

Destroying the Yazidis: How Killing & Sexual Slavery Could Anchor ISIS Genocide Charges

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By: Diana Hall

I. **INTRODUCTION**

While international action and anger have erupted amid continued violent abuses of the Rohingya and Uyghurs, the atrocities committed seven years ago against a particular community of Yazidis have attracted quiet negligence. Justice – holding the perpetrators to account – has been elusive for the terrorized Yazidis, a religious minority nestled into the northwest corner of Iraq. In response to this

silence, this paper argues that ISIS killings of men and sexual slavery of Yazidi women have great potential to satisfy two acts constituting genocide under the *Rome Statute*: killing, and causing serious bodily or mental harm. The acts did not occur in a vacuum: ISIS was on track for a violently successful summer when the group stormed into Sinjar region in August 2014. ISIS controlled and "had made multiple small-scale attacks on Sinjar, which lay between Mosul, their de facto capital in Iraq, and Raqqa, their Syrian 'capital,'" (Cetorelli et al, page 7). The Yazidis of Sinjar were in the way, geographically and ideologically.

II. GENOCIDE: LEGAL ANALYSIS

1. The Yazidis as protected religious group

1.1 The law: protected groups include religious groups

A genocide charge under the *Rome Statute* requires the Prosecutor prove that perpetrators had targeted a national, racial, ethnical, or religious group. The charge directs international condemnation beyond the targeting an individual's identity (Musema, para 165). Accordingly, the Prosecutor must establish that victims belonged to one of these groups and, if applicable, that the perpetrators perceived such membership (Muhimana, para 500). Under the ethnical category of protected groups, Carola Lingaas explains that "dominant groups may also assign ethnic labels pejoratively to other groups with the aim of denying them participation in the system," (Lingaas, page 7). For instance, the ICTY's *Krstic* Trial Chamber found Bosnian Muslims had historically been considered a "nation" (Krstic, para 559). These are examples of subjective beliefs that a targeted group features a protected national, racial, ethnical or religious characteristic. To ignore these perceptions would create a loophole for perpetrators who target groups based on a mistaken or falsified protected characteristic. The ICTY has accordingly disregarded a strictly objective approach to this analysis (Krstic, para 557). Additionally, this group identity must be based on a positive characteristic (Al Bashir, para 135). A "religious group is one whose members share the same religion, denomination or mode of worship," (Akayesu, para 515).

1.2 Application: Yazidis as a religious group

Yazidis almost certainly constitute a religious group because the group's pious character is positively identifiable. The religious beliefs captured by Yazidism attracted ISIS's ire and form the basis of Yazidi self-identity. Their longstanding religion – dating as far back as the 11th century – is derived from Zoroastrianism, Christianity and Islam, and is "distinctly non-Abrahamic," (The Guardian, 2014) Yazidis believe in a god, though their monotheism is unacceptably intertwined with a belief in angels (especially the Peacock Angel, whose similarity to fallen angels such as Lucifer earned them the label of "devil worshippers" in ISIS's view) (Vale, page 515).They also practise religious customs such as visiting the holy Lalish temple, and hold a belief system that covers morals and justice (Ilhan Kizilhan 333-334). Further, "teachings are passed down orally by sheikhs" rather than strictly by holy texts (Vale, page 515).

Significantly, ISIS appears to have recognized the Yazidis as a religious group. ISIS's magazine *Dabiq* justified its attack on the Yazidis by pointing to what ISIS considered to be intolerable beliefs: "The Yazidis, who ISIS define as polytheists […] are seen to practice *shirk* (idolatry) and are held as a direct

threat and insult to the central principle of ISIS-interpreted Islam, an adherence to strict monotheism, or *tawheed*," (Cetorelli et al, page 8). This demonstrates ISIS's belief that the Yazidis adhered to unacceptable religious tenets that threatened its vision of Islam.

