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The Evolution of Cultural Genocide under International Law: The Case of the Yazidi Minority

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Abstract

La presente tesi delinea un'analisi completa del concetto di genocidio culturale nell'ambito del diritto internazionale, enfatizzando la sua natura in continua evoluzione. Attraverso l'esame della sua tassonomia giuridica e l'analisi di casi giuridici pertinenti, si sottolinea come il genocidio stia progressivamente includendo la componente culturale come possibile causa di distruzione di un gruppo specifico.

Questa tesi si è posta un duplice obiettivo. Innanzitutto, evidenziare come il concetto di genocidio culturale non sia mai stato completamente respinto come potenziale crimine, nonostante la sua esclusione da vari strumenti giuridici. Le proposte per l'integrazione della componente culturale all'interno di strumenti di diritto internazionale preesistenti o la sua definizione come un crimine autonomo sono state avanzate ripetutamente. Nonostante questi tentativi terminati con esiti negativi, è stato evidenziato come sia innegabile che si siano nel tempo verificati progressi significativi in questo ambito. In secondo luogo, e in relazione al primo obiettivo, la presente tesi si è proposta di fornire prove concrete, basate sulla giurisprudenza attuale della Corte di Giustizia Internazionale, della Corte Penale Internazionale e dei Tribunali Penali Internazionali, per sostenere che l'elemento fisico non costituisce un requisito unico ed indispensabile per qualificare determinate azioni come genocidarie. La giurisprudenza si rivela di cruciale importanza in quanto dimostra la volontà delle Corti di includere la dimensione culturale nell*'actus reus* del genocidio attraverso un'interpretazione più ampia di quest'ultimo.

Dalle origini del termine - risalenti al 1944, quando il giudice polacco Raphael Lemkin lo coniò e lo introdusse nella sua opera fondamentale "Axis Rules in the Occupied Europe" - fino alla sua presenza variabile all'interno della Convenzione sul Genocidio, questa ricerca ha tracciato l'intricata tassonomia giuridica del genocidio culturale, dall'epoca della sua concezione fino alla sua rilevanza contemporanea. Il primo capitolo analizza il fondamentale contributo di Raphael Lemkin. Egli fu il primo a proporre una definizione del termine, nel 1944, e a proporre un approccio completo e multilivello che avrebbe influenzato in modo duraturo le sue successive evoluzioni. La sua influenza può essere riscontrata nella Risoluzione 180(III) dell'Assemblea Generale delle Nazioni Unite, che ha fornito il fondamento per la bozza iniziale della Convenzione sul Genocidio. In tal senso, l'analisi dei documenti preparatori della Convenzione sul Genocidio, in particolare l'inclusione della componente culturale nella prima bozza dell'articolo II e la sua parziale esclusione dalla versione finale, riveste un'importanza cruciale. Questo studio si è proposto innanzitutto di mettere in evidenza come la parziale esclusione della

componente culturale dall'articolo II sia stata il risultato della prevalenza degli interessi degli Stati, piuttosto che una negazione della gravità degli effetti derivanti dai devastanti attacchi alla cultura avvenuti durante la Prima e Seconda guerra mondiale. In secondo luogo, si è evidenziato come il risultato finale sia caratterizzato da ambiguità, con tracce del genocidio culturale che permangono non solo in modo evidente nella disposizione (e) ma anche nelle disposizioni (b) e (c). I casi giuridici, tra cui il caso Mladic e Karadzic e il caso Jorgic, rappresentano solo due esempi che evidenziano come le Corti abbiano frequentemente utilizzato tali disposizioni al fine di includere la distruzione di elementi culturali all'interno del reato di genocidio.

L'analisi ha proseguito esaminando gli sviluppi del genocidio culturale in altri strumenti giuridici. In particolare, è stata presa in considerazione la bozza dell'articolo 7 della Dichiarazione delle Nazioni Unite sui Diritti delle Persone Appartenenti ai Popoli Indigeni (UNDRIP), spesso considerata erroneamente un fallimento nel riconoscimento e nella protezione dei diritti culturali. In questo contesto, è stato enfatizzato che il genocidio culturale e l'etnocidio non sono stati aboliti, ma sostituiti dal concetto di 'assimilazione forzata', termine utilizzato in modo intercambiabile con il genocidio culturale sin dalla concezione di Lemkin.

Il secondo capitolo rappresenta il cuore del presente lavoro. L'analisi teorica si completa con l'analisi pratica del caso studio concernente il presunto genocidio culturale inflitto dal sedicente Stato Islamico nei confronti della minoranza Yazida. Gli Yazidi, una comunità eterodossa presente in Iraq, Turchia, Siria e Iran, sono stati oggetto di brutali attacchi da parte dello Stato Islamico, che ha mirato sistematicamente sia agli individui che agli elementi culturali della comunità. L'analisi ha esaminato gli attori principali coinvolti e ha posto l'attenzione sulla religione Yazida, utilizzata come pretesto per le campagne di genocidio contro la minoranza. Nell'ambito di questa analisi, il capitolo ha posto particolare enfasi sull'intento dello Stato Islamico di cancellare la cultura Yazida con l'obiettivo preciso di sradicare la minoranza dalla sua identità culturale al fine di distruggere il gruppo stesso. Nel corso dell'analisi, si è posto particolare accento sul reato di stupro. Attraverso lo studio di alcuni casi, tra cui il caso Stakic[1] e Akayesu[2] è stato dimostrato che lo stupro può essere ricondotto all'articolo II paragrafo (b) per le gravi conseguenze psicologiche inflitte alle vittime, sia ai paragrafi (c) e (d) in quanto mina la continuità del gruppo, essendo questo di lignaggio patriarcale.

[1] *Prosecutor v. Milomir Stakic*, Trial Judgement, International Criminal Tribunal for the Former Yugoslavia (ICTY), IT-97-24-T, 31 July 2003.
[2] *The Prosecutor v. Jean-Paul Akayesu*, Trial Judgement, International Criminal Tribunal for Rwanda, (ICTR), ICTR-96-4-T, 2 September 1998.

Un focus ulteriore è stato poi rivolto alla disposizione (e), che riguarda il trasferimento forzato dei bambini verso un altro gruppo. Sono stati fatti ricadere all'interno di tale disposizione le pratiche di trasferimento di ragazzi Yazidi nei campi di addestramento militare e di ragazze Yazide nei quartieri generali della milizia. Come precedentemente spiegato, le disposizioni (b), (c) ed (e) costituiscono il fulcro dell'analisi poiché non richiedono esplicitamente l'elemento fisico come requisito essenziale per classificare certe azioni come genocidarie. Questo avalla l'idea che gli attacchi mirati alla cultura di un gruppo possano essere considerati come rientranti nella definizione di genocidio.

Il terzo capitolo ha posto l'attenzione sul reato di stupro e ha affrontato una discussione dettagliata sulla sua rilevanza all'interno del genocidio culturale. Dopo aver esaminato l'evoluzione concettuale dello stupro attraverso la prospettiva giuridica e analizzato come diverse branche del diritto internazionale, compreso il diritto internazionale umanitario, la legge internazionale dei diritti umani e il diritto internazionale penale, abbiano sviluppato strumenti legali per proteggere le vittime e per perseguire i colpevoli, il capitolo ha fornito le basi per determinare se sia possibile includere lo stupro nel concetto di genocidio culturale. Il caso Akayesu è stato utilizzato per illustrare l'interpretazione progressiva offerta dalla Corte. In questa sentenza, lo stupro è stato classificato come rientrante nell'articolo II(b) della Convenzione sul Genocidio, sottolineando che il danno causato non deve necessariamente essere "permanente e irrimediabile".[3] Ciò ha creato un importante precedente legale che indubbiamente potrà essere utilizzato in futuro. La Corte ha inoltre incluso lo stupro nella disposizione (d), stabilendo che le misure volte a prevenire la nascita di nuovi membri di un gruppo possono essere di natura fisica come anche psicologica. La Corte ha affermato che "lo stupro è un genocidio come qualsiasi altro atto",[4] a condizione che questi atti siano perpetrati con l'intento di distruggere il gruppo.

Il quarto e ultimo capitolo ha affrontato il tema degli attacchi al patrimonio culturale, sia materiale che immateriale. Dopo aver fornito una definizione del patrimonio culturale dal punto di vista giuridico, l'analisi si è concentrata sui principali strumenti giuridici internazionali per la protezione e la conservazione della cultura. Come ampiamente illustrato all'interno di questo capitolo, lo Stato Islamico ha orchestrato una devastante campagna di genocidio che ha preso di mira il patrimonio culturale della comunità Yazida, coinvolgendo aspetti sia materiali che immateriali. Questo capitolo rappresenta la conclusione della ricerca e getta luce su come tali atrocità siano in linea con i parametri del genocidio. Inoltre, enfatizza l'importanza di classificare

[3]Ibidem, para. 504.
[4] *The Prosecutor v. Jean-Paul Akayesu*, Trial Judgement, ICTR, op. cit., para. 731.

queste azioni come genocidio culturale, specialmente se il quadro giuridico si evolverà per includere questa prospettiva. In aggiunta, sottolinea la rilevanza di riconoscere che la devastazione inflitta dallo Stato Islamico va oltre la mera distruzione fisica di siti e manufatti culturali. Essa si estende alla deliberata cancellazione delle pratiche del patrimonio immateriale, le quali costituiscono il tessuto sociale di una comunità, facilitando la trasmissione delle tradizioni, l'espressione dell'identità e il rinforzo di un senso di appartenenza.

Come evidenziato in questa ricerca, il concetto di genocidio culturale rappresenta un toccante monito riguardo all'immenso impatto che la deliberata distruzione del patrimonio, delle tradizioni e dell'identità di un gruppo può avere sia a livello individuale che su intere comunità. Nonostante il riconoscimento del genocidio culturale come una forma distinta di atrocità sia ancora un traguardo da raggiungere, è fondamentale sottolineare che questo passo potrebbe aprire nuovi orizzonti nel panorama del diritto internazionale. Tale riconoscimento solleciterebbe una riflessione più profonda sull'importanza della preservazione della diversità culturale e dei diritti fondamentali di tutte le popolazioni. Inoltre, porterebbe a una maggiore consapevolezza circa la necessità di proteggere non solo la vita fisica, ma anche l'identità culturale dei gruppi vulnerabili, impedendo così il loro annientamento attraverso la distruzione delle fondamenta stesse della loro esistenza.

In conclusione, il genocidio culturale rimane un tema di rilevanza critica nel contesto del diritto internazionale e dei diritti umani, richiamando l'urgenza di sviluppare strumenti legali e meccanismi di tutela adeguati ad affrontare questa forma insidiosa di persecuzione.

List of Abbreviations

AQI: Al-Qaeda in Iraq

CEDAW: Committee on the Elimination of Discrimination Against Women

CERD: International Convention on the Elimination of All Forms of Racial Discrimination

ECOSOC: Economic and Social Council

ICC: International Criminal Court

ECtHR: European Court of Human Rights

IACHR: Inter-American Commission on Human Rights

ICESCR: International Covenant on the

ICJ: International Court of Justice

ICOMOS: International Council on Monuments and Sites

ICRC: International Committee of the Red Cross

ICTY: International Criminal Tribunal for the former Yugoslavia

ICTR: International Criminal Tribunal for Rwanda

IDP: Internally Displaced Persons

ILC: International Law Commission

IMT: International Military Tribunal

IS: Islamic State

ISIL: Islamic State of Iraq and the Levant

ISIS: Islamic State of Iraq and Syria

NATO: North Atlantic Treaty Organization

NGO: Non-Governmental Organizations

NMT: Nuremberg Military Tribunal

PTSD: Post-Traumatic Stress Disorder

R2P: Responsibility to Protect

UDHR: Universal Declaration of Human Rights

UN: United Nations

UNESCO: United Nations Educational, Scientific and Cultural Organization

UNGA: United Nations General Assembly

VCLT: Vienna Convention of the Law of the Treaties

WGIP: Working Group on Indigenous Populations

WWI: World War One

WWII: World War Two

Introduction

Nearly eighty years after the first conceptualization of cultural genocide by the Polish-Jewish lawyer Raphael Lemkin, this crime still lacks a comprehensive legal definition at the international level. The aim of this thesis is to provide compelling evidence of the ways in which the longstanding legal limitations can be overcome. Furthermore, through the available jurisprudence it seeks to shed light on the progresses that have been made in addressing this critical issue within the global legal framework.

The first chapter will delve into the historical context, tracing the evolution of the concept of cultural genocide from its first conceptualization in 1944 to date. As a matter of fact, the primary objective is to undertake an historical and legal analysis of the etymological and conceptual development of cultural genocide. The chapter will be structured to provide a deep understanding of its evolution and its current status under international law. The analysis begins by delving into the seminal contributions of Raphael Lemkin whose pioneering work laid the conceptual foundations for a deep understanding of the crime in object. The study explores other two critical dimensions. First of all, the chapter proceeds to ascertain the current legal status of cultural genocide, assessing whether it can be considered a norm of customary international law. Secondly, it examines the extent to which states can be held responsible for acts constituting cultural genocide and the accountability of states in preventing and addressing such crime within their territories.

The subsequent subchapters pivot towards the Convention on the Prevention and Punishment of the Crime of Genocide adopted in 1948.[5] This pivotal document is scrutinized to understand the original inclusion of cultural genocide within its realm. Special emphasis is placed on the *travaux préparatoires* to reveal how the cultural dimension was originally an integral part of the foundations of the Convention. The exclusion of this dimension is explored in detail. The concluding subchapters will focus on the contemporary status of cultural genocide in international law. Attention is dedicated to current legal mechanisms such as the Declaration of Rights of Indigenous People[6] whose role will be particularly explored.

[5] Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), General Assembly, A/RES/3/260, 1948.

6 United Nations Declaration on the Rights of Indigenous Peoples: Resolution Adopted by the General Assembly, UN General Assembly, A/RES/61/295, 2 October 2007.

The second chapter sets the stage for an in-depth analysis of the genocidal acts committed against the Yazidis by providing a rich and multifaceted context that encompasses historical, religious, and legal dimensions. This contextual understanding is fundamental to the subsequent examination of whether these atrocities may be deemed acts of cultural genocide and how justice can be sought for the victims. It will begin with an in-depth analysis of the actors involved. It will present the Yazidi minority's history, tracing their origins and the challenges they have encountered over centuries. Emphasis will be devoted on understanding the role that religion plays for the community, as it is fundamental to unraveling the motivations behind the prolonged series of persecutions endured by the Yazidis, initially under the Ottoman Empire and later, in more contemporary times, under the regime of the Islamic State. A sub-chapter within this contextual framework will explore the origins and rise of the self-proclaimed Islamic State. Understanding the genesis and the evolution of the extremist group will be pivotal to understand the context in which the atrocities perpetrated against the Yazidis unfolded.

Moreover, this section will scrutinize whether, from a legal perspective, ISIS can be considered a state under international law and the pertinent legal framework under which the Yazidis can be categorized as a minority. This will be fundamental to establish the groundwork for subsequent legal assessments. Notably, these criteria are necessary for evaluating whether the crimes committed by ISIS against this minority can be categorized as genocidal under Article II of the Genocide Convention.[7] Crucially, this section lays the foundation for the overarching inquiry into the actus reus of genocide, demonstrating how actions that do not necessarily culminate in the physical destruction of a group can still fall within its scope. The last sub-chapter will scrutinize the potential legal avenues that can be pursued to provide justice. It will be investigated whether it is feasible to refer the case to the International Criminal Court (hereinafter ICC) or whether alternative mechanisms exist for achieving legal recognition and punishment for these heinous acts.

The third chapter will be devoted to the legal examination of ISIS violence against Yazidi women. Notably the chapter will be focused on determining whether the acts can be classified as genocidal. The chapter will first explore the crime of sexual violence within the realm of international human rights and criminal law. This section will provide the legal frameworks and precedents that have contributed to address sexual violence as a grave violation of human rights, particularly in the context of armed conflict. A sub chapter will be devoted to the Prosecutor v.

[7] Article II of the *Genocide Convention*, 1948, op. cit.

Akayesu case study.[8] This pivotal case will be provided to lay the groundwork for a deeper understanding of the legal intricacies surrounding sexual violence as a crime against humanity but also to prove the possibility to classify the crime as genocidal, more precisely as cultural genocide, if in the future this crime will be conceptualized.

The following sub-chapter will focus on ISIS systematic employment of sexual violence as an instrument to erase the culture and the future of the community. This section will uncover the strategies employed by the militants which extent beyond the physical harm. The analysis will concentrate on the tactics, including forced marriages and impregnation, adopted with the specific intent of obliterating the Yazidi minority. Furthermore, it will delve into profound psychological effects, social rejection, and the amputation of identity through humiliation, exploring how these tactics serve to dismantle the cultural fabric of the Yazidi community. The last sub-chapters will explore the possible referral to the ICC. In this part it will be contemplated the cultural value of rape and examined how sexual violence against Yazidi women not only inflicts physical and psychological harm but also poses a unique threat to the preservation of the intangible heritage of the community. By analyzing the role of the Yazidi women in the safeguarding of their community's cultural identity, it will be explained the far-reaching consequences of these atrocities.

The fourth and last chapter will analyze how attacks toward the cultural heritage and thus the cultural crimes can constitute a genocidal crime. The first sub-chapter will focus on the evolving concept of cultural heritage and the developments that this concept is undergoing through a series of legal instruments. Through the analysis of complex legal frameworks and instruments, it will be explored the evolving jurisprudential landscape that underpins the protection of cultural heritage with particular emphasis on its preservation amid armed conflicts. Recent developments including the contribution of human rights law in providing protection to cultural heritage will be considered. The chapter will proceed with the analysis of the intentional and systematic destruction of cultural heritage perpetrated by the Islamic Stat in the conquered areas of Syria and Iraq with a focus on the dire consequences suffered by the Yazidi minority. This section will provide a description of the Yazidi tangible and intangible cultural heritage and the importance that this plays in shaping the Yazidi collective identity. The focus will then move toward the campaign of obliteration operated by ISIS in an attempt to erase Yazidi community existence. After providing a contextual background the following sub-chapter will scrutinize the deliberate destruction of property as a grave breach of the Geneva Conventions. This section will explore

[8] *The Prosecutor v. Jean-Paul Akayesu*, Trial Judgement, International Criminal Tribunal for Rwanda, (ICTR), ICTR-96-4-T, 2 September 1998.

the pivotal role played by the ICC in establishing individual criminal responsibility while inquiring whether a form of state responsibility can also be revised. Through the analysis of the Prosecutor v. Al Mahdi case[9] it will be explained the far-reaching implications of the deliberate destruction of cultural heritage, and it will be demonstrated how cultural crimes, their implications and consequences, can be classified as cultural genocide.

The aspiration is to contribute to a more profound and nuanced understanding of the enduring significance of cultural heritage, the multifaceted implications of its targeted annihilation, and the inexorable necessity of safeguarding our shared cultural legacy, even amidst the perilous terrain of cultural genocide.

[9] *The Prosecutor v. Ahmad Al Faqi Al Mahdi,* Judgement and Sentence*,* Trial Chamber, International Criminal Court (ICC), ICC-01/12-01/15, 27 September 2016.

Chapter 1. The Evolution of the Concept of Cultural Genocide

1. Introduction

The aim of the first chapter is to analyze the etymological and conceptual development of cultural genocide through historical and legal lens. First of all, the analyses will provide an insight into the pivotal contribution provided by Raphael Lemkin, in order to trace back the origins of the concept. Secondly, the analyses will follow by presenting some judgements to inquire whether at the present moment it can be stated that cultural genocide could be considered a norm of customary law. Then the analyses will proceed with an inquiry into the possibility to address the responsibility of states concerning cultural genocide. In the following subchapters cultural genocide will be examined in the context of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide of 1948[10]. Particular attention will be devoted to the *travaux préparatoire*s to demonstrate how the cultural dimension originally was an inherent part of the foundation of the Convention and how its exclusion has caused a polarized debate that is still open. What the chapter proposes to emphasize is how the final deletion of the provision on cultural genocide represented more a political decision than the refusal of states to recognize the necessity of criminalizing cultural crimes.

As it will be showed, a series of paradoxes concerning the definition crystalized in the Convention on one side make the concept of genocide ambiguous, but on the other open up to the possibility of having once again cultural genocide incapsulated in it and legally recognized. The last subchapters will be focused on the place that nowadays cultural genocide occupies in international law. For the purpose of the present analyses some space will be devoted to the current cultural protection mechanisms and in particular to the role that the Declaration of Rights of Indigenous People[11] plays. As a matter of fact, its introduction has not only been an important achievement in terms of protection of minorities, but also in terms of cultural genocide since it has led to a shift

[10] *Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention),* General Assembly, 1948, A/RES/3/260. Available at: https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf.

[11] *United Nations Declaration on the Rights of Indigenous Peoples: Resolution Adopted by the General Assembly*, UN General Assembly, A/RES/61/295, 2 October 2007. Available at: https://www.refworld.org/docid/471355a82.html.

of focus from criminal law to human rights law[12], opening to new possibilities for cultural crimes to be recognized. As it will be demonstrated, undoubtedly cultural genocide has undergone evolutionary processes and important steps forward have been made at the international level. However, after years of heated debate, cultural genocide is still an unexplored field and a crime that occupies an undefined position in international law. Since 1940s, various attempts have been made to recognize brutal attacks on cultural heritage. Despite this, states are still reluctant in providing a conceptualization of this crime that in the meanwhile is silently spreading.

2. The Evolution of the Concept of Cultural Genocide from a Historical-Legal Perspective

Set at the interstices of international human rights and criminal law, cultural genocide has always been a quite controversial topic. Conceptualized for the first time in 1944 by Raphael Lemkin[13] in an attempt to condemn the Nazi Germans for the atrocities perpetrated during the Holocaust, revived in 1948 during the drafting of the Genocide Convention[14] and then incapsulated in a series of legal instruments under another label, it still lacks international legal recognition. In todays' world the destruction of the tangible and intangible cultural heritage persists to be an issue that involves the entire international community.

The term "cultural genocide" whose legal taxonomy began in 1933 through the works of the Polish Jewish lawyer Raphael Lemkin and emerged to address a specific form of destruction.[15] From that moment on the term has been subjected to uses and misuses. The recent conflicts in Iraq and Syria have demonstrated how cultural heritage might represent one of the main targets in war. On the other side, the cases of Australian Aborigines who were forcibly removed from their communities in the years between 1925 and 1949[16] and the residential schools for native

[12] NOVIC, E., *The Concept of Cultural Genocide: An International Law Perspective*, 1st ed., Oxford University Press, 2016, p. 1.
[13] BACHMAN, J., *Cultural Genocide. Law, Politics, and Global Manifestations,* Routledge Studies in Genocide and Crimes against Humanity, 1st ed., 2019, p. 62.
[14] *Genocide Convention,* General Assembly, 1948, A/RES/3/260, op. cit.
[15] Ibidem, p. 62.
[16] Indigenous children were targeted and removed from their families in order to eradicate them from their culture and inoculate the European values. See as reference *Bringing Them Home, Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families,* Australian Human Rights Commission, April 1997. Available at: https://humanrights.gov.au/sites/default/files/content/pdf/social_justice/bringing_them_home_report.pdf.

Children in Canada[17] have demonstrate how the annihilation of a group through attacks toward its culture can happen also in peacetimes.[18] The Dalai Lama openly talked about cultural genocide in reference to the conduct adopted since 1959[19] by the Chinese government which threatened the Tibetan population through attacks toward culture, the destruction of monasteries, and restrictions to religious freedoms.[20] These cases shed light on the importance of having cultural genocide recognized in international law, they demonstrated how it might happen both in wartimes and peacetimes, and they pointed out the importance of the collective character of the crime that "could manifest against group members as well as group institutions or property".[21] With the birth of the United Nations in 1945[22] important steps were made in terms of recognition of cultural loss. As a matter of fact, in Resolution 96(1) the General Assembly underlined how genocide inflicts significant harm to the global community "in the form of cultural and other contributions represented by these human groups".[23] However, every effort to include the cultural component in the newly born Convention of Prevention and Punishment of Genocide of 1948[24] was thwarted. The aftermath of World War II (hereinafter WWII) seemed to be the momentum for opening discussions concerning the protection of culture. The experience of the Holocaust had shaken the consciences of states that were determined to increase cooperation also through the implementation of legal systems aimed at strengthening both human rights and criminal law realms. However, efforts were not enough, and the outcome was unsuccessful mainly due to the reluctance of states that feared to be persecuted for their own actions.

A second attempt to criminalize the destruction of culture was made through the proposal of a minority rights provision[25] to be inserted in the upcoming Universal Declaration of Human Rights

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[17] Canada's residential school system for Aboriginal children was created for the purpose of separating Aboriginal children from their families, in order to minimize and weaken family ties and cultural linkages. See as reference Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future— Summary of the Final Report of the Truth and Reconciliation of Canada,* 2015. Available at: https://irsi.ubc.ca/sites/default/files/inline-files/Executive_Summary_English_Web.pdf.

[18] BACHMAN, J., *Cultural Genocide. Law, Politics, and Global Manifestations,* op. cit., p. 62.

[19] Ibidem.

[20] "Dalai Lama Blames Tibetan Burning Protests on Cultural Genocide", *The Telegraph*, 7 November 2011, available at: https://www.telegraph.co.uk/news/worldnews/asia/china/8874374/Dalai-Lama-blames-suicide-protests-on-Chinese-cultural-genocide.html in NOVIC, E., *The Concept of Cultural Genocide*, op. cit., p. 1.

[21] BACHMAN, J., *Cultural Genocide. Law, Politics, and Global Manifestations*, op. cit., p. 64.

[22] *History of the United Nations,* in United Nations Official Website, available at: https://www.un.org/en/about-us/history-of-the-un.

[23] UN General Assembly, *The Crime of Genocide*, 11 December 1946, A/RES/96. Available at: https://www.refworld.org/docid/3b00f09753.html.

[24] *Genocide Convention*, op. cit.

[25] The provision proposed by the Sub-Commission on the Prevention of Discrimination read as follows: "in States inhabited by a substantial number of persons of a race, language or religion other than those of the majority of the population, persons belonging to such ethnic, linguistic or religious minorities shall have the right, as far as compatible with public order and security to establish and maintain schools and cultural

of 1948[26] (hereinafter UDHR), which reached the same result. However, this represented a watershed event in international law since it marked a passage from criminal to human rights law and it broadens the focus of protection. In the decades following the Genocide Convention international efforts to provide more protection to culture intensified through the adoption of several legal instruments. however, those efforts were still not enough and every attempt to include specific provisions on cultural heritage were watered down. This was the case of the United Nations Declaration on the Rights of Indigenous Peoples[27] in which the provision incapsulated in the draft of the Declaration in 1944 stating that "indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide"[28] was erased from the final version. Despite that, the issue of protection of culture was not disregarded. Cultural rights started to be protected by a series of human rights instruments which proved to be too general and limited since they are based on the willingness of states and still focused on individuals rather than collectivities.[29]

With the passage of time, both the concept of culture and of genocide underwent different stages so much so that Elisa Novic argued that "one has to look into at least five different branches of international law: public international law itself, international criminal law, international humanitarian law, international human rights law, and international cultural heritage law".[30]Despite the recent developments, cultural genocide still lacks a recognition as an international crime, and it rather tends to be included under the label of war crimes or crimes against humanity. Notably, when classified as a crime against humanity it is described as "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity".[31] This specific category, created to fill the legal vacuum caused by the absence of international legal systems to provide justice to all victims regardless of nationality, emerged in 1945 with the adoption of the Charter of the International

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or religious institutions and to use their own language in the Press, in public assembly and before the courts and other authorities to the State". The provision was rejected at the third session of the Drafting Committee. See as reference 'Report of the Drafting Committee to the Commission on Human Rights' E/CN.4/ 95, UNCHR, Draft art. 31, 21 May 1948, in NOVIC, E., op. cit., p. 30.

[26] *Universal Declaration of Human Rights*, UN General Assembly, 10 December 1948, 217 A (III). Available at: https://www.refworld.org/docid/3ae6b3712c.html.

[27] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution Adopted by the General Assembly*, 2 October 2007, A/RES/61/295, available at: https://www.refworld.org/docid/471355a82.html.

[28] *Report of the Working Group on Indigenous Populations on its Eleventh Session*, UN Doc E/CN.4/Sub.2/1993/29, 23 Aug. 1993, Annex 1, Art. 7. Available at: https://www.refworld.org/pdfid/3b00f49e4.pdf. The substance of art 7 of the draft Declaration was included as art 8 of the Declaration.

[29] BACHMAN, J., *Cultural Genocide. Law, Politics, and Global Manifestations*, op. cit., p. 69.

[30] NOVIC, E., *The Concept of Cultural Genocide*, op. cit., p. 11.

[31] See as reference Art. 7(2)(g) International Criminal Court (ICC) Statute.

Military Tribunal, also known as the Nuremberg Charter.[32] In particular, the crime against humanity of persecution[33] emerged as an akin crime to genocide. In the *Prosecutor v. Zoran Kupreškić*[34] case in front of the International Criminal Tribunal for the Former Yugoslavia, Judge Antonio Cassese argued that "persecution as a crime against humanity is an offence belonging to the same *genus* as genocide"[35] and what differentiates the two is the *dolus specialis.* As a matter of fact, according to Cassese's words the crime of persecution can take various cruel forms based on a discriminatory intent, while in the case of genocide "that intent must be accompanied by the intention to destroy, in whole or in part, the group to which the victims of the genocide belong. Thus, from the viewpoint of the *mens rea*, genocide is an extreme and the most inhuman form of persecution".[36] It can be stated that the crime of persecution seems to open another way for the recognition of cultural genocide. This allows individuals to be persecuted for acts of destruction toward the cultural heritage of a specific group while providing protection to the victims. The cultural and legal grounds are foreseen in the ICC Elements of Crime[37] and also in the 1954 Draft Code of Crimes Against the Peace and Security of Mankind which included under crimes against humanity "persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities".[38] Furthermore, the cultural grounds are revisable in the Statute of some ad hoc international tribunals such as the one created for Iraq[39] and the one created for Cambodia.[40] Although some of todays' instruments gave a certain degree

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[32] This document, commonly known as the Charter of the Nürnberg Tribunal (or Nuremberg Tribunal) formed an integral part of the Agreement for the establishment of an international military tribunal(q.v.), which was signed in London on 8 August 1945. See as a reference. United Nations, *Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement")*, 8 August 1945, available at: https://www.refworld.org/docid/3ae6b39614.html.

[33] See as reference Article 7(1)(h) of the *Rome Statute of the International Criminal Court (ICC),* UN General Assembly, (last amended 2010), 17 July 1998

[34] *Prosecutor v. Kupreskic et al.,* (Trial Judgement), IT-95-16-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 14 January 2000.

[35] *Prosecutor v. Kupreskic et al*., (Trial Judgement), IT-95-16-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 14 January 2000, para. 636, in AKHAVAN, P., "Cultural Genocide: Legal Label or Mourning Metaphor?" *The McGill Law Journal.*, vol. 62, no. 1, 2016, p. 249.

[36] Ibidem.

[37] It contains the elements required for each of the crimes of Art. 5 of the ICC Statute in order to be prosecuted by the Court. See as a reference: Art. 7(1)(h) of the ICC, Elements of Crimes, 2011.

[38] Art. 2 (11) "Draft Code of Crimes against the Peace and Security of Mankind," *Report of the International Law Commission to the General Assembly*, Vol. II, 1954, U.N. Doc. A/CN4/SERA/1954d, April 30, 1954.

[39] See as reference: "Statute of the Iraqi Special Tribunal," December 10, 2003, Art. 12(8), covering Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Tribunal. Available at: https://www.legal-tools.org/doc/70f869/pdf/.

[40] See "Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea,",

of protection to a group's culture, it is important to underline that the unrecognition of cultural genocide has important consequences at the level of collective cultural existence of a specific group.

2.1 Lemkin's Contribution to the Conceptualization of Cultural Genocide

The historical and legal roots of cultural genocide can be found in the works of the Polish Jewish lawyer Raphael Lemkin. To him goes the credit of having coined the term "genocide" in the aftermath of WWII to respond to the necessity to indict individuals or governments for "the destruction of a nation or of an ethnic group".[41] Born in a farm in Wolkowyski, Poland, Lemkin showed from an early young age an interest toward mass killings that was nurtured by readings such as Henryk Sienkiewicz's Quo Vadis through which he gathered knowledge about the massacres of Christians under the Roman emperor Nero,[42] and by other readings concerning the mass murder of French Huguenots, and the mass killings by Genghis Khan's Mongols.[43] The context in which he grew up also influenced his thinking. In the eastern part of Poland, where he spent his childhood, Jews were subjected to persecution and pogroms[44]. In the same way the Armenian massacre attracted his attention. In his autobiography entitled *Totally Unofficial* he recalls the German occupation of the city of Wolkowyski in 1915 and admits that it was from that moment that he started argued "to read more history, to study whether national, religious, or racial groups as such were being destroyed".[45]

In 1933 his thoughts converged in a paper entitled *Acts Constituting a General (Transnational) Danger Considered as Offences Against the Law of Nations* written for the Fifth International

June 6, 2003, Art. 9 (covering "crimes against humanity as defined in the 1998 Rome Statute of the International Criminal Court," which includes persecution on cultural grounds). Available at: https://treaties.un.org/pages/showDetails.aspx?objid=080000028007c9d0.

[41] LEMKIN, R., *Axis Rule in Occupied Europe: Laws of Occupation*, Analysis of Government, Proposals for Redress. Washington: Carnegie Endowment for International Peace, 1944, p. 79.

[42] BALAKIAN, P., Raphael Lemkin, Cultural Destruction, and the Armenian Genocide, Holocaust and Genocide Studies, vol. 27, no. 1, 2013, pp. 57.

[43] LEMKIN, R., *Totally Unofficial: The Autobiography of Raphael Lemkin*, edited by Donna-Lee Frieze, Yale University Press, 2013, p. 1 in BALAKIAN, P., Raphael Lemkin, Cultural Destruction, and the Armenian Genocide, Holocaust and Genocide Studies, vol. 27, no. 1, 2013, pp. 57.

[44] BALAKIAN, P., *Raphael Lemkin*, op. cit., pp. 58.

[45] LEMKIN, R., *Totally Unofficial,* op. cit., p. 1 in BALAKIAN, P., *Raphael Lemkin, Cultural Destruction, and the Armenian Genocide* op. cit., p. 58.

Conference for the Unification of Penal Law.[46] In the paper Lemkin presented the concepts of barbarism and vandalism in whose definition the basic features of genocide are anticipated. As a matter of fact he described the crime of barbarity which encompassed "destructive acts directed against individuals as members of a national, religious, or racial group",[47] and the crime of vandalism that he described as "an attack targeting a collectivity that can also take the form of a systematic and organized destruction of the art and cultural heritage in which the unique genius and achievement of a collectivity are revealed in fields of science, arts, and literature".[48] The proposal was eventually rejected but created the basis for further developments. It is evident how Lemkin considered the cultural dimension as an essential component of the identity of a specific group.

It was in particular the cultural destruction that occurred during the mass murder that occurred in Turkish Armenia[49] on behalf of the Committee of Union and progress (CUP)[50] that influenced Lemkin's theorization of modern genocide. The Armenian genocide represented a watershed event that separated pre-twentieth-century forms of genocide, mainly happened in contexts of colonization.[51] The burning and razing of churches; the torture of men, women, and children with crucifixes; the mass killing of Armenian intellectuals; and the forced conversion of Armenians to Islam[52] were intrinsic component of genocide, according to Lemkin. As a matter of fact, in 1944 these elements converged and gave rise to the concept of genocide[53] – encapsulated in his seminal work entitled *Axis Rule in Occupied Europe Laws of Occupation, Analysis of Government, Proposals for Redress.* [54] In his work Lemkin stated that genocide can affect three dimensions of

[46]LEMKIN, R., "Acts Constituting a General (Transnational) Danger Considered as Offences Against the Law of Nations," Conference Paper for 5th Conference for the Unification of Penal Law, Madrid, October 1933.
[47] Ibidem, p. 6.
[48] *Ibidem*
[49] In 2022 the Armenian massacre was recognized as genocide by 31 countries (list available at: https://www.armenian-genocide.org/recognition_countries.html). However, Turkey continues to refuse. See as a reference: *The Armenian Allegation of Genocide: The issue and the facts,* Republic of Turkey, Ministry of Foreign Affairs, available at: https://www.mfa.gov.tr/the-armenian-allegation-of-genocide-the-issue-and-the-facts.en.mfa.
[50] The CUP was established in 1895, the moment in which it entered into contact with the Ottoman liberals in European exile. Its main aim saw that of unifying the ethnic and religious groups around an Ottoman allegiance. In 1909 they started to exercise a more direct control over the government. See as a reference: https://www.encyclopedia.com/humanities/encyclopedias-almanacs-transcripts-and-maps/committee-union-and-progress.
[51] BALAKIAN, P., *Raphael Lemkin,* op. cit., pp. 61.
[52] This is a direct reference to the description of Armenian genocide provided by BALAKIAN, P., *Raphael Lemkin*, op. cit., pp. 61.
[53] The term was coined in 1943 but the but the book was delayed for a year by contractual negotiations with the publisher. Reference in note 11 in MOSES, A.-D. "Raphael Lemkin, Culture, and the Concept of Genocide", The Oxford Handbook of Genocide Studies, Oxford University Press, 2010, p. 22.
[54] LEMKIN, R., *Axis Rule*, op. cit.

the life of a specific group, namely physical, biological, and cultural. In particular, he defines cultural genocide as a crime that "can be accomplished predominately in the religious and cultural fields by destroying institutions and objects through which the spiritual life of a human group finds its expression, such as houses of worship, objects of religious cult, schools, treasures of art and culture. By destroying spiritual leadership and institutions, forces of spiritual cohesion within a group are removed and the group starts to disintegrate".[55] As it might be noted, already in this work Lemkin started to talk more appropriately about cultural genocide as a crime of its own. As a matter of fact, he devoted the entire Chapter IX to develop the concept of genocide that he declined in a series of forms and practices. The starting point used by the author is already telling. He detached himself from a long tradition which foresaw only crimes committed against individuals and not groups and based his work on a more comprehensive and collective approach. After having clarified that genocide does not necessarily entail the destruction of a nation[56] he specifies how the aim of this crime is that of mining the "essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups."[57] The definition, however broad, contains some pivotal points. First of all, the centrality of the cultural dimension. The comprehensive character offers a multi-layered definition of genocide that does not entail only the physical and biological destruction. Secondly, the shift of focus from an individualistic toward a collective character. He stated that "the actions involved are directed against individuals, not in their individual capacity, but as members of the national group"[58]. The collective dimension is pivotal in discourses concerning cultural genocide, and more broadly cultural crimes since culture itself cannot be conceived except in relation to a specific community. Therefore, in few lines there are already present some emblematic concepts that constitute a milestone in the upcoming debate on genocide.

