, especially when improper lines of questioning open if consent becomes the focus<sup>81</sup>. It creates the situation of a witness testimony scenario where the victim is subject to the insinuation that she was able to be complicit in the dehumanizing treatment that destroyed her village during a genocidal rape campaign<sup>82</sup>. De Brouwer adds another reason against the inclusion of non-consent in the definition of rape, which consists in the silence of the victims that will be created. They will not come forward to testify if they have to be subject to humiliating questions such as if they consented to multiple rapes<sup>83</sup>.

Although not asked directly, the implicit questions lurking behind the discussion of victim consent are whether the victim enjoyed the sexual violence perpetrated by her enemy for the purposes of ethnically cleansing, and demoralizing her ethnic group, and whether she did anything to prevent it<sup>84</sup>.

---

<sup>75</sup> de Brouwer, A. M 2005, *op.cit.*, p. 122; Kalosieh, A, 2003, *op.cit.*, p. 122.

<sup>76</sup> de Brouwer, A. M, 2005, *op.cit.*, p. 121.

<sup>77</sup> de Brouwer, A. M, 2005, *op.cit.*, p. 123.

<sup>78</sup> Schomburg, W. and Paterson, I., 2007, *op.cit.*, p. 127.

<sup>79</sup> See, for example: O'Byrne, K., 2011, *op.cit.*, p. 497; Schomburg, W. and Paterson, I. 2007, *op.cit.*, p. 124; Fitzgerald, K. *Problems of Prosecution and Adjudication of Rape and Other Sexual Assaults under International Law*. 8 European Journal of International Law (1997) p. 664; Akayesu Trial Judgment, para. 668; MacKinnon, C., 2006, *op.cit.*, p. 943; Weiner, P. 2013, *op. cit.*, p. 1224.; Patricia Viseur Sellers. *The 'appeal' of sexual violence: The Akayesu/Gacumbitsi cases* p. 90, 96, 97.; de Brouwer, A. M., 2005, *op.cit.*, p. 123.

<sup>80</sup> Kalosieh, A, 2003, *op.cit.*, p. 134.

<sup>81</sup> de Brouwer, A. M 2005, *op.cit.*, p. 123.

<sup>82</sup> de Brouwer, A. M 2005, *op.cit.*, p. 124; Kalosieh, A, 2003, *op.cit.*, p. 125, 133.

<sup>83</sup> de Brouwer, A. M 2005, *op.cit.*, p. 123.

<sup>84</sup> Kalosieh, A, 2003, *op.cit.*, p.122.

**b) *Kovac, Kunarak and Vukovic: the focus on lack of consent.***

*Kunarac* was the first planned “sex crimes only” prosecution of the ICTY<sup>85</sup>. The *actus reus* of the crime of rape for the Chamber in the *Kovac, Kunarak and Vukovic* indictment is the one that follows<sup>86</sup>: *The sexual penetration, however slight: a) Of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; b) Of the mouth of the victim by the penis of the perpetrator. Where such sexual penetration occurs without the consent of the victim.* The Trial’s interpretation of the crime of rape was a sexual penetration that occurs without the consent of the victim, which *must be given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances*<sup>87</sup>.

The *mens rea* was the intention to affect this sexual penetration and the knowledge that it occurs without the consent of the victim<sup>88</sup>. The Chamber in *Kunarac* diverged from the approach of the *Akayesu* and *Furundizja* trials that established a narrower definition of rape where the Prosecution had to prove an element of coercion and force<sup>89</sup>, and established “non-consent” as a central element of the crime of rape<sup>90</sup>. The Trial Chamber relied on a survey of national rape laws to show an underlying principle, that of sexual autonomy that is violated when a sex act is forced on a victim without her voluntary participation or consent<sup>91</sup>.

The inclusion of “non-consent” as an element was the result of the analysis of the elements of rape in domestic systems, improperly transposing national peacetime rape law norms into the international criminal arena<sup>92</sup>. While national rape law definitions might be appropriate if applied to isolated acts of rape committed for the personal gratification of the perpetrators in a domestic scenario, it is inappropriate in a war-crime

---

<sup>85</sup> Halley, J. 2008, *op.cit.*, p. 83; de Brouwer, A. M, 2005, *op.cit.*, p. 126.

<sup>86</sup> Judgment of the ICTY (Trial Chamber) in the case of *Prosecutor v. Kunarac, Kovac and Vukovic*. (Case Nos. IT-96-23-T & IT-96-23/1-T) 1.10-1.11[hereinafter *Kunarac Trial Judgment*], para. 460.

<sup>87</sup> *Ibid.*, para. 460.

<sup>88</sup> *Ibid.*, para. 460.

<sup>89</sup> Ellis, M. *Breaking the silence: Rape as an International Crime*. Case Western Reserve Journal of International Law, Vol. 28, 2007, p. 229; *Kunarac Trial Judgment, op.cit.*, para. 440.

<sup>90</sup> Non consent as the central element of the crime of rape was upheld by the *Kunarac Appeals Judgment*, in 2002: *Prosecutor v. Kunarac et al.*, 12 June 2002, International Criminal Tribunal for the former Yugoslavia, Appeal Judgment, Case Nos. IT-96-23 & IT-96-23/1 [hereinafter *Kunarac Appeals Judgment*]; O’Byrne, K. 2011, *op.cit.*, p. 504.

<sup>91</sup> *Kunarac Trial Judgment*, para. 440-441, 457; Kalosieh, A, 2003, *op.cit.*, p. 131.

<sup>92</sup> Kalosieh, A, 2003, *op.cit.*, p. 129.

setting because it fails to recognize the context of violence and torture<sup>93</sup>. National laws do not account for the types of atrocities committed in the context of armed conflict, specially where civilians are under attack and sexual violence is used as a war tool<sup>94</sup>. The relevance of consent in domestic criminal law is essentially based on the legal competence and factual ability of the affected individual to dispose of the protected interest under attack<sup>95</sup>, something that does not always exist under ICL scenarios.

Relying on Rule 96 of the ICTY's Rules of Procedure and Evidence, the Prosecution argued in *Kunarac* that lack of consent was not an element of rape, but rather that consent was an affirmative defense<sup>96</sup>, as the existence of force, threat of force or coercion, vitiates consent<sup>97</sup>. The Chamber said that Rule 96 created the defense of consent in order for the prosecution to be able to prove the contrary, by finding that consent was not freely given because the victim was subjected to threats or duress or was afraid of violence or was under oppression<sup>98</sup>.

The *Kunarac* Appeals Chamber noted that “*the Trial Chamber appeared to depart from the Tribunal's prior definitions of rape,*” but that by emphasizing the “*absence of consent as the conditio sine qua non of rape*” the Trial Chamber had not divorced itself from the ICTY's prior jurisprudence; rather, it was concerned to elucidate the relationship between force and consent<sup>99</sup>. Lack of consent could be inferred from the coercive circumstances, which negated consent<sup>100</sup>. The Chamber understood that there are “*factors other than force which would render an act of sexual penetration non-consensual on the part of the victim*”<sup>101</sup>.

---

<sup>93</sup> Kalosieh, A, 2003, *op.cit.*, p. 131, citing Christina M. Tchen, *Rape Reform and a Statutory Consent Defense*, 74 *Journal of Criminal Law & Criminology*, 1983, p. 1528.

<sup>94</sup> One should take this idea into account when approaching the next part of the Article, as it is developed over the genocidal campaign of ISIS against the Yazidi.

<sup>95</sup> Naffine, N. *Windows on the Legal Mind: The Evocation of Rape in Legal Writings*, 18 *Melbourne University Law Review*, p. 757-58 (1992); For a discussion of the several domestic scenarios where consent is analyzed, see, for example: Victor Tadros. *Rape Without Consent*. *Oxford Journal of Legal Studies*, Vol. 26, No. 3 (2006), pp. 515–543.; Helen Power. *Towards a Redefinition of the Mens Rea of Rape*. *Oxford Journal of Legal Studies*, Vol. 23, No. 3 (2003), pp. 379- 404.

<sup>96</sup> *Prosecutor v. Kunarac*, Prosecutor's Pre-Trial Brief, No. IT-96-23-PT, para. 128 (Dec. 9, 1999); This view by the Prosecutor was also shown in *Prosecutor v. Gacumbitsi*, Appellant's Brief, No. ICTR-2001-64-A, paras. 155-83 (Sept. 28, 2004).

<sup>97</sup> *Kunarac* Trial Judgment, *op.cit.*, para. 461.

<sup>98</sup> *Ibid*, para. 463-464.

<sup>99</sup> *Kunarac* Appeals Judgment, *op.cit.*, para. 129.; Schomburg, W. and Paterson, I. 2007, *op.cit.*, p. 135.

<sup>100</sup> *Kunarac* Appeals Judgment, *op.cit.*, para. 132.

<sup>101</sup> *Ibid*, para. 129.

The first version of Rule 96 provided simply that consent shall not be allowed as a defense to rape. However, this raised questions as to whether the defendant would be accorded a fair trial if consent as an affirmative defense was not permitted<sup>102</sup>. The compromise reached was to include the consent language but place abundant restrictions upon it so that the Prosecutor would not have the burden of proving non-consent<sup>103</sup>.

If non-consent is an element of the crime, it was established in the *Gacumbitsi* judgment that the Prosecution must prove beyond reasonable doubt that the victim did not consent to the conduct in question<sup>104</sup>, which could be done with proof of the coercive circumstances. Nonetheless, if consent is an affirmative defense, the *Gacumbitsi* Chamber explained it is for the accused to establish that the victim did consent<sup>105</sup>. Consent was to be assumed absent, unless triggered by some credible evidence brought by the Defense. The accused may raise a consent-based defense only after demonstrating that the evidence of consent is material and probative<sup>106</sup>. The consent element was intended to be the exception, not the rule<sup>107</sup>.

The Trial Chamber explained that when a witness is subjected to the factors listed in the second paragraph of Rule 96, such as threats, duress, detention, or being put in fear, the victim cannot freely give consent<sup>108</sup>. After determining that such circumstances negate consent<sup>109</sup>, the Chamber then referred to the factors listed in Rule 96, stating that “*the reference to them serves to reinforce the requirement that consent will be considered to be absent in those circumstances unless freely given*”<sup>110</sup>. This reasoning was upheld by the Appeals Chamber but recognizing the inherent coercive circumstances during wartime situations and established that “*true consent will not be possible*” under them<sup>111</sup>.

Under the rules of *Kunarac*, non-consent is presumed by the coercive circumstances and can only be defeated by introducing probative evidence on the contrary -namely that they did not take advantage of the coercive circumstances or did not use force- but not

---

<sup>102</sup> Kalosieh, A, 2003, *op.cit*, p. 133.

<sup>103</sup> Schomburg, W. and Paterson, I., 2007, *op.cit*, p. 136.

<sup>104</sup> Gacumbitsi Appeal Judgment, *op.cit*, para. 155-157.

<sup>105</sup> Ibid, para. 153.

<sup>106</sup> As established by Rule 96(iii) of the Rules of Procedure and Evidence of the ICTY.

<sup>107</sup> Schomburg, W. and Paterson, I., 2007, *op.cit*, p. 139.

<sup>108</sup> Kunarac Trial Judgment, para. 464.

<sup>109</sup> Ibid, para. 464.

<sup>110</sup> Ibid, para. 464.

<sup>111</sup> Kunarac Appeals Judgment, *op.cit*, para. 130.

the testimony of the victim that she had consented. It was established that consent cannot be raised if the Prosecution proves that the victim was subjected to coercion<sup>112</sup>.

Some of the defendants before the ICTY raised the issue that the relations were consensual with the women who were placed into the houses of some soldiers, where they had keys to come and go, they did housework for their captors and repeatedly had sex with them<sup>113</sup>. Another accused argued that he had presumed the victim's consent because she had actively sought sexual contact with him<sup>114</sup>. The victim was held captive by the accused and others and selected for multiple acts of sexual violence; and she initiated the contact with the accused only because she had been threatened with death by her captors if she did not satisfy his desires<sup>115</sup>.

In light of these facts, the ICTY held that the victim had not been able to consent freely and found that the circumstances had been so coercive as to negate any possibility of consent<sup>116</sup>. Ultimately, the inclusion of non-consent in *Kunarac* led to a definition of rape that contradicts itself, as the Chamber acknowledges that the coercive circumstances, namely that women were mostly held captive, preclude genuine consent<sup>117</sup>.

Buchhandler understands that viewing rape as an act of abuse of power focuses on the perpetrator that takes advantage of the victim to carry out the abuses<sup>118</sup>. This abuse of power is inherent in a wartime scenario, where rape victims are placed in a subordinated situation against the perpetrators who carry out the war and have the means to subjugate the population. When sexual relations take place under an abuse of power, consent is not present, what is present is “apparent consent”<sup>119</sup>. The victim, under the pressure and intimidation of the perpetrator, submits to the intercourse. The victim can either submit

---

<sup>112</sup> Established by Rule 96(ii) of the Rules of Procedure and Evidence of the ICTY

<sup>113</sup> *Kunarac* Trial Judgment, *op.cit.*, para. 644-646.

<sup>114</sup> *Ibid.*, para. 644-646.

<sup>115</sup> *Kunarac* Trial Judgment, *op.cit.*, para. 644-646.

<sup>116</sup> *Kunarac* Appeals Judgment, *op.cit.*, para. 132; Women’s Caucus for Gender Justice in the International Criminal Court, Recommendations and Commentary for December 1997 Prep. Com on the Establishment of an International Criminal Court United Nations Headquarters (1–12 December 1997) (see especially Part III: War Crimes and recommendation 11), stating that: *even in cases where women are free to go home at night or even to escape, the conditions of warfare might nonetheless be so overwhelming and controlling as to render them little more than sex slaves.*

<sup>117</sup> *Kunarac* Trial Judgment, *op.cit.*, para. 464, 452, 458, for example.; MacKinnon, C., 2006, *op.cit.*, p. 951.; Kalosieh, A, 2003, *op.cit.*, p.124.; The Furundizja Trial Chamber, *op.cit.*, also recognized in para. 271 that “it is the position of the Trial Chamber that any form of captivity vitiates consent.”

<sup>118</sup> Buchhandler-Raphael, M. 2010, p. 132.

<sup>119</sup> *Ibid.*, p. 95.

or even give permission under those circumstances, but that does not necessarily mean she or he consents.

The reason is that the subjective element of consent is not present, as the victim is not willing to engage but instead is induced by fears and pressures stemming from sexual abuse of power<sup>120</sup>. Once the perpetrator's abuse of power has been established, the complainant's consent becomes irrelevant as one cannot reasonably consent to sex after being pressured, intimidated and placed in fear of harm<sup>121</sup>. Women may be captive or not, but when encountering a situation of potential rape, one might question if it is logical to ask whether the victim consented based on the facts<sup>122</sup>. Refusing it is too risky, because victims fear that rejecting the perpetrator's demands would have harmful consequences<sup>123</sup>. There are no meaningful alternatives under coercive circumstances and there is therefore no possibility of consent.

De Brouwer<sup>124</sup> argues that the *Kunarac* decision ignores the fact that rape as a war crime is not merely rape that occurs during a war, but rape that is the war<sup>125</sup>. And rape crimes are not only committed systematically but also opportunistically, because the atmosphere of war and violence creates that opportunity<sup>126</sup>. In such destructive scenarios where rape is used as a tool of massacre, victim consent is legally irrelevant<sup>127</sup>. As MacKinnon explains, if rape is fundamentally an interaction of body parts, it is essentially sex unless something else is wrong with it, which is where non-consent is supposed to come in<sup>128</sup>. The author defends that if sex was being engaged in simply for sexual gratification, for instance, it would not be imposed on one ethnic group by another, as it

---

<sup>120</sup> Ibid, p. 91.

<sup>121</sup> Ibid, p. 172.

<sup>122</sup> Ibid, p. 98.

<sup>123</sup> Buchhandler-Raphael, M. 2010, *op.cit*, p. 87; Fitzgerald, K 1997, *op.cit*, p. 644; Buchhandler-Raphael, M. 2011, *op.cit*, p. 183; The perfect example can be found in the facts of the *Kunarac* Trial judgment, para. 644-646: [...] that D.B. subsequently also had sexual intercourse with Dragoljub Kunarac in which she took an active part by taking of the trousers of the accused and kissing him all over the body before having vaginal intercourse with him [...] The Trial Chamber, however, accepts the testimony of D.B. who testified that, prior to the intercourse, she had been threatened by "Gaga" that he would kill her if she did not satisfy the desires of his commander, the accused Dragoljub Kunarac.