2. Killing and causing serious bodily or mental harm as underlying acts of genocide

2.1 Killing

2.1(a) The law: killing as underlying genocidal act

Killing members of a protected group can constitute an underlying crime of genocide at Article 6(a) of the *Rome Statute*. The act causing death must have been carried out "in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction," (Elements of Crimes, page 2) The *mens rea* of murder, as articulated by the ICTR in *Akayesu*, includes having the "intention to kill or inflict grievous bodily harm on the deceased having known that such bodily harm is likely to cause the victim's death, and being reckless as to whether death ensures or not," (Akayesu, para 589). Under Article 30 of the *Rome Statute*, when a person intends to kill and with knowledge does kill a person from a protected group, this satisfies the *mens rea* for the offence of killing.

2.1(b) Application: Killing Yazidi men and boys as an underlying act of genocide

ISIS's killing of Yazidi men and boys is highly likely to satisfy the underlying act of killing. This is so especially because sources depict a campaign of organized mass killings of men and older boys that likely meets the manifest pattern requirement (Elements of Crimes, page 2). For instance, the OHCHR report concluded that "ISIS fighters summarily executed hundreds of Yazidi men and boys when the victims refused to convert to Islam or were captured with weapons in their possession," (OHCHR report, at para 33). These purposeful executions occurred "at makeshift checkpoints, and on roadsides, as well as on the lower sections of the roads ascending Mount Sinjar," (OHCHR report, at para 33). The OHCHR report noted the organization Yazda later found about 30 mass grave sites in the Sinjar area. These features reflect organization rather than simply wanton violence.

2.2 Serious bodily or mental harm

2.2(a)(i) The law: Causing serious bodily or mental harm

ISIS's assault on the Yazidis of Sinjar could also constitute serious bodily or mental harm as an act of genocide. The perpetrator must intentionally produce the relevant harm (Rome Statute, Art. 30). According to the ICTY, the resulting harm need not be permanent or irremediable (Tolimir, para 738) but must cause "a grave and long-term disadvantage to a person's ability to lead a normal and […] constructive life," (Krstic, para 513). Finally, there is no need for the harm itself to threaten the destruction of the group (Karadzic, para 544).

The ICTR and ICTY offer similar guidance about identifying serious bodily harm: The ICTR Appeals Chamber in *Seromba* agreed that the "quintessential examples of serious bodily harm are torture, rape and non-fatal physical violence that causes disfigurement or serious injury to organs," (Seromba at para 46). The ICTR stated rape "obviously" satisfies the "serious" threshold. In *Seromba*, the ICTR

(citing *Kayishema*) described serious mental harm as “more than minor or temporary impairment of mental faculties,” (Seromba at para 46).

2.2(a)(ii) The law: Sexual slavery as a cause of serious harm

Tribunals are likely to recognize sexual slavery as capable of causing the requisite bodily and mental harm under Article 6(b) because it is a manifestation of the crime of enslavement. It “penalises the perpetrator’s restriction or control of the victim’s sexual autonomy,” (Ongwen, para 2750).

Although sexual slavery is not a specific, codified act of genocide, it is already recognized as a crime against humanity under Article 7(1)(g) of the *Rome Statute*. Tribunals are no strangers to its constituent elements in that context, which would be informative should a sexual slavery “charge” be brought under Article 6(b). Sexual slavery consists of the following features (in addition to the contextual factors specifically establishing this mode of enslavement as a crime against humanity):

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.

2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature. (Elements of Crimes, page 8)

This does not fully capture the nature of sexual slavery, however: in scenarios of coercion, like enslavement, tribunals have found consent to sexual violence may be deemed vitiated (Osterveld, page 639; Rule 70, Rules of Procedure and Evidence (ICC); Kunarac Appeal, paras 132-133). Further, sexual slavery as a crime against humanity encompasses a range of sexual acts: “Accordingly, they not need [*sic*] involve penetration or even physical contact,” (Ongwen, para 2716).

Crucially, the ICC Trial Chamber in *Ntaganda* noted that adjudicators may consider the following factors in identifying ownership power that defines enslavement, including sexual slavery:

> […] control of the victim’s movement, the nature of the physical environment, psychological control, measures taken to prevent or deter escape, use of force or threats of use of force or other forms of physical or mental coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality, forced labour and the victim’s vulnerability. (Ntaganda, para 952)

The General Introduction to the Elements of Crimes confirms that intent and knowledge establish the *mens rea* for sexual slavery. The ICC Trial Chamber in *Katanga* and more recently in *Bemba Gombo* summarized the Article 30-informed *mens rea* of rape (which itself is a tool of sexual slavery): the perpetrator must have intentionally “[engaged] in the conduct in order for the penetration to take place” and that “the perpetrator was aware that the act was committed by force, by the threat of force or coercion, by taking advantage of a coercive environment, or against a person incapable of giving genuine consent,” (Bemba Gombo, paras 111-112).