In *Axis Rule*, Lemkin widened the debate even more by individuating eight techniques of genocide: political, social, cultural, economic, biological, physical, religious, and moral through which the oppressor imposes itself in a totalitarian way over the oppressed.[59] For each technique he provided detailed practical descriptions of actions connected to them. Concerning the cultural

[55] LEMKIN, R. "Genocide as a Crime under International Law." *American Journal of International Law*, vol. 41, no. 1, 1947, p. 147.
[56] LEMKIN, R., *Axis Rule*, op. cit., p. 80.
[57]Ibidem.
[58] Ibidem.
[59] NOVIC, E., *The Concept of Cultural Genocide*, op. cit., pp. 18-19.

one, useful for the purpose of the analyses, Lemkin made particular reference to the prohibition of the use of one's language providing the example of Luxembourg schools in which through the decree of August 6, 1940,[60] only German language could be taught.[61] He secondly referred to the prohibition of practicing liberal arts in Poland and the implementation of forms of control of other activities such as "painting, drawing, sculpture, music, literature, and the theater" for which a license was required; and then he also referred to attacks to national monuments [...] and libraries, archives, museums, and galleries".[62] Overall, he did not specify whether the killing of the members is always required to label certain actions as genocidal giving rise to the "genocide without murder"[63] debate which will be taken up during the drafting of the Genocide Convention. Despite that, his research in this filed became pivotal. As a matter of fact, his influence can be retraced already in the United Nations General Assembly Resolution 96 (I) of 1946.[64]

The multi-layered and comprehensive approach is here revisable in the definition of genocide that figures in the Resolution as the "denial of the right of existence of entire human groups"[65] that "results in great losses to humanity in the form of cultural and other contributions represented by these human groups".[66] His theories represented a very early stage of the conceptualization of a crime that arose many questions and gave space for paradoxes and opposite interpretations that are still part of an enormous debate. The first problem concerns the concept of culture itself. His holistic understanding of the concept of culture was framed by a western ideology that continued to conceive culture as a synonym for "being cultured",[67] as a material product originated from the contribution provided by intellectuals and scientists. He framed his concepts by taking into consideration only Western societies, leaving non-Europeans and indigenous people outside his reasonings, and paradoxically never condemning assimilation openly. Secondly, Lemkin blurred the lines among the eight proposed techniques and stretched the concept of genocide, fueling doubts as to which crimes can be indicted as genocidal. A paradox that is resumed in a statement made by Lemkin himself in which he affirmed: "mass murder does not connote the motivation of the crime. Denationalization seems to be inadequate, since it does not connote biological

[60] LEMKIN, R., *Axis Rule*, op. cit., p. 440.
[61] *Ibidem*.
[62] See note of the Polish Minister of Foreign Affairs of the Polish Government-in-Exile to the Allied and Neutral Powers of May 3, 1941, in *Polish White Book: Republic of Poland, Ministry of Foreign Affairs, German Occupation of Poland - Extract of Note Addressed to the Allied and Neutral Powers, New York: The Greystone Press,* 1942, pp. 36-39 in LEMKIN, R., *Axis Rule*, op. cit., p. 84.
[63] NOVIC, E., *The Concept of Cultural Genocide*, op. cit., p. 8.
[64] UN General Assembly, The Crime of Genocide, 11 December 1946, A/RES/96. Available at: https://www.refworld.org/docid/3b00f09753.html
[65] *Ibidem*, pp. 188-189.
[66] Ibidem.
[67] NOVIC, E., *The Concept of Cultural Genocide*, op. cit., p. 2.

destruction".[68] Lastly, it remained unclear whether cultural genocide must be considered a stand-alone crime or whether it should remain anchored to the concept of genocide. However, it is also true that equating the two terms and putting on the same level the cultural and physical destruction of a group represented an important point of departure, but it was also source of misinterpretations.

Unfortunately, Lemkin theories did not find a positive response from intergovernmental bodies and their applicability resulted to be unsettling and compelling. The Genocide Convention of 1948 adopted a narrower scope, including only three of the eight techniques framed by Lemkin and discarding his proposals.[69] In Part III entitled *Recommendations for the Future*[70] he argued "*De lege ferenda*, the definition of genocide in the Hague Regulations thus amended should consist of two essential parts, in the first should be included every action infringing upon the life, liberty, health, corporal integrity, economic existence, and the honor of the inhabitants when committed because they belong to a national, religious, or racial group; and in the second, every policy aiming at the destruction or the aggrandizement of one of such groups to the prejudice or detriment of another".[71] However, his auspices for the creation of an international legal system to be implemented in the national criminal codes aimed at protecting minorities did not find a positive response from states.

2.2 Cultural Genocide in International Customary Law

Physical and biological genocide remains the only internationally and legally recognized form of genocide, while cultural genocide still lacks explicit recognition. Despite that, on many occasions trial chambers have recognized the importance of condemning both physical and cultural damage. What might be certainly affirmed is that there have been important strides forward concerning the legal status that cultural genocide has acquired in the international legal field. In particular, the aim of this sub-chapter is to identify whether there is consistent and widespread state practice to

[68] LEMKIN, R., "Genocide", *American Scholar*, vol. 15, no. 2, April 1946 in NOVIC, E., *The Concept of Cultural Genocide*, op. cit., p.19.
[69] The Draft Convention on the Crime of Genocide presented on 26th June 1947 included only physical, biological and cultural genocide, while leaving out the political, social, economic, religious, and moral. See as reference NOVIC, E., *The Concept of Cultural Genocide*, op. cit., p. 24.
[70] LEMKIN, R., *Axis Rule*, op. cit., pp. 90-95.
[71] LEMKIN, R., *Axis Rule*, op. cit., p. 93.

enable us to affirm that cultural genocide might be considered a rule under customary international law.

At the present moment, two different approaches might be identified. On one side, a more conservative approach based on the International Law Commission's (hereinafter ILC) *Draft Code of Crimes Against the Peace and Security of Mankind.*[72] In the Draft the ILC referring to the preparatory works of the Genocide Convention stated that genocide is the "material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group"[73]. Furthermore, it specifies how subparagraphs (a) to (c) are acts of physical genocide, while subparagraphs (d) and (e) are acts of biological genocide.[74] This seems to exclude every other possible interpretation. However, on the other side, a more broaden interpretation of Article II of the Genocide Convention has arisen in particular among German national courts which considered genocide in a broader sense.

This is particularly revisable in the judgment delivered on 26th December 1997 by the Higher State Court in Dusseldorf to the Bosnian-Serb Nikola Jorgić,[75] the leader of a Serb paramilitary group was indicted and sentenced to life imprisonment for a series of alleged crimes committed against the Bosnian-Muslim population in Doboj.[76] The sentence released by the Higher State Court in Dusseldorf stated that "the intention to destroy a group in the sense specified by paragraph 220(a) of the Criminal Code means destroying the group as a social unit in its specificity, uniqueness and feeling of belonging; the biological-physical destruction of the group is not required".[77] In 1999 the judgment was appealed in front of the Federal Court of Justice which reinforced the idea presented in the first judgment by stating that "genocide did not necessitate an intent to destroy a group physically, but that it was sufficient to intend its destruction as a social unit".[78] The litigation was eventually upheld by the Federal Constitutional Court of Germany in December 2000[79] that provided its own interpretation arguing that "the statutory definition of genocide defends a supra-individual object of legal protection, i.e. the

[72] "Draft Code of Crimes Against the Peace and Security of Mankind with Commentaries", *Yearbook of the International Law Commission*, vol. 2, Part II, 1996. Available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/7_4_1996.pdf
[73] Ibidem, Para. 12, pp. 46-47.
[74] Ibidem.
[75] *Jorgić*, Trial Judgement, Higher State Court of Düsseldorf, IV-26/96, 2StE 8/96, 26 September 1997.
[76] NOVIC, E., *The Concept of Cultural Genocide*, op. cit., p. 53.
[77] *Jorgić*, Trial Judgement, Higher State Court of Dusseldorf, op. cit., pp. 94-95.
[78] *Jorgić*, Appeals Judgment, Federal Court of Justice, 3StR 215/98, 30 April 1999, in *Case of Jorgić v. Germany*, European Court of Human Rights, App. No. 74613/01, 12 July 2007, para. 23, p. 12.
[79] *Jorgić*, Constitutional Appeals Judgment, German Federal Constitutional Court, 2 BvR 2190/99, 12 December 2000 in *Case of Jorgić v. Germany*, European Court of Human Rights, op. cit.

social existence of the group. The intent to destroy the group extends beyond physical and biological extermination. The text of the law does not therefore compel the interpretation that the culprit's intent must be to exterminate physically at least a substantial number of the members of the group".[80] Through the judgments released by the national Courts what is revisable is a clear tendency toward a broader definition of the concept of genocide and a cultural approach which distances itself from the narrower one provided by the ILC. The case was eventually upheld by the indicted in front of the European Court of Human Rights (hereinafter ECtHR)[81] for the alleged violation of the *nullum crimen sine lege* principle enshrined in Article 7 (1) of the European Convention on Human Rights.[82] The Court considered at first the legal reasoning of the national Courts as "not unreasonable",[83] just to slide back to the interpretation of genocide derived from the Krstić case which provided an opposite outcome and limited the interpretation of the *mens rea* of genocide to the physical and biological sense.[84]

The *Prosecutor v. Krstić* Trial judgment of 2001[85] – the first judgment in which the defendant was convicted for genocide in Srebrenica – exemplifies the abovementioned recognizing the close connection between culture and group's existence. The Trial Chamber considered the *nullum crimen sine lege* principle and endorsed the ILC's statement, but in the Appeal judgement of 2004[86] the Chamber added that if "the focus there was on whether the term genocide, as used in the Convention, included cultural genocide, the generally accepted answer being in the negative. If that does not account for the view expressed by the Commission, then, with respect, that view is not correct. The intent certainly has to be to destroy, but, except for the listed act, there is no reason why the destruction must always be physical or biological".[87] The Appeal Chamber made a remarkable statement which seems to partially enforce the referral to the crime of cultural genocide or at least seemed to incite to take into consideration the discarded cultural component as an inescapable value for the specific group arguing that "those who devise and implement genocide seek to deprive humanity of the manifold richness its nationalities, races, ethnicities and

[80] Ibidem, para. 42, p. 11.
[81] *Jorgić v. Germany*, The European Court of Human Rights, op. cit.
[82] The *nullum crimen sine lege* principle is enshrined in Art. 7 of the European Convention on Human Rights which states that "no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed". See as reference Art. 7, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14., ETS 5, Council of Europe, 4 November 1950. Available at: https://www.refworld.org/docid/3ae6b3b04.html.
[83] *Jorgić v. Germany*, The European Court of Human Rights, op. cit., para 105, p.28.
[84] Ibidem, para. 99, p. 26.
[85] *Krstić Case*, Trial Judgement, International Criminal Tribunal for the Former Yugoslavia, (ICTY), IT-98-33, 2 August 2001.
[86] *Prosecutor v. Radislav Krstić*, Appeals Judgment, International Criminal Tribunal for the Former Yugoslavia (ICTY), IT-98-33. 19, April 2004.
[87] Ibidem, para. 51, p, 105.

religions provide. This is a crime against all of humankind, its harm being felt not only by the group targeted for destruction, but by all of humanity".[88] Even though the Court ended up by considering only the physical and biological dimension of genocide the emphasis it put on the cultural component cannot be overlooked. Particularly noteworthy was the partial dissenting opinion appended by Judge Mohamed Shahabuddeen[89] in which he seemed to embrace a broader definition of genocide. He recalls the definition provided by the ILC arguing that "the intent to destroy the group as a group is capable of being proved by evidence of an intent to cause the non-physical destruction of the group in whole or in part. [...] Consequently, the fact that, in this case, women, children and the elderly were allowed to survive did not signify an intent which was at variance with that which is required".[90]

A similar cultural approach might be retraced also in the Akayesu judgment held on 2 September 1998.[91] In Trial Chamber of the International Criminal Tribunal for Rwanda (hereafter ICTR) convened for persecuting Jean Paul Akayesu for allegedly have taking part in the genocide perpetrated in Rwanda territory between 1st January and 31st December 1994.[92] For the purpose of the current analyses, paragraph 507 results to be particularly relevant. The Court analyzed how widespread and systematic rape might cause the annihilation of the cultural identity. It recalled Article 2(2) of the Statute and it considered that "sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages"[93] should all be interpreted as measures adopted to prevent births within a specific group. In the same way, in a patriarchal society, another measure inflicted to the group to cause its extinction is when a woman gets 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".[94] The Court underlined the phycological effects of such practices inferred on Tutsi women that led to the destruction of the whole group thus widening the definition of genocide to encompass acts which mine the cultural integrity of the group. In particular, the Court tried to prove that rape might fall under Article II (d) of the Genocide Convention. However, the ICTR remained evidently cautious and never openly referred to cultural genocide.

[88] Ibidem, para. 36, p, 12.
[89] See as reference the Partial Dissenting Opinion by Judge Shahabuddeen in *Prosecutor v. Radislav Krstić*, Appeals Judgment, ICTY, op. cit.
[90] Ibidem, para. 54, p. 106.
[91] *The Prosecutor v. Jean-Paul Akayesu*, Trial Judgement, International Criminal Tribunal for Rwanda, (ICTR), ICTR-96-4-T, 2 September 1998.
[92] Ibidem, para. 1.
[93] Ibidem, para 507.
[94]Ibidem.

The German Courts' judgments, the dissenting opinion provided by Judge Shahabuddeen in Krstić case, but also the ICTR in Akayesu case played a particular influence in the *Prosecutor v. Blagojević & Jokić* case of 17th January 2005.[95] The accused, Vidoje Blagojević and Dragan Jokić, were indicted for allegedly being part of the Army of Republika Srpska (ARS)[96] and, inter alia, of a "criminal enterprise whose common purpose of which was to forcibly transfer the women and children from the Srebrenica enclave to Kladanj, on 12 July and 13 July 1995".[97] The Trail Chamber, after analyzing the definition of the word "destroy" through the legal lens provided by the Genocide Convention and customary international law, recognizes the fact that only the physical and biological destruction of a group is encompassed in the crime of genocide. However, in paragraph 658 it states that is spite of the fact that cultural genocide was excluded from the Genocide Convention, "this does not in itself prevent that physical or biological genocide could extend beyond killings of the members of the group".[98] To prove evidence of this the Trial Chamber recalls Judge Shahabuddeen's partial dissenting opinion in the *Krstić* Appeal Judgement. In particular, it founds that according to the Appeal Chamber "forcible transfer could be an additional means by which to ensure the physical destruction of the Bosnian Muslim community in Srebrenica"[99] and to eliminate "even the residual possibility that the Muslim community in the area could reconstitute itself".[100] The Court also followed the legal reasoning provided by the ICTR in the *Akayesu* case in which the term "destroy" was considered "to encompass acts of rape and sexual violence"[101] making particular reference to acts of rape and sexual violence. The Trial Chamber recognizes that the physical and biological dimensions of genocide are not the only ways that lead to the destruction of a group. It argues that these are undoubtedly the "most direct means",[102] but also other acts can lead to the same result. As a matter of fact, it is important to consider that "a group is comprised of its individuals, but also of its history, traditions, the relationship between its members, the relationship with other groups, the relationship with the land".[103] It connects this reasoning in particular to the forcible transfer of children, since this practice, "especially when it involves the separation of its members",[104] in

[95] *Prosecutor v. Blagojevic and Jokic,* Trial Judgment, International Criminal Tribunal for the Former Yugoslavia, (ICTY), IT-02-60-T, 17 January 2005.
[96] The Serb military forces of the Republika Srpska were created in 1992 and remained active during the Bosnian War and took part in the Srebrenica Massacre of 1995.
[97] *Prosecutor v. Blagojevic and Jokic*, ICTY, op. cit. para. 2, p. 1.
[98] Ibidem, para. 658, p. 242.
[99] See as reference: *Krstić,* Appeal Judgement, ICTY, op. cit., para. 31, referring to *Krstić* Trial Judgement, ICTY, op. cit., para. 595 in *Prosecutor v. Blagojevic and Jokic,* ICTY, op. cit., para. 661, p. 243.
[100] Ibidem.
[101]Ibidem, para. 662, pp. 243-244.
[102] Ibidem, para. 666, pp. 244-245.
[103] Ibidem.
[104] Ibidem.

most of the cases "lead to the material destruction of the group, since the group ceases to exist as a group, or at least as the group it was".[105] The Court concludes the reasoning by affirming that this cannot be considered a recognition of cultural genocide [106] but it out of doubt that the interpretation of genocide that the Court has made is the result of a broad understanding of the crime through an expansion of its means rea.

In the judgements that have been reported it might be noted a more flexible interpretation of the provisions provided to include forms of violence that might not cause death through mass killings but the annihilation of the group identity which in tourn leads to the destruction of the group itself. For these reasons, in the abovementioned cases the Courts have recognized the genocidal intent and a form that should be defined cultural genocide for all intents and purposes. This might also be revised in the *Prosecutor v. Krajišnik* judgement of 27th September 2006.[107] The Trial Chamber provided a definition of the word "destruction" by using these terms: "destruction, as a component of the *mens rea* of genocide, is not limited to physical or biological destruction of the group's members, since the group (or a part of it) can be destroyed in other ways, such as by transferring children out of the group (or the part) or by severing the bonds among its members".[108] The analyses of footnote 1701 connected to what was stated by the Court in the abovementioned quote reinforces once again the importance of broadening the definition as: "it is not accurate to speak of "the group" as being amenable to physical or biological destruction. Its members are, of course, physical or biological beings, but the bonds among its members, as well as such aspects of the group as its members' culture and beliefs, are neither physical nor biological".[109]

Concerning cultural genocide, important steps forward have been done both the the international and the regional level. On one hand, at the international level the ICJ provides its own contribution. As a matter of fact, in the Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide concerning the *Bosnia v Serbia* case the Court followed the legal reasoning adopted in the Krstic case and underlined the importance of considering the attacks on cultural and religious property as evidence of the intent.[110] On the other hand, at the regional level, an extensive interpretation of genocide is revisable in the two

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[105] Ibidem.
[106] Ibidem.
[107] *Prosecutor v. Momcilo Krajisnik,* Trial Judgment, International Criminal Tribunal for the former Yugoslavia, IT-00-39-T, 27 September 2006. Available at: https://www.refworld.org/cases,ICTY,48ad29642.html.
[108] Ibidem, para. 854, p. 302.
[109] See as reference footnote 1701 of *Prosecutor v. Momcilo Krajisnik,* Trial Judgment, International Criminal Tribunal for the former Yugoslavia, IT-00-39-T, 27 September 2006, para. 854, p. 302.
[110] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, International Court of Justice (ICJ), 26 February 2007, para. 344.

Commissions established in Australia and Canada. For what concerns Australia, in the mid-1990s Michael Hug Lavarch, the Attorney General of Australia, entitled the Human Rights and Equal Opportunity Commission to release a report concerning the *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* entitled *Bringing Them Home*[111]. The Commission found that "genocide does not necessarily mean the immediate physical destruction of a group or a nation".[112] This is one of the few cases in which Article II (e) of the Genocide Convention was triggered so as to encompass in the *mens rea* the cultural destruction of the group.

The Inquiry's process of consultation and research found that the main aim of removing Aboriginal children from their families was that of eradicating them from their culture of origin, in order to better assimilate them in the Western culture. Thus, the aim was "the disintegration of the political and social institutions of culture, language, national feelings, religion, and the economical existence of Indigenous peoples".[113] This systematic practice is labelled by the Commission as genocidal since it leads to the "destruction of the cultural unit which the Convention is concerned to preserve".[114] The Commission based its reasoning on Lemkin's conceptualization of genocide and recognized both the physical and cultural side of the genocidal crime at the basis of the disintegration of the group. The Commission underlined that this practice is in violation of one of the main aims of the Convention which is related to the preservation of cultures as also stated by Resolution 96 (1). This is in line with Article 31 of the Vienna Convention of the Law of the Treaties (hereinafter VCLT)[115] and to the principle of semantic effectiveness applied by UN Commission of Experts to the Genocide Convention, stating that "the text of the Genocide Convention should be interpreted in such a way that a reason and a meaning can be attributed to every word. No word or provision may be disregarded or treated as superfluous, unless this is absolutely necessary to give effect to the terms read as a whole".[116] The Commission concluded its reasoning by stating that "while child removal policies were often concerned to protect and 'preserve' individual children, a principal aim was to eliminate Indigenous cultures as distinct entities".[117]

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[111] Australian Human Rights Commission, *Bringing Them Home,* op. cit.
[112] Ibidem.
[113] Lemkin, R., *Axis Rule*, op. cit., p. 79 in Australian Human Rights Commission, *Bringing Them Home,* op. cit.
[114] Ibidem.
[115] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, Treaty Series, vol. 1155, p. 331. Available at: https://www.refworld.org/docid/3ae6b3a10.html.
[116] *Letter Dated 24 May 1994 From the Secretary-General to The President of the Security Council: Final Report of the Commission of Experts Established Pursuant to United Nations Security Council Resolution 780 (1992)* UNSC, UN Doc S/1994/674, 1994.
[117] Australian Human Rights Commission, *Bringing Them Home*, op. cit.

A very similar situation concerns Canada in which in the years between 1870s and 1970s Aboriginal children were used to be removed from their families for the same assimilationist scope and with the same modalities used in Australia. In this context the Truth and Reconciliation Commission released a final report in 2015 entitled *Honoring the Truth, Reconciling for the Future*[118] in which is revisable a broaden acknowledgment of the concept of genocide. As a matter of fact, the Commission openly mentions cultural genocide in the report defining it as a measure that aims at mining the political and social foundations that prevent the group "to continue as a group". It reinforces what stated by the Australian Commission underling the inter-generational problems that this will induce and it proceeds by enlisting a series of measures that according to it fall under the label of genocide; these are the seizure of land, the prohibition or restriction of movement, the ban on the use of one's own language, the persecution of the spiritual leaders and the destruction of the spiritual objects.[119] The acts perpetrated in Canada are interpreted by the Commission in an alternative way as it is evident an attempt to encompass in the *mens rea* the cultural dimension of the crime of genocide. However, despite the Commission and the society seemed to have acknowledged the genocidal intent, the respective governments and courts ended up by discarding the annihilation of culture as a crime of genocide[120].

It light of the case law provided above, it might be stated that the ILC rigid distinction between physical and cultural genocide is put into question. However, it cannot be argued that cultural genocide might be envisioned as a norm of international customary law since there is not widespread and consistent state practice.

[118] Truth and Reconciliation Commission of Canada, *Honouring the Truth,* op. cit.
[119] Ibidem, p. 1.
[120] HENSLEY, L., 'Residential School System Was "Cultural Genocide," Most Canadians Believe According to Poll', *National Post*, 9 July 2015 in NOVIC, E., *The Concept of Cultural Genocide*, op. cit., p. 42.

2.3 State Responsibility

As demonstrated in the previous sub-chapters, the encapsulation of cultural genocide in the context of international human rights law has represented an important shift towards a broader understanding of the destruction of the social and cultural foundations of a given group. In particular, this leads to the possibility to expand the discussion to the individual and state responsibility. At the present moment, the preservation of cultural heritage is guaranteed under international law through the development of cultural rights enshrined in a series of legal instruments – namely the UDHR,[121] the International Covenant on the Economic, Social, and Cultural Rights,[122] the International Covenant on Civil and Political Rights,[123] just to mention a few – that will deeply be analyzed in the last chapter of the thesis. This shows how states have progressively recognized the importance of culture. Thus, the recognition of cultural rights represents a reevaluation of the value of culture which has facilitated the integration of culture in the international criminal law realm, in particular through the lens of the crime of persecution. This opens to new possibilities to consider the issue of state responsibility for cultural genocide.

The starting point might be envisioned in the 2007 judgement of the ICJ on the Application of the Genocide Convention[124] which stated that if according to Article I a state is bound to prevent and to punish genocide by analogy it has not to commit it.[125] In the opposite case, the state could in theory be held responsible for genocide under Article IX of the Genocide Convention. A legal vacuum exists when it comes to the crime against humanity of persecution, for which a similar provision does not exists. Legal scholars advanced hypothesis trying to connect individual and state responsibility for crimes against humanity and advanced a series of proposals concerning the possibility to create a Convention on Crimes Against Humanity[126] which was supposed to reproduce verbatim Article 1 of the Genocide Convention. This would have given the possibility to trigger state responsibility, at least by analogy, as it had happened during the ICJ judgment of 2007.[127] A series of subsequent steps tried to confirm the complementarity of individual and state responsibility. First of all, the 1996 Draft Code of Crimes against the Peace and Security of

[121] UN General Assembly, *Universal Declaration of Human Rights*, 217 A (III), 10 December 1948, available at: https://www.refworld.org/docid/3ae6b3712c.html.
[122] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, United Nations, Treaty Series, vol. 993, p. 316 December 1966, Available at: https://www.refworld.org/docid/3ae6b36c0.html.
[123] UN General Assembly, *International Covenant on Civil and Political Rights*, op. cit., p. 171.
[124] ICJ, *Bosnia and Herzegovina v. Serbia and Montenegro*, op. cit.
[125] Ibidem, para. 167, p. 114.
[126] NOVIC, E., *The Concept of Cultural Genocide*, op. cit., p. 171.
[127] ICJ, *Bosnia and Herzegovina v. Serbia and Montenegro*, op. cit.

Mankind[128] adopted by the ILC in which it was affirmed that "the fact that the present Code provides for the responsibility of individuals for crimes against the peace and security of mankind is without prejudice to any question of the responsibility of States under international law".[129] This was echoed by the Commentaries on the Draft Codes adding that an individual can behave as "an agent of state, in name of state, on behalf of state",[130] something that was reaffirmed on the Draft Articles on State Responsibility of 2001. The most heated discussions begin with Roberto Ago, an Italian jurist and judge on the International Court of Justice from 1979 until 1995, who provided a distinction between state responsibility for international wrongful acts and international crimes which was enshrined in Draft Article 19 which states as follows:

"1-An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject-matter of the obligation breached.

2-An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that Community as a whole, constitutes an *international crime.*"[131]

This seems to be endorsed by ILC discussions which took place in 1996 and revolved around the consequences of state crimes – which equated those deriving from international delicts – but also aggravated consequences.[132] However, two main problems arose. First of all, the consequences were limited and mainly centered around cooperation among states. Secondly, the problem of the criminal responsibility which can never be attributed to states but only to individuals. Draft Article 19 was deleted, and a more precise explanation of what state responsibility entails was provided by the ILC in 2001 in the Draft Articles on State Responsibility which substituted the criminal meaning with "serious breaches of obligations under peremptory norms of general international

[128] 'Draft Code of Crimes against the Peace and Security of Mankind with Commentaries', 48th Session, *Yearbook of the International Law Commission*, 1996, vol. II, Part Two.
[129] Ibidem, Art. 4.
[130] International Law Commission Draft Code of Offences against the Peace and Security of Mankind with Commentaries, 1954.
[131] 'Report of the International Law Commission on its Twenty-Eighth Session', *Yearbook of the International Law Commission*, 1976, vol. II, Part Two, p. 75 in NOVIC, E., *The Concept of Cultural Genocide*, op. cit. p. 173.
[132] 'State Responsibility', *Yearbook of the International Law Commission*, vol. II, Part Two, 1996, art. 51, p. 70 in NOVIC, E., *The Concept of Cultural Genocide,* op. cit., p. 173.

law"[133] and made clear already in Article 1 that a state cannot be held responsible for criminal acts, but only for wrongful, or illicit act.[134]

However, the still undefined role that the state may play in relation to possible genocidal acts – whether physical or cultural – was clarified in 2007 judgment in the Application of the Genocide Convention delivered by the IICJ in the context of the *Bosnia and Herzegovina v. Serbia and Montenegro* case.[135] Serbia argued against the legal reasoning of the IJC that by analogy considered the under the Genocide Convention state obligation to prevent must also be interpreted as state obligation to not perpetrate genocide. The fact that this would have necessarily entailed a form of criminal responsibility was used to discard arguments in favor of a possible responsibility of state for genocide. As a matter of fact, Serbia raised an issue concerning state responsibility. It claimed that recognizing state responsibility for genocide would imply the recognition of a form of state criminal responsibility that conflicts with general international law. The case created the momentum for clarifying the difference between the two concepts. The ICJ argued that these were "obligations and responsibilities under international law. They are not of a criminal nature. This argument accordingly cannot be accepted".[136] The ICJ created the principle of state responsibility for genocide which stemmed from the general principles of objective state responsibility for wrongful acts. This created a legal precedent that might be used in the context of cultural genocide since it clearly entail violations of cultural rights that are considered international wrongful acts under international customary law, as it will be analyzed in the last chapter.

One more element should be considered: aggravated state responsibility. At the regional level this concept was particularly emphasized by the Inter-American Court in two cases: *Plan de Sánchez Massacre v. Guatemala*[137] and *Moiwana Community v. Suriname*[138]. In the merits of both cases the spiritual damage, as a form of moral damage was considered as an aggravating factor. Following this reasoning there seems to be a possibility for cultural crimes to be at least recognized as an aggravated factor of state responsibility. Article 40 (1)(2) of the Draft Article on

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[133] *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, International Law Commission, Supplement No. 10, A/56/10, chp.IV.E.1, November 2001. Available at: https://www.refworld.org/docid/3ddb8f804.html.
[134] Ibidem.
[135] *Bosnia and Herzegovina v. Serbia and Montenegro*, ICJ, op. cit.
[136] Ibidem, para. 170.
[137] *Case of the Plan de Sánchez Massacre v Guatemala*, Merits, Inter-American Court of Human Rights, Series C No 105. IHRL 1488, 29th April 2004. Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_105_ing.pdf.
[138] *Case of the Moiwana Community v. Suriname*, Serie C No. 124, Inter-American Court of Human Rights, 15 June 2005. Available at: https://www.refworld.org/cases,IACRTHR,4721bb292.html.

State Responsibility[139] might be useful, in particular paragraph (2) which states that "a breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation",[140] something that seems to emphasize more the degree of criminality rather than the nature of the violation. At the European level the European Committee on Social Rights (ECSR) seems to have followed the same reasoning in the case of the *Centre of Housing Rights and Evictions v. Italy.*[141] In the decision on the merits at paragraph 76 the Committee found that "an aggravated violation is constituted when the following criteria are met: on the one hand, measures violating human rights specifically targeting and affecting vulnerable groups are taken; on the other, public authorities not only are passive and do not take appropriate action against the perpetrators of these violations, but they also contribute to such violence".[142] On this basis, the Committed stated that Italy had aggravated responsibility since it violated some social rights, namely the right to housing and of providing protection and assistance to migrants. This results relevant since aggravated responsibility appears to consider attack which go beyond the physical dimension.

Furthermore, another way to address cultural genocide was made in the *Bosnia and Herzegovina v. Serbia and Montenegro* case. In 1993 in the Application Bosnia and Herzegovina requested provisional measures for the "wanton devastation of villages, towns, districts, cities, and religious institutions".[143] The same claims were advanced by Yugoslavia which asked the Court to take measures to stop "any further destruction of Orthodox churches and places of worship and of other Serb cultural heritage." These accusations were very close to cultural genocide. In 1996 the ICJ requested the parties "take all measures" to prevent genocide and "not to take any action that may aggravate or extend the existing dispute." However, the answer was very generic. Despite that, this case results to be relevant since it addresses the issue of whether it would be possible to obtain provisional measures concerning acts which are not explicitly enlisted in Article II of the Genocide Convention. This underlines the importance of expanding the *actus reus* of genocide to include a cultural dimension to accommodate provisional measures. By doing so, provisional measures could turn out to be an interesting tool to prevent genocide and cultural genocide from occurring. However, in the Application of the Genocide Convention the ICJ position seems controversial. The Court stated that "a state can be held responsible for breaching the obligation

[139] See Art. 40 (1) (2) of *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, International Law Commission, Supplement No. 10, A/56/10, chp.IV.E.1, November 2001, p.112.
[140] Ibidem, Art. 40(2), p. 112.
[141] *Centre on Housing Rights and Evictions (COHRE) v. Italy*, Complaint No. 58/2009, Council of Europe: European Committee of Social Rights, 25 June 2010.
[142] Ibidem, para. 76., p. 23.
[143]ICJ*, Bosnia and Herzegovina v. Serbia and Montenegro*, op. cit.*,* para. 64(q), p. 24.

to prevent genocide only if genocide was actually committed".[144] This approach would be counterproductive since it would completely disregard all the previous phases that lead toward genocide which are the ones where cultural crimes are more likely to be committed. As Schabas noted "there is hardly a need to prosecute attempt when a tribunal is set up *ex post facto",*[145] underling that this problem would be solved if cultural crimes will be analyzed in the already-existing tribunals, namely the ICC and the ICJ, provided that the abovementioned problem will be solved.

In light of what analyzed in this sub-chapter, it is possible to argue that provisional measures might represent in the future a powerful tool to prevent alleged acts of cultural genocide to be committed. What is needed is a wider understanding of both state obligations to prevent genocide and their enforcement. If so, the attacks toward cultural heritage in the context of genocide might be considered an aggravated factor of state responsibility.

3. Cultural Genocide in the 1948 Convention: Interpretation and Limits

On the 11th of December 1946 the United Nations General Assembly (hereinafter UNGA) adopted Resolution 96 (I) on *The Crime of Genocide*[146] which described genocide as the "denial of the right of the existence of entire human groups". [147] Furthermore, it specifies that "such denial [...] results in great losses to humanity in the form of cultural and other contributions represented by these human groups and is contrary to moral law and to the spirit and aims to the United Nations[148]. The contribution provided by Lemkin is already revisable in the language used in this draft to define the concept of genocide. The preamble with its emphasis on the destruction of the cultural element placed at the same level of physical and biological genocide and the non-

[144] Ibidem, para. 431, p. 182.
[145] SCHABAS, W., *Genocide in international law: the crime of crimes / William A. Schabas,* Cambridge University Press Cambridge, England, 2009, p. 335 in NOVIC, E., *The Concept of Cultural Genocide*, op. cit., p. 189.
[146] UN General Assembly, *The Crime of Genocide*, A/RES/96, 11 December 1946. Available at: https://www.refworld.org/docid/3b00f09753.html.
[147] Ibidem in BILSKY, L., and KLAGSBRUN, R., "The Return of Cultural Genocide?" *European Journal of International Law*, vol. 29, no. 2, 2018, p. 388.
[148] Ibidem.

exhaustive definition of genocide exemplifies the fulcrum of debates concerning the upcoming Convention. The UNGA, that proceeded with the adoption of Resolution 180 (III)[149] which reaffirmed Resolution 96(I), claimed that "genocide is an international crime entailing national and international responsibility on the part of individuals and States"[150] and entitled the Economic and Social Council (hereinafter ECOSOC)[151] for preparing the draft of the Genocide Convention. The influence of Lemkin, who was appointed as an expert, was particularly relevant during the preparatory works in which he affirmed that cultural genocide was the most important part of the Convention[152]. During this phase the cultural genocide provision underwent different stages and ended up being included in Article II, with a series of divergent opinions. When on the 26th of June 1947 the Draft Convention on the Crime of Genocide[153] was presented, Article II read as follows:

"In this Convention, the word 'genocide' means a criminal act directed against any one of the aforesaid groups of human beings, with the purpose of destroying it in whole or in part, or of preventing its preservation or development. Such acts consist of:

I. Causing the death of members of a group or injuring their health or physical integrity by:

(a) group massacres or individual executions; or

(b) subjection to conditions of life which, by lack of proper housing, clothing, food, hygiene and medical care, or excessive work or physical exertion are likely to result in the debilitation or death of the individual; or

(c) mutilations and biological experiments imposed for other than curative purposes; or

(d) deprivation of property, looting, curtailment of work, denial of housing and of supplies otherwise available to the other inhabitants of the territory concerned.

