



Rape as Cultural Genocide: The Case of the Yazidi Women

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Abstract: Rifacendosi al caso studio delle violenze subite dalle donne Yazide in Iraq e Siria, l'obiettivo di questo post è quello di intraprendere un'analisi del reato di stupro, perpetrato in contesti di guerra, nel quadro dell'articolo II della Convenzione sul genocidio del 1948, sostenendo una più corretta considerazione del crimine come crimine di genocidio culturale.

Sexual violence in war contexts is not a new phenomenon but it is one of history's greatest silences. Women are identified as primary targets due to the central roles they play within the family and the community on which pervasive repercussions reverberate. As a matter of fact, the crime leaves the survivors with emotional trauma and psychological damage, physical injuries, unwanted pregnancies, social stigma, and sexually transmittable diseases which lead to consequences that will affect generations. The available data report alarming levels of rape during war: between 100,000 and 250,000 women and girls during the 1994 genocide in Rwanda, over 60,000 in Sierra Leone's civil war, more than 60,000 in the Bosnian and Herzegovinian conflict, and around 200,000 in the Democratic Republic of the Congo since 1996 (data available [here](#)). Rape utilized as a form of cultural control and ethnic dilution has left and continues to leave an indelible mark on targeted groups determining in many cases their disappearance. In this regard, the feeble response of international humanitarian law operates as an aggravated factor. The Geneva Conventions, aimed at regulating the conduct of armed conflicts and limiting their effects, provided a generic and anachronistic definition of rape, reduced to a violation of honor (Article 27 of the IV Geneva Convention). Subsequent efforts materialized in a series of UN Resolutions. UNSC [Resolution 1352](#), enacted in 2000 represented the first attempt to address the disproportionate impact of armed conflict on women while focusing on their role in conflict situations and peacebuilding processes. While UNSC [Resolution 1820](#) of 2008 acknowledged sexual violence during conflict as a threat to international peace and security. Despite that, still limited attention was devoted to the far-reaching consequences that this crime inevitably involves. Furthermore, the legal efforts collide with the persistent misconception of sexual violence considered an inevitable reality of conflict, and this perpetuates impunity. This is revisable in more recent times in other campaigns of sexual violence such as the one perpetrated by ISIS against Yazidi women, a cultural genocide that still waits for recognition and justice.

The Evolution of the Definition of Rape

At the international legal level, there is no universally accepted definition of rape. The *actus reus* and the *mens rea* of this crime developed overtime through the jurisprudence of the International Military Tribunals. The first to deal with the absence of a proper definition was the International Criminal Tribunal for Rwanda (ICTR) in the *Akayesu judgement* ([The Prosecutor v. Jean-Paul Akayesu](#)). By drawing initially from the national courts, the ICTR took then distance from definitions provided by national legal systems which were focused on the element of consent and envisioned rape as a mere “mechanical description of objects and body parts”, and it provided its own definition which envisioned rape as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive”. The Court decided to frame the definition of rape in terms of force and coercion instead of including the debated element of consent which, according to the Court, drove the focus on the behavior of the victim instead on that of the perpetrator. The same approach with the focus on coercion, described as the ensemble of “threats, intimidation, extortion and other forms of duress”, was adopted by the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Furundizja judgement* ([Prosecutor v. Anto Furundžija](#)). The Courts found no rationale in requiring proving the non-consent, especially in contexts of war, and considered it an insinuation of the complicity of the victim. Despite that, the Chambers in the *Kovac, Kunarac and Vokoic judgment* diverged ([Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic](#)). The element of non-consent was inappropriately reincluded without considering the war crime context in which proving the consent should be considered legally irrelevant. This testifies the serious consequences of the absence of a legal definition.

Despite that, the progression of jurisprudence in the *Akayesu* and *Furundizja* judgements, where rape was envisioned as a war tool and a means to genocide, contributed to create the legal framework for a more concrete understanding of what constitutes rape in particular in the context of armed conflicts. This has significantly shaped the definition of rape enshrined in the Elements of Crimes (EoC), the auxiliary instrument of the International Criminal Court (ICC) where at [article 7\(1\)\(g\)-1 and article 8\(2\)\(b\)\(xxii\)-1](#) it was underlined how proving the victim’s lack of consent proves to be useless “if the prosecution proves the elements regarding force, coercion, or taking advantage of coercive circumstances”. Rape was included under [articles 7 and 8 of the Rome Statute](#) of the ICC that considers it a war crime and a crime against humanity. Despite not being included explicitly under [Article 6](#) of the Statute, in the Elements of Crimes it is considered as a tool of genocide for causing physical and mental harm (see as reference [Article 6\(b\) of EoC](#)). However, it can also be considered as fulfilling the criteria set out in [Article II](#) of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Notably, it can be made to fall under provisions (b), (c), and (d) which are the historical contested provisions of Article II since they do not include explicitly the physical element, intended as the killing of people, as an essential prerequisite. Considering rape as genocide means acknowledging the entire context in which the

crime is perpetrated and the fact that the consequences extend beyond the individual to the entire targeted group and endorsing the thesis that also the social and cultural annihilation of a group can be considered genocide.