International criminal tribunals agree that sexual violence such a rape – as an element of sexual slavery – can cause both physical and mental injury. In its landmark proclamation on the issue in

Akayesu, the ICTR Trial Chamber found that"rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are […] one of the worst ways of inflict [*sic*] harm on the victim as he or she suffers both bodily and mental harm," (Akayesu, para 731).

2.2(b) Application: ISIS sexually enslaved Yazidi women and girls

ISIS forced many captured Yazidi women and girls to become sexual slaves (OHCHR report, para 55; El-Masri, page 1052). It would be open to a tribunal to find that the following features of ISIS actions satisfy the elements of sexual slavery:

i. ISIS fighters exercised powers of ownership over Yazidi women and girls by purchasing them for sexual pleasure, selling them on slave markets, and by heavily restricting their liberty and movements through force and threats of violence; and

ii. ISIS fighters forced victims to engage in sexual acts.

2.2(b)(i) ISIS exercised ownership powers over Yazidi women

ISIS's conduct reveals an environment of coercion, violence, on-command sexual services and forced commercial transactions: acts that are consistent with ownership powers contemplated by international criminal tribunals. ISIS's system of forced separation and gendered sexual coercion reveals a clear owner-servant relationship. At the system level, ISIS sent captured Yazidi women and girls from Sinjar to slave markets, bought or accepted slaves as gifts, or sent them to perform sexual services at rest houses (OHCHR report, paras 72 and 161). Further, the OHCHR report found Yazidi females were "deemed property of ISIS and are openly termed "sabaya" or slaves. ISIS made eighty per cent of the women and girls available to its fighters for individual purchase," (OHCHR report, para 55).

A tribunal may further find ISIS intended to treat Yazidi females as property because it created a specialized department to supervise the slave trade. It also distributed manuals for slave owners that described women as "merely property" considered sex with them "halal," (El-Masri, page 1053).

2.2(b)(ii) ISIS raped Yazidi women under their control

Rape was one sexual act through which ISIS exercised control over Yazidi women and girls. The OHCHR report found survivors suffered daily rapes and that ISIS fighters routinely used gang rape to punish those for trying to escape or resisting sex. These rapes constitute sexual slavery because they occurred while the Yazidis were trapped in an owner-servant relationship that was inherently coercive. The ICTY has accepted that circumstances of coercion and compulsion vitiate consent. Further, ISIS's publicized stance on slavery, such as in *Dabiq*, revealed that sexual slavery of a sabaya is within the power of fighters and sanctioned by religious law (Amnesty International: Escape From Hell, page 11; El-Masri, page 1053). Finally, some ISIS fighters have reported that they were following orders by raping Yazidi women, indicating they knew they were exerting force, threatening force, or taking advantage of the coercive circumstances.

2.2(c) Application: Yazidi sexual slavery via rape likely causes serious mental or bodily harm

A tribunal is likely to conclude ISIS fighters caused serious bodily and mental harm among Yazidi women and girls by sexually enslaving and raping them. Evidence may be drawn from the OHCHR report, which concluded that rapes resulted in "bleeding, cuts, and bruising," (OHCHR report, para 64).

Additionally, survivors have reported suffering from mental harms including suffering from nightmares reliving their captivity, depression and suicidal thoughts. One woman interviewed in the OHCHR report was still suffering from her physical and psychological wounds six months after she tried to resist rape by her ISIS fighter-owner. After ISIS fighters threatened to gang rape a woman if she refused sex, she reported that she "had no choice. I wanted to die," (OHCHR report, para 65).