<sup>124</sup> de Brouwer, A. M, 2005, *op.cit*.

<sup>125</sup> Chinkin, C. *Rape and Sexual Abuse of Women in International Law*, 5 *European Journal of International Law*, 1994, p. 329.

<sup>126</sup> Askin, K. 2003, *op.cit*, p. 288.

<sup>127</sup> Kalosieh, A, 2003, *op.cit*, p.121.; de Brouwer, A. M, 2005, *op.cit*, p. 170; O'Byrne, K. 2011, *op.cit*, p. 497.

<sup>128</sup> MacKinnon, C. 2006, *op.cit*, p. 956.

was when inflicted on Tutsi woman in Rwanda or, as this essay argues, when it is being carried out towards Yazidi women by ISIS.

Moreover, with regard to the “non-consent” element in connection with the consequent *mens rea*, detractors of the *Kunarac* judgment criticize the requirement that the perpetrator of the rape should be aware that the victim was not consenting. Instead, they prefer the *mens rea* embedded in the *Akayesu* and *Furundizja* judgments, where the Prosecutor has to prove the perpetrator is aware that the intercourse was carried out with force or by taking advantage of the coercive circumstances<sup>129</sup>. Consent for crimes of sexual violence under international law, must be treated at the most as an affirmative defense to be raised only in exceptional cases<sup>130</sup>. This was initially contemplated in the ICTY, ICTR and ICC Rules of Procedure and Evidence to take into account both the reality of rape during mass violence and the need to protect the accused to a fair trial<sup>131</sup>.

However, other authors believe that the lack of consent is the essential element of the crime of rape which must be covered by the mental state of the accused, being aware that the victim was not consenting. Such state of mind, as stated in the *Kunarac* judgment, might be inferred from all the circumstances surrounding the events, including the coercive environment in which the act took place<sup>132</sup>.

These authors argue that the inclusion of non-consent prioritizes the victim’s personal dignity by using as a determinative factor the free will of the victim, against which rape is committed. They contend that taking out the element of non-consent creates a disempowering paradigm where victims are automatically deprived of their autonomy by reason of the cruelty of the circumstances<sup>133</sup>.

In *Kunarac* the Chamber demonstrated that the victim did not consent because she was captive and selected because of her ethnicity, and it supported the conclusion that the circumstances were so coercive that it showed non-consent<sup>134</sup>. For some critics, this argument permits us to presume that the inter-ethnicity of such encounters was evidence of non-consent, when some of the sexual intercourse taking place in Bosnia between the

---

<sup>129</sup> Ellis, M. 2007, *op.cit*, p. 240.

<sup>130</sup> Schomburg, W. and Paterson, I., 2007, *op.cit*, p. 139; Kalosieh, A. 2003, *op.cit*, p.134.

<sup>131</sup> de Brouwer, A. M, 2005, *op.cit*, p. 265; MacKinnon, C. 2006, *op.cit*, p.947.

<sup>132</sup> Elewa Badar, M. *Drawing the Boundaries of Mens Rea in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*. International Criminal Law Review 6, 2006, p. 325.

<sup>133</sup> MacKinnon, C. 2006, *op.cit*, p. 941.

<sup>134</sup> Engle, K. 2005, *op.cit*, p. 804.

different ethnic groups was consensual<sup>135</sup>. Some feminist dissenters started to think that maybe all the intercourse that occurred in Fôca may have not been rape, maybe some women wanted to have intercourse with the Serbian soldiers. Janet Halley states the frequent case that happened in the conflict of Bosnia-Herzegovina, where some women chose to have sex and do house chores for Serbian soldiers to avoid being gang-raped inside the Fôca camps<sup>136</sup>.

Removing the “lack of consent” element does not weaken complainants by portraying them as helpless victims, because Criminalization based on coercion would strengthen complainants by granting them powerful rights, including the right to sexual integrity and to remain free from sexual coercion<sup>137</sup>. Introducing the non-consent element under the rationale of respecting the “freedom of choice” of women fails to recognize the complexities that inequality introduces to what members of powerless groups can want or reject<sup>138</sup>.

Genocide, crimes against humanity and war crimes are not an attack on individual autonomy, for which responsibility depends on the approval or non-approval of one person<sup>139</sup>. When rape is perpetrated as an integral part of a process of destruction, the injury and suffering inflicted extends beyond the individual to the collective targeted group<sup>140</sup>. This composition argues that while it cannot be assumed that any sexual contact occurring in ICL scenarios constitutes a crime, the definition of rape ought to be general, taking into account the general situation and not the exceptions.

This essay defends that the more coercive the circumstances are, the less need to include the element of non-consent. Therefore, in the maximum coercive circumstances that are presented in war scenarios, consent must not be an element of the crime of rape in ICL. For the purpose of this study, we understand the crime of rape as a crime of violence<sup>141</sup>. There is no difference on sticking someone’s fist in the face and sticking it

---

<sup>135</sup> Halley, J. 2008, *op.cit*, p. 87; Engle, K. 2005, *op.cit*, p. 806.

<sup>136</sup> Halley, J. 2008, *op.cit*, p. 120.

<sup>137</sup> Buchhandler-Raphael, M., 2011, *op.cit*, p. 207.

<sup>138</sup> MacKinnon, C. 2006, *op.cit*, p. 955.

<sup>139</sup> Werle, G. *Principles of International Criminal Law* (2005), p. 566-70,645, 817-18; MacKinnon, C. 2006, *op.cit*, p. 943, 955.

<sup>140</sup> Akayesu Trial Judgment *op.cit*, para. 731: *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.*; Askin, K. 2003, *op. cit*, p.320.

<sup>141</sup> Kalosieh, A, 2003, *op.cit*, p. 122; O’Byrne, K. 2011, *op.cit*, p. 510.

into the genitalia<sup>142</sup>. Rape as a crime of violence should be addressed under the coercion test, but because of its sexual nature and the biased view on sexual relations, proof of non-consent is sometimes required<sup>143</sup>. It is illogical to require proof of non-consent regarding these offenses solely because they are committed by means of sexual intercourse<sup>144</sup>. Emphasis on coercion as an element of the crime portrays rape as a crime of inequality, whether physical or other force<sup>145</sup>. Coercion definitions turn on proof of physical acts, surrounding context, or exploitation of relative position. On the other hand, non-consent definitions envision love or passion gone wrong<sup>146</sup>, or a deprivation of sexual freedom.

The evolution of the jurisprudence of the ad hoc tribunals has resulted in the final definition of rape embedded in the EoC of the ICC. As a result of the differing views on the question of consent and the work of feminist advocates, the ICC now includes new sexual violence crimes and new ways to prosecute wartime rape<sup>147</sup>.

## **2.2 The current definition of rape in the ICC**

The Rome Statute for the creation of the ICC was adopted in 1998 and ratified in 2002. By 1997, several nongovernmental organizations became concerned that the representation of the sexual violence crimes in the statute was not gender-sensitive. The “Women’s Caucus for Gender Justice” began lobbying in the ICC to correct the deficiencies with respect to the treatment of sexual violence in ICL<sup>148</sup>. Before the creation of the ICC, feminist advocates and legal experts monitored the *ad hoc* Tribunals of Rwanda and Yugoslavia<sup>149</sup>, which also influenced the work of the Women’s Caucus. Feminists learnt from their successes and mistakes in the *ad hoc* tribunals Statutes when advising for the creation of the ICC Statute, which criminalizes sexual violence occurring

---

<sup>142</sup> Buchhandler-Raphael, M. 2011, *op.cit.*, p. 200, citing the statement made by Michel Foucault: *Politics, Philosophy, Culture: Interviews and Other Writings 1977-1984* (Alan Sheridan and others trans., Lawrence Kritzman ed., 1988).

<sup>143</sup> Buchhandler-Raphael, M. 2011, *op.cit.*, p. 204; O’Byrne, K. 2011, *op.cit.*, p. 509; Fitzgerald, K. 1997, *op.cit.*, p. 643.

<sup>144</sup> Schomburg, W. and Paterson, I. 2007, *op.cit.*, p. 126.

<sup>145</sup> For further analysis, see: MacKinnon, C., *Unequal Sex: A Sex Equality Approach to Sexual Assault*, in *Women’s Lives, Men’s Laws*, p. 240 (2005).

<sup>146</sup> MacKinnon, C. 2006, *op.cit.*, p.941.

<sup>147</sup> Halley, J., 2008, *op.cit.*, p. 79; Engle, K. 2005, *op.cit.*, p. 779.

<sup>148</sup> Spees, P. *Women’s Advocacy in the Creation of the International Criminal Court: Changing the Landscapes of Justice and Power*. *Journal of Women in Culture and Society*, Vol. 28, no. 4, 2003, p. 1238.

<sup>149</sup> Askin, K. 2003, *op.cit.*, p.346.

during armed conflict<sup>150</sup>. Feminists have been able to achieve that lawmakers adopt their proposals, at least many of them.

As a result, ICL contains some of the world's most feminist rules on rape and has moved the crime to a high point in the hierarchy of international crimes<sup>151</sup>. In addition to criminalizing a large list of sexual violence crimes<sup>152</sup>. The Rome Statute of the ICC specifically includes rape as a crime against humanity and a war crime in articles seven and eight. However, several authors contend that, in order to improve the prosecution of rape and the deterrence of further cases of mass rape during armed conflict, the crime should be regarded as an individual crime and not a subsection of other crimes. The failure to define rape as a separate crime permits sexual violence to be viewed as a "lesser crime"<sup>153</sup>.

After achieving criminalization of rape, feminists turned on to the monitoring of enforcement<sup>154</sup>. Feminists also influenced the creation of the document of the EoC in 2002 to assist with the court's interpretation of the Statute<sup>155</sup>. They managed to influence the definition of the criminal offences that were related to sexual violence<sup>156</sup>: the *actus reus* of rape and the components of the crimes of genocide, crimes against humanity and war crimes. However, we cannot conclude that the definitions contained in the EoC are universal and binding<sup>157</sup>.

As the elements of rape are now codified, the Court does not have to recourse to the analysis of the different national legal systems to establish the definition. The context of the crime of rape varies, depending that it is committed as a Crime Against Humanity or a War Crime, but the elements remain the same<sup>158</sup>. These elements have been significantly

---

<sup>150</sup> Ellis, M. 2007, *op.cit.*, p. 238

<sup>151</sup> Halley, J. 2008, *op.cit.*, p. 80; Askin, K. 2003, *op.cit.*, p. 347-348.

<sup>152</sup> de Brouwer, A. M. 2005, *op.cit.*, p. 427; Halley, J. 2008, *op.cit.*, p. 80.

<sup>153</sup> Ellis, M. 2007, *op.cit.*, p. 247; Copelon, R. 2000, *op.cit.*, p. 224; Mitchell, D. 2005, *op.cit.*, p. 251.

<sup>154</sup> Engle, K. 2005, *op.cit.*, p. 779; Spees, P. 2003, *op.cit.*, p. 1246.

<sup>155</sup> O'Byrne, K., 2011, *op.cit.*, p. 503; Spees, P., 2003, *op.cit.*, p. 1241; de Brouwer, A. M., 2005, *op.cit.*, p. 428.

<sup>156</sup> Spees, P., 2003, *op.cit.*, p. 1240.

<sup>157</sup> de Brouwer, A. M., 2005, *op.cit.*, p. 225; Anthony, C. *Recent Developments in the case of the Prosecutor v. Jean-Pierre Bemba Gombo: Cementing Sexual Violence and Command Responsibility within International Criminal Law*. Tulane Journal of International & Comparative Law, Vol. 25, 2017, p. 440.

<sup>158</sup> Ellis, M. 2007, *op.cit.*, p. 239; Weiner, P. 2013, *op.cit.*, p. 1217.

influenced by the jurisprudence of the ICTY and the ICTR, which have ruled on the definition of rape in twelve cases<sup>159</sup>.

In the negotiations on the crime of rape the efforts were to ensure that the elements maintained a focus on the crimes of the perpetrator and not the victim<sup>160</sup>. The definition derives mainly from the *Akayesu*, *Furundizja* and *Kunarac* judgments. In the EoC, rape is defined as following<sup>161</sup>: (i) *The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.*; (ii) *The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.*

The first paragraph enounces both the invasion on the part of the victim and on the part of the perpetrator by forcing the victim to do so. It uses a mechanical approach, more similar to *Furundizja*, focusing on penetration but not in a restrictive manner<sup>162</sup>, departing from a broader definition in *Akayesu*<sup>163</sup>. However, it retains the element of “invasion” stated in *Akayesu*<sup>164</sup>. The definition also resembles to *Akayesu* in the sense that it is gender neutral<sup>165</sup>. It is an expansive definition as it refers to “any part of the body”, which allows for the prosecution of rape when the forced act is done by a finger or a tongue too<sup>166</sup>. It includes penetration with the penis of any other part of the body but leaves out forced masturbation<sup>167</sup>. Thus, the sexual acts included can be objectified, every penetration of a

---

<sup>159</sup> de Brouwer, A. M, 2005, *op.cit.*, refers to: *Akayesu*, *Celibici*, *Furundizja*, *Musema*, *Kunarac*, *Kvočka*, *Semanza*, *Niyitegeka*, *Kajelijeli*, *Kamuhanda*, *Gacumbitsi* and *Muhimana*.

<sup>160</sup> Ellis, M. 2007, *op.cit.*, p. 244.

<sup>161</sup> Articles 7 (1) (g)-1; Article 8 (2) (b) (xxii)-1 and 8 (2) (e) (vi)-1 of the document “Elements of Crimes”.

<sup>162</sup> de Brouwer, A. M, 2005, *op.cit.*, p. 130.

<sup>163</sup> Where the Chamber (para. 597 Trial Judgment) stated that “*elements of the crime of rape cannot be captured in a mechanical description of objects and body parts*”.

<sup>164</sup> de Brouwer, A. M, 2005, *op.cit.*, p. 131.

<sup>165</sup> de Brouwer, A. M, 2005, *op.cit.*, p. 131; Weiner, P. 2013, *op.cit.*, p. 1218; Brigitte Maier, N. *The Crime of Rape under the Rome Statute of the ICC: with a special emphasis on the jurisprudence of the Ad Hoc Criminal Tribunals*. Amsterdam Law Forum, Vol. 3, n° 2, 2011, p. 147.

<sup>166</sup> de Brouwer, A. M, 2005, *op.cit.*, p. 132; Weiner, P. 2013, *op.cit.*, p. 1221; The ICC in Bemba clarified that the definition included oral penetration: *Prosecutor v. Bemba Gombo*, ICC-01/05-01/08, Judgment, cl 100, 101 (Mar. 21, 2016).

<sup>167</sup> de Brouwer, A. M, 2005, *op.cit.*, p. 132.

sexual nature falls within the definition of rape, and subjective perceptions of the victim and the intentions of the perpetrator are excluded<sup>168</sup>.

The definition departs from *Kunarac* by excluding the element of “non-consent” after most part of the legal and feminist doctrine expressed the inadequacy of that element taking into account the inherently coercive circumstances in which the rape takes place<sup>169</sup>. The definition adopts a coercion test instead of a focus on consent. It focuses on the violation of the victim’s sexual autonomy<sup>170</sup>. Therefore, the second paragraph refers to “force, threat of force or coercion” as in the *Furundizja* and *Akayesu* judgments in a broad sense to anticipate the circumstances that occur in wartime<sup>171</sup> such as violence, duress, detention, psychological oppression or abuse of power<sup>172</sup>. The force element is defined broadly enough to encompass the nonphysical coercive circumstances that victims often endure during armed conflict. As it does not include the element of the lack of consent, the definition of the ICC considered to be “victim-friendly” and takes into account the realities under which rape occurs in ICL<sup>173</sup>.

The ICC definition only refers to consent in the specific situation of “*a person incapable of giving genuine consent*”<sup>174</sup>. With this expression it refers to people who due to their age, mental illness or physical condition that are incapable of providing consent and must be protected<sup>175</sup> because the perpetrator takes advantage of them.

Finally, with regard to the *mens rea*, the perpetrator must have the intention to invade the body of the victim knowing it was done by means of force, threat of force or by taking advantage of a coercive environment, or that it was being done to a person incapable of giving genuine consent. The definition does not require that the perpetrator had a knowledge that the victim was not consenting<sup>176</sup>, because it is implicit in the

---

<sup>168</sup> de Brouwer, A. M, 2005, *op.cit*, p. 132.