II. Restricting births by:

(a) Sterilization and/or compulsory abortion; or

[149] UN General Assembly, *Draft Convention on Genocide*, A/RES/180, 21 November 1947. Available at: https://www.refworld.org/docid/3b00f09058.html.
[150] Ibidem.
[151] *Draft Convention on the Crime of Genocide,* United Nations Economic and Social Council, E/447, 26 June 1947. Available at: https://digitallibrary.un.org/record/611058?ln=en.
[152] LEMKIN, R., 'Memorandum on the Genocide Convention', AHJS, P-154, Box 6, Folder 5 in NOVIC, E., *The Concept of Cultural Genocide*, op. cit., p. 29.
[153] Ibidem, p. 24.

(b) segregation of the sexes; or

(c) obstacles to marriage.

III Destroying the specific characteristics of the group by:

(a) forcible transfer of children to another human group; or

(b) forced and systematic exile of individuals representing the culture of a group; or

(c) prohibition of the use of the national language even in private intercourse; or (d) systematic destruction of books printed in the national language or of religious works or prohibition of new publications; or

(e) systematic destruction of historical or religious monuments or their diversion to alien uses, destruction or dispersion of documents and objects of historical, artistic, or religious value and of objects used in religious worship."[154]

Without doubts the final draft did not meet the expectations. The concept of genocide underwent a sort of downgrade from the original status as the eight categories of genocide envisioned by Lemkin were eventually reduced to three – physical, biological, and cultural. According to many states placing physical, biological, and cultural on the same level appeared to be the main problem. Venezuela's delegate summarized a common thought by arguing that "the general public would find it difficult to understand how, under the concept of genocide, massacres of human groups and denial of the right to teach a particular language in schools could be put on the same plane".[155] Undoubtedly, the historical moment influenced state's positions. The provision on cultural genocide gave rise to a polarized debate which reflected the Cold War context in which discussions took place and it served more as a political tool than a legal instrument to reach the original goals of prevention and protection. The approval was compelling, and the response of states was scattered. The hesitancy was much due to the perception of the Genocide Convention as a threat for the integrity of the national sovereignty as it would have hampered processes of assimilation. For this reason, in an attempt to provide a more acceptable legal tool based on the proposals of states an Ad Hoc Committee was established.[156] The Committee composed by the

[154] ECOSOC, "Draft Convention on the Crime of Genocide", E/447, 26 June 1947, in NOVIC, E., *The Concept of Cultural Genocide*, op. cit., p. 25. https://digitallibrary.un.org/nanna/record/611058/files/E_447-EN.pdf?withWatermark=0&withMetadata=0&version=1&registerDownload=1

[155] 'Two Hundred and Eighteenth Meeting: Draft Convention on the Crime of Genocide', *Economic and Social Council* (ECOSOC), E/SR.218, 26 August 1948, in NOVIC, E., *The Concept of Cultural Genocide,* op. cit., p. 29.

[156] Ibidem, p. 26.

United States, the Union of Soviet Socialist Republics (hereinafter USSR), Lebanon, China, France, Poland, and Venezuela separated cultural genocide in what became Article III which proposed a narrower definition:

"In this Convention genocide also means any deliberate act committed with the intent to destroy the language, religion, or culture of a national, racial or religious group on grounds of the national or racial origin or the religious beliefs of its members such as:

1. Prohibiting the use of language of the group in daily intercourse or in schools, or the printing and circulation of publications in the language of the group;

2. Destroying or preventing the use of libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group.[157]

Cultural genocide encompassed at first in Article II paragraph (II) and then isolated in a separate provision, namely Article III, was the focus of heated debates and created further divisions. The new draft underwent another stage and was submitted to the UNGA Sixth Committee.[158] The main holdouts came from the colonial powers, mainly the United States, France, the United Kingdom.[159] They perceived the Genocide Convention as a threat that would turn into a propaganda machine against assimilationist policies of homogenization that many states were pursuing. For this reason, they supported the creation of a more mild, non-binding legal instrument, with a narrower scope to meet the necessities of the time. On the other side, former colonies, and countries from the Soviet bloc, mainly Byelorussia and Czechoslovakia[160], advocated for the inclusion of Article III in the Convention. Pakistan was one of the main defenders of the inclusion of Article III. Mr. Sadar Bahadur Khan, the Pakistani delegate to the Sixth Committee stated that "for his country genocide was a matter of vital concern, for thirty-five million people, bound to Pakistan by ties of religion, culture and feeling but living outside its frontiers, faced cultural extinction at the hands of ruthless and hostile forces".[161] According to it "the deletion of Article III would be contrary to the letter and spirit of Resolution 96(I) of the General Assembly which explicitly mentioned cultural genocide in its preamble" and it would be paradoxical since already Article II defines genocide "as something other than physical

[157] Article III passed by three votes to one and two abstentions. See as reference: 'Ad Hoc Committee on Genocide: Summary Record of the Tenth Meeting', ECOSOC, UN Doc. E/AC.25/SR.10, 16 April 1948.
[158] NOVIC, E., *The Concept of Cultural Genocide*, op. cit., p. 26.
[159] MORSINK, J., "Cultural Genocide, the Universal Declaration, and Minority Rights", *Human Rights Quarterly*, vol. 21, no. 4, 1999, p. 1018.
[160] Ibidem, p. 1028.
[161] Ibidem, p. 1033.

destruction of life, as was clearly shown in sub-paragraphs 2 and 3".[162] The same point was analyzed also by Venezuela which on the same line of Pakistan underlined that the fact that Article II had already included the forced transfer of children to another human group was a recognition of the fact that "a group could be destroyed although the individual members of it continued to live normally without having suffered physical harm"[163].

On the opposite vision were States that abstained or voted against the provision. One of the main reasons was related to the vagueness of the concept. Venezuela considered that the vagueness of the provision was the main obstacle[164], while Sweden condemned the broadness of the provision which encompassed acts which seemed to be "far less serious than those specified in Article II"[165]. The main fear of states was that since drawing a line between what could be considered legal and illegal seemed to be impossible this provision would be subjected to abuses and misuses with very negative repercussions on states which would be very likely to be persecuted for their past behaviors. This pervasive fear might be retraced in the words of the Brazilian Delegation which stated that "given the historical evolution of civilizations, states might be justified in its endeavor to achieve by legal means a certain degree of homogeneity and culture within its boundaries"[166]. As pointed out by Denmark "the national or international tribunals, which would have the task of suppressing genocide, might find themselves in difficulties if they were called upon to pronounce judgment in such an undefined field as cultural genocide".[167]

Among the main objections put forward by the states the impossibility of considering cultural genocide on the same level as physical genocide also emerged. Denmark, Egypt, Iran, and the United States agreed that these were two different crimes whose consequences were opposite and not comparable. Denmark summed up a common feeling while stating that "it would show a lack of logic to include in the same convention both mass murders in gas chambers and the closing of libraries".[168] A very divergent opinion compared with China that perceived cultural genocide as more subtle and for this reason hypothetically more dangerous than physical genocide. Belgium, Brazil, Canada, India, and Sweden firmly believed that cultural genocide should be encapsulated in a separate corpus of law.[169] In particular, what was asked was a re-examination of the crime

[162] See the statement of the Pakistani delegation in UNGA Sixth Committee, 3rd Session, 'Eighty-Third Meeting', UN Doc. A/C.6/SR.83, 25 October 1948, p. 193.
[163] UNGA Sixth Committee, 3rd Session, 'Eighty-Third Meeting', UN Doc. A/C.6/SR.83, 25 October 1948, p. 195.
[164] Ibidem, p. 197.
[165] Ibidem.
[166] UNGA Sixth Committee, 3rd Session, 'Eighty-Third Meeting', UN Doc. A/C.6/SR.83, 25 October 1948, p. 197.
[167] Ibidem, 198.
[168] Ibidem, 199.
[169] UNGA Sixth Committee, 3rd Session, 'Eighty-Third Meeting', UN Doc. A/C.6/SR.83, 25 October 1948.

per se which should be enclosed in a human rights convention, considered a more proper legal instrument to guarantee minority rights. A conclusion that shifts the focus from the original goal aimed at preventing and condemning acts designed to undermine a group's identity and survival toward creating new rights that minorities can enjoy. This would mean placing physical and cultural genocide on two completely different plans. With 25 states opposing the inclusion of the provision and 16 states in favor, with 13 absent states, Article III was deleted at UNGA's 83rd meeting on 25th October 1948[170] and Article II was framed as follows:

"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 of the 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."[171]

As it might be noted, paragraph (e) was paradoxically included. The recognition of the removal of children from their homes as a genocidal act goes against the states' previously advanced statements to abrogate Article III. This on one side might be interpreted as a recognition of states of the cultural element as an integral part of genocide, on the other it sheds light on the necessity of taking steps to create more defined legal standards and more precise definitions of both genocide and cultural genocide. As stated by William Schabas, the provisions of Article II contributed to create a framework of vagueness that was strategically used by states. From the debates a series of problems emerged. The first one related to the complete absence of a proper definition of culture and genocide. According to states – Australia, Canada, France, India, Peru, Sweden, UK, and the US in particular – without proper definitions it was difficult to establish which cultural crimes should be labelled as such so as not to incur in an unrelenting defense of any aspect related to the culture of a particular group and indiscriminate condemnation of it as a genocidal crime. Unlike genocide, for which a generally accepted definition exists, even if with its own practical problems, culture continues to be associated to a plethora of elements raging

[170] Eighty third meeting, Held at Palais de Chaillot, Paris, on Monday, 6th Committee, General Assembly, 3rd session, A/C.6/SR.83, 25 October 1948.
[171] *Convention on the Prevention and Punishment of the Crime of Genocide*, UN General Assembly, 9 December 1948, Treaty Series, vol. 78.

from behaviors, ideas, emotions which have contributed to making the concept of cultural genocide even more difficult to conceptualize. Thus, establishing clear definitions still represents both a problem to be solved and a point from which to depart to provide a definitive legal tool.

The second problem might be revised at the level of interpretation of both the mens rea and actus reus of the crime of genocide. For what concerns the *mens rea* – the intent to destroy a group – clearly contains a limited list of hypothetical targeted groups. It turns out that the inclusion of those groups, namely national, ethnical, racial, or religious groups, entails the exclusion of other categories of potential victims from legal protection. Furthermore, doubts emerge also in reference to the sentence "with the intent of destroy"[172] which does not further specify if the destruction must be carried out completely or whether the intent can be considered a sufficient element. On the other side, the same limiting factor might be retraced in the *actus reus* of Article II which contains a list of potential genocidal acts categorized from paragraph (a) to (e).

Whether the *actus reus* encapsulates cultural destruction of the group or not is still matter of debate. In this regard particular attentions should be given to Article II (b) and (e) which do not entail physical or biological destruction per se. Thirdly, taking the Holocaust as the prototype of genocide turned out to be limiting. The Convention was designed in order to condemn the criminal acts committed by the Nazi Germany and to prevent such atrocities to be perpetrated once again. By doing so, "the Genocide convention describes with sufficient precision a single historical event, an unimaginable, unrepeatable evil. But, in its modern application, the Genocide Convention kills more people than it protects or prosecutes".[173] The delegate of the US argued that in order to have a provision on cultural genocide inserted into the Genocide Convention "it was not enough to say that the acts enumerated in article III shocked the conscience of mankind"[174]. It urges for an evolutive interpretation that would take into consideration a broader spectrum of time and events. Moreover, what is needed is a detachment from simplistic theories that relegate genocide to a dictatorial practice to demonstrate that also liberal democracies might be firsthand perpetrators of genocidal acts. Whatever the starting point would be what should be acknowledged is that cultural genocide does not occur in a limited time or context.

The last problem concerns the political status that the Convention acquired. Analyzing the preparatory works and the conclusion that states reached what might be noticed is a prevalence of states' interests over the scope of the Convention. The result was the creation of a convenient

[172] *Ibidem.*
[173] QUAYLE, P., "Unimaginable Evil: The Legislative Limitations of the Genocide Convention", *International Criminal Law Review*, vol. 5, 2005, pp. 364.
[174] Eighty third meeting, Held at Palais de Chaillot, Paris, on Monday, 6th Committee, General Assembly, 3rd session, A/C.6/SR.83, 25 October 1948.

legal tool that tried to accommodate the will of states and jeopardized the protection of people's rights. Article II opened a long debate that persists with different ideological sides in which the position that cultural genocide should occupy, whether it represents the end or a part of the process of the crime of genocide to which it continues to be linked, and whether physical and cultural destruction should be placed on the same level are still unresolved issues. It turns out that what we have today it is an unchanged definition that is the result of political interests, insufficient to protect group's survival.

3.1 Mens Rea and Actus Reus

The *mens rea, actus reus and dolus specialis* are the key components of Article II of the Genocide Convention and their interpretation proves to be fundamental to differentiate the crime of genocide from other crimes. Moreover, when it comes to analyze the concept of cultural genocide these three elements become even more pivotal since they provide a more comprehensive understanding of the possible interpretations and limits that the genocide provision entails. The fact that the International Law Commission in its *Draft Code of Crimes Against Peace and Security of Mankind*[175] has underlined how genocide should be interpreted only in its physical and biological dimension and the Statute of the International Criminal Court[176] has reproduced verbatim Article II of the Convention without providing changes seems to *prima faciae* endorse the original definition, limited to the inclusion of physical and biological acts. However, the legal reasoning of the courts and the ever-evolving nature of the concept of cultural genocide seem not to go hand-in-hand with this interpretation which appears to be anachronistically anchored to a definition that does not meet the needs of many of the cases debated. Without a common recognized interpretation what emerges are similar cases at the national level with different judgments since the interpretation of the constituent parts of the provision on genocide are applied and interpreted depending on the courts' perception of the provision itself. Hence, the division into two alignments: on one side, the supporters of a physical and biological understanding of genocide, such as the one of the ILC; on the other side, the supporters of a more socio-cultural one, such as the German Courts more prone to take into consideration the destruction of the social

[175] See as reference: Art. 2 (11) "Draft Code of Crimes against the Peace and Security of Mankind," *Report of the International Law Commission to the General Assembly*, Vol. II, 1954, U.N. Doc. A/CN4/SERA/1954d, April 30, 1954.
[176] See as reference Article 6 of the *Rome Statute of the International Criminal Court,* op. cit.

foundations of a group. The processes initiated in the 1990s under the International Criminal Tribunal for the Former Yugoslavia[177] exemplified the above mentioned in a series of dissenting opinions which manifested an inclination toward a physical understanding of the *mens rea* but at the same time an openness toward a wider interpretation.

The *mens rea* in Article II which refers to "the intent to destroy in whole or in part a national, ethnic, racial or religious group, as such"[178] has been a subject of discussions since the codification of the Genocide Convention in 1948. Two are the main problems: the first one concerns the contested interpretation of the word "destruction", in particular whether it involves mass killings or not. The second one concerns the inclusion or exclusion of the cultural component. A broad interpretation which does not include the systematic killing of members of a specific group but that nevertheless leads to the destruction of the social foundations of the group might be found in the *Mladić and Karadžić* case[179] in which the ICTY stated that "the destruction of mosques or Catholic Churches is designed to annihilate the centuries long presence of the group or groups; the destruction of the libraries is intended to annihilate a culture which was enriched through the participation of the various national components of the population".[180]

This is revisable also in the *Jorgic v. Germany* case.[181] Following Article 220a of the Criminal Code, the Court found that "the applicant's acts, which he committed in the course of the ethnic cleansing in the Doboj region with intent to destroy the group of Muslims as a social unit, could reasonably be regarded as falling within the ambit of the offence of genocide"[182]. However, the defendant underlined how the interpretation provided was in conflict with the one provided by the ICTY in the Krstic case still anchored to physical and biological terms.[183] In the context of the discussion concerning the difficulty in establishing a homogeneously accepted definition, the VCLT seems to be a useful tool. In particular, Article 31(1) excludes any possible interpretation which is not "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose"[184] while specifying that only when

[177] In 1993, the establishment of the International Criminal Tribunal for the former Yugoslavia aimed to hold individuals accountable for the war crimes committed during the Balkan conflicts starting from 1991.
[178] Article 2, *Convention on the Prevention and Punishment of the Crime of Genocide*, op. cit.
[179] *Karadžić & Mladić Case* (Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence), International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991, IT-95-5-R61; IT-95-18-R6I, 11 July 1996, para. 95 in NOVIC, E., *The Concept of Cultural Genocide,* op. cit., p. 52.
[180] Ibidem.
[181] *Case of Jorgić v. Germany*, European Court of Human Rights, op. cit.
[182]NOVIC, E., *The Concept of Cultural Genocide*, op. cit., p. 53.
[183] Ibidem, para 99, p. 26.
[184] See as a reference Article 31 of the *Vienna Convention on the Law of Treaties*, United Nations, 23 May 1969, Treaty Series, vol. 1155, p. 331. Available at: https://www.refworld.org/docid/3ae6b3a10.html

the meaning is "ambiguous" or "manifestly absurd or unreasonable"[185] Article 32 allows for the recourse to "preparatory works of the treaty and the circumstances of its conclusion".[186] However, the ILC considers this only as a partial answer since "recourse to many of these principles is discretionary and rather than obligatory and the interpretation of documents is to some extent an art, not an exact science".[187] As a matter of fact, the German courts in the Jorgic case relied more on Article 31 of the VCLT and provided a broaden interpretation of the *mens rea* by giving more importance to the "text, including its preamble and annexes",[188] while the ICTY in the Krstic case relied more on the result of the *travaux preparatoires* of the Genocide Convention for a restrictive interpretation. The interpretative dilemma related to the possible inclusion or exclusion of the cultural component within the meaning of the *mens rea* inevitably involves a reflection on the meaning of the *actus reus***.** The necessity of a broaden understanding was first showcased in the Akayesu judgement, in which Trial Chamber I of the ICTR argued that "the intent may also be inferred from the perpetration of acts which violate, or which the perpetrators themselves consider to violate the very foundation of the group- acts which are not in themselves covered by the list in Article 4(2) but which are committed as part of the same pattern of conduct".[189]

The *acts reus* is the material element of genocide. It refers to the acts which constitute the elements of the crime of genocide. These acts are enlisted in Article II of the Genocide Convention in paragraphs from (a) to (e). For purposes of analysis, subparagraphs (b) and (e) are the most relevant and debated ones, since the cultural component seems to be incapsulated into them and they are for this reason used by the defenders of the cultural dimension of genocide to challenge the physical-biological dimensions. Subparagraph (b) has been broadened at the jurisprudential level, with the inclusion of acts that were not originally encompassed at the moment of the drafting of the Convention. The provision itself puts on the same level bodily and mental harm which seems to preclude that the harm itself does not need to be "permanent and irremediable".[190] The provision seems to be particularly open to different interpretations, both because mental harm does not have a precise definition at the international legal level and because of the reasons behind its implementation. As a matter of fact, its introduction was strongly urged by China in order to provide justice to the Chinese veterans that experienced the dramatic consequences of opium addiction, a drug given to soldiers during World War II that made them "lose their capacities of

[185] Ibidem, Article 32.
[186] Ibidem.
[187] "Draft Articles on the Law of Treaties with Commentaries", International Law Commission at its Eighteenth Session, *Yearbook of the International Law Commission*, vol. II, 1966. Available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf.
[188]See as reference Article 31 of the *Vienna Convention on the Law of Treaties*, op. cit.
[189] *The Prosecutor v. Jean-Paul Akayesu*, op. cit. para. 524.
[190] Ibidem, para. 502.

judgment and resistance".[191] Undoubtedly, by extension this could be applied to recognize the mental harm caused by the destruction of cultural heritage or other hypothetically new elements of the *actus reus*.

The provision was in fact applied by the ICTY in the Blagojevic case to "the forced displacement of women, children, and elderly people"[192] that it defined as a "traumatic experience, which, in the circumstances of this case, reaches the requisite level of causing serious mental harm under Article 4 (2) (b) of the Statute".[193] This is reaffirmed also in the Krstic case in which the Trial Chamber stated that mental harm "must involve harm that goes beyond temporary unhappiness, embarrassment or humiliation"[194] but that it does not necessary involve physical destruction, and included in this category "inhuman treatment, torture, rape, sexual abuse and deportation".[195] Something similar to what was stated by the ICTR in the Akayesu case in which rape was considered part of genocide emphasizing the impact on "families and communities",[196] thus having an impact that relates more to a cultural annihilation than a physical one.

By way of example, in the *Bosnia v. Serbia* case the ICJ explained that rape "was used as a way of affecting the demographic balance" since "children born as a result of these forced pregnancies would not be considered to be part of the protected group",[197] and thus causing a cultural and intergenerational issue. Lastly, in *Krajisnik* it was argued that "a grave and long-term disadvantage to a person's ability to lead a normal and constructive life has been said to be sufficient for this purpose".[198] The same happens with subparagraph (e) in which the connection with the physical-biological dimension is not self-evident. In this regard, William Schabas considered it an "enigmatic provision added to the Convention almost as an afterthought, with little substantive debate or consideration".[199] Subparagraph (e) is what remains from the provision on cultural genocide, introduced in Article II thanks to the Greek amendment.[200] In *Croatia v Serbia*[201] the ICJ interpreted it as a practice that "can have consequences for the group's capacity

[191] 'Ad Hoc Committee on Genocide: Summary Record of the Fifth Meeting', ECOSOC, E/AC.25/SR.5, 16 April 1948, in Novic, E., *The Concept of Cultural Genocide*, op. cit., p. 63.
[192] *Prosecutor v. Blagojevic and Jokic,* op. cit., para. 650, p. 239.
[193] Ibidem.
[194] *Krstić Case*, Trial Judgement, ICTY, op. cit., para 513.
[195] Ibidem.
[196] *The Prosecutor v. Jean-Paul Akayesu Case*, ICTR, op. cit., para 731.
[197]ICJ*, Bosnia and Herzegovina v. Serbia and Montenegro*, op. cit., para 362.
[198] *Prosecutor v. Momcilo Krajisnik,* ICTY, op. cit., para. 862, p. 303.
[199] AKHAVAN, P., "Cultural Genocide", op. cit., p. 260.
[200] Ibidem, p. 261.
[201] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* International Court of Justice, ISBN 978-92-1-157269-8, 3 February 2015. Available at: https://www.icj-cij.org/public/files/case-related/118/118-20150203-JUD-01-00-EN.pdf.

to renew itself, and hence to ensure its long-term survival",[202] thus the physical harm appears to be not an essential prerogative. The provision was eventually expanded in the *Prosecutor v. Jean-Paul Akayesu* case in which the ICTR set out *obiter dicta* that the intention was not only that of sanctioning the forcible transfer of children but also "acts of threats or trauma which would lead to the forcible transfer of children from one group to another".[203] Several acts not involving physical harm were made to fall within provision (e). However, whether these acts should be incapsulated into the actus reus of the provision of genocide is still a matter of debate.

The following are examples of judgments in which the courts have tried to expand Article II although sliding back to the physical-biological dimension, conscious of the fact that international criminal law prevents courts from any interpretation derived from analogy. This surely represent an important point of reference for a possible inclusion of acts that could lead to a conceptualization of cultural genocide in the legal framework. For the purposes of the present analysis, some broaden interpretations of the *mens rea* and *actus reus* will be analyzed in the following subchapters in order to determine whether cultural genocide might be encompassed under the perspective of customary international law.

3.2 Dolus Specialis

The *dolus specialis* (or special intent) is defined as the "intent to destroy" which refers not merely to the knowledge but to the endorsement of the intent on behalf of the perpetrator[204]. The *dolus specialis* is situated in the chapeau of Article II of the Genocide Convention, and it qualifies the *mens rea* in two ways. First of all, it differentiates it from that of other crimes. Secondly, it specifies the degree of criminality that is required to label some acts as genocidal. As a matter of fact, these two prerogatives result to be particularly relevant since enable the Courts to differentiate genocide from other crimes against humanity and in particular from the crime of persecution.

In Akayesu judgement this is highlighted in paragraph 498 that emphasize the importance of the *dolus specialis* considered to be a "constitutive element of the crime" which requires the

[202] Ibidem, para 136, p. 63.
[203] *The Prosecutor v. Jean-Paul Akayesu*, ICTR, op. cit., para. 509.

endorsement of the perpetrator itself.[205] The same is revisable in paragraph 44 of *Jorgic v Germany* case in which in reference to *Prosecutor v. Kupreškić and Others*[206] the Trial Chamber uses the "intent" to provide a distinction between genocide and persecution, considered an "euphemism of genocide" and in fact it specifies that "persecution is only one step away from genocide – the most abhorrent crime against humanity – for in genocide, the persecutory intent is pushed to its utmost limits through the pursuit of the physical annihilation of the group or of members of the group". [207] Thus, it might be stated that in the case of genocide the intent is that of destroying the group as such, while in the case of persecution the intent is that of discriminating the group by violating their human rights in a systematic way. Both the Trial Chamber and the Prosecutor found that here the intent was that of expelling "the group from the village, not at destroying the Muslim group as such".[208] In light of this acknowledgment the Chamber concludes that this was a case of persecution and of genocide.

Furthermore, the intent is used to uphold or dismiss a case. In *Jorgic v Germany*, the "intent" was used by the applicant to dismiss the accuses of genocide by stating that "a conviction for genocide under Article 220a of the Criminal Code required proof that the offender had acted with intent to destroy, in whole or in part, a national, racial, ethnical or religious group as such",[209] adding that "a mere attack on the living conditions or the basis of subsistence of a group, as in the present case, did not constitute destruction of the group itself".[210] In the Blagojevic case the intent was used in the context of expansion of the *actus reus* and to prove the genocidal character of the acts perpetrated. The Chamber noted that "the physical and biological destruction of a group is not necessarily the death of the group members" there can be other acts that "can also lead to the destruction of the group",[211] what has the be assessed is the intent. Even though some acts did not caused deaths they can be genocidal when conducted with the intent to destroy the group.[212] Despite this, the *dolus specialis* still tends to be disregarded.

This is the case of the Australian and Canadian reports. In order to determine the applicability of Article II (e) and thus consider the acts perpetrated as acts of genocide or cultural genocide, it is

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[205] *The Prosecutor v. Jean-Paul Akayesu*, ICTR, op. cit., para. 498.
[206] *Prosecutor v. Kupreskic et al.,* Trial Judgement, International Criminal Tribunal for the former Yugoslavia, IT-95-16-T, 14 January 2000.
[207] Ibidem, para. 44.
[208] Ibidem.
[209] *Case of Jorgić v. Germany*, European Court of Human Rights, op. cit., para. 92, p. 25.
[210] Ibidem.
[211] *Prosecutor v. Blagojevic and Jokic,* Trial Judgment, International Criminal Tribunal for the former Yugoslavia, IT-02-60-T, 17 January 2005, para. 666, p. 245 in MUNDORFF, Kurt. "Other Peoples' Children: A Textual and Contextual Interpretation of the Genocide Convention, Article 2(e)", *Harvard International Law Journal*, vol. 50, no. 1, 2009, pp. 61-93.
[212] *Prosecutor v. Blagojevic and Jokic,* Trial Judgment, ICTY, op. cit.

essential to understand what the intent was. What emerges from the reports is a double intent. Through ad hoc polices the government on one side wanted to prevent the transmission of the culture to future generations and it manifested the intent to assimilate the aboriginal children by separating them from their families. On the other, it strategically used the intent to underline how those policies were implemented "in the best interest of the Aboriginals".[213] However, in light of the consequences caused, the good motives advanced by the government do not preclude the intent to destroy. As pointed out by Daniel Short "although the resulting physical, cultural and mental harm may be the opposite of the alleged motivation and hence not *prima facie* intentional as such … foresight and recklessness as to the consequences of action are evidence from which intent may be inferred".[214] The intent in this case results to be fundamental not only to have those actions recognized as genocidal but also to determine which kind of genocide has been perpetrated. If the intention is that of preventing births inside the group, the genocide will be biological. If the intention is that of eradicating children from their culture to prevent its transmissibility, the genocide will be cultural. By following this reasoning, the Australian report was able to affirm that: "when a child was forcibly removed that child's entire community lost, often permanently, its chance to perpetuate itself in that child. The inquiry has concluded that this was a primary objective of forcible removals and is the reason they amount to genocide".[215]

4. From Cultural Genocide to Ethnocide

The legal taxonomy of cultural genocide has created a series of semantic ambiguities. The concepts of genocide, cultural genocide and ethnocide frequently overlap to the point that sometimes making a clear distinction turns out to be compelling. Lemkin himself frequently used the terms interchangeably casting a debate that culminated during the 1960s and 1970s in which a series of anthropologists intervened. Two streams of thought emerged from the discussions. On one side some scholars, among them Robert Jaulin and Pierre Clastres, who tend not to perceive a genocidal intent in attacks aimed at destroying the cultural and social foundations of a group.[216]

They distinguish ethnocide from genocide arguing that the former does not lead to the destruction of a group while genocide aims at its extermination. On the other side, scholars such as Jean Paul

[213] *Kruger v. Commonwealth, High Court of Australia*, 190 CLR 1, 31 July 1997.
[214] SHORT, D., Cultural Genocide and Indigenous Peoples: a Sociological Approach, *in Sociology and Human Rights: New Engagements*, 1st ed., 2010, p.62.
[215] Australian Human Rights Commission *Bringing Them Home,* op. cit.
[216] NOVIC, E., *The Concept of Cultural Genocide*, op. cit., pp. 35-36.

Sartre endorsed Lemkin vision which tended to equate the two terms considering cultural and physical destruction of a group as part of the same process, and thus defining the war in Vietnam as a genocidal war not for the physical destruction that derived from it but for the cultural and intergenerational losses caused.[217]The concept withstood the test of time and received other codifications. For instance, the Declaration of San José of 1981 entitled *UNESCO and the Struggle Against Ethnocide*[218] endorses the first school of thought. In the preamble of the Declaration, it states that ethnocide "means that an ethnic group is denied the right to develop and transmit its own culture and its own language, whether collectively or individually. This involves an extreme form of violation of human rights and in particular the right of ethnic groups to respect for their cultural identity".[219] It further specifies at paragraph 1 that "ethnocide, that is, cultural genocide, is a violation of international law equivalent to genocide, which was condemned by the United Nations Convention on the Prevention and Punishment of the Crime of Genocide of 1948"[220]. This might be considered the first recognition in international law. Ethnocide is here used as a synonym for cultural genocide, and it is once again reconducted to the experience of indigenous people.

As a matter of fact, discourses concerning the issue of cultural genocide and ethnocide can be retraced in the *travaux préparatoires* of the UNDRIP. The Working Group on Indigenous Populations (hereinafter WGIP)[221], firstly in its 1st session in 1982 and then in the following sessions, took as an example the Declaration of San José and stressed the importance of drafting a declaration to provide an answer to: "inequalities and oppression suffered for centuries; ethnocidal practices; the actual dismal situation and marginalized existence in many countries, notwithstanding lofty statutes and policies; lack of understanding and knowledge reflected in accusations of backwardness and primitiveness; and forced assimilation and integration by majority populations".[222] The reference to ethnocidal practices was matter of dissent that intensified with draft Article 7 that read as follows:

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[217] Ibidem, p. 37.
[218] "Declaration of San Jose: UNESCO and the Struggle against Ethnocide." December 1981. Available at: https://unesdoc.unesco.org/ark:/48223/pf0000049951.
[219] Ibidem.
[220] Ibidem, para. 1.
[221] The Working Group on Indigenous Populations (hereinafter WGIP) was authorized by Economic and Social Council in 1982. It was established in order to review developments in relation to the promotion and protection of the human rights and fundamental freedoms of Indigenous populations and give special attention to the evolution of standards concerning the rights of Indigenous populations. See as reference: PRUIM, S., Ethnocide and indigenous peoples: Article 8 of the declaration on the rights of indigenous peoples, *The Adelaide Law Review*, vol. 35, n. 2, p. 274.
[222] *Report of the Working Group on Indigenous Populations on its Twenty-Fourth Session,* Working Group on Indigenous Populations, UN Doc A/HRC/Sub.1/58/22, 14 August 2006 in PRUIM, S., "Ethnocide and indigenous peoples, op. cit., p. 274.

"Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide, including prevention of and redress for:

a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities.

b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources.

c) Any form of population transfer which has the aim or effect of violating or undermining any of their rights.

d) Any form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures.

e) Any form of propaganda directed against them."[223]

On one side Draft Article 7 seems to represent an evolution in the recognition and protection of cultural rights if compared to Article II of the Genocide Convention. The expansion of the *actus reus* through the determinant "any" and the deletion of the proof of the intent which was considered among the main reasons behind the failure of the provision on cultural genocide represent important developments. On the other side, it raised a series of issues. First of all, the ambiguity concerning the terminology used required the Special Rapporteur Erica-Irene Daes to provide a clear distinction between the concepts. The Special Rapporteur clarified that "cultural genocide referred to the destruction of the physical aspects of a culture and 'ethnocide' described the elimination of an entire "ethnos" and people".[224] However, the issue persisted, and the draft received the holdouts of Canada, Chile and the US. After discussions, Draft Article 7 became Article 8 to which these modifications were made:

"1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.

2. States shall provide effective mechanisms for prevention of, and redress for:

(a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;

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[223] Ibidem, p. 280.

[224] *Report of the Working Group on Indigenous Populations on its Eleventh Session*, UN Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1993/29, 23 August 1993 in NOVIC, E., *The Concept of Cultural Genocide*, op. cit., p 108.

(b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;

(c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;

(d) Any form of forced assimilation or integration;

(e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them."[225]

The reference to cultural genocide and ethnocide disappeared and were replaced with "forced assimilation or destruction of their culture", which opens another debate. Since Lemkin's conceptualization of forced assimilation, this term was used interchangeably with cultural genocide. It was then considered, as acculturation, a common and inevitable process of history and differentiated from ethnocide and cultural genocide which unlike the former concept inevitably involve the adoption of coercive measures. However, the Australian and Canadian cases have proved that when assimilation is forced and reached through ad hoc policies implemented by governments, the differentiation with ethnocide becomes less immediate and leaves the debate open.

4.1 The Protection of minorities under international law

After the non-inclusion of the cultural genocide provision in the 1948 Genocide Convention, discourses concerning the importance of protecting culture especially in the context of human rights persisted. Cultural genocide and more in general the protection of cultural rights revived in the context of minority rights. In particular, a provision on minority rights was advanced by UNESCO in a report aimed at drafting a possible International Bill of Rights[226], which refers to the three key international human rights documents: the Universal Declaration of Human Rights

[225]PRUIM, S., "Ethnocide and indigenous peoples", op. cit., p. 271.
[226] See as reference Draft art. 31*Report of the Drafting Committee to the Commission on Human Rights,* UN High Commissioner for Refugees, E/CN.4/ 95, 21 May 1948, in NOVIC, E., *The Concept of Cultural Genocide: An International Law Perspective*, 1st ed., Oxford University Press, 2016, p. 60.

(UDHR)[227], the International Covenant on Civil and Political Rights (ICCPR)[228], and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).[229] The provision encapsulated in the draft Article 31 stated as follows:

"In States inhabited by a substantial number of persons of a race, language or religion other than those of the majority of the population, persons belonging to such ethnic, linguistic or religious minorities shall have the right, as far as compatible with public order and security to establish and maintain schools and cultural or religious institutions and to use their own language in the Press, in public assembly and before the courts and other authorities to the State."[230]

Similarities with the provision of cultural genocide might be retraced both in the features of the provision and in the fate of the draft Article itself. As it happened with Article II a polarized debate arose. The holdouts came from the same states that had opposed the encompass of Article III in the Convention, namely Brazil, Egypt, the US and lately Australia, not surprisingly the main colonial powers.[231] The same were the motivations advanced, well resumed in one statement made by Australia in which it admitted that "it desired the dispersal of groups rather than the formation of minorities".[232] On the other side Denmark, Yugoslavia, Poland, and the USSR sided for the inclusion of the provision. The discussions took more a political than a legal downturn. The rejection of the provision in its 3rd session represented a second defeat in the process of protection of cultural heritage and led to a necessary reflection. The final draft of the UDHR reflected a still dominant western ideology based on an individualist perspective of human rights and discarded the collective dimension of culture, a *modus operandi* made of "standards and values that are relative to the culture from which they derive so that any attempt to formulate postulates that grow out the beliefs or moral codes of one culture must to that extent detract from the applicability of any Declaration of Human Rights to mankind as a whole".[233]

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[227] *Universal Declaration of Human Rights*, UN General Assembly, Resolution 217 A (III), 10 December 1948.
[228] *International Covenant on Civil and Political Rights*, 16 December 1966, UN General Assembly United Nations, Treaty Series, vol. 999, p. 171.
[229] *International Covenant on Economic, Social and Cultural Rights*, UN General Assembly, United Nations, Treaty Series, vol. 993, p. 3, 16 December 1966.
[230] Ibidem.
[231] NOVIC, E., *The Concept of Cultural Genocide*, op. cit., pp. 30-32.
[232] 'Third Committee 161st Meeting, Draft International Declaration of Human Rights, Proposal concerning the Protection of Minorities', UN General Assembly, A/C.3/SR.161, 27 November 1948, p. 721 in NOVIC, E., *The Concept of Cultural Genocide*, op. cit., p. 32.
[233] The Executive Board, 'Statement on Human Rights', *American Anthropologist Association*, New Series, Vol. 49, No. 4, 1947, p. 539 in NOVIC, E., *The Concept of Cultural Genocide*, op. cit., p. 34.