Further evidence of lasting mental harm is articulated in a study published in *Peace and Conflict: Journal of Peace Psychology*. The study features interviews with seven Yazidi survivors of sexual violence about their mental trauma. All participants reported having "moderate to severe PTSD and depression symptoms," including "reliving the traumatic event, disruptive sleep, self-harm, and suicidal thoughts and attempts," (Msall, page 143).

Yazidi sexual survivors reported feeling a "loss of individual and collective honour through rape" because "sexual relations with non-Yazidis […] constitutes a forbidden act of religious 'conversion,'" (Vale, page 527). Additionally, the rapes destroyed any resulting child's ability to gain Yazidi membership, only attained by being born to two Yazidi parents. Such births have forced mothers to grapple with isolating stigma, as well as choosing between her community and her child (The Guardian, 2021). A tribunal could accept this mental anguish satisfies the threshold of seriousness under Article 6(b).

3. **Intent to destroy in whole or in part: Dolus specialis**

A successful genocide prosecution must establish the *dolus specialis* – that is, the special intent not only to target certain individuals specifically due to their membership in a protected group but also to destroy that group (Kambanda, para 16).

The term "destroy" in genocide jurisprudence means physical or biological destruction (Krstic, para 580). Genocidal intent means the goal of the underlying act(s) or omission(s) must be to destroy the group at least in part (Karadzic, para 555), regardless of whether actual physical or biological destruction is the result. When a tribunal infers *dolus specialis*, it must be the only reasonable inference (Karadzic, para 14).

The ICTR Trial Chamber in *Semanza* and *Akayesu*, offered additional guidance on inferring genocidal intent:

- utterances and slurs made against the prohibited group;
- the general context of other culpable acts committed against the protected group in a systematic fashion;
- whether the perpetrator(s) were the same in the cumulation of such conduct;

- the scale of atrocities committed in a certain region or their general nature; and
- the exclusion of other groups from the targeted, impugned conduct. (Akayesu, para 728; Semanza, para 313).

For instance, *Karemera and Ngirumpatse* the Trial Chamber of the ICTR considered the widespread and public context of the killings of Tutsis in its analysis. The *Karadzi?* Trial Chamber took the harmonious position that a genocidal intent inquiry "should consider whether all of the evidence, taken together, demonstrates a genocidal mental state," (Karadzic, para 550).

3.1(a) Defining 'the whole'

The *Krstic* Trial Chamber's part-versus-whole group analysis offers guidance as to how to conduct the genocidal intent inquiry. For instance, it placed high importance on the historical recognition of Bosnian Muslims as a national group (Krstic, para 559). Importantly, the ICTY found the targeted part as the Bosnian Muslims at Srebrenica (Krstic, para 560). However, they did not constitute a whole national group on its own. The ICTY's analysis clearly considered the targeted group's perception of their identity as well as the perpetrators' perception. Accordingly, the tribunal found Bosnian Muslims of Srebrenica were a geographic part of the whole national group of Bosnian Muslims. Following the ICTY's logic in the Yazidi context, a tribunal could find the "whole" group to be all Yazidis, a group defined by their religious identity and thus owed protection.

3.1(b) Defining the "part"

Several factors guide a tribunal in determining whether a portion of a targeted and protected group constitutes a "part" of such a group. That portion has to be "significant enough to have an impact on the whole," (Krstic, para 8) such as being "emblematic of the overall group, or is essential to its survival," (Krstic, para 12). The numeric size of the targeted portion and the group as a whole is the "starting point" in determining whether the targeted portion was substantial enough (Popovic, para 832). Another consideration involves the extent the targeted group is within the control of the perpetrators. Additionally, the perpetrators "must view the part of the group they wish to destroy as a distinct entity which must be eliminated as such." For example, the *Krstic* Appeals Chamber agreed that the target – the Bosnian Muslims of Srebrenica – constituted a "part" of a whole protected group, even though Bosnian Serbs focused on massacring the military-aged men. This amounted to about 40,000 people, or 2.27 per cent of the Bosnian Muslim population.

3.2 Yazidis of Sinjar region targeted as part of protected group

Following the same logic, a tribunal would likely find ISIS targeted the Yazidis of Sinjar region as part of a whole group, just as the ICTY identified Bosnian Muslims of Srebrenica as the targeted "part." The Sinjar Yazidis were a similarly geographically distinct group, and they formed a territorial and religious threat to ISIS's caliphate.