<sup>169</sup> de Brouwer, A. M, 2005, *op.cit*, p. 134; Kirk McDonald, G. 2000, *op.cit*, p. 16; L. Haffagee, R 2006, *op.cit*, p.8.

<sup>170</sup> O’Byrne, K. 2011, *op.cit*, p. 509.

<sup>171</sup> Weiner, P. 2013, *op.cit*, p. 1218.

<sup>172</sup> See Buchhandler-Raphael, M. *Sexual Abuse of Power*. University of Florida Journal of Law and Public Policy. Vol 21. Pages 78-146.; Buchhandler-Raphael, M. *The Failure of Consent: Re-Conceptualizing Rape as Sexual Abuse of Power* (2011). Michigan Journal of Gender and Law. Volume 18, Issue 1. Pages 147-228.

<sup>173</sup> de Brouwer, A. M, 2005, *op.cit*, p. 136.

<sup>174</sup> Articles 7 (1) (g)-1; Article 8 (2) (b) (xxii)-1 and 8 (2) (e) (vi)-1 of the document “Elements of Crimes”.

<sup>175</sup> de Brouwer, A. M, 2005, *op.cit*, p. 136; Weiner, P. 2013, *op.cit*, p. 1218; Ellis, M. 2007, *op.cit*, p. 240.

<sup>176</sup>Weiner, P., 2013, *op.cit*; The ICC in Bemba (para. 103) said that it interpreted this part of the statute in light of *Akayesu*.

coercive circumstances. Therefore, the only possible defense of the perpetrator is that they did not know that they were taking advantage of a coercive environment or they did not know the person was not able to consent. All in all, we consider this definition to be appropriate as, even though it is not as broad as *Akayesu*, it encompasses many forms of committing rape and endorses the view that non-consent is presumed under coercive circumstances.

Parallel to the negotiations on the definitions of the crimes were the negotiations on the Rules of Procedure and Evidence, largely influenced by gender justice groups<sup>177</sup>. While the EoC are not understood to be a binding document, the Rules of Procedure and Evidence are<sup>178</sup>. They include provisions addressing victim protection and victim-friendly procedures in their participation for those who have suffered from rape<sup>179</sup>. These rules ultimately protect the adequate treatment of the victim and limit the defense of consent to specific and exceptional circumstances<sup>180</sup>. Consent is a defense, but it is legally precluded by a list of structuralist-feminist inspired conditions about the possibility of women's actual consent to sexual encounters with men<sup>181</sup>. Rule 96 imposes limits on evidence of consent that may be led in cases of sexual assault and has undergone several amendments since the original drafting<sup>182</sup>.

The first version of Rule 96 stated that “*In cases of sexual assault: (i) no corroboration of the victim's testimony shall be required; (ii) consent shall not be allowed as a defence; (iii) prior sexual conduct of the victim shall not be admitted in evidence.*” This first drafting reflected the view stated in the *Akayesu* judgment: the context of war makes consent irrelevant to the prosecution of sexual assaults<sup>183</sup>. However, it was contended that the total rejection of the defense of consent threatened due process rights. In fact, it made the accused guilty not because of his own actions but because of the existence of a wartime situation or a widespread and systematic attack<sup>184</sup>.

---

<sup>177</sup> de Brouwer, A. M, 2005, *op.cit*, p. 135.

<sup>178</sup> de Brouwer, A. M, 2005, *op.cit*, p. 170.

<sup>179</sup> Oosterveld, V. *The Making of a Gender-Sensitive International Criminal Court*. n.d, p. 41; Valerie Oosterveld. *Atrocity Crimes Litigation Year-in Review: A Gender Perspective*. Northwestern Journal of International Human Rights, Vol. 9, Issue 3, 2010, p. 338.

<sup>180</sup> Spees, P. 2003, *op.cit*, p. 1241; Anthony, C. 2017, *op.cit*, p. 424.; Oosterveld, V, 2010, *op.cit*, p. 333.

<sup>181</sup> Halley, J. 2008, *op.cit*, p. 120.

<sup>182</sup> Fitzgerald, K, 1997, *op.cit*, p. 639.

<sup>183</sup> de Brouwer, A. M, 2005, *op.cit*, p. 171; Fitzgerald, K, 1997, *op.cit*, p. 641.

<sup>184</sup> Fitzgerald, K, 1997, *op.cit*, p. 642.

Therefore, the rule was amended stating that consent could not be allowed as a defense if the victim “(a) has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or (b) reasonably believed that if she did not submit, another might be so subjected, threatened or put in fear”. The modification was an intent to balance the rights of the accused and the protection of the victim. The last modification affected the third part of the rule stating that: (iii) *before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible.*

In this way, the victim does not have to bear a trial where a defense of consent may be uncritically raised, which could morally harm the victim, and protects the victim from flagrantly offensive allegations<sup>185</sup>. Once the prosecutor satisfies Rule 96(ii), the presumption arises that no defense of consent can be advanced. Therefore, to admit evidence of consent before the Trial Chamber, the defendant must first negate the presumption raised under sub-rule (ii)<sup>186</sup>. When the test is coercion, the Defense must prove there was not a use of force or the accused did not take advantage of the coercive circumstances<sup>187</sup>. Moreover, Rule 70 prohibits the inference of consent from the words, conduct or silence of the victim in certain circumstances where force or coercion has been used, or where the victim is incapable of giving genuine consent<sup>188</sup>.

The ICC definition is not the final definition of rape in ICL<sup>189</sup>. There is not a definite consensus as to the appropriate definition, but it is suggested that the judges of the ICC should follow the path laid out in the EoC and formulate definitions of sexual crimes based on coercion<sup>190</sup>. In fact, the ICC has recently applied the definition of rape in the judgment of *Prosecutor v Bemba*. Jean-Pierre Bemba Gombo, the former Congolese vice-president, was accused for his alleged failure to control the Movement for the Liberation of Congo troops, who raped, murdered and looted while deployed in the Central African Republic between October 2002 and 2003<sup>191</sup>. Even though Bemba was acquitted due to

---

<sup>185</sup> Fitzgerald, K 1997, *op.cit.*, p. 642.

<sup>186</sup> Fitzgerald, K 1997, *op.cit.*, p. 643.

<sup>187</sup> Fitzgerald, K 1997, *op.cit.*, p. 643.

<sup>188</sup> Halley, J. 2008, *op.cit.*, p. 90; Anthony, C. 2017, *op.cit.*, p. 411.

<sup>189</sup> Weiner, P. 2013, *op.cit.*, p. 1236. The author shows how the International Tribunal for Sierra Leone has included in the mens rea of the crime of rape “knowledge that the victim was not consenting”.

<sup>190</sup> O’Byrne, K. 2011, *op.cit.*, p. 513; de Brouwer, A. M, 2005, *op.cit.*, p. 133.

<sup>191</sup> Wakabi, W. *Questions and Answers with Marie-Edith Douzima-Lawson, Lawyer for victims in the Bemba Trial.* 24<sup>th</sup> June, 2011. Interview available at the International Justice Monitor webpage.

the lack of proof of its effective command over the Movement, this case is important to understand how the definition of rape of the ICC has been applied in practice.

The ICC acknowledged in *Bemba* that circumstances under which rape occurs are coercive and inherent in certain scenarios such as armed conflict or military presence, referring to the *Akayesu* judgment in order to define such environment<sup>192</sup>. Therefore, the ICC has addressed the *actus reus* of rape leaving out the element of non-consent and stating that “*rape under the Statute does not require proof of a victim’s lack of consent*” and noted that “*drafters purposively excluded that requirement due to the practical hurdle it presents for prosecuting potential offenders*”<sup>193</sup>. Similarly, the Court concluded that “*proving a victim’s lack of consent is unnecessary if the prosecution proves the elements regarding force, coercion, or taking advantage of coercive circumstances*”<sup>194</sup>.

The Court’s decision is noteworthy for being the first to charge rape as a war crime with the use of a command responsibility theory for individual liability under the Statute and will provide a model for any future prosecutions based on similar charges<sup>195</sup>. *Bemba* is to date the ICC’s first ever usage of the Statute’s codification of rape as a war crime, representing a significant victory in the pursuit of moving sexual violence up the hierarchy of International Law to give it equal prominence among other actions considered war crimes and crimes against humanity. Through *Bemba* the ICC has reaffirmed that the International Community wants rape to stand equally among the world’s most condemned crimes and the decision shows the recent increased acceptance of rape as a heinous tool of war<sup>196</sup>.

However, there has been a crescent discussion over the consequences of the Criminalization of rape in International Criminal Law. Some authors like Janet Halley or Karen Engle question whether it will be good for feminism and good for women involved as combatants or civilians in armed conflict to insert into ICL new crimes of sexual violence and new ways to prosecute wartime rape. They challenge the idea that making

---

<sup>192</sup> Judgment of the International Criminal Court in the case of *Prosecutor v. Jean Pierre Bemba Gombo* of the 21<sup>st</sup> of March, 2016. No.: ICC-01/05-01/08 [hereinafter *Bemba Judgment*], para. 102-103.

<sup>193</sup> *Bemba Judgment, op.cit.*, para. 105.

<sup>194</sup> *Bemba Judgment, op.cit.*, para. 106.

<sup>195</sup> Ba, O. *What Jean-Pierre Bemba's acquittal by the ICC means. The ICC decision to overturn Bemba's conviction will have major consequences for both the DRC and the court.* 13<sup>th</sup> June, 2018. Available at the online version of the “Al Jazeera”.

<sup>196</sup> Anthony, C., *op.cit.*, p. 424.

sexual violence in war more criminal is an unequivocally good thing to do<sup>197</sup>. This criminalization could have an impact on the understanding of woman's agency during wartime. In particular, Engle points out that many ideas behind the criminalization of rape objectify ethnic differences and diminish women's capacity to engage in sexual activity with the enemy during the war, plus they downplay the extent to which women themselves could be perpetrators of the war<sup>198</sup>.

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

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

---

<sup>197</sup> Halley, J., 2008, *op.cit*, p. 84.

<sup>198</sup> Engle, K., 2005, *op.cit*, p. 804; Halley, J., *op.cit*, 2008, p.88; also see Mettraux, G. *International Crimes and the ad hoc Tribunals* 109 n.101 (2005) when stating that “*The question of true consent in the context of an armed conflict may prove a difficult one to deal with, but there may be no presumption that sexual intercourse between members of opposing parties is necessarily non-consensual*”.



### 3. CHAPTER II:

#### THE CRIME OF GENOCIDE COMMITTED THROUGH RAPE

The purpose of this second Chapter is to address the elements of the *actus reus* of genocide, which can be committed through the crime of rape. In other words, this study will aim to prove in this Chapter that genocide can indirectly be perpetrated through rape. Chapter II will be structured in three parts. Firstly, it will address each of the acts of genocide that can be executed by rape individually. Secondly, it will briefly mention the *mens rea* or specific intent required for the commission of genocide. Finally, it will refer to the feminist debate over the disappearance of gender in the crime of rape when one analyses “genocidal rape”.

##### 3.1. The *actus reus* of Genocide

Genocide is defined by the Genocide Convention<sup>199</sup> as *any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group*. Rape was acknowledged as a form of genocide for the first time by the *Akayesu* Trial Judgment<sup>200</sup>. The Judgment recognized the intersectionality of the crime: it happened to certain women because of their ethnicity<sup>201</sup>. Genocidal sexual assaults seek to destroy the targeted group’s biological and cultural identity<sup>202</sup>. The underlying acts of

---

<sup>199</sup> Convention on the Prevention and Punishment of the Crime of Genocide. Approved and proposed for signature and ratification or accession by General Assembly resolution 260 A (III) of 9 December 1948. Entry into force: 12 January 1951, in accordance with article XIII.

<sup>200</sup> *Akayesu* Trial Judgment, *op.cit*, para. 731: “[...] *rape and sexual violence, the Chamber wishes to underscore the fact that in its opinion, they constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such. Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflicting harm on the victim as he or she suffers both bodily and mental harm. In light of all the evidence before it, the Chamber is satisfied that the acts of rape and sexual violence described above, were committed solely against Tutsi women, many of whom were subjected to the worst public humiliation, mutilated, and raped several times, often in public, in the Bureau Communal premises or in other public places, and often by more than one assailant. These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole*; Examples of other ICTR Chambers that have acknowledged that rape can amount to genocide under certain circumstances are: Prosecutor v. Kayishema Trial Chamber; Prosecutor v. Gacumbitsi and Prosecutor v. Muhimana; Samantha Power, Op-Ed., *The real meaning of genocide*, BOSTON GLOBE, Sept. 14, 1998; Askin, K. *A Decade of the Development of Gender Crimes in International Courts and Tribunals: 1993 to 2003*. 3 Human Rights Brief vol. 16, n°17 (2004); Copelon, R., 2000, *op.cit*, p. 227.

<sup>201</sup> Russel-Brown, S. 2003, *op. cit*, p.351; Copelon, R., 2000, *op.cit*, p. 227.

<sup>202</sup> Sharlach, L. *Rape as Genocide: Bangladesh, the Former Yugoslavia, and Rwanda*. New Political Science, Volume 22, Number 1, 2000, p.89-80.

genocide cover a conduct that has the potential to destroy a protected group<sup>203</sup>. The 1820 UN Security Council Resolution states the fact that women and girls are “particularly targeted by the use of sexual violence, including as a tactic of war to humiliate, dominate, instill fear in, disperse and/or forcibly relocate civilian members of a community or ethnic group” and that rape and other forms of sexual violence “can constitute a war crime, a crime against humanity, or a constitutive act with respect to genocide”<sup>204</sup>.

The genocide provision covers rape indirectly but not directly. Within the list of acts that constitute genocide by the Convention, four of them can be committed by rape<sup>205</sup>: causing serious bodily or mental harm; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction; imposing measures intended to prevent births within the group and forcibly transferring children of the group to another group.

**a) *Causing serious bodily or mental harm***

Rape causes serious bodily or mental harm to members of the group<sup>206</sup>, not only to the individual victim but also to their families and their community<sup>207</sup>. The *Akayesu* judgment viewed rape as a tool of war with the intent to destroy a group and defined rape as a form of aggression and violation of personal dignity<sup>208</sup>. It caused body and mental

---

<sup>203</sup> Schomburg, W. and Paterson, I., 2007, *op.cit.*, p.128; Ellis, M. *Breaking the Silence: Rape as an International Crime*. Case Western Reserve Journal of International Law. Volume 38, 2007, p.232.

<sup>204</sup> Women and peace and security, UN Security Council Resolution 1820, UN Doc. S/RES/1820 (19 June 2008); Stephens, B. *Humanitarian Law and Gender Violence: An End to Centuries of Neglect?* 3 Hofstra L. & Pol’y Symposium. 87 (1999), p. 89-90: “*The systematic use of rape in war also serves to destroy a society's morale: women usually play a central role as the mainstay of the family, ensuring continuity in the culture and the society. Destroying women's ability to fulfill that role results in the destruction and destabilization of the society. The rapes in Bosnia-Herzegovina, employed as a tool of genocide and ethnic cleansing, clearly were designed in part to destroy Bosnian Muslim society by attacking one of the pieces that held the society together: attacking women as an intentional tactic to destroy the enemy.*”; Christopher Scott Maravilla. *Rape as a War Crime: The Implications of the International Criminal Tribunal for the Former Yugoslavia's Decision in Prosecutor v. Kunarac, Kovac, & Vukovic*. International Humanitarian Law, 13 FLA. J. INT’L L. 2001, p.325.

<sup>205</sup> Askin, K., 2003, *op.cit.*, p. 316; Vandenberg, M. & Askin, K., *The Use of Gender Violence as Instruments of Genocidal Destruction*. Women and International Human Rights Law (Kelly Askin, Martina Vandenberg, & Deena Hurwitz eds., vol. IV, 2003); Askin, K., Women and International Humanitarian Law. 1 Women and International Human Rights Law 41, 71-76 (Kelly D. Askin & Doreen M. Koenig eds., 1999).