Despite that, the UDHR[234], adopted by the UN General Assembly in Paris on 10th December 1948 during its 183rd plenary meeting, represented a step forward in the recognition and protection of cultural rights casting them in the international human rights realm. This is exemplified in the inclusion of Article 27 in the Declaration that states that "everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits"[235] which subsequently became Article 15(1)(a) of the International Covenant on the Economic, Social and Cultural Rights (hereinafter ICESCR) of 1996.[236] These provisions paved the way for the recognition of cultural rights that started to be included into an increasing number of legal instruments. The cultural component was in fact incapsulated also in the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter CERD) of 1965[237] which deals with racial discrimination "based on race, colour, descent, or national or ethnic origin"[238] which reconnects culture to genocide, being hate at the basis of the majority of the genocidal campaigns.

At the regional level Article 13 of the American Declaration of the Rights and Duties of Man[239] reproduces verbatim Article 15 of the ICESCR which stresses the importance of preserving culture as "a duty for every man", and Article 14 of the Protocol of San Salvador of 1988[240] which states "the right to the benefits of cultures".[241] At the European level cultural rights tend to be incapsulated in other provisions such as Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[242] Lastly, the African Charter on Human and

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[234] *Universal Declaration of Human Rights*, UN General Assembly, 10 December 1948, 217 A (III). Available at: https://www.refworld.org/docid/3ae6b3712c.html.
[235] KINGSTON, L., "The Destruction of Identity: Cultural Genocide and Indigenous Peoples", *Journal of Human Rights*, vol. 14, no. 1, 2015, p. 64.
[236] Ibidem.
[237] *International Convention on the Elimination of All Forms of Racial Discrimination*, UN General Assembly, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195.
[238] See as reference Art.1 (1) of the *International Convention on the Elimination of All Forms of Racial Discrimination*, UN General Assembly, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195.
[239] Article XIII refers to the Rights to the benefits of culture. It states that "Every person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries". See as reference Article XIII of the American Declaration of the Rights and Duties of Man, Inter-American Commission on Human Rights (IACHR), 2 May 1948.
[240] *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador")*, Organization of American States (OAS), A-52, 16 November 1999. Available at: https://www.refworld.org/docid/3ae6b3b90.html.
[241] Article 14 of the *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador")*, Organization of American States (OAS), A-52, 16 November 1999.
[242] Article 8 of *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, Council of Europe, ETS 5, 4 November 1950. Available at: https://www.refworld.org/docid/3ae6b3b04.html.

People's Rights[243] in which Article 17(2) concerning the right to education, to take part to cultural life of the community and the promotion and protection of morals and traditions[244]; finally, Article 22 concerning the right to economic, social, and cultural development.[245] This is a partially illustrative example of the developments that have occurred both at the regional and international level concerning the protection of cultural rights. This part does not contain an exhaustive list but rather the most emblematic examples as it aims to showcase the improvements that have been made to fill the legal vacuum concerning the protection of culture and minorities. In 2007 the adoption of the United Nations Declaration on the Rights of Indigenous Peoples[246] represented a watershed event. Adopted by the United Nations General Assembly through Resolution 61/295[247] the Declaration marked the transition toward cultural rights no longer intended as a sub-category of human rights but as a main element of the Declaration itself, appearing in fact in at least seventeen of the total forty-six articles of the Declaration.

It is through the UNDRIP that cultural genocide connected to the experience of indigenous people. It is important to underline that indigenous people and minority groups have different characteristics under international law. However, many legal tools implemented to protect the right of indigenous people result to be relevant when discussing the right of minorities since they underline important principles and approaches that can be applied more broadly to the protection of minorities. If one side it is true to state that they are two distinct entities, on the other they share common challenges related to the preservation of their culture, identity. Furthermore, indigenous people played a pivotal role in reviving cultural discourses. This is showcased by the cases of forcible transfer of children happened in Australia and Canada in the 19th and 20th centuries. The cases gave rise to ambiguities. As for the Australian case, the practice consisted in forced assimilation through the transfer of children both in boarding schools and in white Australian foster families by compulsion. For the purposes of the present analyses, what results to be relevant is the inquiry process carried out by the Australian Human Rights and Equal Opportunities Commission established in 1995[248] on behalf of the former Attorney-General, the Hon. The

[243] *African Charter on Human and Peoples' Rights ("Banjul Charter")*, Organization of African Unity (OAU), CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), 27 June 1981. Available at: https://www.refworld.org/docid/3ae6b3630.html.
[244] Ibidem, Article 17(2).
[245] Ibidem, Article 22.
[246] *United Nations Declaration on the Rights of Indigenous Peoples: Resolution / Adopted by the General Assembly*, UN General Assembly, A/RES/61/295, 2 October 2007.
[247] Ibidem.
[248] *Australia: Human Rights and Equal Opportunity Commission Act 1986 - Declaration on the Elimination of all forms of Intolerance and of Discrimination based on Religion or Belief*, National Legislative Bodies / National Authorities, F2009B00174, 8 February 1993. Available at: https://www.refworld.org/docid/4993f52c2.html.

Commission was appointed to undertake a national inquiry into *The Separation of Aboriginal and Torres Strait Islander Children From Their Families.*[249] The 1997 report entitled *Bringing Them Home* created the momentum for the revival of cultural genocide discourses as those acts were considered to fall under Article II(e). In particular in the Kruger case the High Court of Australia considered the accusations made by the victims and their parents and categorized the alleged acts as cultural genocide, considering that the aim was "the disintegration of the political and social institutions of culture, language, national feelings, religion, and the economical existence of Indigenous peoples. Removal of children with this objective in mind is genocidal because it aims to destroy the cultural unit which the Convention is concerned to preserve".[250] However, the case was dismissed since "the Genocide Convention is not concerned with cultural genocide, references to cultural genocide being expressly deleted from it in the course of its being drafted"[251], meaning that a broaden understanding of the *mens rea* would have changed the course of the events. As already analyzed a similar case happened in Canada. In 2006 the Truth and Reconciliation Commission[252] recognized that Canada in dealing with Aboriginals Canada adopted all the measures that according to the Commission fall under the label of cultural genocide.[253]

The two cases present a series of similarities. Both Commissions had a non-binding character, something that enable the government to easily dismiss accusations of genocide. Cultural genocide persists as a controversial topic that states tend to disregard. However, ethnic conflicts have showcased how the cultural dimension plays an important role in conflict and genocide prevention leading toward a possible revival of cultural genocide. Traditionally situated at the interstices of international human rights and criminal law, due to the recent evolution, cultural genocide envisions in the latter a possibility for a legal recognition through the development of cultural rights.

[249] Australian Human Rights Commission, *Bringing Them Home,* op., cit.
[250] *Kruger v. Commonwealth*, High Court of Australia, 190 CLR 1, 31 July 1997.
[251] Ibidem.
[252] Truth and Reconciliation Commission of Canada, *Honouring the Truth,* op. cit.
[253] Ibidem.

5. Analyses of the cases: *Poland v Greiser* and *Prosecutor v Nickola Jorgić*

The aim of this last sub-chapter is that of providing an analysis of two judgements. The first one is the *Greiser v. Poland* case which was delivered by the Supreme National Tribunal of Poland. The second one is the *Prosecutor v Nickola Jorgić* which was delivered by German Courts. These cases appear to be relevant since they explored the concept of cultural genocide by providing a broader interpretation of the crime of genocide. Thus, the jurisprudence of these case and the legal interpretation provided by the Courts had implications on how cultural genocide is perceived.

The first case to be analyzed will be the *Greiser v. Poland* case[254]. Born in 1897 in Posen, a Prussian province in the German-Polish region[255], Greiser became first a member of the Nazi Party in 1929 and then Gauleiter of Posen that fall under the Third Reich in 1939[256]. His role was decisive for the fate of Posen in which he undertook a Germanization program which rapidly led to the annihilation of the social structure of the fundaments of the Polish society. According to some research carried out by the International School for Holocaust Studies he "wanted to rid his region of Poles and replace them with *Volksdeutsche* (ethnic Germans). He took away Polish property, placed Polish orphans with 'Aryan' families, terrorized the clergy, and limited cultural and educational programs. From 1939 to 1945 he kicked out 630,000 Jews and Poles and replaced them with 537,000 ethnic Germans".[257] Following WWII, the first judgment sentencing a high-ranking Nazi official was issued by the Supreme National Tribunal of Poland which was appointed precisely to prosecute major war criminals. Despite the fact that throughout the decades, the trial received scarce attention, this case is particularly relevant for the approach that was adopted.

On 23rd October 1945,[258] the Polish government asked the Americans, who had arrested Greiser some month before, the possibility to judge the defendant in Poland by invoking the Moscow Declaration which read as follows: "war criminals who had committed crimes in occupied countries would be sent back to those countries and stand trial and be sentenced on the basis of

[254] 'Trial of Gauleiter Artur Greiser', *The UN War Crimes Comm'n, Law Reports of Trials of War Criminals (Law Reports),* 13, 1949.
[255] DRUMBL, M., 'Germans are the Lords and Poles are the Servants': The Trial of Arthur Greiser in Poland, 1946, *Washington & Lee Legal Studies*, Paper No. 2011-20, 2013, p. 411.
[256] Ibidem.
[257] Ibidem, p. 415.
[258] Ibidem, p. 417.

those countries' laws".[259] Three were the accusations moved against the defendant. It was firstly alleged that between the years 1930 and 1945 he was involved in criminal activities led by the Nazi Party with the aggravating factor of being one of the leaders. Secondly, he was accused of being "in charge of the Nazi Party branch in the territory of the Free City of Danzing and that in this capacity between 1933 and 1939 he conspired with German chief government organs to cause warlike activities, aggression, and military occupation of Poland".[260] Lastly, he was accused of having allegedly committed a series of offences that involved "pertinent offences included mass murders of civilians, persecution, deprivation of the private property of the Polish population, and also the systematic destruction of Polish culture...and Germanization of the Polish country and population."[261] Additionally, Greiser was accused by the Supreme National Tribunal of "insulting and deriding [of] the Polish nation by proclaiming its cultural and social inferiority, and persecution of the Polish population that exceeded in practice the legal and administrative regulations"[262] and prevented Poles from "freely practicing their religious cult, especially the Catholics".[263] Greiser was sentenced to death on the 7th July 1946[264] for all the above mentioned crimes.

This represented the first ever legal ruling on the crime of genocide. The defendant was mainly sentenced according to the municipal law and the London Agreement since laws concerning war crimes and crimes against humanity were still in its infancy. For the purposes of the present analyses, the judgement results particularly relevant for the broaden understanding of genocide that the Tribunal adopted. Since the trial was held before the adoption of the Genocide Convention the label was used not in conformity with the upcoming Convention. However, the Tribunal seemed to endorse Lemkin conceptualization of genocide encompassing into the definition also the cultural dimension of the crimes perpetrated. Thus, even before the discourses that arose after 1948 the tendency was that of considering the annihilation of a specific group not only physically but also through the destruction of its social and cultural foundations.

The second analyses concerns the *Jorgić v. Germany* case.[265] Jorgić, a Bosnian-Serb residing in Germany, who was convicted for allegedly being the leader of a paramilitary group and for having

[259] EPSTEIN, C., *Model Nazi: Arthur Greiser and the Occupation of Western Poland,* Oxford: Oxford University Press, 2010 in DRUMBL, M., 'Germans are the Lords and Poles are the Servants', op. cit. p. 417.
[260] 'Trial of Gauleiter Artur Greiser', *Law Reports* op. cit., in DRUMBL, M., 'Germans are the Lords and Poles are the Servants', op. cit., p. 411.
[261] 'Trial of Gauleiter Artur Greiser', *Law Reports,* op. cit., in DRUMBL, M., 'Germans are the Lords and Poles are the Servants', op. cit., p. 419.
[262] Ibidem.
[263] Ibidem.
[264] DRUMBL, M., 'Germans are the Lords and Poles are the Servants', op. cit., p. 1.
[265] *Jorgić*, Trial Judgement, Higher State Court of Düsseldorf, op. cit.

committed crimes of genocide between May and September 1992 against the Bosnian-Muslim population living in the region of Doboj.[266] The case was upheld by the Higher State Court of Dusseldorf that delivered the judgement in 1997, then by the Federal Supreme Court in 1999, the Federal Constitutional Court in 2000 and finally it was heard before the ECtHR that rendered the judgement in 2007. The judgements delivered by the German Courts, the first ones that dealt with the crimes committed during the Former Yugoslavian conflict, represent a point of reference when it comes to deal with cultural related crimes since they might be considered the first recognition of the cultural dimension of genocide.

In the first trial, the Federal State Court of Dusseldorf convicted the applicant on eleven counts of genocide basing its reasoning on Article 220a of the German Criminal Code which was added in order to "incorporate the genocide Convention into national law".[267] The Court having considered the acts involving "detention, mistreatment, acts of violence, looting and destruction of houses and mosques, by which the Muslims living in the areas claimed by the Serbs were deprived of the fundamentals of their existence and were compelled, insofar as they had not been not killed during acts of violence or in the camps, to leave their homeland",[268] in Paragraph 18 it provided a wide interpretation of the above mentioned Article 220 by interpreting the "destruction of a group" as "destruction of social unit in its distinctiveness and particularity and its feeling of belonging together".[269] The Judgement was appealed in front on the Federal Supreme Court in 1999.[270] It endorsed the legal reasoning of the High State Court pointing out that the defendant actions had to be considered as only one count of genocide based on Article 220 (4) referred to "imposition of measures which are intended to prevent births withing the group"[271] and 220(5) referred to "forcible transfer of children of the group into another group".[272] Even in this case, the physical component is considered as not necessary to determine the destruction of a group.

In 2000 the Federal Constitutional Court defined the legal reasoning of the previous Courts as "foreseeable".[273] In 2007 the case was then upheld by the EUCtHR which considered the interpretation of genocide as not "unreasonable".[274] In the merits of the case the applicant contested the broader interpretation, arguing that according to the literal meaning of the term

[266] NOVIC, E., *The Concept of Cultural Genocide*, op. cit., p. 53.
[267] *Jorgić v. Germany,* European Court of Human Rights, op. cit., para. 93, p. 25.
[268] *Jorgić*, Trial Judgement, Higher State Court of Düsseldorf, op. cit., p. 95 in *Jorgić v. Germany*, European Court of Human Rights, op. cit., para. 18, p. 95.
[269] Ibidem, para. 18, p. 95.
[270] *Jorgić*, Appeals Judgment, Federal Supreme Court of Germany, op. cit., in *Jorgić v. Germany*, European Court of Human Rights, op. cit.
[271] Ibidem, para. 23, p. 5.
[272] Ibidem.
[273] *Jorgić*, Constitutional Appeals Judgment, German Federal Constitutional Court, op. cit., para 27, p. 6.
[274] *Jorgić v. Germany,* European Court of Human Rights, op. cit., para. 105, p. 28.

"destroy", "a mere attack on the living conditions or the basis of subsistence of a group did not constitute destruction of the group itself"[275]. It specified that the "ethnic cleansing carried out by Bosnian Serbs in the Doboj region had been aimed only at driving all Muslims away from that region by force, that is, at expelling that group, not destroying its very existence".[276] On the other side, the Government considered the notion of genocide provided as not in breach of Article VII (1) of the Genocide Convention, and thus not restricted to physical-biological offences. It based its ratio on the expression figuring out in Article 220 of the German Criminal Code that refers to the intent to destroy the "group as such", an expression that seems to be encompassing or at least not excluding the social dimension. Furthermore Article 220 (4) and (5) refer to acts which per se do not encompass the killing of the group members. To provide evidence of that, the Court brought as an example Resolution 47/121[277] delivered by the United Nations General Assembly concerning the case of Bosnia and Herzegovina in which it was stated that the "mass expulsions of defenceless civilians from their homes and the existence in Serbian and Montenegrin controlled areas of concentration camps and detention centres, in pursuit of the abhorrent policy of "ethnic cleansing" had to be considered "a form of genocide".[278] The defendant contested once again the too broad interpretation of the mens rea based on Article 7(1) of the European Convention on Human Rights (ECHR), which refers to the *nullum crimen sine lege* principle.[279] Furthermore, he provided as an example the conflicting interpretation with the Krstić case in which it was adopted a narrower definition of "group destruction".

In any event, the German courts had not qualified ethnic cleansing in general as genocide, but had found that the applicant, in the circumstances of the case, was guilty of genocide as he had intended to destroy a group as a social unit and not merely to expel it. At the end, the Krstić judgements could not be taken into account since they "were delivered subsequent to the commission of his offences".[280] For this reason, "the applicant could not rely on this interpretation being taken by the German courts in respect of German law at the material time, that is, when he committed his offences".[281]

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[275] Ibidem, para. 92, p. 25.
[276] *Jorgić v. Germany*, European Court of Human Rights, op. cit., para. 92, p. 25.
[277] UN General Assembly, *The Situation in Bosnia and Herzegovina: Resolution Adopted by the General Assembly*, A/RES/47/121, 7 April 1993. Available at: https://digitallibrary.un.org/record/158781?ln=en.
[278] See as reference para. 41, p. 10 in *Jorgić v. Germany* European Court of Human Rights, op. cit., para. 107, p. 29.
[279] *European Convention for the Protection of Human Rights and Fundamental Freedoms* (as amended by Protocols Nos. 11 and 14), Council of Europe, 4 November 1950. Available at: https://www.refworld.org/docid/3ae6b3b04.html
[280] *Jorgić v. Germany,* European Court of Human Rights, op. cit., para. 113, p. 30.
[281] Ibidem.

All in all, the two judgements result to be particularly relevant for different reasons. First of all, because they show how even before the drafting of the Genocide Convention there was a tendency toward a broader understanding of the actus reus of genocide, derived from an interpretation of the "group as such" not merely as a physical entity but as a social unit as well. The judgments emphasize how the cultural dimension is a fundamental component that can be either an integral part of genocide or a crime of its own. The judgments clash with the part of jurisprudence in favor of recognizing purely physical and biological annihilation, emphasizing that attacks on the foundations of a group are equally indictable as genocidal acts. These judgments form a fundamental part of jurisprudence on which to base future developments for a possible codification of cultural genocide.

Chapter 2- The Atrocities Perpetrated by the Islamic State Against the Yazidi Minority and the Possible Classification as Cultural Genocide

1- Introduction

Before proceeding with the analyses of the alleged genocidal atrocities perpetrated by ISIS toward the Yazidi population and of whether these might eventually be considered not only as a form of genocide but more specifically as cultural genocide, it is important to provide an analysis of the parties involved. The chapter will start with an overview concerning the history of the Yazidi minority and an inquiry into the origins of the self-proclaimed Islamic State (hereinafter ISIS). A sub-chapter will provide an insight into the Yazidis religion fundamental to understand the causes behind the long series of persecutions that have been inflicted toward the minority under the Ottoman Empire first and then in more recent times under the Islamic State. since its blurred origins and misinterpretations are at the basis of their persecution. The following sub-chapters will be devoted to understanding, from a legal perspective, whether the Islamic State might be considered a state under international law and under which legal framework Yazidis might be considered a minority. This information will be fundamental to proceed with the inquiry that aims at clarifying whether ISIS crimes might be considered genocidal under Article II of the Genocide Convention. However, the aim of the chapter is that of providing evidence of how the acts that do not necessarily lead to a physical destruction of the group may fall under the actus reus of genocide. Finally, the last sub-chapter will investigate whether it would be possible to refer the case to the International Criminal Court or whether other possibilities exist in order to have those atrocities to be legally recognized and punished.

2- The Origins of the Yazidis Minority

The Yazidis are a Kurdish heterodox minority[282] originally located in remoted areas in Iraq, Turkey, Syria, and Iran.[283] Yazidis are among the most ancient communities in the world with an history of more than 6500 years, rooted in the Sumer and Babylonian civilizations.[284] There seems to be common agreement in considering Yazidis as the original Kurds, as also affirmed multiple times by the President of Iraq Kurdistan Region Masoud Barzani in his speeches.[285] The fact that they commonly speak Kurdish, which is also the language used in their sacred texts,[286] is frequently used as a proof of this.

Yazidis were a sedentary community based on agriculture and livestock. Nowadays the majority of them live in norther Iraq, in disputed and isolated regions between Jabal Sinjar and Shaikham in Mosul Province, in the middle of Upper Mesopotamia, now modern Iraq.[287] This is a geographically isolated, and for this reason a strategic one, that was chosen by Yazidis to protect themselves from the persecutions of the Ottoman Empire first and then of the Islamic State. The mountains became a shelter for the Yazidis first and then for many Armenians who fled from the 1915 genocide[288], and they are still used as a shelter by many minorities. As a matter of fact, modern Iraq counts for about 75% of Arabs[289] and the remaining 25% is composed by Alevi, Christian, Zoroastrian and Yazidi minorities with whom they have a relationship based on violence and tension. This area is also part of an ever-evolving struggle between Iraq and the autonomous region of Kurdistan which in turn have frequently advanced claims of sovereignty over the territory, creating an element of further instability. Little is known concerning their religion and customs, and there is still lack of unanimity among scholars concerning more generally the origins of the group. For this reason, various theories, frequently contradictory, have been advanced throughout the years. This is aggravated by the fact that they maintained a long-

[282] FUCCARO, N., "Communalism and the State in Iraq: The Yazidi Kurds, c.1869-1940", *Middle Eastern Studies*, vol. 35, no. 2, 1999, p.1.
[283] ALLISON, C., "The Yazidis", *Oxford Research Encyclopedia of Religion*, Oxford University Press, 2017, p.1.
[284] *Destroying the soul of the Yazidi,* RASHID International, Yazda et EAMENA Project, 2019, p.29.
[285] SALLOUM, S., *Êzidîs in Iraq,* op. cit., p. 57.
[286] SALLOUM, S., *Êzidîs in Iraq. Memory, Beliefs and Current Genocide,* Research conducted in partnership with Un ponte per... and CEI, 2016, pp. 58-64.
[287] Ibidem, p.11.
[288] Ibidem.
[289] HADŽIĆ, F., Religious and Cultural Violence; The 21st-Century Genocide Against the Yazidis, *Philosophy, Economics and Law Review,* Volume 1, 2021, p. 173.

standing existence characterized by seclusion. It was after ISIS persecution that their history started to be known. There are very few documents available, and these appear to be very recent.

Yazidis is the name through which the minority group will be referred throughout the thesis since it is the English translation from Sumerian and the name through which they are known internationally. However, for clarity's sake it is relevant to retrace its origins. The names through which the Yazidis call themselves are *Êzid, Êzî*, or *Izid* which probably derive their roots from the Sumerian *Ê Zî Dî* meaning "the ones who are on the right path and have the good and unspoiled spirit".[290] While according to other scholars the name derives from the Middle Persian and Kurdish words *Yazda* or *Yazdan* which mean "God" but also "Angel", but it could be also related to the Avesta verb *Yazata* meaning "a being worthy of worship".[291] The name itself denotes a close connection with Êzidîsm, the old religion that has since always determined the sorts of this minority. It is generally believed that Êzidîsm is a monotheistic religion based on the belief that *Xuada* (God) has created both the world and the Lalish Temple, the holiest temple located in Northern Iraq, helped by seven angels headed by *Tawuse Melek*, the head of the angles.[292] They believe in God as the source of both good and evil and they have a close relationship with the natural elements,[293] something that made them to be perceived as polytheistic and devil worshippers.

Furthermore, Êzidîsm is a religion mainly based on oral tradition with very few holy books that have been lost during the genocidal campaigns. The books have been subsequently rewritten but not faithfully to the original.[294] As a matter of fact, scholars denounce distortions and evident adaptation to the prevailing Islamic culture. The absence of a holy book was an additional expedient used to reject Êzidîsm both from Islam and from Abrahamic religions of which Judaism and Christianity are part.[295] The existence of a holy book would have permitted to categorize their religion as monotheistic or polytheistic and thus to solve any doubt concerning their belief. All these elements contributed to exacerbate relations with this minority and to create stereotypes, false myths and accusations as it will be further discussed in the following sub-chapters. Nowadays, there seems to be agreement concerning the historical value of this religion that Yazidis themselves consider to be the most ancient of the Middle East. Religion also influences the social organization of the group. As a matter of fact, they are a closed hierarchical community

[290] Destroying the soul of the Yazidi, op. cit., p.29.
[291] AÇIKYILDIZ, B., The Yezidis. The History of a Community, Culture and Religion, London New York: I. B. Tauris, 2010, p. 35.
[292] *Destroying the soul of the Yazidi*, op. cit., p.29.
[293] Ibidem.
[294] SALLOUM, S., *Êzidîs in Iraq,* op. cit., p. 27.
[295] Ibidem, p. 15.

divided in castes. This system forbids any type of exogamy and endogamy meaning that marriages both with non-Yazidis and with Yazidis who belong to different castes are forbidden.[296] They follow a strict class division in which three different sects are revisable: the Merid to which the general population belong; the religious Pir and the Shix sect, which correspond to the spiritual ranks.[297]

Different are the theories also concerning their origins which remain blurred. According to some scholars they would be descendants of the Parsees, for others they were Muslims who later refused Islam. According to the historian Al-Samani – the first one who in the 10th century retraced the genealogy of Yazidi minority –, they descend from Umayyad Caliph Yazid I[298] who ruled from 680 to 683 CE,[299] whose army was considered responsible for the assassination of Imam Husayn[300] the grandson of the prophet Muhammad, the founder of Islam, during the battle of Karbala in 680 CE.[301] This provides both a chronological reference concerning the supposed period during which the minority emerged and one of the multiple elements used by the Islamic world to reject and persecute the Yazidis. As a matter of fact, theirs is a history of persecution since they have always been excluded from a state that recognizes the existence of only three groups: the Shiite, the Sunnis and the Kurds.[302]

To date, an accurate number of Yazidis remains uncertain. The difficulty in determining their population size is due first of all because of their isolation and secondly for the absence of official ethnic demographic data in Iraq. The worldwide number of Yezidis is estimates between 800,000 and 1,000,000.[303] According to the Yazidi Affair Department at the Ministry of Religious Affairs in Kurdistan Regional Government about 550,000 reside in Iraq and the remaining part is scattered among Armenia, Georgia, Syria and Turkey.[304] However, throughout years the long series of genocides they have suffered have reduced them in number. As a matter of fact, that of the Yazidis is an history of persecutions that started under the Ottoman Empire and continued in the Modern Iraq with very short apparent peaceful intervals. The long series of genocides they suffered had an impact on their demography but also on their cultural and religious heritage, since

[296] *Destroying the soul of the Yazidi*, op. cit., p.29.
[297] Ibidem.
[298] Umayyad Dynasty was a dynasty established in Damascus which ruled from 750 1258 CE. It was the first to take the title of Caliphate. Reference: KHAN, S. M. *Umayyad Dynasty,* 2020, World History Encyclopedia, available at: https://www.worldhistory.org/Umayyad_Dynasty/.
[299] KIZILHAN, J.-I., "The Yazidi—Religion, Culture and Trauma", Advances in Anthropology, vol. 7, 2017, p.334.
[300] AÇIKYILDIZ, B., *The Yezidis,* op. cit., p. 36.
[301] KHAN, S. M. *Umayyad Dynasty,* op. cit.
[302] SALLOUM, S., *Êzidîs in Iraq,* op. cit., p.13.
[303] KIZILHAN, J.-I., "The Yazidi", op. cit., p.333.
[304] SALLOUM, S., *Êzidîs in Iraq,* op. cit., p.12.

Yazidis have been destroyed both physically and culturally. Many have been the attempts to destroy this minority group and to include them under the Arab Kurdish mainstream. A document secretly drafted in 1966 by the Iraqi authorities under the Baathist regime addressed toward the community leaders of the Mosul Governorate expressed doubts concerning the Yazidi identity.[305] It was in this circumstance that it was specified that their ethnicity could be considered Kurdish, but the religion was not perceived as part of the prevailing Islamic structure. This has been only one of the multiple attempts to make their identity to fall under the wider Kurdish and Islamic mainstream. They suffered a long way of persecution which began under the Ottoman Empire and continued under Islamic State.

2.1-The Persecution of the Yazidis: Religion as the Alleged Cause for Genocide

Yazidis are a religious minority, whose belief has frequently been labelled as mysterious and for this reason stereotyped. The roots of this ancient religion are unclear. Some scholars argue that it started to be professed by some Persian communities and then it rapidly spread in northern Iraq. Kurdish scholars in their works refer to Êzidîsm as a Kurdish religion that with the passage of time received the influence of other religions.[306] It now appears as an ensemble of different beliefs. As a matter of fact, it is composed by elements belonging to old Paganism, in particular for what concerns the worship of the moon and the sun; Jewish elements for what concerns the prohibition of certain foods; Christian elements such as baptism, eucharist and breaking of bread and finally Muslim elements such as circumcision, fasting, and pilgrimage.[307] Yazidis have a close relationship with the natural elements – namely air, earth, fire and water – as their temples and shrines testify. Furthermore, they not only consider God (*Azda-Khuda*) as the symbol of good and evil but it is also believed to have created the world and for this reason he is worshipped in his "oneness and multiplicity".[308] Due to this thy have been frequently described as polytheistic and devil worshippers. They recognize what they call *Malak Ta'us* or Peacock Angel.[309] In Judaism,

[305] Ibidem, p. 68.
[306] Ebied, R.Y., "Devil Worshippers: The Yazidis", *Mehregan in Sydney*, School of Studies in Religion, 1998, p. 93.
[307] Ibidem, p. 94.
[308] SALLOUM, S., *Êzidîs in Iraq,* op. cit., pp. 33-34.
[309] EBIED, R.Y., "Devil Worshippers: The Yazidis", op. cit., p. 95.

Christianity and Islam tradition the Angel worshipped by the Yazidis is the symbol of evil, since it represents the angel which fall on earth and transformed itself into a colorful bird without the consent of God. It was banished from the sight of God for its disobedience.[310] Another important symbol venerated by the Yazidis is the black serpent.[311] However, in the three Abrahamic religions all these represent controversial and negative symbols associated to the devil. All these elements contribute to make their religion questionable.

All in all, the Islamic world consider them murderers because of their descend from Umayyad Caliph Yazid I; they are considered heretics for considering God the source of both good and evil; they are rejected from religions that accept only the ones based on scriptures; and finally, they are perceived as dissenters for not having accepted to convert like the majority of the Kurdish population did during the Islamization of the Middle East in the 7th century.[312] Yazidis have been labelled as *kafir* meaning non-believers, satanists and infidels[313] and they have been subjected to heinous accusations that exacerbated in pogroms and persecutions. Due to this they became a closed isolated community, its doctrine became non-missionary, and its belief was professed in secret.

Religious intolerance started in the early 16th century during the Ottoman Empire under which the Yazidi experienced seventy-two *firmans* [314] or decrees which were adopted to legitimize what for Yezidis were genocidal campaigns – that involved looting, mass killings and enslavement – used to convert minorities to Islam. Thus, to the seventy-two *firmans* that have been chronicled corresponds the same number of genocides. The Ottoman leaders were among the first ones to promote *fatwas* in order to endorse the looting and killing of Yezidi people who inhabited areas considered as war zones according to the *Sharia* laws.[315] A *fatwa* is a legal ruling or religious edict issued by an Islamic scholar or religious authority, normally the *Sheikhul Islam* – an outstanding legal scholar and the only accredited source who can solve issues concerning the adherence to the Islamic law. The word *fatwa* comes from Arabic and literally means a "legal opinion" or "judgment." Fatwas are issued by Islamic scholars who have expertise in Islamic law

[310] BACHMAN, J., *Cultural Genocide. Law, Politics, and Global Manifestations,* op. cit., p. 212.
[311] ISAKHAN, B., and SHAHAB, S., "The Islamic State's destruction of Yezidi heritage: Responses, resilience and reconstruction after genocide", *Journal of Social Archaeology*, vol. 20(1), 2020, p. 10.
[312] KIZILHAN, J.-I., "The Yazidi", op. cit., p. 333.
[313] Ibidem, p. 11.
[314] A *firman* in Ottoman Turkish refers to a public legislative document or decree adopted by the head of an Islamic Caliphate – in this case by the Ottoman Empire – which progressively acquired the status of a traditional body of law. The content had always to conform to Islamic Law (Sharia). See as reference: CHETERIAN, V., "ISIS Genocide Against the Yazidis and Mass Violence in the Middle East", *British Journal of Middle Eastern Studies*, vol. 48:4, 2021, p. 636.
[315] SALLOUM, S., *Êzidîs in Iraq,* op. cit., p. 14.

(*Sharia*) and are considered authoritative within their respective communities.[316] They became bodies of law through which Yezidis and other minorities were judged. In reality, they started to be used as justifications for the looting and killing of the Yazidis in particular. As a matter of fact, *fatwas* stereotyped Yezidis, labelled them as infidels and justified any form of violence against them. It has been so that through fatwas, Ottoman's fight towards Middle East minorities was legitimized and acquired the name of *Jihad*, a holy war against the unbelievers, while the territories inhabited by minorities were labelled as war zones from a religious perspective.[317]

Intolerance ran rampant in the following decades. After the fall of the Ottoman Empire and during the establishment of the modern Iraq in 1920, when the League of Nations granted Britain a mandate over Mesopotamia, the situation was exacerbated.[318] The Sinjar Mountains were a strategic position that Britain, France and Turkey started to contend in order to consolidate their influence over Iraq. The powers negotiated with Yazidis that ended up to ally with Britain under the promise of terminating the *firmans*. However, this represented only a political escamotage in which the minority's needs were exploited to reach political interests. They became part of the Modern State of Iraq, forced to recognized King Faisal I of Iraq, an Arab King. The 1925 Iraqi Constitution entailed a series of legislations in accordance with the Iraqi commitment made to the Council of the League of Nations to protect the rights of minorities.[319] This resulted in the Local Language Law of 1931 which acknowledged and recognized language plurality in the areas between Kurdistan and Turkmenistan.[320] This was followed by a series of codes granting minorities the possibility to manage their own affairs. These resulted in the Orthodox Armenian Cult Code No. 70 and the Jewish Cult Code No. 77.[321] What emerges from this body of legislations is the complete absence of laws concerning Yazidi minority. The situation was exasperated under the Baath party which promulgated the Arabization decree which aimed at annihilating Yazidis religion and identity who once again started to be addressed as "a devious Islamic faction"[322] or as the result of confusion caused by the dissolution of the precedent empires.

The Baathist party which ruled from 1968 to 2003[323] aimed at creating a single Arab socialist nation. It underwent the so-called Arabization policy whose aim was the annihilation of the Yazidi identity. Destruction of villages, forced displacement of Yazidi people, violent military

[316] SALLOUM, S., *Êzidîs in Iraq,* op. cit., p. 73.
[317] Ibidem, p. 74.
[318] Ibidem, p. 89.
[319] Ibidem, pp. 80-81.
[320] Ibidem, p. 89.
[321] Ibidem.
[322] Ibidem, p. 91.
[323] Britannica

campaigns were at the basis of the policy which was integrated with the Law of 1st July, 1963 through which Yazidis' areas were put under Arab administration and Yazidis inhabitants were registered as Arabs in the 1977 census.[324] With the 2005 Iraqi Constitution[325] an unprecedent step forward concerning Yazidis recognition seemed to have been made. Article 3 in fact states that "this Constitution guarantees the Islamic identity of the majority of the Iraqi people and guarantees the full religious rights to freedom of religious belief and practice of all individuals such as Christians, Yazidis, and Mandean Sabeans."[326] As it can be noted for the first time in history the word Yazidi figured in a body of law. However, a question concerning to what extent toleration would be enacted emerges spontaneously especially in light of what stated in Article 2 which reads as follows: "Islam is the official religion of the State and is a foundation source of legislation" just to continue in Article 2 First (A) by stating that "No law may be enacted that contradicts the established provisions of Islam."[327] Furthermore, without proper institutions to protect the minorities' rights discrimination and violent repression continued to be enacted.

Violence intensified in 2014, after the invasion of Sinjar on behalf of ISIS militias. Saddam Hussein Arabization policy exacerbated the already fragile situation and under its caliphate the Yazidi minority suffered the seventy-third genocide.[328] *Fatwas* were once again implemented to justify mass killings, sexual violence, and deportation that this time were accompanied by unprecedent attacks toward their cultural heritage. Once again religion was used as an expedient for what might be labelled both as genocide and cultural genocide as it will be further discussed. ISIS differed from other groups such as Al-Qaeda in the violence it targeted people and heritage. The atrocities reached its peak under the caliphate of Abu Bakr Al-Baghdadi during which the enforcement of Daesh interpretation of the Islamic law mined the survival of the different minorities.