A regional characteristic identifies the Sinjar Yazidis as "part" of a protected religious group. Yazidis were concentrated in the Sinjar area, nestled between two of ISIS's recent military conquests of Mosul, Iraq, and Raqqa, Syria. The Sinjar region – through its inhabitants – was a real and symbolic threat to ISIS because it was real and symbolic home of Yazidism. As ISIS secured territorial advantage in Sinjar, the group simultaneously controlled the fate of Sinjar's Yazidi residents. This

portion of Yazidis was the specific subset of the religious group that ISIS was capable of controlling in August 2014. ISIS made dedicated, monstrous efforts to execute that control. ISIS solely and systematically attacked Sinjar region, committing a series of violent acts such as killing, coerced conversions for those who refused, forcing people from their homes and homeland, and forcing Yazidis into servitude. They did not extend this same assault to Yazidis in Iraq-Kurdistan at the time. ISIS set its sights on Sinjar, and by so doing likely rendered the area's Yazidis "part" of a protected group.

4. Application: Identifying ISIS's intent to destroy the Yazidis in part

4.1 Intent to destroy in part

It is very likely that inferences from ISIS's systematic conduct directed at the Yazidis in Sinjar would establish the *dolus specialis* among ISIS operatives. The relevant circumstantial factors include the use of slurs; the systematic nature of other culpable acts against Yazidis in Sinjar; the pattern of segregation and execution; and the public nature of ISIS's condemnation of Yazidism.

For instance, ISIS has continually referenced the Yazidis' religious beliefs in an aggressively derogatory manner: ISIS fighters call Yazidis "infidels and 'dirty kuffar'" while referring to enslaved women as "sabaya" or slaves (OHCHR report, para 104). Further, the organized and carefully gendered attack on Sinjar also reveals an intent to destroy based on a policy or plan. In particular, killing men in a patriarchal society (in which Yazidi membership comes only through birth (OHCHR report, para 14)) was likely executed to physically destroy the group's men and to biologically ruin the Yazidi capability to procreate.

5.1(a) Killing men and boys: Dolus specialis application

There is great potential in the evidence to infer genocidal intent accompanied the massacres. The ICTY has acknowledged the effect that large-scale gender- and age-selective killing would have upon the procreative capability of a "part" group. As articulated in *Krsti?*, "Bosnian Serb forces had to be aware of the catastrophic impact that the disappearance of two or three generations of men would have on the […] survival of a traditionally patriarchal society," (Krstic, para 595). The Yazidis of Sinjar are a patriarchal society who also lost generations of reproductive partners and future leaders.

5.1(b) Sexual slavery: Dolus specialis application

The systematic sexual slavery of Yazidi women and girls may also reflect an intent to destroy the Yazidis of Sinjar. The systematic nature may be established by evidence of online auctions featuring details of the female slaves' age, marital status and price, or of a registration system to collect the names and physical details of thousands of female slaves (OHCHR at para 57). Further, the particular selection of Yazidi women as sexual slaves may reflect genocidal intent. It is open to a tribunal to find ISIS intended sexual slavery to destroy the Sinjar Yazidis by physically harming its female victims through rape and inflicting lasting mental harm, both of which can affect biological and psychological reproductive capacity.

III. CONCLUSION

Evidence of systematic sexual slavery of women and girls as well as organized executions of men and boys have strong potential to anchor genocide charges against ISIS perpetrators. These acts are likely to constitute two underlying acts of genocide recognized by the *Rome Statute*: killing and causing serious bodily or mental harm to members of a group targeted for destruction. Accountability enforced by genocide prosecutions is not justice: They will not improve the lives of victimized communities nor honour their dead. This type of prosecution is, however, a meaningful cornerstone of international criminal law. It has the power to put names and faces to a violent, amorphous threat to human lives and dignity.

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About the author

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Image: Sebastian Castelier/Shutterstock.com “SINJAR, IRAQ - JANUARY, 29, 2018: Dozens of Yazidis, a religious minority persecuted by the Islamic State in 2014, are buried at the cemetery of Sardashti Camp, Sinjar, Iraq.”