<sup>206</sup> This is the only action which is clarified in a footnote of the Elements of the Crimes of the Rome Statute as including rape. See: Elements of the Crimes of the Rome Statute, Article 6(b), footnote 3; Russel-Brown, S., 2009, *op.cit.*; Reid-Cunningham, A.R. *Rape as a Weapon of Genocide*, Genocide Studies and Prevention: An International Journal, Vol. 3, Issue. 3, Article 4, 2008, p. 280; Lisa Sharlach, 2000, *op.cit.*, p.90; Boon, K. *Rape and Forced Pregnancy Under the ICC Statute: Human Dignity, Autonomy and Consent*, 32 Columbia Human Rights Law Review, 2001, p. 627; Chinkin, C, 1994, *op.cit.*, p. 328.

<sup>207</sup> Askin, K., 2003, *op.cit.*, p. 298.

<sup>208</sup> Russel-Brown, S., 2009, *op.cit.*, p. 368.

harm through the physical and psychological destruction of the women, their families and communities<sup>209</sup>.

As stated in the jurisprudence, the harm does not have to be permanent or irreparable<sup>210</sup> but it must be so serious as to cause a threat of the destruction of the group in whole or in part<sup>211</sup>. The injury must result in a grave and long-term disadvantage to a person's ability to lead a normal life<sup>212</sup>. This is the situation that victims of rape face after the crime due to the trauma it creates to them, which impedes them from continuing a normal life or having normal social relations afterwards.

Rape, as an act of violence, causes bodily distress in the physical pain that the action *per se* inflicts and the pain that victims endure after the rape if it has caused them internal or external injuries. Survivors experience abdominal cramps, internal bleeding, and their reproductive capacity may also be damaged by physical injuries received during rape<sup>213</sup>. It also causes serious mental harms to the victim, their families and their community<sup>214</sup>. Sexual violence often leads to posttraumatic stress disorder, depression, anxiety disorders, and other adverse conditions amongst victims<sup>215</sup>.

***b) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction***

The jurisprudence has stated that the inflictions of conditions of life do not need to be through the use of method that would lead to an immediate death<sup>216</sup>, and Tribunals have accepted that “slow death” measures would fulfill the requirement<sup>217</sup>. Other methods

---

<sup>209</sup> Russel-Brown, S., 2009, *op.cit.*, p. 372; Reid-Cunningham, A.R., 2008, *op.cit.*, p.285.

<sup>210</sup> Akayesu Trial Judgment, *op.cit.*, para 508.

<sup>211</sup> Judgment of the ICTR (Appeals Chamber) in the case of *Prosecutor v Athanase Seromba*, (Case No. ICTR-2001-66-I), para. 46.

<sup>212</sup> Judgment of the ICTY (Trial Chamber) in the case of *Prosecutor v. Radislav Krstic* (Case No. IT-98-33-T), 2<sup>nd</sup> August 2001, [hereinafter *Krstic Judgment*] para. 513.

<sup>213</sup> Reid-Cunningham, A.R., 2008, *op.cit.*, p. 285; Rogers, S. *Sexual Violence or Rape as a constituent act of Genocide: Lessons from the ad hoc Tribunals and a prescription for the International Criminal Court*. 48 *Geo. Wash. Int'l L. Rev.* 265, 2016, p. 3.

<sup>214</sup> For more information about the mental harm that rape produces, see, for example: Quina, K. & Carlson, N. *Rape, Incest, & Sexual Harassment -A Guide for helping Survivors* 86, 143 (1989); Resick, P.A. *The Psychological Impact of Rape*, 8 *J. Interpersonal Violence*, p. 223-55 (1993); Folnegovi-Smalc, V. *Psychiatric Aspects of the Rapes in the War Against the Republics of Croatia and in Bosnia-Herzegovina*, in “Mass Rape: The War Against Women In Bosnia-Herzegovina” p. 174 (Alexandra Stiglmayer ed., 1994).

<sup>215</sup> Yüksel, S., Saner, S., Basterzi, A., Oglagu, Z., Bülbü, I., Green, E., 2018, *op.cit.*, p. 124-25.

<sup>216</sup> Judgment of the ICTR in the case *Prosecutor v Kayishema and Ruzindana* (Case No. ICTR-95-1-T), ICTR T. Ch., Judgment, 21 May 1999 [hereinafter *Kayishema judgment*], para. 116

<sup>217</sup> *Kayishema judgment, op.cit.*, para. 115

of inflicting conditions of life recognized by the jurisprudence are the subjection of members of the group to a subsistence diet or their systematic expulsion of homes<sup>218</sup>.

Under the rubric “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part”, we can consider it as bringing about a slow death through the infection of HIV/AIDS through rape, as was done in Rwanda<sup>219</sup>. Transmission of HIV through mass rape may be used as a strategy of population reduction<sup>220</sup>.

***c) Imposing measures intended to prevent births within the group and forcibly transferring children of the group to another group***

The forcible transfer of children of the group to another group is applicable only when those transferred are part of the protected group and below the age of 18<sup>221</sup>. The transfer needs to be carried out in a forcible manner but not restricted to physical force as acts of threats would qualify as a coercive transfer<sup>222</sup>.

Lastly, within “imposing measures intended to prevent births within the group and forcibly transferring children of the group to another group”, one can consider forced abortion or miscarriage, forced impregnation, sexual mutilation, or rape by a different ethnic group when custom dictates that the father determines the ethnicity of the child<sup>223</sup>.

As the *Akayesu* Trial Chamber stated, in patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group

---

<sup>218</sup> Akayesu Trial Judgment, *op.cit.*, para. 506.

<sup>219</sup> de Brouwer, A. M, 2005, *op.cit.*, p.57.

<sup>220</sup> Reid-Cunningham, A.R, 2008, *op.cit.*, p.285.

<sup>221</sup> Article 6 of the EoC, elements 1, 2, 4 and 5.

<sup>222</sup> Akayesu Trial Judgment, *op.cit.*, para. 509.

<sup>223</sup>Chinkin, C., 1994, *op.cit.*, p. 333; MacKinnon, C., *Crimes of War, Crimes of Peace*, in “On Human Rights: The Oxford Amnesty Lectures 89-90 (Stephen Shute & Susan Hurley eds., 1993); MacKinnon, C. *Rape, Genocide and Women’s Human Rights*, 17 Harvard Women’s Law Journal (1994); Askin, K., *War Crimes Against Women: Prosecution In International War Crimes Tribunals* 1-48 (1997), p. 338-39; Tierney Goldstein, A. *Recognizing Forced Impregnation as a War Crime under International Law* 24 (The Center for Reproductive Law and Policy, 1993); Russel-Brown, S., 2009, *op.cit.*, p. 363; Rogers, S., 2016, *op.cit.*, p. 6; For an examination of whether rape constitutes genocide against the children conceived by such rape, see Carpenter, S. “*Surfacing Children: Limitations of Genocidal Rape Discourse*”. Paper presented to the Association of Genocide Scholars Conference, June 1999; Prosecutor v. Karadzic and Mladic, Review of the Indictment Pursuant to Rule 61, Nos. IT-95-5-R61, IT-95-18-R61, para 64 (July 11, 1996); EUROJUST, 2017, *op.cit.*, p. 9; Reid-Cunningham, A.R, 2008, *op.cit.*, p. 286; Copelon, R., 2000, *op.cit.*, p. 228.

is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group<sup>224</sup>. The Tribunal in *Akayesu* also found that the “prevention of births” in a particular protected group can be done through physical and mental means<sup>225</sup> if a woman who has been raped subsequently refuses to have children because of her trauma<sup>226</sup> or she cannot have more children because of the damage done to her reproductive system<sup>227</sup>. The ICTY also made a connection between forced pregnancy and genocide and found that forced impregnation may constitute evidence of genocidal intent through ethnic cleansing<sup>228</sup>.

Rape is also an instrument to force the exile of population and to destroy a group<sup>229</sup>. Doctors Without Borders describe rape as a “weapon used to destabilize or even break a particular ethnic, national, or religious group or to ‘ethnically cleanse’ a whole society”<sup>230</sup>. Survivors, family members and witnesses tend to avoid the trauma by leaving the areas where the events took place<sup>231</sup>.

Moreover, when rape is committed against a community which has marked religious and ethnic features, women also face greater stigmatization and fear of rejection because of their beliefs. Women from minorities often face reprisals by their own communities and their families because of cultural reasons<sup>232</sup>. This is why an adequate and sensitive treatment of victims is very important to achieve women to come forward and denounce the abuses<sup>233</sup>.

Many ethnic communities believe that the survivor has been inflected by the enemy and the child born is an enemy too<sup>234</sup>. Children of rape and their mothers are stigmatized and socially punished within their own communities because in the view of their

---

<sup>224</sup> Akayesu Trial Judgment, *op.cit*, para. 507.

<sup>225</sup> Ellis, M., 2007, *op.cit*, p. 234.

<sup>226</sup> Akayesu Trial Judgment, *op.cit*, para. 508.

<sup>227</sup> Copelon, R., 2000, *op.cit*, p. 228.

<sup>228</sup> Ellis, M., 2007, *op.cit*, p. 234.

<sup>229</sup> Russel-Brown, S., 2009, *op.cit*, p. 365.

<sup>230</sup> Dusauchoit, T. *Enough Is Enough: Why Sexual Violence Demands a Humanitarian Response*, in International Activity Report (Brussels: Medicins Sans Frontieres/Doctors Without Borders, 2003), p. 3.

<sup>231</sup> Reid-Cunningham, A.R, 2008, *op.cit*, p. 289.

<sup>232</sup> Campanaro, J. *Note, Women, War, and International Law: The Historical Treatment of Gender-Based War Crimes*. 89 GEO. L.J, 2000, p. 2571-72; Scholz, J. *War Rape's Challenge to Just War Theory*, in S. P. Lee (Eds.), *Intervention, terrorism and torture: contemporary challenges to just war theory*, 4th Edition, Springer, 2007, p. 275.

<sup>233</sup> Spees, P. *Women's advocacy in the creation of the International Criminal Court: Changing the landscapes of justice and power* (2003) *Journal of Women in Culture and Society*. Vol. 28, no. 4, p. 1239.

<sup>234</sup> Reid-Cunningham, A.R, 2008, *op.cit*, p. 286.

community they represent their humiliation<sup>235</sup>. Siobhán Fisher argues that forced impregnation, not rape per se, constitutes genocide<sup>236</sup> Forcing females of a targeted ethnic group to conceive is genocidal because those so “impregnated” cannot carry the babies of men of their own ethnic group while their wombs are so “occupied”<sup>237</sup>.

Rapes have the intention to ostracize women due to the cultural values and stigma around rape<sup>238</sup>, as rape survivors and their children born from rape are a daily reminder of the horrors committed, the group has the desire to exclude them from society<sup>239</sup>. Rape taking place in certain ethnic communities with strong cultural values produces an immense trauma to women and fear of rejection. These societies often value the virginity of women until marriage and punish sexual relations outside the marital sphere with ostracism<sup>240</sup>. The societal consequences for a raped woman are tremendous, as women face the vulnerability of being rejected by their family and society<sup>241</sup>.

### **3.2. The *mens rea* of Genocide**

In this section the dissertation will briefly refer to the general *mens rea* of the crime of genocide, not the specific *mens rea* in each of the acts of the provision that we have analyzed before. The general or specific intent to commit genocide is *the intent to destroy, in whole or in part, a protected group as such*<sup>242</sup>. In essence, genocide can be committed

---

<sup>235</sup> Campanaro, J. 2000, *op.cit.*, p. 2571-72; Scholz, J. *War Rape's Challenge to Just War Theory*, in S. P. Lee (Eds.), *Intervention, terrorism and torture: contemporary challenges to just war theory*, 4th Edition, Springer, 2007, p. 275.

<sup>236</sup> K. Fisher, S. “*Occupation of the Womb: Forced Impregnation as Genocide*” *Duke Law Journal* 46 (1996), p. 91, 92, 94; Chertoff, E., 2017, *op.cit.*, p. 1077.

<sup>237</sup> K. Fisher, S., 1996, *op.cit.*, p. 91, 92, 94; Chertoff, E., 2017, *op.cit.*, p. 1077.

<sup>238</sup> Russel-Brown, S., 2009; Scholz, J., 2007, p. 275.

<sup>239</sup> Reid-Cunningham, A.R, 2008, *op.cit.*; Ahrum, A., 2015, *op.cit.*

<sup>240</sup> Campanaro, J. 2000, *op.cit.*; Scholz, J., 2007, *op.cit.*, p. 275.

<sup>241</sup> de Brouwer, A. M., 2005, *op.cit.*; Rogers, S., 2016, *op.cit.*

<sup>242</sup> Article 6 of the Rome Statute.

through rape<sup>243</sup> when committed with this specific genocidal intent<sup>244</sup>. If the intent is to destroy, in whole or in part a member of the protected group by any of the aforementioned methods, targeted as such because of their membership in the group, that should constitute genocide<sup>245</sup>.

The threshold for the genocidal intent has been subject to a profound doctrinal controversy. What the Chambers normally require is that the perpetrator “seeks to achieve” or has the “goal” of destroying the group<sup>246</sup>. It is sufficient that the perpetrator knows that his acts are destroying, in whole or in part, the group as such<sup>247</sup>. The intent has to be referred to the material destruction of the group either by physical or biological means<sup>248</sup>. The intended destruction must refer at least to a “substantial part” of the protected group<sup>249</sup>, not only by referring to the number of victims but also to the importance of the size of the group in relation to the overall community size<sup>250</sup> or the possible “prominence” or leadership or the targeted part<sup>251</sup>. The Tribunals have also stated that the part of the group can be limited to a specific region or geographical location, or even a municipality<sup>252</sup>.

---

<sup>243</sup> This idea has been developed by several authors, see for example: MacKinnon, C. “*Rape, Genocide, and Women’s Human Rights*,” extracted from the book “Violence Against Women: Philosophical Perspectives”, ed. Stanley G. French, Wanda Teays, and Laura M. Purdy, 43–54 (Ithaca, NY: Cornell University Press, 1994); Viseur Sellers, P. *The ‘appeal’ of sexual violence: The Akayesu/Gacumbitsi cases*, n.d., p.51-104.; Buss, D. *Rethinking ‘Rape as a Weapon of War’* Feminist Legal Studies (2009); MacKinnon, C., 2006, *op. cit*; Ellis, M. (2007); Askin, K., *A Decade of the Development of Gender Crimes in International Courts and Tribunals: 1993 to 2003*, 3 Human Rights Brief vol. 16, n°17 (2004); Rebecca L. Haffajee. *Prosecuting Crimes of Rape and Sexual Violence at the ICTR: The Application of Joint Criminal Enterprise Theory*. Harvard Journal of Law & Gender, Vol. 29. 2006; Askin, K., *War Crimes Against Women: Prosecutions in International War Crimes Tribunals* (1997); Askin, K., *Prosecuting Wartime Rape and other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 Berkeley Journal of International Law 288 (2003); Mitchell, D. *The Prohibition of Rape in International Humanitarian Law as a norm of Jus Cogens: Clarifying the Doctrine*. Duke Journal of Comparative & International Law, Vol 15, 2005.

<sup>244</sup> EUROJUST, 2017, *op.cit*, p. 9.

<sup>245</sup> Askin, K., 2003, *op.cit*, p. 315; Judgment of the ICTR (Trial Chamber) in the case of *Prosecutor v. Niyitegeka*, No. ICTR-96-14-T, 16 May 2003, para. 410; Gúenäel Mettraux, *International Crimes and the ad hoc Tribunals* (2005), p.235-236.

<sup>246</sup> See, for example: Judgment of the ICTY (Appeals Chamber) *Prosecutor v. Goran Jelisić*, (Case No. IT-95-10-A) 5 July 2001, paras 45-46 or Kristic Judgment, paras 571, 572.

<sup>247</sup> Judgment of the ICTY (Appeals Chamber) in *Prosecutor v. Jelisić*, 5 (Case No. IT-95-10-A) July 2001, para. 42

<sup>248</sup> Judgment of the ICTR (Trial Chamber) in the case of *Prosecutor v. Seromba*, (Case No. ICTR-2001-66-I), 13 December 2006, para. 319.

<sup>249</sup> See, for example: Judgment of the ICTY (Trial Chamber) in the case of *Prosecutor v. Radoslav Brđanin* (Case No. IT-99-36-T), 1 September 2004, para. 701 and Kristic Judgment, para. 11.

<sup>250</sup> Kristic Trial Judgment, *op.cit*, para. 12.; Kristic Appeals Judgment, *op.cit*, para. 16 and 37.