[324] FARHAN, D. N., "Sufferings of Êzidî Kurds under Iraqi Governments 1921-2003", The Kurdish Studies and Archives Center, 2008, p. 116 in SALLOUM, S., *Êzidîs in Iraq,* op. cit., p. 14.
[325] *Constitution of the Republic of Iraq*, 15 October 2005, available at: https://www.constituteproject.org/constitution/Iraq_2005.pdf?lang=en.
[326] Article 3 of the *Constitution of the Republic of Iraq*, op. cit.
[327] Article 2 of the *Constitution of the Republic of Iraq,* op. cit.
[328] SALLOUM, S., *Êzidîs in Iraq,* op. cit., p. 60.

2.2- The Origins of the So-Called Islamic State

What todays is called the Islamic State of Iraq and Syria (hereinafter ISIS) was an extremist jihadist group emerged as a branch of Al-Qaeda that spread rapidly in the territories of Iraq, Libya and Syria.[329] It was mainly a militant Sunni-Salafi-jihadist organization[330] that differentiated itself from other terrorist groups in its aim to become a state. It was founded in 2002 in Iraq by the Jordanian Abu Musab al-Zarqawi (hereinafter Al-Zarqawi) with the name of Jamaat al-Tawhid wa-i-Jihad.[331] The group underwent different phases during which it progressively changed its name. The first phase runs from 2002 to 2013 in which the self-proclaimed state called itself the Islamic State of Iraq; a second phase from 2013 to the beginning of 2014 in which it became the Islamic State of Iraq and Sham; and finally in 2014 it was beginning a new phase under the name of Islamic State as the Outright Caliphate.[332] Nowadays it is commonly addressed to as Islamic State of Iraq and Syria (ISIS), Islamic State of Iraq and the Levant (ISIL) or with the acronym Daesh. It will be addressed throughout the thesis as ISIS.

Al-Zarqawi, who ruled from 2002 to 2006[333], founded the group with a twofold intent. First of all, it aimed to create a sharia-based state founded upon the intolerance toward every individual that does not share the Sunni Islamic faith.[334] The idea was that of bringing Islam back to original Islamic Caliphate of the 7th century.[335] Secondly, it wanted to provide support to Al-Qaeda in its fight against the United States after its invasion of Iraq in 2003.[336] The US invasion was perceived by many Iraqis as the cause of the fragmentation of the social and political Iraqi structure. In particular, and the erosion of the Baathist Party and the consequent deposition of Saddam Hussein had a side-effect.[337] The US created a Shiite government led by Al-Malaki which generated the discontent of the Sunni that felt being marginalized.[338] ISIS gathered together Sunni Islamic

[329] HOVE, M., "Middle East: The Origins of the 'Islamic State' (ISIS)", *Conflict Studies Quarterly*, Issue 23, 2018, p. 5.
[330] ROBILLARD, M., *Terrorist Group: ISIS*, Counter Terrorism Ethics, available at: https://counterterrorismethics.tudelft.nl/terrorist-group-isis/.
[331] HOVE, M., "Middle East", op. cit., p.4.
[332] Ibidem, p.5.
[333] HOVE, M., "Middle East", op. cit., p.4.
[334] TOMUSCHAT, C., "The Status of the 'Islamic State' under International Law", *Die Friedens-Warte*, vol. 90, no. 3/4, 2015, p. 225.
[335] ROBILLARD, M., *Terrorist Group: ISIS*, op. cit.
[336] Ibidem.
[337] HOVE, M., "Middle East", op. cit., p.5.
[338] Ibidem, p.6.

insurgents who aimed at annihilating the Shiites[339], but also members of the former Baathist party, and extremists that were already part of Al-Qaeda. However, the group operated along with Al-Qaeda for a very brief period due to divergent ideological views. After the death of Al-Zarqawi killed by the US intelligence in 2006, the Egyptian Abu Ayoub al-Masri became the new leader[340] of the terrorist group with whom it reaches its second phase. His leadership lasts until 2010 when he was killed by the US, and he was substituted by Abu-Baker Al-Baghdadi (hereinafter Al-Baghdadi).

In 2011 the US withdrew from Iraq, leaving the country in a political fragility. Al-Baghdadi exploited both the instability of the Iraqi front, and the political tensions in the Syrian front caused by the opposition of the president Bashar Al-Assad and the ruling class of Shia Alawis against the Sunni that represented the major power of the region.[341] The Syrian civil war that resulted from the political tensions represented a fertile ground for the government of Al-Baghdadi that took advantage of the situation to infiltrate into Syrian territories. It allied with the Al-Nusra front, the anti-Assad insurgents,[342] and managed to establish a new leadership under an ISIS affiliate namely Abu Muhammad Al-Julani.[343] The attempts to instrumentalize the Arab uprising represent a misinterpretation of the peaceful protests that were asking for democracy and freedom. In spite of that, the fragile political context that had split the society into opposed factions created a fertile soil for the terrorist group. They advanced in the Syrian territories rapidly conquering Raqqa between 2013 and 2014 where it was established a capital[344] while advancing also in the Iraqi front and conquering the provinces of Fallujah, Ramadi, and Mosul[345] imposing itself as a *de facto* territorial power.

In this context a new phase began. Al-Baghdadi wished to create a military coalition with the Nusra Front but Julani preferred allying with Al-Qaeda. For this reason, on the 29th June 2014 Al-

[339] Sunnis focus on following the Prophet's example whereas Shi'a focus on the lineage of Muhammad's family through a series of Imams. The historical division between Sunnis and Shiites within Islam is mainly due to disagreements over the rightful successor to the Prophet Muhammad after his death in 632 CE. The conflict emerged from differing interpretations of Islamic leadership and authority. See as reference: "What's The Difference Between Sunni And Shi'a Muslims?", Centre for research and Evidence on Security Threats, 2016, available at: https://crestresearch.ac.uk/comment/whats-difference-sunni-shia-muslims/#:~:text=Sunnis%20focus%20on%20following%20the,parts%20of%20the%20Middle%20East.
[340] HOVE, M., "Middle East", op. cit., p. 6.
[341] ROBILLARD, M., *Terrorist Group: ISIS*, op. cit.
[342] LONGOBARDO, M., "The Self-Proclaimed Statehood of the Islamic State between 2014 and 2017 and International Law", *Anuario Español de Derecho Internacional,* 2017, p. 209.
[343] HOVE, M., "Middle East", op. cit., p. 13.
[344] ROBILLARD, M., *Terrorist Group: ISIS*, op. cit.
[345] HOVE, M., "Middle East", op. cit., p. 13.

Baghdadi announced the end of the alliance with Al-Qaeda[346] and the creation of a worldwide Caliphate and proclaimed himself Caliph.[347] It was in this period that the group gained power and prominence supported by a massive social media campaign where it reported the atrocities that the group was carrying out, the beheadings of foreign captured journalists and the destruction of the cultural heritage. Social media resulted to be particularly useful in attracting foreign fighters from all around the world. They established a media group called Al-Hayat to spread their ideology, they founded the magazine Dabiq, and the Amaq News Agency.[348] Although data were difficult to gather it has been estimated that the group counted among 60,000 to 100,000 combatants.[349] The massive increase of militants enabled the group to conquer new regions and to penetrate in Sinjar starting an alleged genocidal campaign in particular against minorities. The Yazidi minority in particular has endured severe mistreatment. Yazidis were persecuted, thousands of them were killed, women were raped, and children were forcibly displaced and obliged to convert, their villages were plundered.[350]

ISIS started to spread terror across the world, lunching attacks in Paris, Tripoli, attacking the Bardo museum, the mosques in Yemen, and Saudi Arabia, the refugee camps in Damascus, a Tunisian resort in Sousse and plenty more, leaving a trail of death behind every attack.[351] At that time ISIS had the control of a territory which extended from Aleppo to northwestern Syria.[352] This allowed them to leverage more economic resources. The main source of income came from human trafficking, collection of illicit taxes, revenues that came from oil, gas, and phosphate fields that they had conquered and the smuggling of archeological artifacts.[353]

On 7th of August the US, under the leadership of Barak Obama, announced the beginning of a massive air-strike campaign.[354] After being recognized as a global menace by the International Community, the US created the Global Coalition to Defeat ISIS which was supported in its operations by the newly formed Combined Joint Task Force – Operation Inherent Resolve (also known with the acronym CJTF – OIR) which was joint by sixty-four countries.[355] Upon Iraqi request a non-combat mission was created by the North Atlantic Treaty Organization (hereinafter

[346] ROBILLARD, M., *Terrorist Group: ISIS*, op. cit.
[347] LONGOBARDO, M., "The Self-Proclaimed Statehood of the Islamic State", op. cit. p. 209.
[348] ALMOHAMAD, S. *Not a Storm in a Teacup: The Islamic State after the Caliphate,* 2021, German Institute for Global and Area Studies, Number 3, available at: https://www.giga-hamburg.de/en/publications/giga-focus/not-a-storm-in-a-teacup-the-islamic-state-after-the-caliphate
[349] ROBILLARD, M., *Terrorist Group: ISIS*, op. cit.
[350] TOMUSCHAT, C., "The Status of the 'Islamic State', op. cit., p. 225.
[351] ROBILLARD, M., *Terrorist Group: ISIS*, op. cit.
[352] ALMOHAMAD, S., *Not a Storm in a Teacup,* op. cit.
[353] ROBILLARD, M., *Terrorist Group: ISIS*, op. cit.
[354] Ibidem.
[355] ALMOHAMAD, S. *Not a Storm in a Teacup*, op. cit.

NATO) with the aim of training the Iraqi Army.[356] ISIS started to progressively lose territories and was forced to withdraw. In 2019 the Caliph Al-Baghdadi was killed.[357] However, it was succeeded by Abu Ibrahim al-Hashimi al-Qurashi, accused to be the head of the atrocities committed against the Yazidis. On 19th of December 2018 President Trump announced the defeat of ISIS.[358] However, the Caliphate has never chased to exist completely. Al-Qurashi was killed during an US Special Operations raid but was immediately substituted by the Abu al-Hassan al-Hashemi al-Qurayshi with whom initiated the fourth Caliphate.[359] At the time of writing, a report carried out by the UNSC has underlined how ISIS still represents a menace to the International Community that due to new technologies with the passage of time has become "more sophisticated and prolific."[360]

3- Can ISIS be Considered a State Under International Law?

The question of whether ISIS could be considered a state or not emerged in particular when France invoked the mutual defence clause of the European Union Treaty[361] after the terrorist attacks which hit Paris in 2015. This clause enshrined in Article 42(7) of the Treaty of Lisbon states that if a Member State is the victim of an armed aggression on its territory, the other Member States have an obligation to aid and assist it by all the means in their power in accordance with Article 51 of the Charter of the United Nations.[362] However, before invoking Article 42(7) is essential to determin whether an entity detains statehood or not and this appears to be compelling. States are the primary subjects of international law. In spite of that, the criteria to determine when an entity can be considered a state from an international legal perspective remain still controversial. The

[356] Ibidem.
[357] Ibidem.
[358] Ibidem.
[359] ROBILLARD, M., *Terrorist Group: ISIS*, op. cit.
[360] UN Security Council, *Sixteenth report of the Secretary-General on the threat posed by ISIL (Da'esh) to international peace and security and the range of United Nations efforts in support of Member States in countering the threat*, S/2023/76, 1 February 2023.
[361] Article 42 of the European Union, *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, 2007/C 306/01,13 December 2007.
[362] Article 51 of the United Nations, *Charter of the United Nations*, 1 UNTS XVI, 24 October 1945.

legal framework commonly used to understand whether a state might be recognized as such is Article 1 of the Montevideo Convention on the Rights and Duties of States of 1933.[363] The Convention sets out four criteria of statehood, and it reads as follows:

"The state as an international person should possess the following qualifications:

(a) a permanent population;

(b) a defined territory;

(c) government;

(d) the capacity to enter into relations with other states."[364]

Proceeding with the analyses of each criterion, it might be asserted that ISIS does not meet any of those. Concerning the first one which refers to a permanent population, the Western Sahara Case of 1975[365] might be helpful. Since the people of that territory were nomadic and there was no authority, it was asked to the ICJ whether the population could be considered as permanent and whether this was an essential criterion in determining statehood. In that case the ICJ in its advisory opinion specified that "at the time of colonization Western Sahara was inhabited by peoples which, if nomadic, were socially and politically organized in tribes and under chiefs competent to represent them."[366] It results that, it seems to be not necessary to have a population fixed to a specific area. This by analogy results to be particularly relevant concerning the present case since ISIS population was continuously evolving with the assimilation of new members and the transfer of these from one place to another. However, in this case a more important element must be considered. The population of the zones subjected to ISIS control refused to recognize and support the regime.[367] As a matter of fact, ISIS imposed itself by disseminating terror throughout the population and enforcing in this way its power.

Concerning the second criterion enlisted, ISIS was unable to establish a homogenous territory under defined and fixed borders. However, well-defined boundaries seem to be not an essential prerequisite. In the North Sea Continental Shelf case[368] the ICJ specified that "there is no rule that

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[363] "Montevideo Convention on the Rights and Duties of States", *American Journal of International Law*, vol. 27, no. 2, 1933, pp. 184-188.
[364] See Article 1 of the "Montevideo Convention on the Rights and Duties of States", op. cit., p. 184.
[365] *Western Sahara*, Advisory Opinion, International Court of Justice (ICJ), ICJ GL No 414, 16th October 1975.
[366] Ibidem, para. 81, p. 31.
[367] TOMUSCHAT, C., "The Status of the 'Islamic State' Under International Law", *Die Friedens-Warte*, vol. 90, no. 3/4, 2015, p. 229.
[368] *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, International Court of Justice (ICJ), 20 February 1969.

the land frontiers of a State must be fully delimited and defined, and often in various places and for long periods they are not."[369]Fixed borders appear to be more a consequence of statehood than an essential criterion. Thus, on one side, considering provision (b) alone, ISIS can hardly be said to meet the requirement set out in the Montevideo Convention, since there was too much uncertainty with respect to the territories controlled by the caliphate itself. The territorial control of ISIS was characterized by constant changes and the lack of clear demarcation lines. Moreover, the international community, including Syria and Iraq, the most involved states, vehemently asserted that the conquest areas remained an inherent part of their respective national territories. Despite ISIS's attempts to progressively isolate the territories once conquered, there was no stability or continuity in their control over these areas. The fluid nature of the territorial control by ISIS, coupled with the conflicting claims of sovereignty from established states, presented significant challenges in assessing their compliance with the criteria outlined in the Montevideo Convention.[370]

Provision (c) refers to the fact that a government is needed, and this must be independent and effective to enable the factual exercise of powers over a territory and a population. As far as the governmental structure is concerned, it is out of doubt that ISIS was able to establish itself upon a well-designed governmental organization. The UN Human Rights Council in the report of the Independent International Commission of Inquiry on the Syrian Arab Republic[371] affirmed that the ISIS presented "a hierarchical structure, including a policy level."[372] The Caliphate of Al-Baghdadi was based on a "military council" and "a network of regional and local emirs and military commanders."[373] The state had also its judicial system based on a heinous body of laws that were immediately implemented in the conquered cities while a series of Courts were established in Iraq, Syria and Lebanon[374] to enforce legislation. For instance, the Contract of the City of Nineveh[375] enlisted a series of violence, physical mistreatments and even executions as a punishment for alleged criminal offences. From an administrative perspective ISIS controlled everything from the educational system – that from that moment had to be based on *Sharia*

[369] Ibidem, para. 46, p. 33.
[370] TOMUSCHAT, C., "The Status of the 'Islamic State', op. cit., p. 229.
[371] *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic* UN Human Rights Council, A/HRC/27/CRP.3, 19 November 2014.
[372] Ibidem, para. 13, p. 3.
[373] Ibidem.
[374] KULLAB, S., and SEMAAN, E., "ISIS Running Shariah Court in Arsal in Bid to Win Hearts and Minds", *The Dayly Star Lebanon*, 2015, in LONGOBARDO, M., "The Self-Proclaimed Statehood of the Islamic State", op. cit., p. 216.
[375] LONGOBARDO, M., "The Self-Proclaimed Statehood of the Islamic State", op. cit. p. 216. For the original document see: MOORE, J., "Iraq Isis Crisis: Medieval Sharia Law Imposed on Millions in Nineveh Province", *International Business Times*, 2014, available at www.ibtimes.co.uk/iraq-isis-crisis-medieval-sharia-law-imposed-millions-nine- veh-province-1452401

doctrine and had to be used as a tool for indoctrination – to the supply of water, electricity and the general basic services.[376] On the other side, its territories changed on a daily basis and this represented an obstacle for the new government that prevent it from applying the *ratione personarum* and *ratione loci*[377] principles which are fundamental to determine the effectiveness. Thus, what is relevant is the factual exercise of powers over a territory and a population but in this case the lack of continuity in particular seems to make this last criterion abortive.

Lastly, provision (d) referred to the capacity to enter relations with other states is not considered a fundamental element in international law for determining the existence of states**.** States exist because they can exercise "*de facto* powers over a territory but are provisional in character."[378] If a State is able to exercise factual powers, meaning to exercise the control over a territory, then recognition is not relevant. However, there are two theories which could be helpful concerning this further element. The first one is the declaratory theory which considers recognition not as a fundamental element in international law for the existence of states.[379] It stems from Article 3 of the Montevideo Convention which states that "the political existence of a state is independent of recognition by other states."[380] On the other hand, the constitutive theory considers recognition a fundamental element for the existence of the state.[381] Without recognition a state is neither part of the international community nor considered a legal person under international law. However, ISIS potential statehood has not been recognized not by a single state. For clarity's sake it must be specified that all these criteria have been largely debated and the Convention has been subjects of continuous amendments.

According to some authors another principle that results to be useful to determine statehood is the principle of self-determination. This principle is the product of the decolonizing era, and it is enshrined in the UN Charter and in the International Covenant on Civil and Political Rights as the right of "all people."[382] On this basis the UNGA Resolution 2649[383] stated that "the legitimacy of

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[376] LONGOBARDO, M., "The Self-Proclaimed Statehood of the Islamic State", op. cit. p. 216.
[377] Ibidem, p.217.
[378] CASSESE, A., *International Law*, Oxford, Oxford University Press, 2nd edition, 2005, p. 71 and p. 130 in LONGOBARDO, M., "The Self-Proclaimed Statehood of the Islamic State", op. cit. p. 218.
[379] "Declaratory and Constitutive Theories of State Recognition", LawTeacher.net, 2013, available at: https://www.lawteacher.net/free-law-essays/constitutional-law/declaratory-and-constitutive-theories-of-state.php#citethis.
[380] Article 3 of the "Montevideo Convention on the Rights and Duties of States", op. cit., p. 184.
[381] "Declaratory and Constitutive Theories of State Recognition", op. cit.
[382] Article 1 of the UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.
[383] UN General Assembly, *The importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights,* A/RES/2649(XXV)-EN, 30 November 1970, Available at: https://www.un.org/unispal/document/auto-insert-184727/.

the struggle of peoples under colonial and alien domination recognized as being entitled to the right of self-determination to restore to themselves that right by any means at their disposal."[384] This principle has been outlined since ISIS emerged as a group of insurgents who declared that the aim was that of liberating people from countries such as Syria and Iraq that have been negatively influenced by the West that has broken them away from *Sharia* law.[385] However, the invocation of this principle would be improper since ISIS has never been part of a liberation war and it has never received the legitimacy neither of the people of Syria and Iraq nor of the International Community, thus it has operated in violation of the procedural aspect of the principle of self-determination and *uti possidetis*.[386] ISIS appeared to be more an armed revolutionary movement, a group of Sunni Islamist insurgents that created a situation that can be qualified as an armed conflict between them and the two states. Furthermore, ISIS is a self-proclaimed and not legitimate state based upon the idea of being entitled to purify Islam in order to bring it back to the origins. They were able to create a powerful narrative according to which the group was entitled to wage a war and conquer territories in order to create a unique Islamic world.

As a matter of fact, according to this narrative they would operate under a different legal framework, namely the Islamic International and Humanitarian Law, also known as *siyar*.[387] *Siyar* is a corpus of laws, based on the rules set out in the *Qur'ān,* in which are stated the "ways and methods followed by the Prophet in his dealing with non-Muslim states and individuals in times of peace and war."[388] Unlike international law, the *siyar* derives from divine law and it is more a collection of opinions. It is based on a theory that considers the world as divided into *dār al-Islam* or the reign of peace I which Arab Muslims reside and *dār al-harb* or the reign of war[389] composed by the non-Muslims states. The recognition of the existence of the two sides of the world in constant opposition seems to provide them the basis for the legitimation of the use of violence. This theory would be based on the Syrian School of thought which arose in the 8th century which considered war against the *dār al-harb* as "a moral obligation."[390] This is in open contrast to the behavior adopted by the Islamic world since the majority of Muslim have tried to integrate in the modern international law becoming members of the United Nations and signing the Geneva

[384] Ibidem, para.1.
[385] BADAR, M., "The Self-Declared Islamic State (ISIS/Da'esh) and Ius ad Bellum under Islamic International Law", The Asian Yearbook of Human Rights and Humanitarian Law, vol. 1, 2017, p. 12.
[386] LONGOBARDO, M., "The Self-Proclaimed Statehood of the Islamic State", op. cit. p. 223.
[387] BADAR, M., "The Self-Declared Islamic State (ISIS/Da'esh) and *Ius ad Bellum* under Islamic International Law", The Asian Yearbook of Human Rights and Humanitarian Law, vol. 1, 2017, p. 14.
[388] Ibidem.
[389] Ibidem.
[390] Ibidem.

Conventions[391] and adhering in particular to Article 2 (4) of the United Nations Charter[392] which reads as follows: "all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[393] A principle that seems to be completely ignored from *siyar* that provides for the rights to a defensive *jihād* as part of the *ius ad bellum.*[394]

All in all, ISIS does not recognize international law, it operates under another corpus, it is not recognized neither by the international community nor by the people subjugated. Thus, it cannot be considered a state from a legal perspective, it is not entitled of statehood. It is an insurrectional group that exercised *de facto* powers over an-ever evolving territory over which it exercised a provisional administration. Considering the fact that ISIS cannot be considered a state, and considering that neither Syria nor Iraq are parties to the Rome Statute[395] – something that prevent ISIS members to be brough in front of the ICC[396] – the following subchapter will analyze the alleged crimes on the basis of the provisions of the Genocide Convention considering also the developments that international law underwent and analyzing the possibilities that could provide justice. As underlined in Article IV "the Convention makes clear that persons committing genocide shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."[397] These authorities unambiguously reflect that, from its incorporation into international law, the proscription of genocide has applied equally to state and non-state actors.

[391] Known as the Geneva Convention, this agreement became the foundation of modern international humanitarian law, which now encompasses four conventions and three additional protocols, see as reference BADAR, M., "The Self-Declared Islamic State, op. cit., p. 16.
[392] *Charter of the United Nations*, United Nations, 1 UNTS XVI, 24 October 1945.
[393] Article 2(4) of the *Charter of the United Nations*, op. cit.
[394] BADAR, M., "The Self-Declared Islamic State, op. cit., p.16.
[395] *Rome Statute of the International Criminal Court*, UN General Assembly, A/CONF.183/9, 17 July 1998.
[396] If a state is not party to the ICC Statute, it is not directly subjected to the jurisdiction of the ICC which has jurisdiction only over crimes committed on the territory of states that have ratified or acceded to the Rome Statute, or for crimes committed by nationals of those states. This is enshrined in Articles 12 and 13 of the ICC Statute.
[397] Article IV of the *Genocide Convention*, op. cit.

3.1- Can Yazidis be Considered as a Protected Group Under International Law?

The definition of protected group is encapsulated in Article II of the Genocide Convention, and it is reproduced verbatim in the Rome Statute under Article 6. The two articles point out the *mens rea* of genocide stating that a protected group must be "a national, ethnic, racial, or religious group, as such."[398] Group membership is the essential element which distinguishes genocide form other crimes since the victim of the crime of genocide is the group itself.[399] However, determining whether a group can be considered as a protected one or not under the Genocide Convention proves to be compelling.

As a matter of fact, Article II of the Convention provides only a limited protection since it addresses only four categories namely national, ethnical, racial and religious groups, and these categories have never been properly defined. This has been underlined by the United Nations Study on Genocide which stated that "the lack of clarity about which groups are, and are not, protected has made the Convention less effective and popularly understood than should be the case."[400] For this reason, the jurisprudence of the ad hoc tribunals of Rwanda and former Yugoslavia and the case law of the ICJ and the ICC is fundamental. Furthermore, the expression "as such" has been matter of much debate. The ICTR provided its own interpretation. According to the Court the expression means that the "prohibited act must be committed against a person based on that person's membership in a specific group and specifically because the person belonged to this group, such that the real victim is not merely the person but the group itself."[401] This requirement is fundamental since it states that in order to label some acts as genocidal these must have been committed against one or several individuals because such individual or

[398] Article II of the *Genocide Convention*, op. cit., and Article 6 of the *Rome Statute*, op. cit.
[399] *The Prosecutor v. Alfred Musema,* Judgement and Sentence, International Criminal Tribunal for Rwanda (ICTR), ICTR-96-13-T, 27 January 2000, para 161 in *"They came to destroy": ISIS Crimes Against the Yazidis*, op. cit., para 104, p. 20.
[400] WHITAKER, B., *Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide*, UN Doc. E/CN.4/Sub.2/1985/6, para. 30 in LINGAAS, C. *Defining the protected groups of genocide through the case law of international courts,* 2015, International Crimes Database, ICD Brief no. 18, p. 2.
[401] See as reference *Prosecutor v. Muhimana*, Trial Judgment, ICTR, ICTR- 95-1B-T, 28 April 2005, para. 500 and *Prosecutor v. Kajelijeli*, Trial Judgment, ICTR, ICTR-98-44A-T, 1 December 2003, para. 813 in *"They came to destroy": ISIS Crimes Against the Yazidis*, op. cit., para 100, p. 20.

individuals were part of a specific group and specifically because they belonged to this group".[402] This represents the legal framework from which to start the analyses.

The Yazidis can be categorized as an ethnic-religious group. The ICTR in Akayesu trial judgement, the first genocidal trial in history, represents an important legal precedent since it made a deep analysis of the provisions of Article II and of the meaning of the four protected groups. For the purposes of the present analyses, it will be analyzed only the definitions of ethnic and religious group. The Chamber defined ethnic group as "a group whose members share a common language or culture"[403] and considered the Tutsi to fall under this category in spite of the fact that they spoke the same language of the Hutus and shared with them the same culture. Concerning Yazidis, their ethnicity is still matter of debate. For many they are Kurds even though some of them are considered Arabs since they were born in Syria. Furthermore, they speak Kurdish, and they inhabit countries with a Kurdish population, such as Georgia, Armenia, Syria and Turkey.[404] However, despite the many attempts made to include Yazidis under the Kurdish cultural mainstream, they have managed to preserve their own culture, visibly different from the Kurdish one in particular for what concerns the caste-based system and the prohibition of endogamous and exogamous marriages. On the basis of these elements and on the *Akayesu* trial judgement the Commission states that Yazidis can be considered an ethnic group. On the other side the ICTR defined religious group as "one whose members share the same religion, denomination or mode of worship."[405] In spite of the fact that their cult has received the influence of many other religious currents they worshipped their own God and Tawûsê Melek, they consider Lalish the holiest place on earth, they pass on their faith through a strict endogamy which forbids marriage and inclusion of other religions inside the community. These are the main features of Yazidis religion which makes them a different religious group.

If on one side the ICTR used mainly an objective approach, the ICTY recognized that the "attempt to define a national, ethnical, racial or religious group today using objective and scientifically irreproachable criteria would be a perilous exercise whose result would not necessarily correspond to the perception of the persons concerned by such categorization."[406] Through a case-by-case analyses both the ICTR and the ICTY distanced themselves from the solely objective approach, considering the importance of the subjective element. This was outlined both in the

[402] Ibidem.
[403] *The Prosecutor v. Jean-Paul Akayesu*, Trial Judgement, ICTR, op. cit., para. 513.
[404] SALLOUM, S., *Êzidîs in Iraq,* op. cit., p. 24.
[405] *The Prosecutor v. Jean-Paul Akayesu*, Trial Judgement, ICTR, op. cit., para. 515.
[406] *Prosecutor v. Goran Jelisic,* Trial Judgement, IT-95-10-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 14 December 1999, para. 70, p. 22.

Prosecutor v. Rutaganda case[407] in which the court underlined the importance of verifying whether the victim "is perceived by the perpetrator of genocide as belonging to a group slated for destruction" but also whether the victim perceives itself "as belonging to the said group."[408] The same was stated by the Court in the *Kayishema* and *Ruzindana* case[409] in which the self-identification "or" the identification of others are considered pivotal elements.[410] The use of the conjunction "or" seems to suggest the importance of giving due consideration both to the objective and subjective approach. The same approach was used by ICTY in the *Jelisić* case[411] in which the court underlined how "the stigmatization of a group as a distinct national, ethnical or racial unit by the community" is another element to consider in order to determine "whether a targeted population constitutes a national, ethnical or racial group in the eyes of the alleged perpetrators" and how it would be more appropriate to analyze the "status of a group from the point of view of those persons who wish to single that group out from the rest of the community."[412]

In *Prosecutor v. Kajelijeli*[413] the ICTR specified that it is important to prove that such victim or victims (a) belonged to the targeted ethnical, racial, national, or religious group or (b) was or were believed by the perpetrator to so belong.[414] In this case the ICTR convenes with the ICTY that the reasons that lie behind ISIS attacks should be considered in order to determine membership. Religion has been frequently addressed by ISIS as the reason behind those attacks. Yazidis were addressed to as *dirty kuffar*.[415] ISIS in its statements frequently addressed to the Yazidis religion as a polytheist one and for this reason adverse to Islam, even though there is no historical grounding to prove it and justified the attacks toward religious idols and statues for "having been worshipped besides God."[416] It considered Yazidis as a separate religious community who had to be uprooted to conform to Islam. In its journal Dabiq ISIS has continually referred to them as infidels and explicitly blamed their religion as the cause of their massacre. Moreover, the ICTY

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[407] *The Prosecutor v. Georges Anderson Nderubumwe Rutaganda,* Judgement and Sentence, International Criminal Tribunal for Rwanda (ICTR), ICTR-96-3-T, 6 December 1999.
[408] Ibidem, para. 56, p. 27.
[409] *The Prosecutor v. Clément Kayishema and Obed Ruzindana,* Trial Judgement, International Criminal Tribunal for Rwanda (ICTR, ICTR-95-1-T, 21 May 1999.
[410] Ibidem, para. 98, p. 44.
[411] *Prosecutor v. Goran Jelisic,* Trial Judgement, International Criminal Tribunal for the former Yugoslavia (ICTY), IT-95-10-T, 14 December 1999.
[412] Ibidem, para. 70, p. 22.
[413] *The Prosecutor v. Juvénal Kajelijeli,* Judgment and Sentence, International Criminal Tribunal for Rwanda (ICTR), ICTR-98-44A-T, 1 December 2003.
[414] Ibidem, para. 813, pp. 179-180.
[415] *"They came to destroy": ISIS Crimes Against the Yazidis*, op. cit., para 74, p. 15.
[416] STEIN, G. J., et. al., "Performative Destruction: Da'esh (ISIS) Ideology and the War on Heritage in Iraq", Los Angeles: Getty Publications, 2022, p. 171, available at: https://www.getty.edu/publications/cultural-heritage-mass- atrocities.

in *Brđanin*[417] stated that another defining element was the perception that the victim has of itself. Inside the community Yezidis perceive themselves as a separate religious group. As a proof of this they have progressively became an even more closed community that tries to preserve its diversity through isolation and endogamy. It is also important to underline the fact that they are also recognized as religious minority under Article 2(2) of the Iraqi Constitution[418] and represented by the quota system in the Parliament as a separate group.[419]

All in all, through the analyses it emerges that the Courts progressively adopted both an objective and subjective approach to determine the membership of the group to one of the categories enlisted in Article II of the Convention. Following both anthropological considerations and the perception of the group itself and of the perpetrators the Commission found that Yazidis can be considered a protected group.

3.2- From Genocide to the Possible Qualification as Cultural Genocide

In absence of a legal codification of the crime of cultural genocide, the subchapter aims first at inquiring whether the acts perpetrated toward the Yazidi minority could be labelled as genocidal in light of Article 2 of the Genocide Convention[420]. ISIS actions will be discussed in the context of the material element of genocide. For the purposes of the present analyses, subparagraph (b), (d), and (e) of Article 2 will be taken into account. As a matter of fact, chapter one has investigated into the ambiguous nature of these provisions which do not necessarily seem to imply the physical destruction and they will be particularly relevant to condemn acts that would more properly fall under the cultural genocide label. The available jurisprudence which has shown a tendency of the Court toward a wider interpretation of the actus reus will be fundamental to determine whether the atrocities committed toward this minority might be classified as genocidal while not leading to the physical annihilation of the group. The inaccessibility of the areas involved made the

[417] *Prosecutor v. Radoslav Brđjanin,* Trial Judgement, International Criminal Tribunal for the former Yugoslavia (ICTY), IT-99-36-T, 1 September 2004.
[418] See as reference Article 2(2) of the Constitution of the Republic of Iraq, 15 October 2005, op. cit.
419 SALLOUM, S., *Êzidîs in Iraq*, op. cit., p. 16.
[420] Article II of the *Genocide Convention*, op. cit.

process of gathering information extremely difficult. For this reason, the data available come from two main sources. The first one is the report of the United Nations High Commissioner for Human Rights (hereafter UN Human Rights Council Report)[421] which has collected information based on interviews made on witnesses. The second one is the joint report of the United Nations Assistance Mission for Iraq and Office of the United Nations High Commissioner for Human Rights.[422] These reports together with data coming from reports conducted by non-governmental organizations will constitute a basis for the following analyses. For the analyses, it will be used the available jurisprudence provided by the ad hoc tribunals which have shown a tendency toward a wider interpretation of the actus reus of genocide. This will be fundamental to determine whether the atrocities committed toward this minority, while not leading to the physical destruction of the group, might be classified as genocidal.

When ISIS invaded Sinjar in 2014 immediately began mass killing campaigns against the Yazidi minority. Article 2 (a) referred to the killing of the members of group[423] is the first parameter that seems to be met. In 2014 the paramilitaries of the self-proclaimed Islamic State reached northern Iraq where the majority of Yazidis resided. They initiated a mass killing campaign against them. The UN Human Rights Council reported that "killings were of groups between two and twenty men and boys"[424] while larger executions have been carried out in Kocho and Qani.[425] ISIS "summarily executed Yazidi men after they had been segregated from the women and children."[426] The reported data are based on eyewitness testimonies and the investigation carried out by Yazda, the Global Yazidi Organization. Yazda reports the discovery of "around seventy mass graves"[427] located mainly in the area of Sinjar. Mass killings had been reported not only in Iraq but also in Syria, in particular in the region of Aleppo. However, also a relevant number of suicides has been reported. Concerning suicides, in the *Prosecutor v. Krnojelac*[428], after having analyzed the connection between causation and intent, the ICTY argued that the acts of suicide might be considered equivalent to causing someone's death if the "acts or omissions for which he

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[421] *"They came to destroy": ISIS Crimes Against the Yazidis*, UN Human Rights Council, A/HRC/32/CRP.2, 15 June 2016, available at: https://digitallibrary.un.org/record/843515
[422] *A call for Accountability and Protection: Yezidi Survivors of Atrocities Committed by ISIL*, Office of the United Nations High Commissioner for Human Rights United Nations Assistance Mission for Iraq, August 2016.
[423] Article II of the *Genocide Convention*, op. cit.
[424] *"They came to destroy",* op. cit., para 36, p. 8.
[425] Ibidem.
[426] Ibidem, para. 36, p. 8.
[427] *Destroying the soul of the Yazidis, Cultural Heritage Destruction during the Islamic State's Genocide against the Yazidis,* RASHID International & Yazda & EAMENA Project, 2019, p. 33.
[428] *Prosecutor v. Milorad Krnojelac*, Trial Judgement, International Criminal Tribunal for the former Yugoslavia (ICTY), IT-97-25-T, 15 March 2002.

bears criminal responsibility induced the victim to take action which resulted in his death."[429] This applies to all those case in which suicide results to be an action that "a reasonable person could have foreseen as a consequence of the conduct of the accused, or of those for whom he bears criminal responsibility."[430]

The second provision to be analyzed will be sub-paragraph (b) referred to the acts "causing serious bodily or mental harm to members of the group."[431] Both the *Stakić*[432] and the *Akayesu*[433] judgements prove to be fundamental for the present case. The ICTR in the *Prosecutor v. Jean-Paul Akayesu*, by recalling Adolf Eichmann judgement of 12th December 1961[434], enlisted a series of acts that can cause bodily or mental harm and for this reason they might fall under paragraph (b). These are: enslavement, starvation, deportation and persecution"[435] but also the detention of people in "ghettos, transit camps and concentration camps in conditions which were designed to cause their degradation, deprivation of their rights as human beings, and to suppress them and cause them inhumane suffering and torture."[436] According to the UN and Yazda reports, ISIS seems to have committed almost all these acts. As analyzed in Chapter 1, the ICTR provided a wider interpretation of paragraph (b) considering rape as "an integral part of the destruction of the Tutsi as a group"[437], an act that cause not only physical but also psychological destruction of the identity of the minority. In Elements of Crimes footnote 3 referred to Article 6(b) specifies that the provision may include "torture, rape, sexual violence or inhumane or degrading treatment."[438] In *Stakić* the Court added that "the harm inflicted need not to be permanent and irremediable"[439] once again supporting the hypothesis that physical annihilation may not necessarily be present.