Rape of Yazidi women as cultural genocide

On August 3, 2014, following the conquest of Mosul, Iraq's second-largest city, ISIS extended its control into Iraqi territories. The report from the UN Human Rights Council (see as reference UN Human Rights Council, *They Came to Destroy: ISIS Crimes Against the Yazidis*, 2016, A/HRC/32/CRP.2 available [here](#)) meticulously documented evidence of a genocidal campaign orchestrated by ISIS militants. A grim facet of this genocidal campaign involved the unlawful detention of women in centers where they were systematically subjected to sexual assaults by multiple militants. In the context of the material element of genocide, it is discerned that at least four acts specified in the *actus reus* of the crime can be achieved through rape. Notably, this post aims to establish the alignment of the crime of rape with the requirements outlined in provisions (b), (c), and (d).

As a matter of fact, the criminal act extended beyond the direct killing of group members. Rape was not intended to provoke the death of women directly. In the majority of the cases, it was meant to produce life-threatening injuries and genital mutilations designed not only to induce pain and suffering but also permanent physical and psychological damage. This impairment hindered their ability to engage in normative sexual and future childbearing experiences, further impaired by the fear of transmitting sexually transmitted diseases to the rest of the group. Furthermore, rape resulted in long-lasting psychological trauma, leading victims to associate all men with their tormentors and to perceive sexuality as a threatening experience. Many survivors reported to suffer from suicidal thoughts, viewing death as the only way to escape from the emotional pain they endure. Post-Traumatic Stress Disorder (PTSD) is a common consequence among victims, obstructing the establishment of relationships within the community. In some instances, the desire to forget traumatic events prompted individuals to flee, resulting in the migration and dislocation of women and children, contributing to the dismantlement of the social fabrics of the community and causing a cultural shock. For the consequences that rape produced, it can be categorized under provision (b) since it caused serious bodily and mental harm to the members of the group; provision (c) since it inflicted conditions of life calculated to bring about the physical destruction of the group in whole or in part; and provision (d) since it was used as a measure intended to prevent births within the group. Both the ICTY in the *Kristic* case and the ICTR in the *Akayesu* case asserted that rape amount to genocide when it causes mental impairment, emphasizing that it does not need to be "permanent and irremediable" to be categorized as such.

Another element that must be considered is that the effects of rape can be exacerbated by social and cultural conditions that make them particularly acute and enduring, as also underlined by the ICTY in the *Mucic et al. judgement (Prosecutor v. Zdravko Muci also known as "Pavo" et. al.)*. Within the closed ethno-religious group of the Yazidis, exogamy is absolutely prohibited. Sexual intercourse with a

non-Yazidi or being subjected to rape leads to the exclusion and isolation of women, deemed dishonorable for the community that consider them "untouchable" and "socially infertile" ([Jaffal, 2020](#)) Furthermore, children resulting from rapes are considered adversaries to the community's culture. The practice of "bad memory babies" ([Reid-Cunningham, 2008](#)), observed in other genocidal contexts such as the Rwanda genocide (1994) and the Bosnia-Herzegovina genocide (1991-1995), further substantiates the demographic impact of rape, contributing to a decline in birth rates and population growth. Undoubtedly, these last elements make the crime of rape to fall under provisions (c) and (d) of Article II.

Conclusion

The rape of Yazidi women perpetrated by ISIS militants comes undoubtedly under the crime of genocide, since also the *mens rea* has been ascertained. The atrocities were committed in a coercive environment and with deep knowledge concerning the cultural rules of the targeted group, as testified by the declarations written in the Dabiq, the online magazine of ISIS group, which serves as a testimony of the admission of the intent (Report [Independent International Commission of Inquiry on the Syrian Arab Republic](#)). This fulfills the *dolus specialis* requirement, an essential element to determine the occurrence of genocide. Despite in the majority of the cases rapes did not result in the death of the victims, through the widespread and systematic reiteration of this act, ISIS has progressively destroyed the cultural foundations and the social fabrics of the community, preventing this from reproducing itself. This would more properly be classified as cultural genocide. However, whether this crime, which would deserve a separate study, will be legally conceptualized or not in the future and whether the crime of rape will be considered as part of it, it is difficult to determine. To date, the above-mentioned jurisprudence creates at least a legal precedent that testifies the possibility of criminalizing the crime through a broad interpretation of the actus reus of Article II. However, at the moment of writing this remains at discretion of the Courts, and it cannot still be considered a norm of customary law since there is not consistent state practice and opinion juris. The auspice is to reach a legal conceptualization of the crime of cultural genocide that would include the crime of rape, advancing justice with an increasing gender-sensitive approach ([De Vido, 2018](#)). The first step, as underlined in the *Akayesu* Trial judgement, would be that of acknowledging the fundamental role of women in the preservation of culture and recognizing rape as a crime that leads to the "destruction of the spirit, of the will, and of the life" of a community.

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