<sup>251</sup> Judgment of the ICTY (Trial Chamber) in the case of *Prosecutor v. Radoslav Brđanin*, (Case No. IT-99-36-T), 1 September 2004, para. 702.

<sup>252</sup> Kristic Trial Judgment, *op.cit*, para. 589.

Finally, as the victim must belong to a particular “national, ethnical, racial or religious group”<sup>253</sup>, the perpetrator must have the intent to destroy in whole or in part a community of this kind. A national group was defined in *Akayesu* as that whose members are seen as sharing a legal bond, based on common citizenship, coupled with reciprocity of rights and duties<sup>254</sup> and an ethnic group as that whose members share a common language or culture<sup>255</sup>. The same Chamber defined a racial group as one where their hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors<sup>256</sup> and members of a religious group those who share the same religion, denomination or mode of worship<sup>257</sup>. An ethnic group has also been identified when the community distinguishes itself as such or identified as such by others<sup>258</sup>. For the purpose of the *mens rea*, the perpetrator has to subjectively perceive the victim as belonged to the group targeted for destruction<sup>259</sup>.

### 3.3. The feminist debate over genocidal rape

While it is true that genocide can be committed through rape, when the convictions of rape as genocide arose for the first time, a feminist debate arose too. The debate revolves around whether a focus on genocidal rape would take out attention from the fact that rape occurred always towards woman in wartime<sup>260</sup>. Some feminists challenge the idea that rape in the context of genocide is used to injure not only the individual victim, but also the collective to which the victim belongs<sup>261</sup>. Many feminists consider that women cannot be merely viewed as the object through which and by which the destruction of the group occurs, because it denies her subjectivity and portrays her as an object of a crime that is ultimately committed against a particular faction rather than against the individual woman<sup>262</sup>.

---

<sup>253</sup> Article 6 of the EoC.

<sup>254</sup> *Akayesu* Trial Judgment, *op.cit*, para. 512.

<sup>255</sup> *Akayesu* Trial Judgment, *op.cit*, para. 513.

<sup>256</sup> *Akayesu* Trial Judgment, *op.cit*, para. 514.

<sup>257</sup> *Akayesu* Trial Judgment, *op.cit*, para. 515.

<sup>258</sup> Judgment of the ICTR (Trial Chamber) in the case of *Prosecutor v Clément Kayishema and Obed Ruzindana*, (Case No. ICTR-95-1-T), 21 May 1999, para. 98.

<sup>259</sup> Judgment of the ICTR (Appeals Chamber) in the case of *Prosecutor v Seromba*, (Case No. ICTR-2001-66-A), 13 December 2006, para. 318.

<sup>260</sup> Engle, K., 2005, *op.cit*, p. 780.

<sup>261</sup> Schomburg, W. and Paterson, I., 2007, *op.cit*, p. 138.

<sup>262</sup> Russel-Brown, S., 2009, *op.cit*, p. 351.

One side of the feminist debate argues that genocidal rape should be paid special attention as an intersectional rape, committed against women because of their gender but also because of their specific ethnicity<sup>263</sup>. The first group of feminists hopes to establish that in those conflicts, women are raped by certain men for specific reasons, which are also ethnicity<sup>264</sup>. MacKinnon, for example, wants to give attention both to rape as genocide and the generic rape. Certain women from a specific group are targeted for genocide and genocidal rape, which is rape by some men to certain women because of their ethnicity, race, religion or nationality<sup>265</sup>. MacKinnon considers that sexism and racism operate in conjunction and their identity as women cannot be separated from their membership in a particular race or religion<sup>266</sup>.

The other side of the debate is worried that the gendered nature of the rapes is overlooked because of the ethnicity content<sup>267</sup>. De Brouwer states that, for example, the Tutsi women were attacked on the basis of their gender only, as a result of the prevailing chaos during the conflict<sup>268</sup>. Many scholars maintain that rape when committed as part of a genocide is a crime against a wider protected group but is equally a crime committed against a female as an individual, on the basis of her sex<sup>269</sup>. Rhonda Copelon, for example, is concerned about the treatment of genocidal rape and calls for the “surfacing of gender” in the midst of genocide<sup>270</sup>. Copelon fears that the treatment of rape by the courts during genocide could have the effect of indicating that the rape that takes place outside genocide is not a crime of equal magnitude<sup>271</sup>.

However, authors such as Karen Engle criticize both sides of the debate. She maintains that they are based on flawed assumptions: the essential ethnic differences among the groups and the view of women as powerless, incapable of defending

---

<sup>263</sup>Russel-Brown, S., 2009, *op.cit*, p. 351.

<sup>264</sup> Russel-Brown, S., 2009, *op.cit*, p. 351; EUROJUST, 2017, *op.cit*, p. 10 and Chertoff, E., 2017, *op.cit*, p. 1069, with regard to the ethnicity of the Yazidi women raped by ISIS.

<sup>265</sup>MacKinnon, C., *Crimes of War, Crimes of Peace*, 4 UCLA WOMEN's L. J. 59 (1993). p. 64-65; MacKinnon, C., *Intersectionality as Method: A Note*, 38 SIGNS, p. 1026-27 (2013); Crenshaw, K. *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. (1991), p. 1244.

<sup>266</sup>MacKinnon, C., *Crimes of War, Crimes of Peace*, 4 UCLA WOMEN's L. J. 59 (1993), p.64-65.

<sup>267</sup> Russel-Brown, S., 2009, *op.cit*, p. 351; de Brouwer, A. M , 2005, *op.cit*, p. 13; Allen, B. *Rape Warfare: The Hidden Genocide in Bosnia-Herzegovina and Croatia* (1996).

<sup>268</sup> de Brouwer, A. M, 2005, *op.cit*, p. 13

<sup>269</sup> Russel-Brown, S., 2003, *op.cit*, p. 372.

<sup>270</sup>Copelon, R., *Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law*. Hastings Women's Law Journal, Vol. 5, Issue 2, Article 4, 1994.

<sup>271</sup>Copelon, R. *Women and War Crimes*. St. John's Law Review 69:1-2 (1994), p. 67-68.

themselves or even participating in the war<sup>272</sup>. This is also true for the idea of forced impregnation as a way to prevent births, which also perpetuates cultural assumptions by insisting that an ethnic group wanted to destroy another by injecting their sperm and creating children of their ethnicity<sup>273</sup>. Karen Engle considers that feminists who developed genocidal rape reinforced a view of rape that ostracizes women because of the rejection by their community and have diminished the agency of the women in deciding that the child they bear had their ethnicity and not that of the father<sup>274</sup>. With these views, the author states, feminists deny the women's sexual and political agency.

---

<sup>272</sup> Engle, K., 2005, *op.cit*, p. 797.

<sup>273</sup> Engle, K., 2005, *op.cit*, p. 810.

<sup>274</sup> Engle, K., 2005, *op.cit*, p. 810.

## 4. CHAPTER III: THE RAPE OF THE YAZIDI WOMEN AS GENOCIDE

This last Chapter aims to address whether the rape committed by ISIS towards the Yazidi women qualifies as a genocide. The study will firstly refer to the consideration of the Yazidi as infidels by ISIS, as the reason for their will to eliminate their group and religion. Moreover, it will present the operating method of ISIS in the treatment of the Yazidi. The second part of the Chapter addresses the application of the rape definition embedded in the EoC to the crimes committed towards the Yazidi women, which qualifies as rape. Finally, the third Chapter will study the facts that sustain the presumption that the rape of the Yazidi women by ISIS could qualify as a genocide and the composition will make a brief commentary to the application of the genocidal rape debate to the Yazidi women.

### 4.1. Background

ISIS is a terrorist group<sup>275</sup> that emerged from the widely known al-Qaeda in Iraq. Abu Bakr al-Baghdadi became the leader of the new terrorist group in 2013<sup>276</sup>. After its expansion over Syria by taking advantage of the ongoing civil war in the country, ISIS extended to Iraq during the summer of 2014<sup>277</sup>. On August third, 2014, ISIS launched attacks on villages across the region of Sinjar, close to the Iraqi-Syrian border targeting the Yazidi population<sup>278</sup>. The aim of ISIS is to give an end to the Yazidi community and its religion<sup>279</sup>. Yazidis are a closed community with a long history of being persecuted

---

<sup>275</sup> As established by the United Nations Security Council in its 1267 Resolution (1999) S/RES/1267.

<sup>276</sup> McCoy, T. *How Isis Leader Abu Bakr al-Baghdadi Became the World's Most Powerful Jihadist Leader*, Washington Post (June 11, 2014).

<sup>277</sup> Human Rights Watch. *ISIS escapees describe systematic rape* (April 14, 2015).

<sup>278</sup> Human Rights Council. The Commission of Inquiry Report “*They came to destroy*”: *ISIS Crimes Against the Yazidis*. A/HRC/32/CRP.2, 2016, para. 1 [Human Rights Council Report (2016) as of now]; Office of the United Nations High Commissioner for Human Rights. United Nations Assistance Mission for Iraq – Human Rights Office: *A Call for Accountability and Protection: Yazidi Survivors of Atrocities Committed by ISIL*. (2016), p. 6 [UNAMI Report (2016) as of now]; Murad, N. 2017; Callimachi, R. *Enslaving Young Girls, The Islamic State Builds a Vast System of Rape*, N.Y. TIMES, Aug. 14, 2015; Sverdlov, D. *Rape in War: Prosecuting the Islamic State of Iraq and the Levant and Boko Haram for Sexual Violence Against Women*. Cornell International Law Journal, vol.50, article 6, 2017, p.356.; Henne, P. & Hackett, C. *Iraqi Yazidis: Hazy Population Numbers and a History of Persecution*, Pew Research Center (Aug. 12, 2014); *Persecuted Yazidis Again Caught in Larger Struggle*, N.Y. TIMES (Aug. 11, 2014); Cooper, H. & Shear, M. *Militants’ Siege on Mountain in Iraq Is Over, Pentagon Says*, N.Y. TIMES (Aug. 13, 2014).

<sup>279</sup> Counter Extremism Project Report: *ISIS Persecution of Religions*. May 2017.

and first faced accusations of devil worship by Muslims in the late 16th and early 17th centuries<sup>280</sup>. ISIS incorrectly considers Yazidi population “*kufar*” or infidels due to the view of the Yazidi faith as a religion of “devil-worshippers”<sup>281</sup>. ISIS has seized Yazidi towns carrying out massacres against men and elderly women and subjecting Yazidi women and girls to a system of organized rape in an attempt to ‘purify’ the region from the non-Islamic influences<sup>282</sup>.

Their mode of operation consists on separating men and women, men being asked to convert or die, and women directly sent to the organized sexual market<sup>283</sup>. Women are forcibly transferred to the different “sexual market points” throughout Iraq and Syria to be sold, mostly schools and prisons where they are collectively held until an ISIS member bought them<sup>284</sup>. They are sold as sexual slaves<sup>285</sup> to ISIS fighters and held captive in common buildings and military bases in order to be raped by the soldiers on a daily basis<sup>286</sup>. ISIS records their names and takes photos of them in order to keep a record and be able to capture them back if they manage to escape<sup>287</sup>. In 2016, it was estimated that at least 3,200 Yazidi women and girls remained captives of ISIS<sup>288</sup>.

It is important to mention the strong ideology that governs the sexual organized market of ISIS. The terrorist group delivered in October 2014 a series of instructions to ISIS soldiers and affiliates who buy women in the market to carry out intercourse with them in *Dabiq*, the Islamic State Magazine. The pamphlet’s title was “Questions and

---

<sup>280</sup> Yüksel, S., Saner, S., Basterzi, A., Oglagu, Z., Bülbü, I., Green, E. *Genocidal sexual assault on women and the role of culture in the rehabilitation process: Experiences from working with Yazidi women in Turkey*. International Rehabilitation Council for Torture Victims, vol. 28, n°3, 2018, p. 125.

<sup>281</sup> Murad, N., 2017 *op.cit.*; YAZDA, 2017, *op.cit.*; Ahmado, 2018, *op.cit.*; Spencer, R., 2013, *op.cit.*

<sup>282</sup> Human Rights Watch (2017); Murad, N., 2017, *op.cit.*; Yüksel, S., Saner, S., Basterzi, A., Oglagu, Z., Bülbü, I., Green, E., 2018, *op.cit.*, p. 125; Callimachi, R. *Enslaving Young Girls, The Islamic State Builds a Vast System of Rape*, N.Y. TIMES, Aug. 14, 2015; Ahram, A. *Sexual Violence and the Making of ISIS*. Survival vol. 57, no. 3, 2015, p. 57; Mara Revkin, *ISIS’ Social Contract: What the Islamic State Offers Civilians*, Foreign Affairs (Jan. 10, 2016).

<sup>283</sup> EUROJUST (2017), p.10.

<sup>284</sup> Human Rights Council Report, 2016, *op.cit.*, para. 55; Murad, N., 2017 *op.cit.*; Ahram, A., 2015, *op.cit.*, p.58.

<sup>285</sup> UNAMI Report (2016), p. 3; Chertoff, E., 2017, *op.cit.*, p. 1060; Even though as Nadia Murad itself has declared they prefer the term “survivor” and not “sex slaves”.

<sup>286</sup> Murad, N., 2017, *op.cit.*; Callimachi, R., 2015, *op.cit.*; EUROJUST, 2017, *op.cit.*; There exist authors that contend that the crime committed against the Yazidi women can be charged as a crime against humanity under the rubric of “gender persecution”. For a superb analysis of that idea, see: Chertoff, E. 2017, *op.cit.*, p.1052-1116.

<sup>287</sup> Human Rights Council Report, 2016, *op.cit.*, para. 57; Murad, N., 2017, *op.cit.*; *ISIS Tightens Grip on Scores of Female Sex Slaves*, Bus. INSIDER (July 5, 2016, 4:06 PM).

<sup>288</sup> Human Rights Council, 2016, *op.cit.*; Callimachi, R., 2015, *op.cit.*; Chan, S. & Sengupta, S. *Woman Who Escaped Islamic State Captivity Wins Human Rights Prize*, N.Y. TIMES, Oct. 11, 2016.

Answers on taking captives as slaves” and stated a series of rules for ISIS fighters of what is acceptable or not acceptable to do with the Yazidi girls<sup>289</sup>. The captured women are considered to be ISIS property and termed openly “*sabaya*” or slaves<sup>290</sup>. Fighters who participate in this organized sexual market come from everywhere in the Middle East and some victims have also stated that their rapists looked European<sup>291</sup>. ISIS defends in *Dabiq* that “enslaving the families of the non-believers and taking their women as concubines is a firmly established aspect of sharia<sup>292</sup>. However, a majority of Muslim clerics disagree with the mentioned ISIS ideas and condemn their actions<sup>293</sup>.

#### **4.2. The rape of the Yazidi in the ICC definition of rape**

The first Chapter of this dissertation discussed how rape is portrayed in the Rome Statute, specifically defined inside the EoC. In this section, we argue that the actions committed by ISIS amount to rape as defined in the EoC of the Rome Statute and we will carry out an analysis to demonstrate it. We should recall the definition of rape embedded in the EoC of the Rome Statute: *The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body; 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*

---

<sup>289</sup> UNAMI Report, 2016, *op.cit.*, p. 14; EUROJUST, 2017, *op.cit.*, p. 15; As an example, *Dabiq* states that soldiers cannot have intercourse with the girls during her period, or that brothers cannot sell the girls between them; “*Questions and Answers on Taking Captives and Slaves*” attributed to the Research and Fatwa Department. Islamic State (ISIS) Releases Pamphlet on Female Slaves, MEMRI JIHAD & TERRORISM THREAT MONITOR (Dec. 4, 2014); *ISIS Sex Slaves Guide Mars International Human Rights Day*, AL-ARABIYA NEWS (Dec. 10, 2014); Withnall, A., *ISIS Releases ‘Abhorrent’ Sex Slaves Pamphlet with 27 Tips for Militants on Taking, Punishing and Raping Female Captives*, INDEPENDENT (U.K.) (Dec. 10, 2014); Landay, J. et al., *Exclusive: Islamic State Ruling Aims To Settle Who Can Have Sex with Female Slaves*, REUTERS (Dec. 29, 2015, 7:32 PM); Some of the instructions the fatwa gives are “prohibit, among other things, anal sex with a “female captive,” or sex “during her menstrual cycle,” also noting that “it is not possible to cause [the woman] to abort if she is pregnant.”