As underlined by the Court also "humiliation and psychological abuse" [440]may serve to dismember the group. Once captured, Yazidi women and girls were in immediately and violently separated from their husbands and together with children they were forced to assist to their

[429] Ibidem, para. 329, p.123.
[430] Ibidem, para 130, p. 61.
[431] Article II of the *Genocide Convention*, op. cit.
[432] *Prosecutor v. Milomir Stakic*, Trial Judgement, International Criminal Tribunal for the Former Yugoslavia (ICTY), IT-97-24-T, 31 July 2003.
[433] *The Prosecutor v. Jean-Paul Akayesu*, Trial Judgement, ICTR, op. cit.
[434] *Attorney General of the Government of Israel vs. Adolph Eichmann*, Trial Judgment, District Court of Jerusalem, Criminal Case No. 40/61, 12 December 1961.
[435] Ibidem quoted in *The Prosecutor v. Jean-Paul Akayesu Case*, ICTR, op. cit., para 503.
[436] Ibidem.
[437] *The Prosecutor v. Jean-Paul Akayesu*, Trial Judgement, ICTR, op. cit., para 731.
[438] See as reference Footnote 3 referred to Article 6(b) of *Elements of Crimes*, International Criminal Court (ICC), 2011.
[439] *Prosecutor v. Milomir Stakic*, Trial Judgement, ICTY, op. cit., para 516, p. 146.
[440] Ibidem, para.537, p. 152.

executions. Mothers were forced to watch their daughters be raped or sold and vice versa or to watch their sons to be indoctrinated and forced to fight with the militants. This caused permanent psychological damages. However, the heinous acts extended far beyond rape and took the form of sexual slavery. This crime is categorized as a crime against humanity in Article 7 (1) (g)[441] and a war crime under Article 8(2)(e)(VI) of the Rome Statute.[442] However, it might fall under Article II (b) of the Genocide Convention for the trauma it causes on the victim. What emerged from the testimonies and the material findings terrorists, women were categorized and assigned a monetary value. The UN Special Representative on Sexual Violence in Conflict reported that girls were "stripped naked, tested for virginity and examined for breast size and prettiness."[443] Then they were sent to Raqqa be sold in the sexual market that sometimes took the form of online auctions. The process was meant to dehumanize them, deprive them of their identity and dignity. Women were often handcuffed and tied to the beds and raped and continually threated to be killed in the case they resisted rape.[444] These acts seem to respond also to the definition of sexual slavery provided by the ICC in *Katanga* Trail Judgement[445] in which it is defined as the exercise of ownership by "purchasing, selling, lending or bartering" but also by perpetrating acts which lead to a "deprivation of liberty." [446]

Yazidi women were not only subjected to systematic violence, but also forced to work for ISIS families, they were detained in terrorists' houses, treated as property. Amnesty International reported that the majority of women who have been sexually abused present "various illnesses, physical disabilities, psychological consequences such as post-traumatic stress disorder, anxiety, depression, and inability to conceive."[447] Rape and sexual violence cause insecurity and shame which have an enormous impact in a society which is based on honor and the violation of honor. Multiple women have testified how they have been rejected by their community because they have lost their "marriageable status."[448] Rape was perceived by families as disgraceful and for this reason they have been ostracized by their own families. This creates a sense of loss which in some cases results to be impossible to process. The psychological consequences represented a

[441] See as reference Article 7(1)(e) of the *Rome Statute of the International Criminal Court,* op. cit.
[442] See as reference Article 8(2)(e)(VI) of the *Rome Statute of the International Criminal Court,* op. cit.
[443] "UN Envoy 'Sickened' by Rampant IS Sexual Violence", *The Times of Israel*, 23 May 2015 in DAKHIL, V., et al., "'Calling ISIL Atrocities Against the Yezidis by Their Rightful Name': Do They Constitute the Crime of Genocide?", *Human Rights Law Review*, vol. 17, no. 2, June 2017, p. 272.
[444] *"They came to destroy",* op. cit., para 64, p. 14.
[445] *Prosecutor v. Katanga*, Trial Judgment, International Criminal Court (ICC), ICC-01/04-01/07, 7 March 2014
[446] Ibidem, para 974-977.
[447] HADŽIĆ, F., "Religious and Cultural Violence; The 21st-Century Genocide Against the Yazidis", *Journal Philosophy, Economics and Law Review*, vol. 1, 2021, p. 178.

"step in the process of destruction of the spirit, of the will to live, and of the life itself"[449], a definition that seems to go far beyond the physical destruction of the group, leading toward an annihilation of the social foundations of the group itself. The violence perpetrated on Yazidi women is of particular relevance since it is a twofold violence since it was not only based on religion but also on sex. The continuous denigration, vexation, threats to kill, caused long-lasting psychological effects which included acute emotional distress, post-traumatic stress disorder while many others were unable to live with the sense of shame resulting from the violence they had suffered. This led to an increment in the suicide incidence. Evidence of mental harm stemmed also from the accounts testifying the fear, insecurity and disorientation caused by the systematic transfer of people from one location to another. This was particularly due to the fact that the Yazidis have a close relationship with the environment that in turn has a strong religious meaning. By doing this Yazidis were completely uprooted and unable to reconstitute themselves as a group.

Article II (c) of the Genocide Convention refers to acts "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part."[450] As specified in footnote 3 of Article 6(c) of the Rome Statute these acts may include "deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes."[451] After ISIS attacks of the 4th August 2014, about 40,000 Yazidis found refuge in the Sinjar mountains[452] where jihadist militants surrounded them. They were left without food, water, and medicines. The impervious area made aids impossible, and Yezidis remained trapped in the mountains under temperatures above 45 degrees Celsius[453] with no proper shelters. As stated by the UN Office for the Coordination of Humanitarian Affairs Yazidis were "exposed to extreme heat, dehydration and the imminent threat of attack," underling the immediate need of "life-saving assistance."[454] Rape and sexual slavery are made to fall also under this sub-paragraph, however there are still divergent opinions.

In 2015 the ICJ in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),*[455] convened in stating that rape could fall under paragraph (c) even though "these occurrences" were not capable of "bringing about the destruction of the

[449] *The Prosecutor v. Jean-Paul Akayesu*, Trial Judgement, ICTR, op. cit., para 732.
[450] Article II of the *Genocide Convention*, op. cit.
[451] See as reference footnote 3 Article 7(1)(e) of the *Rome Statute of the International Criminal Court,* op. cit.
[452] DAKHIL, V., et al., "'Calling ISIL Atrocities Against the Yezidis by Their Rightful Name', op. cit., p. 271.
[453] Ibidem.
[454] Ibidem.
[455] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* op. cit.

group."[456] The ICTR in *Prosecutor v. Kayishema* explained that "the conditions of life envisaged included rape."[457] In spite of the fact that these acts are mainly related to sub-paragraph (b) since they cause serious mental harm they cannot be completely excluded from sub-paragraph (c) since they are meant to destroy the group. As a matter of fact, Yazidis customs forbids exogamy, meaning that sexual relations outside marriage were prohibited. For this reason, rape has to be viewed as "intended to desecrate the ways members of collectivities are bound together and thereby to permanently destroy their capacity to rebuild themselves as stable and active collective agents in human history."[458] The same reasoning is followed by the report issued by the UNHR Council.

Concerning Article 2 (d) it refers to "measures intended to prevent births within the group".[459] The *Akayesu* Judgement once again interpreted the provision including in it "sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages."[460] After the attacks of August 2014 Yazidi women were separated from Yazidi men, the majority of which were immediately killed. The only exception was made for women and men that accepted conversion, even if these represented isolated cases registered only in the city of Qasr Maharab.[461] The damage here was also cultural since as already stated Yazidi tradition is based on endogamy, and marriage between members of the group belonging to different castes, and marriages with non-Yazidis members are completely forbidden. As stated in Akayesu "in patriarchal societies, where membership of a group is determined by the identity of the father, an example of measure intended to prevent births within the group is the case where, during rape, a woman is 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."[462] Also in this case the physical harm seems to be not an essential prerogative, as noted by the Court in *Akayesu*. The court in fact explains that "rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate"[463] as a consequence of the threats or trauma suffered. As testified by an interviewee "younger girls, for whom rape was their first experience of sex"[464], an experience

[456] Ibidem, paras. 363-364.
[457] *Prosecutor v Kayishema and Ruzindana,* Trial Judgment, International Criminal Tribunal for Rwanda, ICTR-95-1, 21 May 1999, para. 116 in DAKHIL, V., et al., "'Calling ISIL Atrocities Against the Yezidis by Their Rightful Name', op. cit., p. 273.
[458] DAKHIL, V., et al., "'Calling ISIL Atrocities Against the Yezidis by Their Rightful Name', op. cit., p. 274.
[459] Article II of the *Genocide Convention*, op. cit.
[460] *The Prosecutor v. Jean-Paul Akayesu*, Trial Judgement, ICTR, op. cit., para. 507.
[461] *"They came to destroy": ISIS Crimes Against the Yazidis*, op. cit., para 143.
[462] *The Prosecutor v. Jean-Paul Akayesu*, Trial Judgement, ICTR, op. cit., para. 507.
[463] Ibidem.
[464] "*They came to destroy": ISIS Crimes Against the Yazidis*, op. cit., para 145.

they were subjected to for a very long time and "at the hands of multiple men"[465] show difficulty in having relationships and a form of "anxiety around sex"[466] which led to the refusal to procreate. Due to the stigma attached to them they could no longer be considered as part of the community. In some cases, there have been attempts to reintegrate them but for the majority to find a husband and create a family became impossible. From the testimonies emerged that ISIS doctors conducted abortions through injections in women that were two of three months pregnant. Rape resulted to be particularly impactful in the Yazidi community where membership is determined by the father who transmit the ethnic identity and guarantees the survival of the group. The social consequences caused by rape determine the end of the community.

Article 2(e) referred to "forcibly transferring children of the group to another group"[467] is what remains of the provision on cultural genocide. After the attacks of 2014 Yazidi children – but also women and men – were scattered in different ISIS headquarters between Syria and Iraq where they were imprisoned for days and then, in the majority of the cases, sold. Girls under the age of nine were transferred together with their mothers in ISIS basis in different locations and sold with them as sex slaves. Boys above seven years old were transferred in particular in schools and in training camps in particular in Tel Afar and Raqqa where they were forcibly indoctrinated and prepared to fight.[468] Boys under twelve years old were isolated from the rest of the group and they were forced to take Arabic lessons, attend Islamic studies and the military training which included how to load and unload guns, shoot using live bullets and launch small and medium rockets as part of the indoctrination and the preparation for the *Jihad*. Moving children away from their community was a strategic measure adopted "to ensure that the language, traditions and culture of their group become or remain alien to the children."[469] The measures inflicted had the precise scope to eradicate Yazidi children from their cultural and religious traditions.

The Commission, after having considered and analyzed all the acts that have been reported, has found ISIS in violation of Article II of the Genocide Convention, thus it has determined that ISIS has allegedly committed genocide against Yazidis. At the time of writing Yazidis genocide has

[465] Ibidem.
[466] "*They came to destroy": ISIS Crimes Against the Yazidis*, op. cit., para 145.
[467] Article II of the Genocide Convention, op. cit.
[468] DAKHIL, V., et al., "'Calling ISIL Atrocities Against the Yezidis by Their Rightful Name', op. cit., pp. 276, 277.
[469] JESSBERGER, F., "The Definition and the Elements of the Crime of Genocide." *The UN Genocide Convention: A Commentary*, Oxford University Press, 2009, p. 103 in DAKHIL, V., et al., "'Calling ISIL Atrocities Against the Yezidis by Their Rightful Name', op. cit., p. 275.

been recognized by the Council of Europe[470], the European Parliament[471] and by a series of states, namely Armenia, Australia, France, Germany, Scotland, the United Kingdom and the United States[472] while the UNSC by Resolution 2370 has described it as "the first genocide of the 21st century."[473] However, in spite of that, also in light of the analyses that has been carried out in these sub-chapters, it is out of doubt that also a cultural genocide has been carried out, even though a formal recognition lacks. This is undoubtedly due to the absence of a legal conceptualization of this crime under international law but also to the scarce attention that both the academic and legal sphere devote to the destruction of tangible and intangible cultural heritage. However, it is important to underline that the attacks toward Yazidi cultural roots were part of ISIS's project of purification, iconoclasm, and ethnic-cultural cleansing. ISIS aim went beyond the physical annihilation of the group. The final goal was instead the deprivation of the minority's future, a more subtle attempt to completely destroy the group by eliminating all the traces of cultural memory to impede the group to reconstitute itself.

Another element should be considered. The inquiry evidently includes in particular in sub-paragraphs (b), (d), and (e) a series of acts which do not necessary lead to the physical destruction of the group. It presents a wider interpretation of the *actus reus* to include acts that are not formally recognized in Article II of the Genocide Convention. This represents a step forward since also acts which do not necessarily entail the physical destruction of the group have been considered. This seems to be in line with what stated by Judge Elihu Lauterpacht, in his separate opinion concerning the case of *Bosnia and Herzegovina v. Serbia and Montenegro* advocated for a broader interpretation of the *actus reus* ad argued that "the character of the attack on the leadership must be viewed in the context of the fate or what happened to the rest of the group".[474] Furthermore, it added that a group that is subjected to mass killings or "to other heinous acts, for example deported on a large scale or forced to flee, the cluster of violations ought to be considered in its entirety in order to interpret the provisions of the Convention in a spirit consistent with its purpose."[475]

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[470] See as reference Resolution 2091 adopted by the Council of Europe Parliamentary Assembly in 2016 cited in *Destroying the soul of the Yazidis* op. cit., p. 35.
[471] See as reference *Resolution of 4 February 2016 on the Systematic Mass Murder of Religious Minorities by the so-called 'ISIS/Daesh'*, Doc No 2016/2529 adopted by the European Parliament cited in *Destroying the soul of the Yazidis* op. cit., p. 35.
[472] *Destroying the soul of the Yazidi,* RASHID International, Yazda et EAMENA Project, 2019, p.36.
[473] UN Security Council, *Security Council resolution 2370, (on preventing terrorists from acquiring weapons)*, S/RES/2370, 2 August 2017.
[474] See as reference Report of the Commission of Experts, para. 9 cited in *Prosecutor v. Goran Jelisi*, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991, IT-95-10-T, 14 December 1999, para. 82, p. 26.
[475] *Ibidem.*

However, this represents only a partial recognition of the extent of the damage caused to the group. A fully recognition will be possible only through the conceptualization of the crime of cultural genocide which in turn would mean understanding that a minority can be annihilating also through the destruction of its culture. This would mean acknowledging that the aim of ISIS was that of erasing the social and cultural fundaments of the group to completely eliminate its existence.

3.3- The Recognition of Cultural Genocide and the Possibilities to Provide Justice

After having analyzed the actus reus of the alleged genocide perpetrated against the Yazidis, it is important to ascertain the presence of the specific intent. However, the difficulty in determining the presence of the *mens rea* of genocide is usually due to the fact that "only the accused himself has first-hand knowledge of his own mental state, and he is unlikely to testify to his own genocidal intent."[476] For this reason, considering other elements proves to be fundamental. The ICC in Article 30[477] refers not only to the intent but also to "knowledge" as a necessary requirement. This might be proved through the presence of "speeches or remarks revealing discriminatory intent"[478] behind acts that will necessarily lead to the destruction of the foundation of the group.

For what concerns the present case, a proof of intent might be retraced in the statements made through ISIS journal Dabiq. In particular, the article entitled *The Revival of Slavery Before the Hour*[479] provided a detailed explanation of how ISIS conducted a prior assessment to give instructions of how Yazidis would have to be treated. It was explained how Yazidis should have been treated differently compared to Christians and Jews for which the *jizyah* payment[480] was accepted. For women enslavement would have been the only option, firstly they would have been divided from men as *khums*[481] and then sold. Furthermore, research made by the terrorists

[476] *Sylvestre Gacumbitsi v. The Prosecutor,* Appeal Judgement, International Criminal Tribunal for Rwanda (ICTR), ICTR-2001-64-A, 7 July 2006, para. 40, p. 15.
[477] Article 30 of the *Rome Statute of the International Criminal Court,* op. cit.
[478] *Prosecutor v. Vujadin Popovic,* Trial Judgment, International Criminal Tribunal for the former Yugoslavia (ICTY), IT-05-88-T, 10 June 2010, para 1004, p. 387.
[479] Dabiq, "The Revival of Slavery Before the Hour", Issue 4, 2014.
[480] Ibidem, pp. 14-16 in *"They came to destroy": ISIS Crimes Against the Yazidis*, op. cit., para 154, p. 29.
[481] Ibidem.

concerning how the interpretation of religion would have justified the abuses, sexual enslavement, indoctrination, and abduction and finally the killing for those who would resist. Another element to consider is the extent of the repeated occurrence of the acts. As stated in Elements of Crime the attacks must be "widespread and systematic."[482] Coordination of attacks proceeded by a series of statements and documents that show a well-organized and coordinating project that materialized into near-identical actions carried out across Sinjar and in other conquered regions between Syria and Iraq. This practice of holding Yazidis captive in predetermined sites and then the completed records used to register the Yazidis, women in particular to determine their value and then sell or kill them are part of a "manifest pattern of similar conduct"[483] aimed at destructing the group. The same happens for the repeated practice of killing those who refused to convert, a further prove which underlines the premeditative and organizational character of the atrocities committed, as also underlined by the UN report. In Akayesu the Court explained that in the case of lack of confession it is useful to consider the "general context"[484] and the "repetition"[485] of those criminal acts. In light of the analyses carried out, this requirement seems to be satisfied.

Proof of the intent might also be retraced in the presence of "acts which violate the very foundation of the group – acts which are not in themselves covered by the list in Article 4 (2), but which are committed as part of the same pattern of conduct."[486] For the purpose of the present analyses the statements made by the Court in the *Krstic* case[487] results to be particularly relevant. The Court affirmed that the destruction of cultural property may serve evidentially to confirm an intent, "to be gathered from other circumstances, to destroy the group, as such."[488] At the same time the Appeal Chamber of the ICTY underlined that "the genocidal intent may be inferred, among other facts, from evidence of other culpable acts systematically directed against the same group."[489] References to the destruction of culture as proofs of the intent have already been made in other cases, for instance in the *Mladić and Karadžić* case[490] in which the Court considered the "destruction of mosques or Catholic Churches" as a mean "to annihilate the centuries long presence of the group or groups"; in the same way "the destruction of the libraries" was carried out in order "to annihilate a culture which was enriched through the participation of the various

[482] Article 7 (1)(a) of the *Elements of Crimes*, 2011, International Criminal Court (ICC).
[483] Article 6 of the *Elements of Crimes*, op. cit.
[484] *The Prosecutor v. Jean-Paul Akayesu*, Trial Judgement, ICTR, op. cit., para 523.
[485] Ibidem, para. 524.
[486] Ibidem.
[487] *Krstić Case*, Trial Judgement, op. cit.
[488] Ibidem, para. 53, p. 106.
[489] *Krstić Case*, Trial Judgement, op. cit., para. 33, p. 11.
[490] *Karadžić & Mladić Case,* (Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence), op. cit.

national components of the population."[491] This was reaffirmed in *Krstic* and endorsed by the International Court of Justice in the 2007 case *Bosnia and Herzegovina v. Serbia and Montenegro*.[492] The destruction of the Bosnian Muslims' homes and of the main mosque in Srebrenica and the forcible transfer of the population, which per se are not part of the *actus reus* and do not entail physical destruction of the members of the group, are used as evidence of the intent. In particular, according to the ICJ the destruction of cultural heritage can play a critical role for determining the dolus specialis. In this case the cultural destruction was used not only to prove the intent but there was a request of recognition on behalf of the Prosecutor to recognize those acts as genocidal, a request that was eventually rejected but which demonstrate the willingness to go beyond the physical destruction as proof of genocide.

As reported by the International Commission of Inquiry on the Syrian Arab Republic ISIS destroyed shrines and temples as part of its widespread plan of destruction of the minority. On 3rd August 2014, the Islamic State invaded Sinjar.[493] The attacks came from four fronts – Mosul, Tal Afar, Al-Shaddadi, and Tel Hamis[494] – to leave Yazidis no way out. During the invasion the Yazidis community was not only subjected to mass killings, enslavement, torture, sexual servitude, forced conversion, but also to an iconoclastic campaign against them. As a matter of fact, their cultural and spiritual roots were systematically targeted to eradicate the group. This included the devastation of archeological sites in Nineveh and Nimrud[495], and the destruction of almost all the temples and shrines of the conquered territories between Syria and Iraq. However, the arduous access into the affected areas has made investigations very compelling. For this reason, data result to be approximate. It has been estimated that around sixty-eight sanctuaries and shrines have been completely destroyed, but they targeted also monuments and every other political, religious and cultural symbol considered idolatrous, in order to purify Islam. The aim was that of "destroying the past and present to create a new vision of the future."[496] These attacks had far-reaching consequences since they led to the disappearance of also all the connected rituals and religious practices. The attacks concentrated also in the Lalish Valley in northern Iraq, considered the most important religious site, where Yazidis were asked to make regular pilgrimages and where the most important religious rituals and festivals took place. The damage caused by the destruction of these sites results to be even more severe since Yazidis' is a religion

[491] Ibidem, para. 95 in NOVIC, E., *The Concept of Cultural Genocide,* op. cit., p. 52.
[492] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, op. cit.
[493] *Destroying the soul of the Yazidi,* op. cit., p. 29.
[494] Ibidem, p. 33.
[495] Stein, G. J., et. al., "Performative Destruction", op. cit., p. 171.
[496] Ibidem.

of orthopraxy meaning that participation on rituals is essential for the survival of the belief itself. The sectarian violence of ISIS targeted in particular the twin towns of Bashiqa and Bahzani in north-east of Mosul, where a total amount of forty-seven shrines were destroyed. Almost all the 35,000 inhabitants[497] tried to flee from leaving the religious sites completely without defense. The same happened in the region of Sinjar where approximately 34,000 Yazidis[498] tried to flee along with the Kurdish forces that were in charge of protecting the area. Those rapidly became contested territories, something that complicated even further the return of the displaced Yazidis.

At the present moment, the majority of international conventions dealing with the protection of cultural heritage have dealt with the material character of it while leaving aside for instance the spiritual loss and consistent suffering that this cause to the besieged minority incapable to practice its rituals or practicing and passing on its costumes. This is revisable in the Venice Charter in which protection seems to be required only for the purpose of preserving and revealing "the aesthetic and historic value of the monument."[499] The same might be revised in the UNESCO World Heritage List which has been accused multiple times of placing too much importance over "monumentality"[500] while considering only in part the pivotal role that heritage plays in the life of a community. However, there have been some steps forward. In particular the 2003 UNESCO Convention on Safeguarding Intangible Heritage[501] has focused on the value of rituals and practices. It affirmed that "intangible heritage must be seen as the larger framework within which tangible heritage takes on its shape and significance" and underlined how "personal and cultural identity is bound up with place."[502]

Both the Independent International Commission of Inquiry on Syria and the UN High Commissioner for Human Rights recognized through the dolus specialis the genocidal intent behind ISIS attacks. Likewise, US Secretary of State Kerry stated that "Daesh is genocidal by self-proclamation, by ideology, and by actions – in what it says, what it believes, and what it does."[503] They recognized ISIS genocide in Iraq and thus *inter alia* toward Yazidis. However, this is only a partial recognition of the crimes committed. Using cultural destruction to prove the intent does not mean acknowledging the real extent of the damage caused. Shrines and sanctuaries

[497] *Destroying the soul of the Yazidi*, op. cit., p. 34.
[498] Ibidem.
[499] ISAKHAN, B., and SHAHAB, S., "The Islamic State's destruction of Yezidi heritage", op. cit., p. 6.
[500] Ibdiem.
[501] *Convention for the Safeguarding of the Intangible Cultural Heritage*, United Nations Educational, Scientific and Cultural Organization (UNESCO), 2003 in ISAKHAN, B., and Shahab, S., "The Islamic State's destruction of Yezidi heritage", op. cit., p. 6.
[502] Ibidem.
[503] US Secretary of State John Kerry, 'Remarks on Daesh and Genocide', Press Briefing Room, Washington DC, 17 March 2016 in DAKHIL, V., et al., "'Calling ISIL Atrocities Against the Yezidis by Their Rightful Name', op. cit., p. 278.

represent the basis upon which the Yazidi community is built, and they create a sense of belonging which is fundamental for the survival of the group. A total amount of sixty-eight shrines have been destroyed in Bashiqa, Bahzani, Sinjar and Walat Sheikh.[504] The Baba Sheikh, the head of the Yazidi faith explained that "in the past, the presence of the Yazidis vanished from many areas due to shrines not being rebuilt following previous genocides."[505] This proves once again the fact that only through the legal conceptualization of the crime of cultural genocide the value of culture will be recognized and full justice will be granted. It is hoped that in the future the Office of the Prosecutor of the ICC with the consent of the Pre-Trial Chamber initiate an *investigation motu proprio*[506] considering all the information gathered concerning the destruction of the cultural heritage.

Another important aspect concerns responsibility. The Genocide Convention requires states to take all the necessary steps to prosecute genocidal acts. In particular, in Article V it requires the Contracting Parties to implement the provisions of the Convention in the domestic legislation and in compliance with their Constitutions.[507] While in Article VI it entitles the State in which the acts have been committed to take the defendant in front of a national competent tribunal or an international penal tribunal, today the International Criminal Court.[508] Moreover, in matters of responsibility the legal reasoning of the ICJ in the *Bosnia and Herzegovina v. Serbia and Montenegro* case[509], as already analyzed in the previous Chapter, constitutes a pivotal legal precedent. As a matter of fact, the Court stated that "responsibility is incurred if the State manifestly failed to take all measures to prevent genocide"[510] and on this basis it found Serbia in violation of Article I of the Genocide Convention. However, the responsibility of states is still matter of debate. In any case Article IX[511] states that the ICJ remains the body responsible for solving dispute concerning responsibility, upon request filed by any of the parties to the dispute. Related the present case, Syria and Iraq present a completely different factual and legal background. On one side, on 18th June 2014 Iraq advanced a formal request for air support which was immediately granted by a coalition involving Australia, British, French and Iraqi forces

[504] *Destroying the soul of the Yazidi*, op. cit., p. 19.
[505] Ibidem, p. 20.
[506] It refers to the case in which the Prosecutor decides to initiate an investigation because it has reasonable basis to believe that a crime under the jurisdiction of the Court was committed. These are called proprio motu investigations. Article 15 (1) of the Rome Statute provides that 'the Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court'. See as reference Article 15(1) of the *Rome Statute*, op. cit.
[507] Article V of the *Genocide Convention*, op. cit.
[508] Article VI of the *Genocide Convention*, op. cit.
[509] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* op. cit.
[510] Ibidem, para. 430 in *"They came to destroy": ISIS Crimes Against the Yazidis*, op. cit., para 188, p. 34.
[511] Article IX of the *Genocide Convention*.

headed by the US[512] to provide aid to the Iraqi civilians and in particular to Yazidis who were trapped into the mountains. On the other side, a request of aid from President of Syria Al-Assad did not arrive until September 2015, when it accepted the Russian military support[513] meaning casting doubts on whether Syria has or has not taken all the necessary steps to prevent those atrocities to be committed. Thus, Syria and Iraq might be held responsible for failing to undertake all the necessary steps to prevent the alleged genocide perpetrated by the self-proclaimed Islamic State toward the Yazidi minority.

The hopes to provide justice to Yazidis relay on three other options. On 15th June 2016, two years after ISIS invasion of Sinjar, the report of the Independent International Commission of Inquiry on the Syrian Arab Republic carried out by the United Nations Human Rights Council was released. In the report the Council defined the atrocities perpetrated as genocidal while labelling them also as war crimes and crimes against humanity.[514] The report of the Commission was based on interviews to victims and survivors and artificial intelligence (used to locate mass graves and identify DNA). It could identify then the elements of genocide. However, as previously specified, inquiry commissions are not tribunal, thus they cannot decide compensations, but they can provide recommendations saying what states must or should do. As also underlined by the Commission there are several paths that can be followed to provide justice. The first possibility is to prosecute the crimes committed by ISIS would be a referral to the International Criminal Court. However, Article 12 paragraph 2 of the Rome Statute states that:

"2-the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

(b) The State of which the person accused of the crime is a national.

3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9."[515]

[512] TOMUSCHAT, C., "The Status of the 'Islamic State' under International Law", op. cit., p. 228.
[513] *"They came to destroy": ISIS Crimes Against the Yazidis*, op. cit., para 191, p. 35.
[514] *"They came to destroy": ISIS Crimes Against the Yazidis*, op. cit., p. 1.
[515] Article 12 (2) and (3) of the *Rome Statute*, op. cit.

The territorial State in which the crimes have been perpetrated is the entity that detains the primary responsibility for prosecuting international crimes. This provision led to the so-called self-referrals[516] which means that some states have referred the situations in their own territories to the ICC. However, concerning the present case neither Syria nor Iraq are parties to the Statute or have decided to file an ad hoc declaration accepting the jurisdiction of the Court.[517] The second possibility refers to the personal jurisdiction. The active personality principle could be invoked if the State to which the perpetrator's belong is party to the Rome Statute. According to Article 12 (2)(b) of the Statute the ICC may exercise its jurisdiction.[518] This seems to be a valid option to at least provide a condemn to the so-called "foreign fighters", people who have the nationality other than Syrian or Iraqi. The last option would be the exercise of universal jurisdiction. Every national court may exercise universal jurisdiction to prosecute the most serious crimes namely war crimes, crimes against humanity and genocide. Although a territorial or personal link seems not to be essential prerogatives it is generally stated that there should be at least a connection with the state exercising jurisdiction. Universal jurisdiction has been exercised in December 2016 by the General federal Court of Justice.[519]

However, there would be another option since the UNSC has the right to refer a situation to the ICC anywhere in the world.[520] According to Article 12(3) of the Rome Statute "by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question".[521] Furthermore Article 13 (b) and (c) and Article 16 of the abovementioned Statute provide that the UNSC is granted the authority to refer the case by invoking Chapter VII of the UN Charter.[522] Chapter VII allows the Council to "determine the existence of any threat to the peace, breach of the peace, or act of aggression" and to take any possible measure to "restore international peace and security."[523] The Commission recommend the UNSC to refer the case to the ICC or to an ad hoc tribunal. A legal precedent was set in 2005 when the UNSC referred the case of Darfur through Resolution 1593[524] and the case of Libya in 2011 through Resolution

[516] EVANS, M. *International Law,* Oxford University Press, first ed, 2018, p. 763.
[517] *"They came to destroy": ISIS Crimes Against the Yazidis*, op. cit., para 196, p. 36.
[518] Article 12 (2) (b) of the *Rome Statute*, op. cit.
[519] *German court jails ISIL member for life over Yazidi genocide,* 2021, Al Jazeera, available at: https://www.aljazeera.com/news/2021/11/30/german-court-jails-isil-member-for-life-over-yazidi- genocide.
[520] EVANS, M. *International Law*, op. cit., p. 763.
[521] Article 12 (3) of the *Rome Statute*, op. cit.
[522] Article 13 (b) (c) and Article 16 of the Rome Statute, op. cit.
[523] *"They came to destroy": ISIS Crimes Against the Yazidis*, op. cit., para 207(b), p. 37.
[524] UN Security Council, *Resolution 1593 (2005) / adopted by the Security Council at its 5158th meeting, on 31 March 2005,* S/RES/1593(2005), 31 March 2005.

1970[525]. However, an attempt to refer the case concerning the situation in Syria to the ICC was blocked in May 2014 after that China and Russia vetoed a draft Security Council resolution.[526] No similar attempt was made concerning the situation in Iraq.

Due to the obstacles that both the UNSC and the ICC faced, the international community established new mechanisms. The first attempt to address the problem was made by the UNGA. On 21st December 2016 it adopted the International, Impartial and Independent Mechanism to assist in the investigation and prosecution of persons responsible for the most serious crimes under international law committed in the Syrian Arab Republic since March 2011, more commonly known as "the Mechanism" or with the acronym "IIIM".[527] However, it did not receive the consent of Syria, fundamental not to turn the mechanism into a coercive one. On the other side, Iraq requested the intervention of the UNSC while underling the importance of maintaining "its national sovereignty and retain jurisdiction, and its laws must be respected, both when negotiating and implementing the resolution."[528] The UNSC was granted the consent to establish an Investigative Team through Resolution 2379[529] in order to investigate and collect "evidence of acts that may amount to war crimes, crimes against humanity and genocide."[530] Despite not having received the approval of Syria nowadays the IT remains the only valuable mechanism of investigation to collect proves also in Syrian territories. However, also this mechanism resulted defective for a series of reasons. First of all, because it had only investigative but not prosecutorial powers meaning that it was obliged to work with the domestic legal system. As a matter of fact, the Iraqi Penal System despite covering a series of domestic crimes it is silent concerning international criminal law issues in particular in matter of genocide, war crimes and crimes against humanity. Secondly, connected to this, states refused to rely on national justice which was based on the death penalty and on the Iraqi High Tribunal which was considered to be too weak to provide justice. For these reasons, the body received the holdout of many. Despite that, the IT results the only available system on which foreign courts will be able to rely on to gather

[525] UN Security Council, Resolution 1970 Adopted by the Security Council at its 6491st meeting, on 26 February 2011, S/RES/1970, 26 February 1970.
[526] *"They came to destroy": ISIS Crimes Against the Yazidis*, op. cit., para 197, p. 36.
[527] The mechanism was adopted by the UN General Assembly through Resolution 71/248 on 21st December 2016 as explained in VAN SCHAACK, B., "The Iraq Independent Investigative Team & Prospects for Justice for the Yazidi Genocide", *Journal of International Criminal Justice*, vol. 16, 2018, p. 114.
[528] VITRENKO, Y., Letter dated 14 August 2017 from the Chargé d'affaires a.i. of the Permanent Mission of Iraq to the UN addressed to the President of the Security Council, UN Doc. S/710/ 2017, 16 August 2017 in VAN SCHAACK, B., "The Iraq Independent Investigative Team", op. cit., p. 115.
[529] UN Security Council, *Resolution 2379 Adopted by the Security Council at its 8052nd meeting*, S/RES/2379, 21 September 2017.
[530] Ibidem in VAN SCHAACK, B., "The Iraq Independent Investigative Team", op. cit., p. 115.

information also concerning the damages caused to the cultural heritage to persecute the crimes committed by ISIS.

Chapter 3. ISIS Violence on Yazidi Women Through Legal Lens: Can it Count as Cultural Genocide?

1-The Development of the Concept of Rape Under International Law

For the purposes of consistency and clarification the analysis will begin with the definitions of sexual violence, gender-based crimes and then the corpus of the sub-chapter will be devoted to the definition of rape. Notably, providing clear definitions is necessary when it comes to sexual and gender-based violence since many instances of sexual violence, among which rape, are rooted in gender-based power imbalances and discrimination. Thus, the terms are often used interchangeably leading to confusion. Providing these definitions is essential for clarity's sake since they are often used interchangeably leading to confusion or misunderstanding. Furthermore, this will be fundamental since throughout the chapter references will be made to rape as well as to sexual violence in particular committed toward Yazidi women. The focus of the present sub-chapter will be on the crime of rape but also other crimes which fall under the category of sexual violence will be considered when connected to the crime of rape. It will be then investigated whether these crimes can constitute cultural genocide. This will represent the core of the analysis.

Regarding sexual violence, a noteworthy aspect is the absence, at the international legal level, of a comprehensive definition both for the crime of sexual violence per se and for its various manifestations. The ICTY in the Akayesu case tried to provide a first definition. It described it as "any act of a sexual nature which is committed on a person under circumstances which are coercive."[531] In this definition the Court specified that the element of coercion must not be intended only in relation to physical force but as referred to "threats, intimidation, extortion and other forms of duress which prey on fear or desperation."[532] It further added that "sexual violence is not limited to a physical invasion of the human body and may include acts which do not involve penetration or even physical contact."[533] However, the broadness of the definition and the total absence of a minimum threshold of gravity hinder the establishment of clear criteria for determining the severity of the impacts that these crimes can have. The ICC provided its own contribution. However, rather than providing an all-encompassing definition, it enlisted a series of acts which can be considered as constituting sexual violence. These are: "sexual slavery,

[531] *The Prosecutor v. Jean-Paul Akayesu*, Trial Judgement, ICTR, op. cit., para. 598.
[532] Ibidem, para. 688.
[533] Ibidem

enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity."[534] Once again, the term "of comparable gravity" is not further specified.

The World Health Organization in the World Report on Violence and Health[535] defined the crime in question as "any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed, against a person's sexuality using coercion, by any person regardless of their relationship to the victim, in any setting, including but not limited to home and work."[536] This casted further doubts regarding the level of gravity required for an act to be considered to amount to sexual violence. At the moment of writing no precise definition exists. The only improvement which stems from the jurisprudence of some Courts as well as form the implementation of some legal instruments is inclusion of other acts considered to be acts of sexual violence. These are: trafficking for sexual exploitation[537], mutilation of sexual organs[538], sexual exploitation[539], forced abortions[540], enforced contraception[541], sexual assault[542], forced marriage[543], sexual harassment[544], forced inspections for virginity[545] and forced public nudity[546].