<sup>290</sup> Nadia Murad, 2017, *op.cit.*

<sup>291</sup> Amnesty International Report. *Escape from Hell. Torture and sexual slavery in Islamic State Captivity in Iraq*, 2014, p. 9. [Amnesty International Report (2014) as of now].

<sup>292</sup> Jelínková, E. *The strategic use of sexual violence as a weapon of war in genocide and in ethnic/religious conflicts and a case study on the use of sexual slavery by ISIL within the context of the most recent Yazidi genocide in Iraq*. 2017, p.41.; Spencer, R. *Thousands of Yazidi Women Sold as Sex Slaves ‘For Theological Reasons’*, Says *ISIL*, TELEGRAPH (Oct. 13, 2013, 1:13 PM); Ahram, A., 2015, *op.cit.*, p. 63.; EUROJUST, 2017; Chertoff, E., 2017, *op.cit.*, p. 1062.

<sup>293</sup> Goodstein, L. “*Muslim Leaders Wage Theological Battle, Stoking ISIL’s Anger*”. New York Times, May 8, 2016.

*by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.*

Regarding the *actus reus*, it can be derived from the testimonies of the witness set out in several reports. There is evidence of physical invasion of a victim deriving from the Yazidi survivors' testimonies about their experiences to, for example, Human Rights Watch<sup>294</sup>, the US Congress<sup>295</sup>, United Nations<sup>296</sup>, and other institutions<sup>297</sup>. Once a girl is bought, she is subjected to continuous rape by his raptor and some are handcuffed behind their backs during rapes while others had their hands and legs tied to the corners of the beds<sup>298</sup>. Girls as young as nine are also subject to rape, as well as pregnant women<sup>299</sup>. Most of them become severely injured as a result of the rapes. If the girls do not submit, they are severely beaten or threatened with gang rape, death or the death of their children<sup>300</sup>. Fighters order and supervise gang rapes of Yazidi women and girls who have tried to escape<sup>301</sup>.

With regard to the circumstances in which the rapes take place, the environment can be classified as inherently coercive. This environment derives from the facts that ISIS sold women on a market and subjected them to a registration system and carried out a widespread slaughter of Yazidi men<sup>302</sup>. One should recall the jurisprudence set out in *Kunarac*<sup>303</sup>, where the Appeals Chamber elucidates the lack of consent under captivity. ISIS fighters have full power over the Yazidi captives, subject them to abuses and prevent

---

<sup>294</sup> Human Rights Watch, 2015, *op.cit.*

<sup>295</sup> Browne, R. *Escaped ISIS Sex Slave Tells Congress of Horrors*, CNN (June 21, 2016, 4:40 PM).

<sup>296</sup> Alter, C. *Yezidi Woman Testifies an American ISIS Fighter Held Her as a Sex Slave*, TIME (Oct. 7, 2015, 3:50 PM).

<sup>297</sup> Malm, S. *"The Saddest Thing I Remember Was This Little Girl, 12 Years Old. They Raped Her Without Mercy": Dressed in Traditional Wedding Gowns, Yazidi Sex Slaves Relive Their Torture by ISIS*, DAILY MAIL (Jan. 18, 2016, 2:04 PM).

<sup>298</sup> Human Rights Council Report, 2016, *op.cit.*, para. 64; UNAMI Report, 2016, *op.cit.*, p. 11.

<sup>299</sup> Human Rights Council Report, 2016, *op.cit.* para. 64; UNAMI Report, 2016, *op.cit.*, p. 14.

<sup>300</sup> Human Rights Council Report, 2016, *op.cit.*, para. 65.

<sup>301</sup> Human Rights Council Report, 2016, *op.cit.*, para. 65.

<sup>302</sup> Sverdlov, D., 2017, *op.cit.*, p. 348.

<sup>303</sup> *Kunarac*, Case Nos. IT-96-23-T & IT-96-23/1-T, Judgment, 1.10-1.11. "Force or threat of force provides clear evidence of non-consent, but force is not an element per se of rape. There are factors other than force which would render an act of sexual penetration non-consensual or nonvoluntary on the part of the victim; para. 129: A narrow focus on force or threat of force could permit perpetrators to evade liability for sexual activity to which the other party had not consented by taking advantage of coercive circumstances without relying on physical force; para. 132, 133: The Chamber considered that the extreme detention conditions and the intensity and regularity of the rapes committed on the detained women established 'circumstances that were so coercive as to negate any possibility of consent'; para 409: This finding shows that force or compulsion was used prior to rape. In this context, the Appeals Chamber further refers back to its finding that the coercive circumstances of this case made consent to the sexual acts by the Appellants impossible.

them from leaving their home<sup>304</sup>. Girls and women are abducted against their will and forced to stay collectively in buildings until they are bought. Testimonies show how they try to resist being sold and if they resist, they are severely beaten. They either forced to marry a fighter or forced to live in ISIS military bases to be raped by many soldiers.

The Yazidi women suffer from psychological oppression by being constantly threatened and verbally abused by their captors. They might finally submit to the rapes in order to avoid the consequences either to their own life or that of their families. The environment is that of violence, where women are unable to decide about their freedom and under the fear of punishment, they submit to any action committed to them. ISIS victims come forward with a testimony of being abducted, separated from her family, her male relatives being killed, being forced to stay with a fighter that has bought her and taken her against her will, has forced her to live with him and raped her every day despite her crying and praying him to stop<sup>305</sup>.

Turning to the debated issue of the element of “non-consent”, in this inherently coercive scenario we can understand the factual atmosphere of violence over which ICL operates. In these scenarios, as we have assessed previously, it has to be understood that the definition of rape is incompatible with an element of “non-consent” on the part of the victim. Therefore, the absence of consent of a victim of sexual violence does not need to be established and is presumed under the described circumstances, as “lack of consent” is not an element of the *actus reus* of rape<sup>306</sup>. ISIS fighters also carry out rapes against girls as young as six who we argue are incapable of giving genuine consent due to their age as established in the ICC definition, because children are incapable to voluntarily consent to the intercourse<sup>307</sup>.

The mass rapes against the Yazidi women are another example of the situation in which women are posed in wartime due to the use of rape as a weapon of war<sup>308</sup>. As we

---

<sup>304</sup> Gacumbitsi Appeals Judgment, *op.cit.*, para. 148 and 155; Human Rights Council Report, 2016, *op.cit.*, para. 48.

<sup>305</sup> These examples have been inspired in the testimony of Nadia Murad, *op.cit.*

<sup>306</sup> EUROJUST, 2017, *op.cit.*, p. 7.

<sup>307</sup> Weiner, P., 2013, *op.cit.*, p.1219; La Haye, E. *Article 8(2)(b)(xxii)—Rape, Sexual Slavery, Enforced Prostitution, Forced Pregnancy, Enforced Sterilization, Sexual Violence, in The International Criminal Court: Element of Crimes and Rules of Procedure and Evidence* 184, 190 (Roy S. Lee ed., 2001); see also de Than, C. & Shorts, E. *International Criminal Law and Human Rights* 359 (2003), arguing for a rule that a child below a certain age is incapable of giving consent.

<sup>308</sup>Kalosieh, A, 2003, *op.cit.*, p. 133. The author correctly states that *no one can consent to their own genocide*.

will argue in the next section of the Chapter, the rapes carried out by ISIS towards the Yazidi women are part of a genocidal campaign against the Yazidi community. Such facts establish the presence of circumstances that are extremely coercive and rule out any possibility of genuine consent<sup>309</sup>.

Finally, with respect to the *mens rea* of the crime of rape, ISIS fighters know they are committing the crime with force or threat of force, or that they are taking advantage of a coercive environment. The force ISIS uses has been shown by the testimonies of victims stating that they have physically tried to resist the rapes and have been beaten as a result. The threat of force has also been shown by the fact they are threatened with their loved ones being killed if they try to resist. ISIS fighters sometimes need to tie the women to rape them, which also illustrates the use of force. Ammar Hamid Mahmoud Hussein, known as Abu Yasser, gave an interview in 2017 speaking about the multiple rapes he perpetrated, stating that *“At first, it was an order,” [...] “We were young, we were not married, and we needed that.” The women often resisted. “We would tell them, ‘O.K., I am your husband, I am the owner of you’.* *“Sometimes they needed to be beaten to make them comply<sup>310</sup>.*

The coercive environment they take advantage of is proved since women are kidnapped against their will and kept captive<sup>311</sup>. ISIS fighters exploit their abuse of power towards the Yazidi women they have kidnapped and dispose of them as they wish. Cultural knowledge as well as gender stereotypes that ISIS holds about the Yazidis and Yazidi women especially are the root causes of the sexual violence by which ISIS thinks that they can exert complete power over the Yazidis<sup>312</sup>.

As the Human Rights Council states in their reports, *“the view of females as objects, not specific to ISIS, when backed by radical religious interpretation and territorial control affording dominance over women and girls, finds horrific though logical extreme in the terrorist’s group conduct. It is the common thread that links ISIS forcing Sunni women and girls to remove themselves from the male gaze by having them remain indoors or covering themselves entirely in public, and the trade of Yazidi women and girls as sex*

---

<sup>309</sup>Schomburg, W. and Paterson, I., 2007, *op.cit*, p. 128.

<sup>310</sup>Wright, R. *Face to Face with the ghost of ISIS*, 2017.

<sup>311</sup>This was the argument used in the Kunarac Appeals Judgment, *op.cit*, para. 132.

<sup>312</sup>Jelínková, E., 2017, *op.cit*, p.37.

slaves. Care must be paid to the fact that Yazidi women and girls have been doubly victimized, on the basis of their religion and their sex”<sup>313</sup>.

### 4.3. The rape of the Yazidi as genocide

The previous Chapter demonstrated how four of the acts of the *actus reus* of genocide can be committed through rape. Those four acts are being carried out towards the Yazidi women. For the purpose of this essay, we consider the Yazidi as one of the protected groups of the Genocide Convention: either a racial, ethnic or religious group, or the three of them. The ICC has the chance to bring ISIS leaders to justice for the rape of the Yazidi women as a weapon of genocide against the Yazidi community<sup>314</sup>, whose leaders could be prosecuted, for example, under the theory of Joint Criminal Enterprise<sup>315</sup> or under the Superior Liability Theory<sup>316</sup>.

ISIS bears the genocidal intent<sup>317</sup>, the “*mens rea*” of genocide, which is embedded in the Genocide Convention. Rape is, inside genocide, a violent act perpetrated with intent to destroy a group<sup>318</sup>. The intent of ISIS is to destroy an ethnic, racial or religious group, which are the Yazidi<sup>319</sup>. ISIS leaders have the intent to cause serious bodily suffering and mental harm to the Yazidi people under Article 2(b) of the Genocide Convention through the use of rape and the specific intent to destroy the Yazidi people, in whole or in part, through such rape<sup>320</sup>.

---

<sup>313</sup> For a further analysis of the social, cultural and religious reasons of the hyper-masculine ISIS behavior towards women, see: Ahram, A., 2015, *op.cit*, p. 57–78

<sup>314</sup> David Sverdlov, 2017, *op.cit*, p. 359; Chertoff, E., 2017, *op.cit*, p. 1066; Bellinger III, J. *Make ISIS’ Leaders Face Justice*, N.Y. TIMES (Apr. 2, 2015); United Nations Assistance Mission for Iraq Report. “*Human Rights, Every Day, for all Iraqis*” *Promotion and Protection of rights of victims of sexual violence captured by ISIL/or in areas controlled by ISIL in Iraq*. (22 Aug. 2017), para. 35.

<sup>315</sup> For further analysis of the JCE, see: Haffajee, R. *Prosecuting Crimes of Rape and Sexual Violence at the ICTR: The Application of Joint Criminal Enterprise Theory*. Harvard Journal of Law & Gender, Vol. 29. 2006, p. 202-221.

<sup>316</sup> See: article 28 of the Rome Statute.

<sup>317</sup> For a wider analysis of the *dolus specialis* of the crime of genocide, see: Schabas, W. *Genocide in International Law* (2000), p. 217-228.

<sup>318</sup> Russel-Brown, S., *op.cit*, p. 2009. As the author states, the Akayesu Tribunal acknowledged genocidal rape to be one of the most effective ways to inflict injury and harm to advance the destruction of the Tutsi.; de Brouwer, A. M., 2005, *op.cit*, p. 44; Sharlach, L., 2000, *op.cit*, p. 90; MacKinnon, C., 2006, *op.cit*, p.209; Brigitte Maier, N. *The Crime of Rape under the Rome Statute of the ICC: With a Special Emphasis on the Jurisprudence of the ad hoc Criminal Tribunals*. Amsterdam Law Forum Vol 3, n°2, 2011, p.7.

<sup>319</sup> In further articles, it would be interesting to assess the features of the Yazidi community that determine it is included as a protected group in the Genocide Convention. However, for the purpose of this article we assume that the Yazidi are a protected group within the Genocide Convention, and we will focus on explaining why the rape of the Yazidi can be regarded as genocide.

<sup>320</sup> Sverdlov, D. 2017, *op.cit*, p. 353.

This affirmation is drawn from the fact that militants gave the Yazidis a choice to convert to Islam, and there is a punishment for refusing such conversion<sup>321</sup>. A general intent to cause serious bodily and mental harm to the Yazidis exists<sup>322</sup>. This intent can be drawn from the propaganda that ISIS carries out in *Dabiq* and has been commented at the beginning of this Chapter.

The Yazidi are the sole group targeted by ISIS for mass killings and rape<sup>323</sup>, which is committed as part of a genocidal campaign against the protected group. The atrocities committed against the Yazidis became recognized by the UN Security Council as Genocide in 2017<sup>324</sup>, following a 2016 UN Human Rights Council report titled “They came to destroy: ISIS crimes against the Yazidis” that stated: “*ISIL has sought to destroy the Yazidis through killings; sexual slavery, enslavement, torture and inhuman and degrading treatment and forcible transfer causing serious bodily and mental harm; the infliction of conditions of life that bring about a slow death; the imposition of measures to prevent Yazidi children from being born, including forced conversion of adults, the separation of Yazidi men and women, and mental trauma; and the transfer of Yazidi children from their own families and placing them with ISIL fighters, thereby cutting them off from beliefs and practices of their own religious community, and erasing their identity as Yazidis*”<sup>325</sup>.

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

Yazidi women are targeted both on the base of ethnicity and gender. The intention of ISIS is to destroy the Yazidi and genocidal rape is a way to specifically harm the Yazidi

---

<sup>321</sup> U.S. Holocaust Memorial Museum, *Our Generation is Gone: The Islamic State's Targeting of Iraqi Minorities in Ninewa* [hereinafter US Holocaust Memorial Museum Report], p. 16.

<sup>322</sup> David Sverdlov, 2017, *op.cit.*, p. 353.

<sup>323</sup> This is declared by the Report of the U.S Holocaust Memorial Museum, which singles out the Yazidi as the only victims of genocide by ISIS.

<sup>324</sup> Security Council resolution 2379 (2017) on the establishment of an Investigative Team to Support Domestic Efforts to Hold the Islamic State in Iraq and the Levant Accountable for Its Actions in Iraq

<sup>325</sup> Human Rights Council Report, 2016, *op.cit.*, para. 202.

woman<sup>326</sup> to advance it. When ISIS targets the Yazidi women, they also target the Yazidi community as a whole to destroy it<sup>327</sup>, to make it escape from the territories the terrorist group has conquered and to eliminate their religion by subjugating them. 300,000 Yazidis fled as ISIS killed and kidnapped women and girls living in Mount Sinjar in 2014, and more than 6,000 women and children were subjugated under systematic mass rape<sup>328</sup>.

***a) The cause of serious bodily and mental harm and the deliberate infliction of conditions of life calculated to bring about the physical destruction of the Yazidi***

Besides the clear physical harm that Yazidi women endure during the rapes as shown in the Human Rights Reports testimonies, which are common to all victims of rape during armed conflict, Yazidi women and the whole community also suffer a specific mental harm, characteristic of closed religious communities. Hundreds of Yazidis are being treated in Europe for physical and mental conditions<sup>329</sup>.

Yazidis social structure follows a caste social stratification system where, as often observed in the Middle East, there is a large family model and a strict system of patriarchy<sup>330</sup>. Marrying or having sex with a non-Yazidi is a reason for excommunication and sexual intercourse before marriage is forbidden for women<sup>331</sup>. Normally, if a Yazidi woman is raped or has intercourse with a non-Yazidi, she will be rejected from her family and community, and her family will retain the stigma and dishonor inside the whole community.