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[534] See as reference Arts 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi) of the Rome Statute, op. cit.
[535] *World Health Organization (WHO),* "World Report on Violence and Health", ed. Etienne G. Krug, 2002, p. 149 in GAGGIOLI, G., Sexual Violence in Armed Conflicts: A Violation of International Humanitarian Law and Human Rights Law, *International Review of the Re International Review*, 2014, p. 506.
[536] Ibidem.
[537] See Art. 3 of the "Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children", supplementing the United Nations Convention against Transnational Organized Crime, 2000 in GAGGIOLI, G., "Sexual Violence in Armed Conflicts", op. cit., p. 519.
[538] *Prosecutor v. Théoneste Bagosora,* ICTR, Trial Judgment Case No. ICTR-96-7, 18 December 2008, para. 976.
[539] BASTICK, M., et. al., "Sexual Violence in Armed Conflict: Global Overview and Implications for the Security Sector", *Geneva Centre for the Democratic Control of Armed Forces*, 2007, p. 19. See also *World Health Organization (WHO),* "World Report on Violence and Health", ed. Etienne G. Krug, 2002, p. 149.
[540] BASTICK, M., et. al., "Sexual Violence in Armed Conflict", op. cit., p. 19; and *World Health Organization (WHO),* "World Report on Violence and Health", op. cit., p. 149.
[541] BASTICK, M., et. al., "Sexual Violence in Armed Conflict", op. cit., p. 19
[542] See Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949 (GC IV), Art. 27; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 (AP I), Art. 75(2) (b); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977 (AP II), Art. (4)(2)(e); Rome Statute, Art. 8(2)(e)(vi); Statute of the International Tribunal for Rwanda, 8 November 1994 (ICTR Statute), Art. 4(e); Statute of the Special Court for Sierra Leone, 16 January 2002 (SCSL Statute), Art. 3(e); and UN Transitional Administration in East Timor, Regulation No. 2000/15, Section 6.1(e)(vi).
[543] BASTICK, M., et. al., "Sexual Violence in Armed Conflict", op. cit., p. 49; and *World Health Organization (WHO),* "World Report on Violence and Health", op. cit., p. 149.
[544] *The Prosecutor v. Jean-Paul Akayesu*, Trial Judgement, ICTR, op. cit., para. 693.
[545] BASTICK, M., et. al., "Sexual Violence in Armed Conflict", op. cit., p. 19; *World Health Organization (WHO),* "World Report on Violence and Health", op. cit., p. 150.
[546] *The Prosecutor v. Jean-Paul Akayesu*, Trial Judgement, ICTR, op. cit., para. 688; *Prosecutor v. Dragoljub Kunarac and Others*, ICTY, Trial Judgement, Case No. IT-96-23&23/1, 22 February 2001, paras. 766–774.

When it comes to gender-based violence, the Istanbul Convention defined it as "physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life."[547] While in its General Recommendation No. 19 issued in 1992, the Committee on the Elimination of Discrimination Against Women (hereinafter CEDAW)[548] provided its own definition which states as follows: "violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental, or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty."[549] Within this definition it included "domestic violence, rape, sexual exploitation/abuse, forced prostitution, trafficking, forced/early marriage, female genital mutilation, honor killings and compulsory sterilization or abortion."[550] The Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, commonly known as Convention of Belém do Parà, described it as "any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere."[551] While the European Commission defined it as "violence directed against a person because of that person's gender or violence that affects persons of a particular gender disproportionately."[552] What is deducible from the definitions available is that gender-based violence seems to be a broader concept than sexual violence.

Although on one side this definition encompasses a wide range of criminal acts, on the other it appears to be restrictive in terms of the individuals towards which it extended protection. As a matter of fact, gender-based violence, as described, is identified as a form of discrimination which affects women exclusively. The reason behind this could be found in the scope of the Committee itself or in the fact that women and girls are generally perceived as the primary victims of gender-based violence. However, this definition has been highly criticized.

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[547] See Article 3 of *The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence*, Council of Europe, November 2014.
[548] UN Committee on the Elimination of Discrimination Against Women (CEDAW), *UN Committee on the Elimination of Discrimination against Women: State Party Report*, Italy, 1 November 1996.
[549] Ibidem, para. 6.
[550] Ibidem, para. 20 in GAGGIOLI, G., "Sexual Violence in Armed Conflicts", p. 510.
[551] Organization of American States (OAS), Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belem do Para"), 9 June 1994.
[552] *European Commission*, "What is Gender-Based Violence?", Available at: https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/gender-equality/gender-based-violence/what-gender-based-violence_en#:~:text=gender%2Dbased%20violence-,Gender%2Dbased%20violence%20(GBV)%20by%20definition,of%20a%20particular%20gender%20disproportionately.

The rest of the analysis will now be devoted to the evolution of the definition of rape under international law. When it comes to rape there is no universally accepted definition at the international legal level as there is no single treaty or convention that provides a universally agreed-upon definition of this crime. Consequently, the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) results to be pivotal. The jurisprudence stemming from the cases of *Akayesu,*[553] *Čelebići,*[554] *Muhimana,*[555] *Furundžija*[556], and *Kunarac*[557] on one side is pivotal in providing at least a guidance in defining rape but on the other it reveals conspicuous divergence of positions among judges. This represents a step forward in tackling the long-standing impunity of many perpetrators of rape or sexual violence, but it also demonstrates how reaching a consensus remains a complex and ongoing process.

The first to deal with the crime of rape and the issue of the absence of a proper definition was the ICTR in the *Akayesu* judgement which will be deeply analyzed in the following sub-chapters. By drawing from the judgements delivered by some national courts and the definitions provided by the major legal systems – in particular Canada, Germany, Sweden, and the United Kingdom[558] – the ICTR took distance from definitions which envisioned rape only as "a mechanical description of objects and body parts"[559] and in Akayesu judgement it provided its own definition. The Court described rape as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive."[560] It mainly focalized on the circumstances in which the crime is committed and further emphasized the fact that "sexual violence may include acts which do not involve penetration or even physical contact."[561] The same was stated in the *Čelebići* judgement in which the ICTY completely relied upon the definition provided in *Akayesu*. While a conflicting interpretation can be revised in the *Furundžija* case in which the Court provided a different definition. As a matter of fact the ICTY stated that:

"The Trial Chamber finds that the following may be accepted as the objective elements of rape:

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[553] *The Prosecutor v. Jean-Paul Akayesu*, Trial Judgement, ICTR, op. cit.
[554] *Čelebići Camp, Prosecutor v Zejnil Delalić and ors*., Appeal Judgment, ICTY, Case No. IT-96-21-A, ICL 96, 20th February 2001.
[555] *The Prosecutor v. Mikaeli Muhimana,* Judgement and Sentence, ICTR, ICTR- 95-1B-T, 28 April 2005.
[556] *Prosecutor v. Anto Furundzija,* Trial Judgement, ICTY, IT-95-17/1-T, 10 December 1998.
[557] *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic,* Trial Judgment, ICTY, IT-96-23-T & IT-96-23/1-T, 22 February 2001.
[558] MCHENRY, J.-R., "The Prosecution of Rape Under International Law: Justice That Is Long Overdue", v. 35 *Vanderbilt Law Review* 1269, 2021, in GAGGIOLI, G., "Sexual Violence in Armed Conflicts", p. 510.
[559] *The Prosecutor v. Jean-Paul Akayesu,* op. cit., para. 687.
[560] Ibidem, paras. 598 and 688.
[561] Ibidem, para. 688.

(i) 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; or

(b) of the mouth of the victim by the penis of the perpetrator;

(ii) by coercion or force or threat of force against the victim or a third person."[562]

It can be observed that the focus is on the sexual act rather than on the circumstances in which the act takes place. The same approach was adopted in the case of *Kunarac* which expanded the definition even further by including "other factors which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim."[563] The Court tried to combine the element of consent and the element of coercion, and it was considered a turning point in the formation of the standards of rape, a definition which may "assist in the creation of generally accepted international standards on the adjudication of sexual offences."[564] In the *Kunarac* case the Court referred to *Furundzija* also to specify that "the true common denominator which unifies the various systems may be a wider or more basic principle of penalizing violations of sexual autonomy."

In the *Musema*[565] and the *Niyitegeka*[566] cases the ICTR followed the legal reasoning set out in the Akayesu case, while the judges in the *Semanza*[567], *Kajelijeli*[568] and the *Kamuhanda*[569] cases followed the definition set out in the *Furundžija* and *Kunarac* cases. An attempt to reconcile the different schools of thought was made in the *Gacumbitsi*[570] case in which the Chamber stated that according to its opinion "any penetration of the victim's vagina by the rapist with his genitals or with any object constitutes rape, although the definition of rape under Article 3(g) of the Statute is not limited to such acts alone."[571] One main element that has risen much debate concerns the matter of consent. On one hand, this element was considered fundamental to determine the

[562] *Prosecutor v. Anto Furundzija,* op. cit., para 185.

[563] *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic,* op. cit., para. 438.
[564] MCHENRY, J.-R., "The Prosecution of Rape Under International Law, op. cit., p. 41.
[565] *The Prosecutor v. Alfred Musema,* Judgement and Sentence, ICTR, ICTR-96-13-T, 27 January 2000.
[566] *The Prosecutor v. Eliézer Niyitegeka,* Judgement and Sentence, ICTR, ICTR-96-14-T, 16 May 2003.
[567] *The Prosecutor v. Laurent Semanza,* Judgement and Sentence, ICTR, ICTR-97-20-T, 15 May 2003.
[568] *The Prosecutor v. Juvénal* Kajelijeli, Judgment and Sentence, ICTR, ICTR-98-44A-T, 1 December 2003.
[569] *The Prosecutor v. Jean de Dieu Kamuhanda*, Judgement and Sentence, ICTR, ICTR-99-54A-T, 22 January 2004.
[570] T*he Prosecutor v. Sylvestre Gacumbitsi*, Trial Judgement, ICTR, ICTR-2001-64-T, 17 June 2004.
[571] Ibidem, para. 321.

offence, as underlined by the European Court of Human Rights.[572] On the other hand, it was criticized by many jurists for whom devolving to much attention to the matter of "consent" would be misleading.

The concept of consent was debated in the *Kunarac* case. The Court envisaged three circumstances that can be fundamental to prove rape: "those involving force or threat of force, those involving a lack of consent on the part of the victim and those involving, a variety of other specified circumstances which made the victim particularly vulnerable or negated her ability to make an informed refusal."[573] The novelty consists both in talking about "sexual autonomy" and by providing a more specific definition of "consent" defined as "consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances"[574], emphasizing once again the importance of verifying the presence or not of coercive circumstances to determine consent.

The concepts of coercion and consent were once again considered by the ICTR in the *Muhimana* case. In particular, the Court underlined how circumstances can vitiate true consent, in particular in cases of genocide, crimes against humanity or war crimes that can determine the removal of consent. In *Gacumbitsi* the Appeals Chamber on the one hand argued that non-consent can be proved "by proving the existence of coercive circumstances under which meaningful consent is not possible"[575] and on the other it specified that "knowledge of non-consent may be proven, for instance, if the Prosecution establishes beyond reasonable doubt that the accused was aware, or had reason to be aware, of the coercive circumstances that undermined the possibility of genuine consent."[576] These judgments have contributed to the development of the jurisprudence in this area.

Proceeding with the analysis of the evolution of the concept of rape, the International Criminal Court provided its own contribution. As a matter of fact, the crime of rape is explicitly mentioned in Article 7 and 8 of the ICC Statute which refer to crimes against humanity and war crimes. Thus, the statute of the Court does not deal with rape as a stand-alone crime, but it considers it only in relation to other crimes. Rape is better defined in its constitutive elements. Thus, in the ICC

[572] *M.C. v. Bulgaria*, Appl. No. 39272/98, Council of Europe: European Court of Human Rights, 3 December 2003.
[573] *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic,* op. cit., para. 442.
[574] Ibidem, para 461.
[575] *The Prosecutor v. Sylvestre Gacumbitsi,* op. cit., para. 155.
[576] Ibidem, para. 157.

Statute only the particular elements of crimes against humanity and war crimes are set out, while those for rape are instead enlisted in the Elements of the Crimes.[577]

In the Elements of Crimes,[578] the auxiliary instrument of the ICC which focuses on the conduct, consequences, and circumstances of the crime,[579] specifies that rape occurs when "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."[580] Furthermore, the invasion must be 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."[581] However, these provisions have been contested for its lack of clarity which has resulted in divergent interpretations by Courts. In particular, ambiguity concerns the level of coercion required, and the non-better specified threshold related to the "widespread and systematic" requirements.[582] A matter of further debate concerns once again the element of "consent". The footnote referred to Art. 7(1)(g)-1 states that "it is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity."[583] However, the lack of specificity leaves room for ambiguity and challenges in determining the scope and application of consent in various circumstances.

[577] ICC, *Elements of Crimes*, op. cit. The Elements of Crimes contains the elements required for each of the acts which constitute in this case the crime of rape. See as reference Art. 7(1)(g)-1 concerning the crime against humanity of rape and Art. 8(2)(b)(xxii)-1 concerning the war crime of rape.
[578] ICC*, Elements of Crimes*, op. cit.
[579] Ibidem, Art. 7(a).
[580] Art. 7(1)(g)-1, Elements of Crimes; Arts 8(2)(b)(xxii)-1 and 8(2)(e)(vi)-1, Elements of Crimes, op. cit.
[581] Ibidem.
[582] GREWAL, K., "The Protection of Sexual Autonomy Under International Criminal Law, op. cit., p. 376.
[583] See as reference Footnote 16 referred to Art. 7(1)(g)-1, ICC, *Elements of Crimes*, op. cit.

1.2-The Crime of Rape During Conflicts and the Role of International Humanitarian Law

As it has been frequently reported, throughout history sexual violence has unfortunately become a common practice during armed conflicts. Due to the sensitive nature of the issue and underreporting, determining the extent of the phenomenon is difficult. In particular before the 1990s there was scarcity of documentation concerning sexual violence committed in wartimes.[584] Thus, determining the motivations behind the perpetration of that specific crime, the impact that it could have on the victim and on the entire community during and after the conflict were among the main issues.[585] However, numerous documented cases and reports from conflict zones based on first-hand witnesses suggest that sexual violence has always been a distressingly prevalent phenomenon.

Sexual violence in armed conflicts can take various forms, including rape, sexual slavery, forced prostitution, and other forms of sexual abuse. Both women and men, as well as children, can be victims of such violence. However, women are the main victims of rape and more in general of conflict-related sexual violence. For clarity's sake it must be underlined that the term "conflict-related sexual violence" will be used throughout these pages, but the terminology does not stem from international humanitarian law.[586] It is a commonly used term that the UN has described as "sexual violence that occurs in conflict or post conflict settings or other situations of concern and that has a direct or indirect nexus with the conflict or political strike itself".[587] However, this terminology will be used but it is not adopted under International Humanitarian Law instruments.

To be considered a violation of International Humanitarian Law a "direct or at least sufficient" nexus to the armed conflict must be present.[588] Once again the jurisprudence of the Courts was essential. As a matter of fact, the definition of the nexus requirement is taken from the *Kunarac* case in which the ICTY argued that "what ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment – the armed

[584] SUK, C., SKJELSBÆK, I., "Sexual Violence in Armed Conflicts", International Peace Research Institute, Oslo (PRIO), 2010, p. 2.
[585] Ibidem, p. 1.
[586] GAGGIOLI, G., "Sexual Violence in Armed Conflicts", op. cit., p. 513.

[587] Conflict-Related Sexual Violence: Report of the Secretary-General, UN Doc. A/66/657–S/2012/33, 13 January 2012, para. 3 in Gaggioli, G., "Sexual Violence in Armed Conflicts", op. cit., p. 513.
[588] ICTY, Prosecutor v. Duško Tadić, Trial Judgment, ICTY, Case No. IT-94-1-T, 7 May 1997, para. 572; Prosecutor v. Kordić and Čerkez, Trial Judgment, ICTY, Case No. IT-95-14/2-T, Trial Judgment, 26 February 2001, para. 32 in GAGGIOLI, G., "Sexual Violence in Armed Conflicts", op. cit., p. 514.

conflict – in which it is committed."[589] It continues by stating that "the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed. Hence, if it can be established, as in the present case, that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict."[590] Furthermore in the Appeals Chamber the Court set out some requirements needed to further prove the existence of the nexus. These are "the fact that the perpetrator is a combatant; the fact that the victim is a non- combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and that the crime is committed as part of or in the context of the perpetrator's official duties."[591] These definitions are considered essential by the Courts that prefer relying on objective tests rather than defining *in abstracto* criteria. Only in this case a crime can be considered as amounting to war crime, a serious violation of International Humanitarian Law.

Sexual violence in armed conflicts can be perpetrated by State and non-State actors, peacekeepers, members of private military and security companies.[592] Rape and sexual violence are used as a weapon of war to provide demonstration of power and dominance or simply as a form of abuse of authority.[593] When committed in a systematic way it has been frequently considered a "method of warfare"[594] when this is understood as a way to "overwhelm and weaken the adversary".[595] Other times it is defined as a "weapon of war"[596] even though these are not technical terms but more terminological instruments to emphasize the magnitude of the issue.

Rape is not a recent phenomenon, but an old-aged tactic used to exert power, to demonstrate superiority or as underlined by Radhika Coomaraswamy, former Under-Secretary-General of the United Nations, rape can be used to "humiliate the community."[597] As a matter of fact, the consequences extend beyond the mere individual, undermining "the well-being and secure

[589] *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic,* Appeal Judgement, op. cit., para. 58.
[590] Ibidem.
[591] Ibidem, para. 59.
[592] GAGGIOLI, G., "Sexual Violence in Armed Conflicts", op. cit., p. 504.
[593] Ibidem.
[594] Ibidem, p. 517.
[595] SASSÒLI, M., et.al., "How Does Law Protect in War?", International Committee of the Red Cross (ICRC), Geneva, 2011, p. 280.
[596] GAGGIOLI, G., "Sexual Violence in Armed Conflicts", op. cit., p. 517.
[597] COOMARASWAMY, R., "Of Kali Bom: Violence and the Law in Sri Lanka", in *Freedom from Violence: Women's Strategies from Around the World,* M. Schuler ed., 1992, p. 49.

existence of the community."[598] Throughout history, armed conflicts have almost always been accompanied by widespread sexual violence. Instances of rape as weapon of war or a mens of control and a method used to spread terror among the population have been documented in many victim's accounts. Abuses have been registered during WWII when Japanese soldiers have committed mass rape against the so-called "comfort women";[599] then during the genocide in Rwanda and in the former Yugoslavia where rape has been "massive, organized and systematic";[600] in Sierra Leone;[601] during the Kuwait invasion when about 5,000 women have reported to have been subjected to systematic rape on behalf of Iraqi soldiers, as well as many women in Kashmir reported to have suffered rape on behalf of Indian soldiers;[602] while during the 12-year internal war in Peru "women have been targets of sustained, frequently brutal violence committed by both parties to the armed conflict. Women have been threatened, raped, and murdered by government security forces; and women have been threatened, raped and murdered by die Communist Party of Peru-Shining Path. Often, the same woman is the victim of violence by both sides."[603] These are only some examples, but the list is far from exhaustive.

Despite that, historically rape and sexual violence have received little attention and recognition. For much history such crimes have been ignored and treated more as a collateral damage and for this reason inevitable. This is revisable in the Lieber Instruction of 1963[604], also known as Lieber Code, a set of guidelines that were drafted during the American Civil War and submitted to President Abraham Lincoln to govern the conduct of the Union forces during the conflict. They represent the first codification of customary international laws of land warfare. The Code in Article 44 stated that all the crimes committed during an armed conflict which included "rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense. A soldier, officer or private, in the act of committing such violence, and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior."[605]

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[598] Ibidem.
[599] CHINKIN, C., "Rape and Sexual Abuse of Women in International Law", *European Journal of International Law*, Volume 5, Issue 3, 1994, p. 328.
[600] UN Security Council, *Security Council resolution 820, (Bosnia and Herzegovina)*, 17 April 1993, S/RES/820, 1993.
[601] CHINKIN, C., "Rape and Sexual Abuse of Women in International Law", op. cit., p. 328.
[602] Ibidem, p. 327.
[603] Americas Watch and the Women's Rights Project, *Untold Terror: Violence Against Women in Peru's Armed Conflict,* 1992, p. 1.

[604] *Lieber Code: Instructions for the Government of Armies of the United States in the Field*, General Order No. 100, 24 April 1863.
[605] Ibidem.

Only recently, rape and sexual violence in armed conflicts have increasingly received growing recognition. International humanitarian law constitutes the legal framework used to address and criminalize sexual violence, particularly when committed during armed conflicts. However, this body of laws has raised concern since it has been frequently considered inadequate in the way it deals with the needs of women during conflicts and for not implementing provisions to prohibit and criminalize sexual violence in a more explicit manner.

The Geneva Conventions of 1949[606] and its Additional Protocols of 1977[607] are the core component of International Humanitarian Law, also known as the law of armed conflict or the law of war. These corpuses of laws stem from the jurisprudence of the Nuremberg Tribunal and the Military Tribunal for the Far East. However, the current law applicable enshrined in these instruments, results to be contradictory when it comes to provide comprehensive definitions of rape and more generally of sexual violence. Two main criticisms have been raised concerning these instruments. Firstly, they have been criticized for not providing a comprehensive definition of rape and, as it has already been pointed out, for not being more explicit. Secondly, they have been criticized for being too general. As a matter of fact, no explicit prohibition can be envisaged in its constitutive provisions which prohibit rape by making it fall under other forms of sexual violence such as cruel treatment and torture, outrages upon personal dignity, indecent assault and enforced prostitution and other crimes aimed at erasing honor. Thus, rape can be considered a prohibited act under the Geneva Conventions but only through extension and interpretation.

In the Geneva Conventions the positions on rape seem to be ambitious. Article 27 of the III Geneva Convention Relative to the Protection of Civilian Persons in Time of War,[608] which is reproduced almost verbatim in Article 76 of Protocol I related to the Protection of Victims of International Armed Conflicts,[609] states that "protected persons are entitled, in all circumstances, to respect for their persons, their honor, their family rights, their religious convictions and

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[606] International Committee of the Red Cross (ICRC), *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)*, 12 August 1949; International Committee of the Red Cross (ICRC), *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention)*, 12 August 1949; International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949; International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949.

[607] International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977; International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977.

[608] Article 27 of the *Third Geneva Convention,* ICRC, op. cit.

[609] Article 76 of the *Protocol I,* ICRC, op. cit.

practices, and their manners and customs. They shall at all times be humanely treated and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity."[610] The IV Geneva Convention adopted a more explicit terminology and in Article 27[611] stated that women shall be protected "against any attack on their honor"[612] in particular "against rape, enforced prostitution, or any form of indecent assault."[613] Once again the provision was subjected to criticism since it seemed to be anachronistic and was perceived as a declassification of rape to a mere offence to women honor. The protection to which Article 27 of the IV Geneva Convention refers to is widened through Article 4 of the same Convention[614] which refers to "who at a given moment and, in any manner, whatsoever find themselves, in case of a conflict or occupation, in the hands of a party to the conflict or occupying power of which they are not nationals."[615] It should also be emphasized that the focus and the aim of the Articles analyzed so far is that of providing protection instead of setting out a clear prohibition of the crime in question.

Prohibition of the above-mentioned crime is present in Article 75 of Protocol I[616] which prohibits those acts "at any time and in any place whatsoever, whether committed by civilian or by military agents."[617] While Article 3 common to the Geneva Conventions[618] prohibits in provision "(a) violence to life, and person, in particular murder of all kinds, mutilation, cruel treatment and torture; and through provision (c) outrages upon personal dignity, in particular humiliating and degrading treatment."[619] Rape can be made to fall within it only through interpretation. Article 3 is completed through Article 4 of Protocol II[620] which prohibits those acts to be perpetrated against "all persons who do not take a direct part or who have ceased to take part in hostilities."[621]

It is important to underline that there have been significant improvements in the recognition and response to rape in armed conflicts over the years and many legal bodies have progressively underlined the urgency of providing and implementing effective measures. The World Conference on Human Rights held in Vienna in 1993[622] pointed out that "violations of the human

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[610] Article 27 of the *Third Geneva Convention,* ICRC, op. cit. and Article 76 of the *Protocol I,* ICRC, op. cit.
[611] Article 27 of the *Fourth Geneva Convention,* ICRC, op. cit.
[612] Ibidem.
[613] Ibidem.
[614] Article 4 of the *Fourth Geneva Convention,* ICRC, op. cit.
[615] Ibidem.
[616] Article 75 of the of the *Fourth Geneva Convention,* ICRC, op. cit.
[617] Ibidem.
[618] Common Article 3
[619] Ibidem.
[620] Article 4 of the *Protocol IV,* ICRC, op. cit.
[621] Ibidem.
[622] UN Commission on Human Rights, *World Conference on Human Rights.*, 9 March 1994, E/CN.4/RES/1994/95.

rights of women in situations of armed conflict (with no distinction drawn between international and non-international armed conflict) are violations of the humanitarian principles of international human rights and humanitarian law."[623] Furthermore, the United Nations condemned violations of international humanitarian law, including the massive organized and systematic detention and rape of women[624] through Security Council in Resolution 820[625] of 1993. In the same way the Commission on the Status of Women "urged all States and all relevant intergovernmental and non-governmental organizations to consider long-term action-oriented plans and programs and the provision of adequate financial resources for the physical, social and psychological rehabilitation of women and children subjected to rape and other forms of violence, utilizing where possible community self-help groups,"[626] and it also "urged all States and all relevant intergovernmental and non-governmental organizations to ensure that counselling and other support for women subjected to rape and other types of violence form an integral part of health and welfare services in order to encourage women to avail themselves of such assistance."[627]

These are only some of the contributions that international legal instruments have provided which result to be relevant since they denote an increase commitment of the international law framework in providing justice to women victims of rape. Particularly noteworthy is the fact that in recent times sexual violence in armed conflicts has been predominantly and increasingly included within the UN Security Council's agenda. This has resulted in the implementation of a series of resolutions outlining the duties and obligations of member-States in addressing these matters. This is the case of UN Security Council Resolution 1352 on Women, Peace, and Security[628], implemented in 2000. This was a landmark resolution since it represents the first attempt to address the disproportionate impact of armed conflict on women. It focuses on the role of women in conflict situations and in peacebuilding processes urges the participation of women themselves in the peace and security processes. Furthermore, the Resolution invites the Parties to the conflict to implement measures aimed at safeguarding women and girls from sexual violence, with particular attention to rape. It also calls upon States to prosecute individuals for crimes of

[623] Ibidem in CHINKIN, C., "Rape and Sexual Abuse of Women in International Law", op. cit., p. 332.
[624] Ibidem.
[625] UN Security Council, *Security Council resolution 820, (Bosnia and Herzegovina)*, 17 April 1993, S/RES/820, 1993.
[626] Report of former Secretary-General, Rape and Abuse of Women in the Territory of the Former Yugoslavia, UN Doc. E/CN.4/1994/5, 1993, para. 19 in CHINKIN, C., "Rape and Sexual Abuse of Women in International Law", op. cit., p. 334.
[627] Ibidem.
[628] UN Security Council, *Security Council resolution 1325 (on women and peace and security)*, S/RES/1325, 31 October 2000.

genocide, crimes against humanity and war crimes which encompass different forms of sexual violence.[629]

This instrument was followed by Resolution 1820[630] adopted by the UNSC in 2008. Through this Resolution the UNSC unequivocally condemns sexual violence perpetrated in armed conflicts and labelling it as an international security issue. It emphasizes how sexual violence constitutes both a "security issue" and "a tactic of war" as well as being a grave breach of international humanitarian law that can amount to a war crime, crimes against humanity, or genocide.[631] While in 2009 the UNSC adopted Resolution 1888[632] which was built upon the foundations laid by Resolution 1820. It presented a series of provisions to strengthen the protection of women both in conflict and post-conflict settings while recognizing sexual violence as a critical aspect of conflict. It aimed at making those provisions to be included within the mandated of the United Nations peacekeeping operations. It also underlined the importance of addressing sexual violence concerns from the very outset of peace processes. Lastly, it requested the appointment of a Special Representative for Sexual Violence in Conflict to ensure a more comprehensive response to sexual violence issues.[633]

In 2008 the global campaign "UNiTE to End Violence"[634] was lunched by the UN Secretary General Ban Ki-Moon with the aim of combining efforts to foster action to address and prevent violence against women worldwide. Furthermore, several UN agencies have been created also with the aim of protecting women from conflict-related sexual violence. These are the Office of the Special Adviser on Gender Issues, the United Nations Development Fund for Women, and the United Nations International Research and Training Institute for the Advancement of Women. Despite the increased and evident efforts made by the international community in addressing the issue of sexual violence in armed conflicts, still limited attention has been devoted to the far-reaching consequences that the crime inevitably involves. The situation of the children born because of rape, the impacts on the reproductive health of the victims and the enormous cultural

[629] Ibidem in SUK, C., and SKJELSBÆK, I., "Sexual Violence in Armed Conflicts", op. cit., p. 3.
[630] UN Security Council, *Security Council resolution 1820 (on acts of sexual violence against civilians in armed conflicts)*, S/RES/1820, 19 June 2008.
[631] Ibidem in SUK, C., and SKJELSBÆK, I., "Sexual Violence in Armed Conflicts", op. cit., p. 3.
[632] UN Security Council, *Security Council resolution 1888 (on acts of sexual violence against civilians in armed conflicts)*, S/RES/1888, 30 September 2009.
[633] Ibidem in in SUK, C., and SKJELSBÆK, I., "Sexual Violence in Armed Conflicts", op. cit., p. 3.
[634] SUK, C., and SKJELSBÆK, I., "Sexual Violence in Armed Conflicts", op. cit., p. 3.

consequences that involve the victim as well as the community are still under-documented and overlooked.

1.3-The Contribution of Human Rights Law

International human rights law and international humanitarian law are traditionally two distinct branches of law, one dealing with the protection of persons from abusive power, the other with the conduct of parties to an armed conflict. However, developments in international and national jurisprudence and practice have led to the recognition that these two bodies of law not only share a common humanist ideal of dignity and integrity but overlap substantially in practice. Thus, the different systems are interconnected, and the interpretation provided by one system can be relevant and can influence the other legal frameworks. Human rights law results particularly relevant to interpret the meaning of rape and sexual violence. On one side, it provides useful guidance to ensure an effective application of International Humanitarian Law to prevent the occurrence of sexual violence during armed conflicts and to strengthen the protection of the victims. Thus, it complements International Humanitarian Law by providing it with fundamental interpretative tools to create a more comprehensive approach to address sexual crimes. On the other, it aims at providing a comprehensive legal framework to protect individuals within conflict situations but also in cases where no nexus with the ongoing conflict is revisable.[635] However, for the purposes of the present analyses only situations concerning armed conflicts will be considered.

From a deep analysis of the main legal instruments dealing with human rights both at the international and regional level what results to be evident is a lack of specific and explicit reference to prohibition of sexual violence. As a matter of fact, sexual violence is more generally included into other provisions or only addressed it in a general manner. This is revisable in the Convention on the Elimination of Discrimination Against Women (hereinafter CEDAW),[636] the international treaty adopted by the United Nations General Assembly in December 1979 aimed at promoting and protecting women's rights and eliminating all forms of discrimination against them. However, no explicit mention to the protection of women in armed conflicts or post-conflict

[635] GAGGIOLI, G., "Sexual Violence in Armed Conflicts", op. cit., p. 519.
[636] UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, United Nations, Treaty Series, vol. 1249, 1979.

situation has been included.[637] Only some exceptions are revisable. From a deeper analysis CEDAW itself through its General Recommendation No. 19[638] adopted in 1992 which recognizes sexual violence as a form of discrimination which "impairs or nullifies the enjoyment by women of human rights and fundamental freedoms."[639] In particular, Article 1(c) includes in the rights and freedoms "the right to equal protection according to humanitarian norms in time of international or internal armed conflict."[640] At the regional level particularly relevant is the Protocol to the African Charter on Human and People's Rights of Women in Africa[641] adopted in 2003, also known as the Maputo Protocol. In Article 11(1) provides that "States Parties undertake to respect and ensure respect for the rules of international humanitarian law applicable in armed conflict situations, which affect the population, particularly women".[642] In Article 11(2) it states that "States Parties shall, in accordance with the obligations incumbent upon them under international humanitarian law, protect civilians including women, irrespective of the population to which they belong, in the event of armed conflict."[643] While in Article 11(3) it provides that "States Parties undertake to protect asylum seeking women, refugees, returnees and internally displaced persons, against all forms of violence, rape and other forms of sexual exploitation, and to ensure that such acts are considered war crimes, genocide and/or crimes against humanity and that their perpetrators are brought to justice before a competent criminal jurisdiction."[644]

At the European level Recommendation Rec (2002)5 of the Committee of Ministers to Member States on the Protection of Women against Violence[645] was adopted by the Committee of Ministers in April 2002. In the part related to the "measures concerning violence in conflict and post-conflict situations"[646] it recommends States to "penalize all forms of violence against women and children in situations of conflict, in accordance with the provisions of international humanitarian law, whether they occur in the form of humiliation, torture, sexual slavery or death

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[637] GAGGIOLI, G., "Sexual Violence in Armed Conflicts", op. cit., p. 520.
[638] UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 19: Violence against women*, 1992.
[639] Ibidem, para. 7.
[640] See as reference Art. 1 of the UN Committee on the Elimination of Discrimination Against Women, op. cit.
[641] African Union, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol)*, 11 July 2003.
[642] Article 11(1) of the *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa,* op. cit.
[643] Article 11(2) of the *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa,* op. cit.
[644] Article 11(3) of the *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa,* op. cit.
[645] Council of Europe, *Recommendation Rec (2002)5 of the Committee of Ministers to Member States on the Protection of Women against Violence, adopted by the Committee of Ministers on 30 April 2002 at the 794th meeting of the Ministers' Deputies,* 2002.
[646] Ibidem.

resulting from these actions" and to "penalize rape, sexual slavery, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity as an intolerable violation of human rights, as crimes against humanity and, when committed in the context of an armed conflict, as war crimes."[647] However, recommendation are non-binding acts which aims at achieving certain ends without imposing a mandatory legal framework.

As Recommendation Rec (2002)5 other non-binding human rights instruments deal with sexual violence issues. This is the case of the Beijing Declaration and Platform for Action[648] adopted by consensus in 1995 at the Fourth World Conference on Women. The Declaration highlights how urgent measures should be implemented to prevent acts of violence against women which include "violation of the human rights of women in situations of armed conflict, in particular murder, systematic rape, sexual slavery and forced pregnancy".[649] Furthermore it recognizes that "violations of the human rights of women in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law,"[650] while adding that "massive violations of human rights, especially in the form of genocide, ethnic cleansing as a strategy of war and its consequences, and rape, including systematic rape of women in war situations, creating a mass exodus of refugees and displaced persons, are abhorrent practices that are strongly condemned and must be stopped immediately, while perpetrators of such crimes must be punished."[651]

However, although many human rights instruments do not explicitly prohibit or refer to sexual violence this does not imply that rape and sexual violence are allowed or completely disregarded by human rights law. In most of the cases, they are not treated as stand-alone crimes but included for extension under other non-derogable norms which can be considered as basis to condemn sexual violence comprehensively. This occurs for instance with the inclusion of rape under the crime of torture.[652] The United Nations Convention against Torture (hereafter CAT)[653] defines torture as "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

[647] Ibidem, para. 69.
[648] United Nations, *Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women*, 27 October 1995.
[649] Ibidem, para. 115.

[650] Ibidem, para. 132.
[651] Ibidem.
[652] GAGGIOLI, G., "Sexual Violence in Armed Conflicts", op. cit., p. 521.
[653] UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85.

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."[654] By following the legal reasoning adopted by the ICTY in the *Kunarac* case[655], rape seems to fall within this definition by extension. As stated by the Appeals Chamber "sexual violence (not rape) necessarily gives rise to severe pain or suffering, whether physical or mental, and in this way justifies its characterization as an act of torture."[656] Furthermore, the Trial Chamber in *Delalić* case[657] stated that "rape causes severe pain and suffering, both physical and psychological" which can be "particularly acute and long lasting."[658] Furthermore, it is difficult to envisage "circumstances in which rape, by, or at the instigation of a public official, or with the consent or acquiescence of an official, could be considered as occurring for a purpose that does not, in some way, involve punishment, coercion, discrimination or intimidation."[659] In the view of this Trial Chamber this is inherent in situations of armed conflict.[660] The Special Rapporteur on Torture, Mr. Kooijmans, explicitly includes rape in the Report of 1986[661] among the list of methods considered to cause physical torture.