ISIS planned to achieve their genocidal goal relying on the consequences of trespassing on the integrity of women's bodies and deeply entrenched notions about honor and marriage held by the Yazidis<sup>332</sup>. However, the main religious leaders<sup>332</sup> of the Yazidi community have stated that women who return from ISIS captivity should be taken care of and not marginalized, not considered to be dishonorable and the community should embrace and accept them<sup>333</sup>.

---

<sup>326</sup> Sverdlov, D. 2017, *op.cit*, p. 352.

<sup>327</sup> Sverdlov, D. 2017, *op.cit*, p.342.

<sup>328</sup> Cetorelli et al., *Mortality and kidnapping estimates for the Yazidi population in the area of Mount Sinjar, Iraq, in August 2014: A retrospective household survey*. PLOS Medicine, vol. 14, n°52017; Amnesty International Report, 2014, *op.cit*, p. 5-6.

<sup>329</sup> Yüksel, S., Saner, S., Basterzi, A., Oglagu, Z., Bülbü, I., Green, E., 2018, *op.cit*, p.128.

<sup>330</sup> Ahram, A. 2015, *op.cit*; Yüksel, S., Saner, S., Basterzi, A., Oglagu, Z., Bülbü, I., Green, E., *op.cit*.

<sup>331</sup> Kizilhan, 2018; Jelínková, E., 2017, *op.cit*.

<sup>332</sup> Jelínková, E., 2017, *op.cit*, p. 37.

<sup>333</sup> Human Rights Council Report, 2016, *op.cit*, para. 79.

***b) The prevention of births and forcible transfer of Yazidi children from one group to another***

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

In addition, ISIS counts on the cultural impact of rape and forcefully impregnating Yazidi women to work in their favor to make sure that future generations of Yazidi would not be born<sup>334</sup>, similar to the intention that Serbian soldiers had when raping Bosnian Muslim women in Bosnia-Herzegovina. ISIS rapes Yazidi women in order to make them bear a child with the ethnicity of the father, which qualifies as the forcible transfer of children from one group to another. However, religious leaders have stated that Yazidi women should educate their newborns in the Yazidi faith and the community should embrace them as Yazidi<sup>335</sup>.

**4.4. The genocidal rape debate applied to the Yazidi**

The previously addressed actions of indirect commission of genocide towards the Yazidi by means of rape is based on, what Karen Engle considers an assumed stigma around rape under Islamic law, where women are rejected by their families instead of assuming that women can negate this assumption and the Muslim community could react differently<sup>336</sup>, as has been shown in the case of the Yazidi. Concerning the Yazidi, it has also been shown how instead of assuming that the newborn from a rape of an ISIS soldier will carry the ethnicity and religion of the father, the child can be raised by her mother inside her culture, without being rejected by the community and being treated as a Yazidi.

Other authors specifically refer to the Yazidi women, and state that thinking of them only as members of a religious minority places sexual violence in a second place, because

---

<sup>334</sup> Jelínková, E., 2017, *op.cit.*, p. 37.

<sup>335</sup> Human Rights Council Report, 2016, *op.cit.*, para. 79.

<sup>336</sup> Engle, K. 2005, *op.cit.*, p. 809.

they are targeted as a result of their gender too<sup>337</sup>, not only because of being Yazidi, but ultimately because they are women. In fact, Yazidi women that have started to speak out are challenging their view as victims despite the horrible violence they suffered and their role in their communities has changed<sup>338</sup>.

While Karen Engle's debate mentioned earlier in this composition, about whether Bosnian Muslim women in the Former Yugoslavia could have willingly engaged in sexual intercourse with Serb soldiers is interesting, it is not applicable to the case of the Yazidi. We can strongly affirm that it is reasonable to believe that none of the Yazidi women kept captive by ISIS fighters are willingly engaging in sexual activity with them. Even if one of them was, it could be arguable if it was her real "will" and it would not be representative of the whole picture we are trying to present in this composition. Nonetheless, another side of the debate that Engle presents is important: the women's political agency.

Engle contends that seeing rape as a fate worse than death<sup>339</sup> highly victimizes women and retains the "Victorian" idea of the loss of honor. In this case we will not refer to the Yazidi women, but to the women who are not Yazidi and are participating in the genocide along with ISIS. Karen Engle discusses that portraying women as "victims" in every war, denies their capability to actively participate in the war<sup>340</sup>, which is shown in the Yazidi genocide as the wives of ISIS soldiers are actively taking part in the genocidal campaign by assisting their husbands in keeping Yazidi women captive and exploited.

Most of the wives of the ISIS fighters take part in the maintenance of the mass-raping system being carried out by ISIS. Women that are on the side of ISIS are also subordinate to the fighters due to the religious societal behavior, but there have been

---

<sup>337</sup> Jelínková, E. 2017, *op.cit*, p. 39.

<sup>338</sup> Jelínková, E., 2017, *op.cit*, p. 40.

<sup>339</sup> This idea is also referred by Janet Halley when reviewing the book "Rape in Berlin". Halley, J., 2008, *op.cit*, p.112: *Rape in the context of war puts particular stress on the old adage, "rape is a fate worse than death" [...] The most quoted line in the book by far: 'It [rape] sounds like the absolute worst, the end of everything — but it's not'.*

<sup>340</sup> Karen Engle also refers to how women in Yugoslavia did nothing to stop the war, and they were seen as with no political instinct and easy to manipulate. They were seen as mere cheerleaders of their husbands while they might have had a role in the war. Engle reminds us of the incident of Abu Grhaib to think about what women could do if they were in positions of power and states that portraying men as superior and women as victims of the war is functional for feminists, because it relieves them from responsibility of the lack of speech and involvement in the war; On another side, Sherrie L. Russel Brown (Russel Brown, S., 2009, *op. cit.*) presents the conviction of Pauline Nyiramasuhuke for the genocide in Rwanda as an example of a woman taking an active part in the incitement of rapes towards the Tutsi.

instances of wives of fighters helping Yazidi women escape. This constant victimization also portrays women as the ones who have suffered the most from the war when, in reality, rape might not have been the worst they have suffered, taking into account they have seen their family being killed<sup>341</sup>. Somehow, women are raped and not killed like man<sup>342</sup>, so being a woman saved them because they are not seen as a threat<sup>343</sup>.

---

<sup>341</sup> Engle, K. (2005), p. 803; Halley, J. (2008), p.112-113.

<sup>342</sup> Human Rights Council Report (2016), para. 23 to 99.

<sup>343</sup> Engle, K. (2005) p. 803.

## 5. CONCLUSION

The definition of rape in ICL presents a positive evolution. Rape has progressed from a lack of recognition and prosecution by the International Community to being explicitly set out in the Rome Statute as a crime against humanity, a war crime and a mean to commit genocide in the document of the EoC. The *actus reus* and *mens rea* of rape were initially developed by the jurisprudence of the Ad Hoc International Criminal Tribunals of Rwanda and Yugoslavia and the prohibition of rape is nowadays a norm of *ius cogens*.

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

This dissertation has aimed to show both the evolution of the definition of rape in ICL and how the crimes perpetrated by the ISIS fighters towards the Yazidi women qualify as rape as defined in the EoC, the current rape definition for the ICC. More specifically, this study has pursued to show that the actions executed by ISIS qualify both as rape, and in the same line, as a genocide being committed regarding the Yazidi by means of rape.

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

Although we have witnessed a positive evolution of ICL when acknowledging the seriousness of the sexual violence that women endure during armed conflict and genocidal campaigns, there are further improvements that can be carried out. Several

authors have stated that, to further advance the effectivity of rape prosecutions and the deterrence of further rape instances in future intrastate or interstate conflicts, rape should be prosecuted as a crime, in and of itself and not only as a subsection of crimes against humanity and war crimes.

The ICC is responsible for prosecuting ISIS leaders and fighters who have committed rape against the Yazidi women as part of their genocidal campaign towards the destruction of the Yazidi community. Moreover, the International Community is responsible to secure justice for the Yazidi survivors and should increase its support to the rebuilding of their community, both physically and morally through financial and psychological assistance. In order to redress the Yazidi women this essay contends that the shame and stigma that society imposes to victims of sexual violence should be challenged.

Lastly, while there exist several extraordinary articles on the evolution of the definition of rape in ICL, this study has added to the evolution several important aspects. Firstly, it has addressed the influence of the jurisprudential evolution of the elements of rape in the definition set out today in the EoC of the Rome Statute. In addition, it has analyzed how the definition applies to the crimes committed against the Yazidi women, which qualify as rape in ICL. Finally, the composition has addressed how, in the specific and current topic of the ongoing genocide of the Yazidi by ISIS, rape is being used as a means to carry out this genocidal campaign because the *actus reus* of genocide can be satisfied through rape.

## BIBLIOGRAPHY

### Journal Articles and Books

- Ahram, A. *Sexual Violence and the Making of ISIS*. *Survival*, Vol. 57, n°. 3, pp. 57-78 (2015)
- Allen, B. *Rape Warfare: the Hidden Genocide in Bosnia-Herzegovina and Croatia*. University of Minnesota Press (ed.) (1996).
- Askin, K. *Prosecuting wartime rape and other gender-related crimes under International Law: Extraordinary advances, enduring obstacles*. *Berkeley Journal of International Law*, Vol. 21, Issue 2, Article 4 (2003).
- Askin, K. *A Decade of the Development of Gender Crimes in International Courts and Tribunals: 1993 to 2003*, 3 *Human Rights Brief* 16 (2004).
- Boon, K. *Rape and Forced Pregnancy Under the ICC Statute: Human Dignity, Autonomy and Consent*, 32 *Columbia Human Rights Law Review*, pp. 645-46 (2001).
- Buhhandler-Raphael, M. *Sexual Abuse of Power*. *University of Florida Journal of Law and Public Policy*, Vol 21, pp. 78-146 (2010).
- Buhhandler-Raphael, M. *The Failure of Consent: Re-Conceptualizing Rape as Sexual Abuse of Power*. *Michigan Journal of Gender and Law*, Vol. 18, Issue 1, pp. 147-228 (2011).
- Buss, D. *Rethinking 'Rape as a Weapon of War'* *Feminist Legal Studies*, Vol. 15, p. 145.163 (2009).
- Campanaro, J. *Note, Women, War, and International Law: The Historical Treatment of Gender-Based War Crimes*. 89 *George Washington Law Journal* 2557 (2000).
- Charlesworth, H; Chinkin, C. and Wright, S. *Feminist approaches to International Law*. *The American Journal of International Law*, Vol. 85, No. 4, 1991, pp. 613-645
- Charney, J. *Universal International Law*. 87 *American Journal of International Law* 529 (1993).
- Chertoff, E. *Prosecuting Gender-Based Persecution: The Islamic State at the ICC*. *The Yale Law Journal* n° 126, pp.1052-1116 (2017).
- Chinkin, C. *Rape and Sexual Abuse of Women in International Law*. *Symposium: The Yugoslav Crisis, new International issues*. 5 *European Journal of International Law*, pp. 326-341 (1994)
- Clayton, A. *Recent Developments in the case of the Prosecutor v. Jean-Pierre Bemba Gombo: Cementing Sexual Violence and Command Responsibility within International*

- Criminal Law*. Tulane Journal of International & Comparative Law, Vo. 25, pp. 403-424 (2017).
- Copelon, R. *Gendered War Crimes: Reconceptualizing Rape in Time of War*, in “Women’s Rights, Human Rights: International Feminist Perspectives” (Julie Peters and Andrea Wolper eds.) pp. 192-214 (1995).
  - Copelon, R. *Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law*. McGill Law Journal, Vol. 46, pp. 217-240 (2000).
  - Crenshaw, K. *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*. Stanford Law Review, Vol. 43, n° 6, pp. 1241-1299 (1991).
  - de Brouwer, A. *Supranational Criminal Prosecution of Sexual Violence: the ICC and the practice of the ICTY and the ICTR* (2005)
  - Elewa Badar, M. *Drawing the boundaries of mens rea in the jurisprudence of the ICTY*. 5 International Criminal Law Review, pp. 203–246 (2005).
  - Ellis, M. *Breaking the Silence: Rape as an International Crime*. Case Western Reserve Journal of International Law, Vol. 38, pp. 225-247 (2007).
  - Engle, K. *Feminism and its (Dis)Contents. Criminalizing Wartime Rape in Bosnia-Herzegovina*. The American Journal of International Law, Vol. 99, pp. 779-816 (2005).
  - Fitzgerald, K. *Problems of Prosecution and Adjudication of Rape and Other Sexual Assaults under International Law*. 8 European Journal of International Law, pp. 638-663 (1997).
  - Haffajee, R. *Prosecuting Crimes of Rape and Sexual Violence at the ICTR: The Application of Joint Criminal Enterprise Theory*. Harvard Journal of Law & Gender, Vol. 29, pp. 202-221 (2006).
  - Halley, J. *Rape in Berlin: Reconsidering the Criminalization of Rape in the International Law of Armed Conflict*. Melbourne Journal of International Law, Vol. 9, pp. 78-124 (2008).
  - Jelínková, E. *The strategic use of sexual violence as a weapon of war in genocide and in ethnic/religious conflicts and a case study on the use of sexual slavery by ISIL within the context of the most recent Yazidi genocide in Iraq* (2018) Utrecht University Repository (Master Thesis), pp. 34-41.
  - Kalosieh, A. *Consent to Genocide: The ICTY's Improper Use of the Consent Paradigm to Prosecute Genocidal Rape in Foca*, 24 Women's Rights Law Rep. 121 (2003)
  - Kinports, K. *Rape and Force: The Forgotten Mens Rea*, 4 Buffalo Criminal Law Review 759 (2001).

- Kirk McDonald, G. *Crimes of Sexual Violence: The Experience of the International Criminal Tribunal*. 39 Columbia Journal of Transnational Law, Issue 1 (2000).
- La Haye, E. *Article 8(2)(b)(xxii)—Rape, Sexual Slavery, Enforced Prostitution, Forced Pregnancy, Enforced Sterilization, Sexual Violence*, in “The International Criminal Court: Element of Crimes and Rules of Procedure and Evidence” (Roy S. Lee ed.) (2001).
- MacKinnon, C. ‘*Rape, Genocide, and Women’s Human Rights*, in “Violence Against Women: Philosophical Perspectives”, ed. Stanley G. French, Wanda Teays, and Laura M. Purdy, 43–54 (Ithaca, NY: Cornell University Press, 1994).
- MacKinnon, C. *Unequal Sex: A Sex Equality Approach to Sexual Assault*, in “Women’s Lives, Men’s Laws” Belknap Press (ed.) (2005).
- MacKinnon, C. *Genocide’s Sexuality*, in “Are Women Human? And other International dialogues” Belknap Press (ed.) (2005).
- MacKinnon, C. *Defining Rape Internationally: A Comment on Akayesu*. 44 Columbia Journal of Transnational Law, pp. 940-958 (2006).
- MacKinnon, C. *Intersectionality as Method: A Note*. Signs, Vol. 38, No. 4, “Intersectionality: Theorizing Power, Empowering Theory” pp. 1019-1030 (Summer 2013).
- Maier, N. *The Crime of Rape under the Rome Statute of the ICC: with a special emphasis on the jurisprudence of the ad hoc Criminal Tribunals*. Amsterdam Law Forum, Vol. 3, Issue 2, pp. 146-159 (2011).
- Maravilla, C. *Rape as a War Crime: The Implications of the International Criminal Tribunal for the Former Yugoslavia’s Decision in Prosecutor v. Kunarac, Kovac, & Vukovic* in “International Humanitarian Law”, 13 Florida Journal of International Law 321 (2001).
- Meron, T. *Rape as a Crime Under International Humanitarian Law*. American Journal of International Law, Vol. 87, n° 3, pp. 424-428 (1993).
- Mettraux, G. *International Crimes and the ad hoc Tribunals*. Oxford University Press (ed.) (2005).
- Mitchell, D. *The Prohibition of Rape in International Humanitarian Law as a norm of Jus Cogens: Clarifying the Doctrine*. Duke Journal of Comparative & International Law, Vol 15, p. 219-257 (2005).
- Murad, N. *Yo seré la última: Historia de mi cautiverio y mi lucha contra el Estado Islámico*. Penguin Books (ed.) (2017)

- Naffine, Ngaire. *Windows on the Legal Mind: The Evocation of Rape in Legal Writings*. 18 Melbourne University Law Review, pp. 741-767 (1992).
- O’Byrne, K. *Beyond Consent: Conceptualising Sexual Assault in International Criminal Law*. 11 International Criminal Law Review, pp. 495–514 (2011)
- Oosterveld, V. *The making of a gender-sensitive International Criminal Court*. International Law Forum du Droit International, pp. 38-41 (n.d.).
- Oosterveld, V. *The Special Court for Sierra Leone's Consideration of Gender-Based Violence: Contributing to Transitional Justice?* Human Rights Review, Vol. 10, n° 1 (2009)
- Oosterveld, V. *Atrocity Crimes Litigation Year-in Review: A Gender Perspective*. Journal of International Human Rights of the Northwestern University School of Law, Vol. 9, Issue 3, pp. 325-355 (2010)
- Reid-Cunningham, A.R (2008) *Rape as a Weapon of Genocide*. Genocide Studies and Prevention: An International Journal, Vol. 3: Issue 3, Article 4. Available at: <http://scholarcommons.usf.edu/gsp/vol3/iss3/>
- Rogers, S. *Sexual Violence or Rape as a Constituent Act of Genocide: Lessons from the ad hoc Tribunals and a Prescription for the International Criminal Court*. George Washington International Law Review, Vol. 48, Issue 2, pp. 265-314 (2016).
- Russell-Brown, S. *Rape as an Act of Genocide*, 21 Berkeley Journal of International Law, pp. 350-373 (2003).
- Scholz, S. *War Rape’s Challenge to Just War Theory*, in “Intervention, terrorism and torture: contemporary challenges to just war theory” S. P. Lee (Eds.), 4th Edition, Springer, 2007, pp. 273 – 288.
- Schomburg, W; Paterson, I. *Genuine Consent to Sexual Violence under International Criminal Law*, 101 American Journal of International Law, pp. 121-140 (2007).
- Spees, P. *Women’s advocacy in the creation of the International Criminal Court: Changing the landscapes of justice and power*. Journal of Women in Culture and Society. Vol. 28, no. 4, pp. 1234-1254 (2003).
- Stephens, B. *Humanitarian Law and Gender Violence: An End to Centuries of Neglect?* 3 Hofstra L. & Pol’y Symposium, pp. 87-110 (1999).
- Sverdlov, D. *Rape in War: Prosecuting the Islamic State of Iraq and the Levant and Boko Haram for Sexual Violence Against Women*. Cornell International Law Journal, Vol. 50, n° 2, Article 6, pp.333-358 (2017).

- Tadros, V. *Rape Without Consent*. Oxford Journal of Legal Studies, Vol. 26, n° 3, pp. 515–543 (2006).
- Weiner, P. *The Evolving Jurisprudence of the Crime of Rape in International Criminal Law* (2013). Boston College Law Review. Volume 54, Issue 3, Article 14, pp. 1207-1237
- Werle, G; Jessberger, F. *Principles of International Criminal Law*. Oxford University Press (ed.) (2005)
- Yüksel, S; Saner, S, Devrim, A; Oglagu, Z; Bülbül, I. *Genocidal sexual assault on women and the role of culture in the rehabilitation process: Experiences from working with Yazidi women in Turkey*. Journal on Rehabilitation of Torture Victims and Prevention of Torture, Vol. 28, n° 3 (2018).

### **On-line articles**

- Ahmado, N. (2018) *Yazidis Still Suffering Years After IS Genocide*. Relief Web, April 9, 2018. <https://reliefweb.int/report/iraq/yazidis-still-suffering-years-after-genocide>
- AL-ARABIYA NEWS. *ISIS Sex Slaves Guide Mars International Human Rights Day* (Dec. 10, 2014), <http://english.alarabiya.net/en/perspective/features/2014/12/10/ISIS-sex-slaves-guide-mars-international-Human-Rights-Day.html>
- Alter, C. *Yezidi Woman Testifies an American ISIS Fighter Held Her as a Sex Slave*, TIME (Oct. 7, 2015, 3:50 PM).
- Ba, O. *What Jean-Pierre Bemba's acquittal by the ICC means. The ICC decision to overturn Bemba's conviction will have major consequences for both the DRC and the court*. 13<sup>th</sup> June, 2018. Available in: <https://www.aljazeera.com/indepth/opinion/jean-pierre-bemba-acquittal-icc-means-180612121012078.html>
- Bellinger III, J. *Make ISIS' Leaders Face Justice*, N.Y. TIMES (Apr. 2, 2015), <http://www.nytimes.com/2015/04/03/opinion/make-isis-leaders-face-justice.html>
- Browne, R. *Escaped ISIS Sex Slave Tells Congress of Horrors*, CNN (June 21, 2016, 4:40 PM), <http://www.cnn.com/2016/06/21/politics/escaped-yazidi-slave-isis-usfight>.
- Business Insider. *ISIS Tightens Grip on Scores of Female Sex Slaves* (July 5, 2016, 4:06 PM), <http://www.businessinsider.com/isis-is-tightening-its-grip-on-yazidi-women-andchildren-forced-to-become-sex-slaves-2016-7>
- Callimachi, R. (2015) *Enslaving Young Girls, The Islamic State Builds a Vast System of Rape*, N.Y. TIMES, Aug. 14, 2015.
- Cetorelli V, Sasson I, Shabila N, Burnham G. (2017). *Mortality and kidnapping estimates for the Yazidi population in the area of Mount Sinjar, Iraq, in August 2014: A*

- retrospective household survey*. PLOS Medicine, vol. 14, n°5. <https://doi.org/10.1371/journal.pmed.1002297>
- Chan, S; Sengupta, S. *Woman Who Escaped Islamic State Captivity Wins Human Rights Prize*, N.Y. TIMES, Oct. 11, 2016.
  - Cooper, H; Shear, M. *Militants' Siege on Mountain in Iraq Is Over, Pentagon Says*, N.Y. TIMES (Aug. 13, 2014), <http://www.nytimes.com/2014/08/14/world/middleeast/iraq-yazidi-refugees.html>
  - Ferguson, A. *Persecuted Yazidis Again Caught in Larger Struggle*, N.Y. TIMES (Aug. 11, 2014), <http://www.nytimes.com/2014/08/12/world/middleeast/persecuted-yazidis-again-caught-in-larger-struggle.html>
  - Goodstein, L. (2016) *Muslim Leaders Wage Theological Battle, Stoking ISIL' Anger*. New York Times, May 8, 2016. <https://www.nytimes.com/2016/05/09/us/ISIL-threatens-muslimpreachers-who-are-waging-theological-battle-online.html>
  - Green, E. *The Yazidis, A People Who Fled*, The Atlantic (Aug. 13, 2014), <http://www.theatlantic.com/intemationa/archive/2014/08/the-yazidis-a-peoplewhofled/375964>
  - Henne, P; Hackett, C. *Iraqi Yazidis: Hazy Population Numbers and a History of Persecution*, Pew Research Center (Aug. 12, 2014), <http://www.pewresearch.org/fact-tank/2014/08/12/iraqi-yazidis-hazy-population-numbers-and-a-history-of-persecution>
  - Kizilhan Jİ, Bor, G. (2018). *Êzidî Kadınlar Çok Güçlü; Bunun Sebebi Kuşaklar Arası Travma* (Yazidis women are powerful: Because of transgenerational traumas. Bianet. <https://bianet.org/bianet/toplumsalciinsiyet/199681-prof-kizilhan-ezidi-kadinlar-cokguclu-bunun-sebebi-kusaklar-arasi-travma>
  - Landay, J et al. *Exclusive: Islamic State Ruling Aims To Settle Who Can Have Sex with Female Slaves*, REUTERS (Dec. 29, 2015, 7:32 PM), <http://www.reuters.com/article/us-usa-islamic-state-sexslaves-exclusive-idUSKBN0UC0AO20151230>
  - Malm, S. *"The Saddest Thing I Remember Was This Little Girl, 12 Years Old. They Raped Her Without Mercy": Dressed in Traditional Wedding Gowns, Yazidi Sex Slaves Relive Their Torture by ISIS*, DAILY MAIL (Jan. 18, 2016, 2:04 PM).
  - McCoy, T. *How Isis Leader Abu Bakr al-Baghdadi Became the World's Most Powerful Jihadist Leader*, Washington Post (June 11, 2014), [https://www.washingtonpost.com/news/morning-mix/wp/2014/06/11/how-isis-leader-abu-bakr-al-baghdadi-became-the-worlds-most-powerful-jihadi-leader/?utm\\_term=.962658f23264](https://www.washingtonpost.com/news/morning-mix/wp/2014/06/11/how-isis-leader-abu-bakr-al-baghdadi-became-the-worlds-most-powerful-jihadi-leader/?utm_term=.962658f23264)

- MEMRI JIHAD & TERRORISM THREAT MONITOR “*Questions and Answers on Taking Captives and Slaves,*” attributed to the Research and Fatwa Department. *Islamic State (ISIS) Releases Pamphlet on Female Slaves*, (Dec. 4, 2014), <http://www.memrijttm.org/islamic-state-isis-releases-pamphlet-on-female-slaves.html>
- Morris, L. *ISIS Brings Back Slavery: Yazidi Girls Sold to ISIS Fighters as Concubines for \$1,000*, Independent (UK) 13 October 2014, <http://www.independent.co.uk/news/world/middle-east/isis-brings-back-slavery-yazidi-girls-sold-to-isis-fighters-as-concubines-for-1000-9792056.html>.
- Power, S. *The real meaning of genocide*, Boston Globe, Sept. 14, 1998.
- Revkin, M. *ISIS’ Social Contract: What the Islamic State Offers Civilians*, Foreign Affairs (Jan. 10, 2016), <http://www.foreignaffairs.com/articles/syria/2016-01-10/isis-social-contract>
- Spencer, R. *Thousands of Yazidi Women Sold as Sex Slaves "For Theological Reasons", Says ISIL*, Telegraph (Oct. 13, 2013, 1:13 PM), <http://www.telegraph.co.uk/news/worldnews/islamic-state/11158797/Thousands-of-Yazidi-women-sold-as-sex-slaves-for-theological-reasons-says-Isil.html>
- Viseur Sellers, P. *The Prosecution of Sexual Violence in conflict: The Importance of Human Rights as Means of Interpretation*. Office of the High Commissioner of Human Rights of United Nations Blog. Available in: <https://www.un.org/ruleoflaw/blog/document/the-prosecution-of-sexual-violence-in-conflict-the-importance-of-human-rights-as-means-of-interpretation/>
- Wakabi, W. *Questions and Answers with Marie-Edith Douzima-Lawson, Lawyer for victims in the Bemba Trial*. 24<sup>th</sup> June, 2011. Available in: <https://www.ijmonitor.org/2011/06/qa-with-marie-edith-douzima-lawson-lawyer-for-victims-in-the-bemba-trial/>
- Withnall, A. *ISIS Releases ‘Abhorrent’ Sex Slaves Pamphlet with 27 Tips for Militants on Taking, Punishing and Raping Female Captives*, Independent (UK) (Dec. 10, 2014), <http://www.independent.co.uk/news/world/middle-east/isis-releases-abhorrent-sex-slaves-pamphlet-with-27-tips-for-militants-on-taking-punishing-and-9915913.html>
- Wright, R. (2017) *Face to Face with the ghost of ISIS*. The New Yorker (March 24, 2017) <https://www.newyorker.com/news/news-desk/face-to-face-with-the-ghost-of-isis>
- YAZDA (2017) *An uncertain future for Yazidis: a report marking three years of an ongoing genocide*. September, 2017. <https://www.yazda.org/assets/uploads/report/y1152034125784.pdf>

## **Legal documents**

- *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984, entry into force 26 June 1987, in accordance with article 27 (1).
- *Convention on the Prevention and Punishment of the Crime of Genocide*. Approved and proposed for signature and ratification or accession by General Assembly resolution 260 A (III) of 9 December 1948. Entry into force: 12 January 1951, in accordance with article XIII
- *Elements of Crimes* of the Rome Statute of the International Criminal Court. Published by the International Criminal Court ISBN No. 92-9227-232-2 ICC-PIDS-LT-03-002/11\_Eng.
- *Rome Statute of the International Criminal Court*. Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by process-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002.
- Statute of the International Tribunal for Rwanda, as amended by the Security Council acting under Chapter VII of the Charter of the United Nations, the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighboring States, between 1 January 1994 and 31 December 1994.
- Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, September 2009. Available at: [http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_sept09\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf)

## **Jurisprudence**

- *Prosecutor v. Jean Paul Akayesu*. ICTR-96-4-T, 2 September 1998.
- *Prosecutor v. Furundizja*. IT-95-17/1-T, 10 December 1998.
- *Prosecutor v Kayishema and Ruzindana* (Case No. ICTR-95-1-T), 21 May 1999.
- *Prosecutor v. Kunarac, Prosecutor's Pre-Trial Brief*, (No. IT-96-23-PT), Dec. 9, 1999.
- *Prosecutor v Athanase Seromba*, (Case No. ICTR-2001-66-I).
- *Prosecutor v. Radislav Krstic* (Case No. IT-98-33-T), 2001.

- *Prosecutor v. Goran Jelisić*, (Case No. IT-95-10-A) 5 July 2001.
- *Prosecutor v. Kovac, Kunarac and Vucovik*. (Trial Judgment): IT-96-23-T& IT-96-23/1-T, 22 February 2001; (Appeals Judgment): IT-96-23& IT-96-23/1-A, 12 June, 2002.
- *Prosecutor v. Niyitegeka*, (No. ICTR-96-14-T), 16 May 2003
- *Prosecutor v. Gacumbitsi, Appellant's Brief*, (No. ICTR-2001-64-A), Sept. 28, 2004.
- *Prosecutor v. Sylvestre Gacumbitsi*. (ICTR-2001-64-T), 17 June 2004.
- *Prosecutor v. Radoslav Brđanin* (Case No. IT-99-36-T), 1 September 2004.
- *Prosecutor v. Seromba*, (Case No. ICTR-2001-66-I), 13 December 2006.
- *Prosecutor v. Jean Pierre Bemba Gombo*. (ICC-01/05-01/08), 21 March 2016.

## Reports

- Amnesty International Report. (2014). *Escape from Hell: Torture and Sexual Slavery in Islamic State Captivity in Iraq*.
- Counter Extremism Project Report: *ISIS Persecution of Religions*. May 2017.
- EUROJUST, Report by the Genocide Network. *The prosecution at national level of sexual and gender-based violence (SGBV) committed by the Islamic State in Iraq and the Levant (ISIL)*. The Hague, July 2017.
- Kikoler, N. *Our Generation is Gone: The Islamic State's Targeting of Iraqi minorities in Ninewa* U.S. Holocaust Memorial Museum. <https://www.ushmm.org/m/pdfs/Iraq-BearingWitness-Report-111215.pdf>
- Human Rights Council, Thirty-second session; Agenda item 4 (15 June, 2016). The Commission of Inquiry Report. *“They came to destroy”: ISIS Crimes Against the Yazidis*. A/HRC/32/CRP.2
- McDougall, G. *Contemporary Forms of Slavery: Systematic rape, sexual slavery and slavery-like practices during armed conflict*. Report for the Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1998/13 (1998).
- Office of the United Nations High Commissioner for Human Rights. United Nations Assistance Mission for Iraq – Human Rights Office (August 2016). *A Call for Accountability and Protection: Yazidi Survivors of Atrocities Committed by ISIL*.
- United Nations Assistance Mission for Iraq Report. *“Human Rights, Every Day, for all Iraqis” Promotion and Protection of rights of victims of sexual violence captured by ISIL/or in areas controlled by ISIL in Iraq*. (22 Aug. 2017)

- United Nations Assistance Mission for Iraq, Human Rights Office, *Report on the Protection of Civilians in Armed Conflict* (6 July–10 September 2014) [http://www.ohchr.org/Documents/Countries/IQ/UNAMI\\_OHCHR\\_POC\\_Report\\_FINAL\\_6July\\_10September2014.pdf](http://www.ohchr.org/Documents/Countries/IQ/UNAMI_OHCHR_POC_Report_FINAL_6July_10September2014.pdf)
- United Nations Division for the Advancement of Women, Department of Economic and Social Affairs: Issue Women 2000. *Sexual Violence and Armed Conflict: United Nations Response*.
- Women's Caucus for Gender Justice in the International Criminal Court. *Recommendations and Commentary for December 1997 PrepCom on the Establishment of an International Criminal Court United Nations Headquarters* (1–12 December 1997)