In human rights case law, there are several examples in which sexual violence has been made to fall under the crime of torture. In *Raquel Martín de Mejía v. Peru* case[662], the Inter-American Commission on Human Rights (hereinafter IACHR),[663] condemned the Peruvian State for the violence perpetrated by the military personnel against Raquel Martín de Mejía and her husband. The Commission considered rape a form of physical and psychological torture used to intimidate the victims.[664] The importance of the interconnectedness of different instruments of law is revisable in this case in the reference that the Commission made to International Humanitarian Law to sustain its interpretation. The Commission in fact argued that "current international law establishes that sexual abuse committed by members of security forces, whether as a result of a deliberate practice promoted by the State or as a result of failure by the State to prevent the

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[654] Ibidem, Article 1.
[655] *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic,* Appeal Judgement, ICTY, IT-96-23& IT-96-23/1-A, 12 June 2002.
[656] Ibidem, para. 150.
[657] *Čelebići Camp, Prosecutor v Zejnil Delalić and ors*., Appeal Judgment, ICTY, op. cit.
[658] Ibidem, para. 495.
[659] Ibidem, in footnote 194, para. 142.
[660] Ibidem
[661] *Report of the Special Rapporteur on Torture*, UN Doc. E/CN.4/1986/15, 19 February 1986, para. 119.
[662] *Raquel Martí de Mejía v. Perú*, Inter-American Commission on Human Rights (IACHR), Case 10.970, 1 March 1996 *Raquel Martí de Mejía v. Perú*, Inter-American Commission on Human Rights (IACHR), Case 10.970, 1 March 1996 in GAGGIOLI, G., Sexual Violence in Armed Conflicts, op. cit., p. 522.
[663] Organization of American States (OAS), *Inter-American Commission on Human Rights*, 1959.
[664] *Raquel Martí de Mejía v. Perú*, Inter-American Commission on Human Rights, op. cit.

occurrence of this crime, constitutes a violation of the victims' human rights, especially the right to physical and mental integrity."[665]

Another example can be retraced in the *Aydin v. Turkey* case[666] delivered by the European Court of Human Rights (hereinafter ECtHR) in 1997. The case concerned the rape of a seventeen-year-old girl on behalf of security forces who accused her of collaborating with the PKK.[667] The Court stated that "rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim."[668] Furthermore, the Court focalized on the consequences of this act and argued that "rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence. The applicant also experienced the acute physical pain of forced penetration, which must have left her feeling debased and violated both physically and emotionally."[669] On these bases the Court concluded by stating that "the accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected amounted to torture in breach of Article 3 of the Convention."[670]

The human rights case law involving rape crimes that have been reported, which constitutes a far from exhaustive list, are relevant also when it came to provide an interpretation of rape under other legal frameworks, namely international humanitarian law and criminal law. This has been emphasized also in *Kunarac* case in which in the Trial Chamber the Court affirmed that "because of the paucity of precedent in the field of international humanitarian law, the Tribunal, on many occasions, had recourse to instruments and practices developed in the field of human rights law. Because of their resemblance, in terms of goals, values and terminology, such recourse is generally a welcome and needed assistance to determine the content of customary international law in the field of humanitarian law."[671] However, the Court outlines that in attempting to define an offence under international humanitarian law, the Trial Chamber must be mindful of the specificity of this body of law.[672]

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[665] Ibidem, in GAGGIOLI, G., Sexual Violence in Armed Conflicts, op. cit., p. 522.
[666] *Aydin v. Turkey*, Council of Europe: European Court of Human Rights (ECtHR), Application No. 57/1996/676/866, 25 September 1997.
[667] GAGGIOLI, G., Sexual Violence in Armed Conflicts, op. cit., p. 523.
[668] *Aydin v. Turkey*, ECtHR, op. cit., paras 83-86.

[669] Ibidem.
[670] Ibidem.
[671] *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic,* Trial Judgment, op. cit., para. 467.
[672] *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic,* Trial Judgment, op. cit., para. 467.

2-The Contribution of the International Criminal Court

A significant step in the prosecution of sexual violence as genocide was made with the adoption of the Rome Statute of the International Criminal Court (hereinafter ICC).[673] The Statute was welcomed by the former Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda, Richard Goldstone as a steppingstone through which "gender crimes are given the recognition they were denied for so many years."[674]

The drafting of the Rome Statue was deeply influenced by the legal precedents set by the ICTY and the ICTR. These represented reference points which informed the structure and content of the Statute. As a matter of fact, prior the establishment of the ad hoc Tribunals, sexual violence in international criminal law was largely overlooked as an inherent element of international crimes. The lack of proper definitions and the silence which surrounded the issue of sexual and gender-based violence was evident both in the legal texts and in the prosecution of international crimes. Proof of this can be retraced in the Charter of the Nuremberg International Military Tribunal which never explicitly referred to rape or sexual violence. This is a relevant aspect since "the ability to eliminate a wrong is contingent on it first being named".[675] As a matter of fact, criminalizing rape in an explicit manner is a critical step in the pursuit of justice since it ensures an adequate assessment of the criminal responsibility of the perpetrators.

The establishment of the ICTR and the ICTY gave greater prominence to the prosecution and adjudication of sexual-based crimes through the establishment of a more comprehensive legal framework. Both the ICTY and the ICTR made rape to fall under crimes against humanity[676], while the ICTR Statute considered rape also as a war crime.[677] This reflected on the Rome Statute.

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[673] The Rome Statute was adopted in 1998 and entered into force in 2002. It is the foundational treaty of the International Criminal Court, the first international criminal court which was established to prosecute individuals for the most serious crimes.

[674] GOLDSTONE HON, R.- J., *Prosecuting Rape as a War Crime*, 34 Case W. Res. J. Int'l L. 277, 2002 in ALTUNJAN, T., "The International Criminal Court and Sexual Violence: Between Aspirations and Reality." *German Law Journal*, vol. 22, no. 5, 2021, pp. 878-879.

[675] COOK, R.-J., CUSACK, S., "Gender Stereotyping: Transnational Legal Perspectives", University of Pennsylvania Press, 2011, in ALTUNJAN, T., "The International Criminal Court and Sexual Violence", p. 881.

[676] See Article 5(g) of the UN Security Council, *Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002)*, 25 May 1993; and Article 3(g) of the UN Security Council, *Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006)*, 8 November 1994.

[677] See Article 4(e) of the UN Security Council, *Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006)*, 8 November 1994.

The Rome Statute and its subsidiary documents, namely the Rules of Procedure and Evidence and the Elements of Crimes, which provides detailed guidelines to support and implement the provisions of the statute, represent the first legal instruments to enumerate and define a range of sexual crimes with a specific focus on women and gender through the codification of the elements of rape. Rape, sexual slavery, enforced prostitution, forced pregnancy, and enforced sterilization were considered as part of war crimes and crimes against humanity.[678]

The fact that it incorporated various elements of the two ad hoc Tribunals is revisable also in the wording of Article 6 of the Rome Statute – which provides the definition of genocide – which not only reproduced verbatim Article II of the Genocide Convention but also Article 4 of the ICTY and Article 2 of the ICTR. A footnote referred to Article 6 (b) specifies that rape and sexual violence inflict conditions of life calculated to bring about physical destruction.[679] Other important steps forward were made. First of all, the Statute through Article 36 (8)(b) required State Parties to appoint judges that have "legal expertise on specific issues, including, but not limited to, violence against women or children"[680] and the same competences has to be possessed by the Prosecutor, as stated in Article 42(9).[681] It further highlights in Article 54 (1)(b) the importance of effective investigation by considering "the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children" while adopting measures to "protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses."[682]

In recent practice, the ICC has shown significant advancements and remarkable efforts to prosecute sexual violence. Out of the twenty-six cases that have been brought in front of the ICC, sixteen included charges of sexual violence.[683] This demonstrates how sexual crimes are increasingly recognized in a more comprehensive manner. An example concerns the case of Bosco Ntaganda. This constituted a landmark verdict since the Court delivered a final conviction for sexual crimes. Another case which demonstrates the Court progression in prosecuting sexual violence is the one concerning Dominic Ongwen, the former Lord's Resistance Army commander, a rebel group that operated in Uganda.[684] The indicted was charged for crimes of

[678] See as reference Articles 7(1)(g), 8(2)(b)(xxii), and 8(2)(e)(vi) of the Rome Statute, op. cit.
[679] See as reference footnote 3 referred to Article 6(b) of Elements of Crimes, op. cit.
[680] Article 36(8)(b) of the Rome Statute, op. cit.
[681] Article 42(9) of the Rome Statute, op. cit. which states that "the Prosecutor shall appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children."
[682] Article 54 (1)(b) of the Rome Statute, op. cit.
[683] "Gender Report Card on the International Criminal Court", *Women's Initiatives for Gender Justice,* 2018 in ALTUNJAN, T., "The International Criminal Court and Sexual Violence", p. 887.
[684] ALTUNJAN, T., "The International Criminal Court and Sexual Violence", p. 887.

rape, sexual slavery, forced pregnancy, and forced marriage. The judgment results particularly relevant since it represents the first conviction for crimes against humanity and war crimes of forced pregnancy.

The recognition of the consequences that rape and sexual violence can have on women represent an important step forward for two main reasons. First of all, it "highlights the potential for courts themselves to be involved indirectly in combating the stigma and prejudices that continues to cling to crimes of rape and sexual violence."[685] Secondly, it is a demonstration of the fact that international Tribunals have become more and more sensitive to gender issues.[686] Despite that, the path toward a more comprehensive recognition of the crucial interplay between gender and culture is often missing and it represents the major obstacle to achieve complete justice. This is revisable in the Commission of inquiry on Syria of 2016[687] which recognized the violence perpetrated by ISIS against Yazidi women as genocide but overlooked the importance of considering the different aspects of Yazidi culture and the pivotal role that Yazidi women play in preserving it. For this reason, the incorporation of the cultural dimension into Article II of the Genocide Convention or the formal legal conceptualization of cultural genocide becomes imperative to attain this objective.

[685] Ibidem, p. 879.
[686] DE VIDO, S., "Protecting Yazidi Cultural Heritage through Women: An International Feminist Law Analysis", *Journal of Cultural Heritage*, 33, 2018, p. 265.
[687] UN Human Rights Council, *Report of the independent international commission of inquiry on the Syrian Arab Republic*, A/HRC/S-17/2/Add.1, 23 November 2011.

2.1-Can Rape be Considered Cultural Genocide? Analysis of the Case: The Prosecutor v. Akayesu

The issue of sexual violence as cultural genocide reached a critical juncture with the judgement of Jean-Paul Akayesu. Significantly pivotal to the present analysis, this case has been considered groundbreaking for the legal reasoning that the Court advanced concerning sexual violence and because the matter concerning sexual violence as a form of cultural genocide attained a momentous apex in the pronouncement of this judgement. As it will be discussed through a broader understanding of the actus reus, the ICTR included rape under Article II of the Genocide Convention, despite not being expressly enlisted, and it demonstrated how the physical element is not the sole determinant to reach the deterioration of a group.

Akayesu was the burgomaster of Taba, a commune in the prefecture of Gitarama, territory of Rwanda from April 1993 to June 1994. [688] He was accused of having actively participating and orchestrating a campaign of mass violence – including sexual violence – against the Tutsi women. As a matter of fact, at the outbreak of the Rwanda civil war that eventually culminated with the 1994 genocide, many civilians – the majority of which belong to the Tutsi minority – tried to seek refuge in various places included the bureau communal in Taba. Akayesu, in his official capacity was expected to maintain public order, since it was in charge of the execution of laws and regulations and the administration of justice.[689] Instead, he facilitated the "commission of the sexual violence, beatings and murders to occur on or near the bureau communal premises."[690] He was indicted of fifteen charges which included genocide and crimes against humanity.

In the first judgement Akayesu was originally indicted of twelve counts which encompasses acts of genocide, crimes against humanity and violations of Common Article 3[691] which was

[688] HAYES, N., 'Creating a Definition of Rape in International Law: The Contribution of the International Criminal Tribunals', in Shane Darcy, and Joseph Powderly (eds), *Judicial Creativity at the International Criminal Tribunals*, Oxford, 2010, p. 132.
[689] *The Prosecutor v. Jean-Paul Akayesu*, Trial Judgement, ICTR, op. cit., para. 4.
[690] *The Prosecutor v. Jean-Paul Akayesu*, Trial Judgement, ICTR, op. cit., para. 12A.
[691] Article 3 can be found in all the four Geneva Conventions. It is applicable in case of armed conflict not of international character occurring in the territory of one of the contracting parties to the 1949 Conventions. It also applies to a situation where the conflict is within the State, between the Government and the rebel forces or between the rebel forces themselves. Protocol II which is supplementary to this article has expanded this provision. Article 3 offers an international minimum protection to persons taking no active part in hostilities, including members of armed forces in certain situations specifically stated in the article. See as reference: GANDHI, M., "Common Article 3 Of Geneva Conventions, 1949 in the Era of International Criminal Tribunals"**,** *ISIL Year Book of International Humanitarian and Refugee Law,* Available at: http://www.worldlii.org/int/journals/ISILYBIHRL/2001/11.html#Footnote_auth

specifically addressed to the violations he committed in his role of "burgomaster".[692] Accuses of rape came in a subsequent instance through the testimony of a Tutsi women, named witness J., who moved allegations of sexual violence toward the indicted. More precisely she accused Akayesu of the rape of her six-year-old girl.[693] Other spontaneous testimonies arisen. Judge Pillay, Judge Kama and Judge Aspegren initiated interrogations and requested the prosecutor further investigations.[694]Despite the reluctance of the Tribunal investigators which were more prone to consider sexual violence as a "lesser" or "incidental" crime[695], in the Trial Chamber on 17th June 1997 the indicted was accused of acts of sexual violence under Article 3(g), Article 3(i), Article 4(2)(e) of the ICTR Statute.[696] He was eventually accused of violations of Common Article 3 concerning "outrages on personal dignity." Furthermore, the Chamber emphasized how evidence of the perpetration of acts related to sexual violence is in the "interest of justice".[697]

The Chamber decided *sua sponte* to interpret Article 2 (b) of the Genocide Convention in a broad way and it stated that the harm does not need to be "permanent and irremediable".[698] As already analyzed, this clarification proves to be fundamental not only for the purpose of including rape as part of genocide, but it also creates a legal precedent that can be used to prove the fact that the physical element seems to be not an essential prerogative. This is a proof of the fact that courts seem to be prone to consider acts which mine the cultural foundations of the group as within the meaning of Article II. In absence of a legal conceptualization of cultural genocide this element results extremely relevant at least to provide a partial justice.

Furthermore, the Chamber proceeded by recalling provision (d) and stated that the "measures intended to prevent births within the group may be physical but can also be mental" and added that "rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate".[699] The Chamber concluded that rape and sexual violence amount to genocide "in the same way as any other act" provided that these acts are perpetrated with the "intent to destroy, in whole or in part, a particular group, targeted as such".[700] It further stated that rape and sexual violence not only constitute serious bodily and mental harm but they also represent one of the

[692] HAYES, N., 'Creating a Definition of Rape in International Law", p. 132.
[693] *The Prosecutor v. Jean-Paul Akayesu*, Trial Judgement, ICTR, op. cit., para. 416.
[694] Ibidem.
[695] SHORT, J., "Sexual Violence as Genocide", p. 515.
[696] Ibidem, para. 417.
[697] Ibidem.
[698] The Prosecutor v. Jean-Paul Akayesu, op. cit. para. 524.
[699] *The Prosecutor v. Jean-Paul Akayesu*, Trial Judgement, ICTR, op. cit., para. 508.
[700] *The Prosecutor v. Jean-Paul Akayesu*, Trial Judgement, ICTR, op. cit., para. 731.

worst ways to inflict harm.[701] According to the Court the intent has been proved. There is evidence of the fact that those acts were targeting Tutsi women who were subjected to the worst "public humiliation, mutilated, and raped several times, often in public".[702] As a consequence, the group was destructed both physically and psychologically. For this reason, the Court recognized rape as part of the process of destruction and thus it considered those acts as amounting to genocide.

This judgment results to be relevant for several reasons. Firstly, since it was "indicative of public concern over the historical exclusion of rape and other forms of sexual violence from the investigation and prosecution of war crimes."[703] Secondly, it has expansively interpreted Article II of the Genocide Convention to include rape and for having advanced a first definition of rape. As underlined in the judgement the Court had to deal with the total absence of a definition. However, through the commitment of Judge Pillay who wanted to provide "the law's perception of women's experience of sexual violence"[704] a definition was provided. As a matter of fact, rape was defined as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive, not limited to penetration and capable of including the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual".[705] While sexual violence in general was described as "any act of a sexual nature which is committed on a person under circumstances which are coercive."[706] As a prove of the extensive and sui generis interpretation of the provision on genocide that the Court provided, the judgement was concluded by stating that "sexual violence was a step in the process of destruction of the Tutsi group – destruction of the spirit, of the will to live, and of life itself."[707]

[701] Ibidem.
[702] Ibidem.
[703] HAYES, N., 'Creating a Definition of Rape in International Law", pp. 132-133.
[704] PILLAY, N., "Equal Justice for Women: A Personal Journey", *Isaac Marks Memorial Lecture,* 2008, p. 667 in Hayes, N., 'Creating a Definition of Rape in International Law", p. 134.
[705] *The Prosecutor v. Jean-Paul Akayesu*, Trial Judgement, ICTR, op. cit., para. 596.
[706] Ibidem, paras 598-688.
[707] Ibidem, para 732.

3-The Crime of Rape Perpetrated by ISIS Against Yazidi Women

The analysis will now proceed with the discussion on the crimes of rape and sexual violence committed against Yazidi women. During international or national warfare, rape and more generally sexual violence are frequently used a weapon of war. ISIS has systematically used rape against the women belonging to the minority groups that inhabited the territories they conquered between Syria and Iraq. The Yazidi women have been the main victims of rapes that the UNSC Resolution 1820 labelled as "war strategy"[708] and underlid how this can constitute war crime a crime against humanity and genocide. The information used is mainly based on the reports carried out by the UN Commission of Inquiry in Syria[709], the Office of the United Nations High Commissioner for Human Rights (hereinafter OHCHR), and the report of some major non-governmental organizations in particular Human Rights Watch and Amnesty International which were able to gather the testimonies of many Yazidi women who survived to the atrocities perpetrated by the Islamic State.

After taking the control of certain areas of Syria and Iraq, the Islamic State launched a brutal campaign of violence against the Yazidi community. In particular, the Islamic State committed heinous crimes against Yazidi women. They were systematically abducted, sexually enslaved, and subjected to horrific forms of violence including rape, forced marriages and other forms of both physical and psychological abuse have been reported. Soon after the conquer of the cities in Syria and Iraq and after having been separated from men, Yazidi women were forcibly transferred to multiple holding sites to further their control.[710] The initial phase of the forced transfers took place within Iraq itself. Yazidi women together with their children aged under twelve were led to ISIS headquarters in Tel Afar, Mosul and Baaj.[711] Others were kept as prisoners in the Solagh Technical Institute and in the Civil Records Office 17, the Kurdistan Democratic Party headquarters in Sinjar region, occupied by ISIS fighters[712] The number of holding sites varied, but reports carried out based upon witness's testimonies suggest that there were between four and six strategic sites used as makeshift prisons or detention centers.

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[708]UN Security Council, *Security Council resolution 1820 (on acts of sexual violence against civilians in armed conflicts)*, S/RES/1820, 19 June 2008.
[709]*Report of the Independent International Commission of Inquiry on the Syrian Arab Republic,* op. cit.
[710] *"They came to destroy": ISIS Crimes Against the Yazidis,* op. cit., p. 7.
[711] Ibidem, para. 30, p. 8.
[712] Ibidem, para. 43, p. 10.

In the detention centers women were detained for no longer than twenty-four hours and then they were transferred to other locations.[713] The purpose of these forced and rapid transfers was that of making difficult for families to locate and liberate them and for authorities to track them and start rescue missions. At the primary holding sites women underwent a systematic registration procedure carried out to document the personal details of each victim. ISIS fighters recorded names, ages, and places of origin of women and girls.[714] The registration procedure was also aimed at collecting information about the marital status of the victims. Based on this last criterion, women were divided into two groups: married and unmarried.[715] After that the militants went further to document the number of children each women had. This was useful to determine the price of the woman. In some cases, ISIS fighters took photographs that were used as a means of surveillance to exercise further control over them.[716] Women were prevented to use *abayas* a traditional loose-fitting garment worn by women and girls.[717] This had devastating implications. Refusing to provide them with *abayas* meant exercising a greater control over their captives and further diminish their identity and autonomy. The absence of abayas made easier for ISIS fighters to identify those who tried to escape, since this made them more vulnerable to being recognized and recaptured. For those who tried to escape the consequences were brutal. They were subjected to severe punishment both for having tried to escape but also for having been found outdoor without abayas. As a punishment they were beaten and raped. A women reported that several of her children have been killed after she attempted to escape.[718] The denial of the traditional clothing represented both a tool of control but also a form of cultural erasure. This cultural strategy highlights the manipulative and oppressive tactics employed to subjugate and dehumanize women, through a rapid process of cultural erasure.

The second phase consisted in the transfer of a significant number of women across the border of Syria and where they were detained mainly in Tel Hamis region in Hasakah.[719] Those who were not brought to Syria started to be moved from one site to another within Iraq, the majority were detained in Badoush prison in Mosul, in Al-Arabi, and Galaxy wedding hall in Mosul.[720]

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[713] Ibidem, para. 22, p. 6.
[714] This is based on a witness' account reported in the UN Report, *"They came to destroy": ISIS Crimes Against the Yazidis,* op. cit., pp. 9-10.
[715] *"They came to destroy": ISIS Crimes Against the Yazidis,* op. cit., para. 45, p. 10.
[716] "The Prosecution at National Level of Sexual and Gender-Based Violence (SGBV) Committed by the Islamic State in Iraq and The Levant (ISIL)", European Union Agency for Criminal Justice Cooperation, 2017, p. 6, available at: https://www.eurojust.europa.eu/sites/default/files/assets/2017-07-prosecution-at-national-level-of-sexual-and-gender-based-violence-en.pdf.
[717] *"They came to destroy": ISIS Crimes Against the Yazidis,* op. cit., para. 63, p. 14.
[718] Ibidem, para. 67, p. 14.
[719] Ibidem, para. 23, p. 6.
[720] Ibidem, para. 49, p. 11.

Conducting analysis was extremely complex, thus the precise number of women that have been captured is unknown. Reports talk about thousands of women that by October 2014 were detained in holding sites controlled by ISIS. In the holding sites women suffered the complete lack of basic human rights. Food and water were scarce and often contaminated with insects, making them unhygienic and unsafe for consumption.[721] Due to malnutrition and unsanitary conditions many of the detainees fell sick. An aggravating factor was the total absence of medical care.

The sexual violence suffered by Yazidi women included also sexual slavery. After having been registered, women became property of ISIS fighters who labelled them as *sabaya* or slaves and they were ready to be sold.[722] The slave marked was organized and authorized by the Committee for Buying a d Selling of Slaves.[723] It coordinated the transfer of women from one location to another, it selected the towns were slave markets had to take place and set out the procedures to sell and buy women. A document carried out by the Committee stated that "the bid is to be submitted in the sealed envelope at the time of purchase, and the one who wins the bid is obliged to purchase". Furthermore, ISIS members who wanted to participate in slave markets had to "register their names with the administrative official of the battalion." The Committee created an ideologically motivated organizational policies[724] that were implanted with the aim of justifying and regulate different forms of violence and establishing precise guidelines and conditions under which they could be perpetrated. The Committee also specified which were the legitimate targets of this violence. ISIS pattern of sexual violence in the territories of Syria and Iraq followed a precise path which was regulated also through a series of precise rules. For instance, women could not be sold in between brothers, to non-ISIS members or in certain circumstances, for instance during their menstrual cycle.[725] These details demonstrate how slave markets were meticulously organized and it is a prove of the fact that violence was systematic, coordinated and premeditated.

Although ISIS violence was deemed as "indiscriminate"[726] not all the different minorities that inhabit the territories of Syria and Iraq were targeted. It has been pointed out how Yazidi suffered the major consequences of ISIS occupation, while other minorities were spared. Concerning women, the numerous *fatwas* that have been implemented targeted mainly Yazidi women but

[721] Ibidem, para. 52, p. 11.
[722] Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights on the Human Rights Situation in Iraq in the Light of Abuses Committed by the So-Called Islamic State in Iraq and the Levant and Associated Groups*, A/HRC/28/18, 13 March 2015, para. 16.
[723] Ibidem, para. 58, p. 13.
[724] REVKIN, M.- R., and WOOD, E.- J., "The Islamic State's Pattern of Sexual Violence: Ideology and Institutions, Policies and Practices", *The Journal of Global Security Studies, Forthcoming*, 2020, p. 3.
[725] Human Rights Council, Report of the Office of the United Nations High Commissioner for Human Rights, op. cit., p. 17.
[726] Ibidem, p. 3.

prohibited the enslavement and rape of Sunni women.[727] There is significant less evidence of similar systematic violence perpetrated against other religious or ethnic groups. According to Iraqi government apart from a small number of Shi'ite women belonging to the Turkmens ethnic group other women belonging to Sunni Muslim or Christian minorities did not experience the same scale of violence.[728] The reasons behind that must be found in ideological and sectarian motives. However, the phenomenon is still considered to be anomalous.[729]

Some Yazidi women and girls were sold immediately after their capture by ISIS members who purchase them from the primary or secondary holding centers, others were brought to slave markets, also known as souk *sabaya*, in other cases they were sold in online auctions.[730] Women were treated as slaves whose fate was determined by the whims of the buyers. This practice stripped victims of their dignity and autonomy. It has been estimated that between fifty and three hundred Yazidi women were brought to Syria to be sold. Some of them were detained in an underground prison, others were transported to remote rural areas, in some cases in buildings surrounded by trees, a location commonly known among ISIS militants as "the farm".[731] As established by the Committee, the amount of dollars needed to purchase a women ranged from USD 200 to 1,500 USD.[732] Buyers came not only from Iraq and Syria but from many different counties such as Saudi Arabia, Turkey, Morocco, Algeria, Tunisia, Libya, Egypt, and Kazakhstan.[733] The amount varied according to different factors such as marital status, age, number of children, and beauty. While the amount required to the families of the victims ranged from USD 10,000 to 40,000.[734] The inflated prices were meant to create devastating financial repercussions to their families. Consequently, families had to face dire financial strait.

The exploitation of Yazidi women went beyond sexual violence. As a matter of fact, women reported that in many cases they have been eventually obliged to work in ISIS fighters' houses. Yazidi women were asked to carry out a series of domestic tasks, as reported by a thirteen-year-old Yazidi girl who endured almost a year of captivity during which she was compelled to cook meals, clean the premises, and do household chores for her fighter-owners. The justifications behind the mistreatment were connected to ISIS extremist interpretation of Shariah.[735] On this

[727] Ibidem.
[728] Ibidem.
[729] Ibidem, p. 4.
[730] "They came to destroy": ISIS Crimes Against the Yazidis, op. cit., para. 55, p. 12.
[731] Ibidem, para. 56, p. 12.
[732] Ibidem, para. 60, p. 13.
[733] Ibidem, para. 61, p. 13.
[734] Ibidem, para. 76, p. 15.
[735] In the fourth edition *Dabiq*, ISIS's English-language digital magazine, states said, according to sharia and verses in the Qur'an, female members of the Yezidi sect may legitimately be captured and forcibly made concubines or sexual slaves. See as reference note 5 in AL-ALI, N., "Sexual violence in Iraq:

basis they claimed that slavery was permissible because it was a well-established institution during the first caliphate.[736] However, this represented a distorted interpretation of both history and religion. In ISIS magazine Dabiq it was stated that "one should remember that enslaving the families of the kuffar (infidels) and taking their women as concubines is a firmly established aspect of the Shariah that is one were to deny or mock, he would be denying or mocking the verses of the Quran and the narrations of the Prophet and thereby apostatizing from Islam."[737]

3.1-Psychological and Social Consequences of Rape

The violence inflicted left Yazidi women with long-lasting psychologic damages which continue to affect their mental, emotional, and physical well-being. This sub-chapter will precisely provide an account of the main psychological consequences that affect the life of the Yazidi women and the impact that this is having on their lives and on the community.

The atrocities committed against Yazidi women were characterized by systemic and deliberate acts of sexual violence, forced enslavement, torture, and displacement, which leave them with deep and lasting trauma. As documented in the UN Report it is evident that victims bore not only visible physical wounds resulting from sexual violence and torture but also psychological trauma which appears to be even more pervasive. Many survivors have admitted that they are plagued by thoughts of suicide, envisioning in death the only way to escape from the emotional pain they suffer.[738]

One of the first and most cruel aspect women had to cope with concerns the forced pregnancies that marked the lives of many captured women. The topic of pregnancies, an inevitable

Challenges for transnational feminist politics", *European Journal of Women's Studies*, v. *25*(1), 2018, p. 25.

[736] REVKIN, M.- R., and WOOD, E.- J., "The Islamic State's Pattern of Sexual Violence, op. cit., p. 10.

[737] "The Prosecution at National Level of Sexual and Gender-Based Violence", European Union Agency for Criminal Justice Cooperation, 2017, op. cit., p. 16.

[738] JÄGER, P., et al., "Narrative Review: The (Mental) Health Consequences of the Northern Iraq Offensive of ISIS in 2014 for Female Yezidis", *International journal of environmental research and public health* vol. 16,13 2435, 2019, p. 10.

consequence resulting from the systematic rapes subjected by Yazidi women on behalf of ISIS fighters, was and still is a sensitive subject to broach for two reasons. On one side, the reluctance of women to revive the traumatic experiences endured during the period in which they were held in captivity. On the other side, the reluctance of the families of the victims who consider this a humiliation and refuse to openly discuss this distressing aspect. Furthermore, dealing with the topic of pregnancies caused by rapes results to be particularly complex in a country where abortion is illegal.[739] Women have been frequently obliged to take choices that in any case led to their isolation from the community.

As reported by the UN Report in some cases women were forced to take birth control both in the form of pills or in the worst cases in form of injections.[740] However, in the majority of the cases, no form of birth control was used. The continuous sexual exploitation, the systematic abuses to which Yazidi women were subjected made the occurrence of pregnancies inevitable. For those who got pregnant or gave birth during captivity the circumstances in which they found themselves were dire. They had to face the trauma of giving birth in harsh conditions within the detention centers where medical assistance was denied, and after their release they had to face the trauma of rejection from their own families and the difficulty of reintegration into their own society. Women and girls who found themselves pregnant had to face emotional turmoil and humiliation. The fate of the children born while in captivity remains unclear and the details concerning those circumstances have not been disclosed.

However, trauma, psychological damage and community rejection do not derive only from this consequence. A woman who reported to have been held as slave for a year and to have been sold to many different ISIS fighters, raped several times, and subjected to heinous treatment, reported to have been immediately isolated and rejected from her husband despite not have been subjected to a forced pregnancy. Once she was rescued by her family through the payment of a ransom her husband rejected her due to the shame she would have caused to the family.[741] As a matter of fact, after rape, Yazidi women are considered "socially infertile" and "untouchable" and perceived a s "damaged goods". This has caused profound psychological damages. Furthermore, the lack of protection from sexually transmitted diseases (hereafter STDs) exposed women to significant health risk and was another reason for isolation. For this reason, very frequently, victims show reluctance or in some cases refusal to acknowledge this possibility. The refusal stems once again from the trauma as well as the cultural stigma concerning sexual health.

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[739] *"They came to destroy": ISIS Crimes Against the Yazidis,* op. cit., para. 71, p. 15.
[740] Ibidem, para. 69, p. 15.
[741] Ibidem, para. 70, p. 15.

Another cruel and calculated factor of their captivity was the verbal abuse to which Yazidi women were subjected.[742] ISIS fighters used derogatory language to devalue Yazidi women and girls and used insults targeting their faith and religious beliefs. In a deliberate attempt to undermine their religious and cultural identity ISIS fighters accused them of worshipping stones and called them "dirty kuffar"[743] and "devil-worshippers". The attacks toward religion had a twofold aim. On the one hand, targeting Yazidis' religion was an escamotage used to justify the heinous treatment. On the other hand, it was used to create a sense of detachment from their culture and to completely uproot them by creating a sense of alienation. The verbal abuse had a psychological impact that left lasting emotional scars that persisted also after their captivity ended. The cultural stigma concerning sexual violence and slavery made the return of Yazidi women to their community very arduous if not impossible.

Another element of suffering is related to the difficulty in dealing with the profound loss and uncertainty concerning the faith of their missing family members. The total absence of information, the feeling of being responsible for not having been able to protect their children left them with a constant feeling of emotional turmoil. Trauma and psychological damage are also the direct consequences of the forced displacement that Yazidi women had to face. As a matter of fact, the harrowing memories of the experiences lived during their captivity and the continuous threat of being recaptured instilled in them a deep enduring trauma. This led them to seek refuge in other countries, where possible. At the moment of writing, it has been estimated that around 200,000 Yazidi women[744] live as internally displaced people[745] among the twenty-four camps between Dohuk and Zakho in the Kurdistan Region of Iraq.[746] The majority of them will never come back home for a complex interplay of factors. First of all, for the stigma which stems from societal mispositions and prejudice that are part of the culture of the group they belong to.

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[742] Ibidem, para. 74, p. 15.

[743] Kuffar is a derogatory Arabic word that was commonly used by ISIS members to address to non-Muslims, the ones they considered to be infidels. This was another way to express disdain for Yazidi's beliefs.

[744] VENIS, J., "Justice for the Yazidis", International Bar Association, 2022, Available at: https://www.ibanet.org/Justice-for-the-Yazidis

[745] As outlined in the Guiding Principles on Internal Displacement, internally displaced persons (also known as "IDPs") are "persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized border." See as reference UN Commission on Human Rights, *Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39. Addendum: Guiding Principles on Internal Displacement*, 11 February 1998, E/CN.4/1998/53/Add.2, para. 2.

[746] KIZILHAN, J.- I., et al. "The psychological impact of genocide on the Yazidis," *Frontiers in psychology,* vol. 14 1074283, 2023, p. 2.

Secondly, because most of them have been forcibly converted to Islam.[747] The conversions have been unjustly perceived as a betrayal and for this reason women have been ostracized and excluded from the community upon their return. One last reason concerns the persistent fear of being recaptured. The memory of the atrocities they have been subjected prevent them from returning at home where their safety and well-being cannot be assured.

In recent research conducted in a Kurdistan camp on the Northern Iraq between February and July 2017 a sample of 416 Yazidi women and girls aged between 17 and 75 years old[748] has been taken to observe the consequences of Yazidi genocide on Yazidi women. The analysis has shown high levels of mental ill-health. The statistics showed that 43% of the women presented evidence of PTSD,[749] while 40% show depression.[750] Another statistical analysis was carried out by the Institute of Psychotherapy and Psychotraumatology at the University of Duhok on a sample of women aged from 18 to 34 years old who came from the Sinjar area in Northern Iraq and who have been detained by ISIS militants from August 2014 to September 2018.[751] The results showed that 75% of women suffered affective disorders,[752] 62.5% had anxiety,[753] 38.7% had somatization disorder,[754] while 22.5% had personality disorders[755] and 40.6% presented dissociation seizures.

[747] Ibidem, p. 2.
[748] IBRAHIM, H., et al. "Trauma and perceived social rejection among Yazidi women and girls who survived enslavement and genocide", *BMC medicine* vol. 16,1 154, 2018, p. 1.
[749] Ibidem, p. 2.
[750] Ibidem.
[751] KIZILHAN, J.-I., et al., "Shame, dissociative seizures and their correlation among traumatized female Yazidi with experience of sexual violence." The British journal of psychiatry: the journal of mental science vol. 216,3, 2020, p. 139.
[752] Ibidem
[753] Ibidem
[754] Ibidem
[755] Ibidem, p. 140.

3.2- Rape and Sexual Violence Committed Against Yazidi Women: Does it Amount to Cultural Genocide?

The analysis will move toward the question of whether the crime of rape can be considered as cultural genocide. Firstly, it would be necessary to establish a connection between sexual violence and genocide and determine whether rape and sexual violence would fall under Article II of the Genocide Convention. Neither the Rome Statute nor the Statute of other International Criminal Tribunals whose jurisprudence has been considered do not include rape among the acts amounting to genocide. Despite that in some cases Courts have expanded the actus reus of genocide including the crime of rape in it, or in other circumstances they have considered rape under the categories of crimes against humanity or war crimes, while providing interpretations that would better meet the requirements of the crime of genocide, or more precisely as a crime of cultural genocide, if a legal conceptualization would exist.

Proving that rape can amount to genocide will be pivotal since it will entail the acknowledgment and recognition of how a community can be destroyed by mining its social and cultural roots. By conducting an analysis of how rape functions as a method of genocide it will be demonstrated how in context where cultural genocide unfolds, sexual violence is used in a systematic way to produce grievous effects that can profoundly impact both women as the direct victims, but it can also mine the existence of the community itself. This reasoning will be applied to the experience of the Yazidi minority.

In recent conflicts sexual violence has been increasingly adopted as tool to destroy a community. As it has been stated, rape of women is frequently adopted as a deliberate strategy by the perpetrator with a double-edged aim since it targets women as individuals to strengthen its control, but it then harms the entire community. As a matter of fact, sexual violence has broader implications than simply inflicting heinous sufferance to women. Women are frequently considered as the bearers of the cultural and community identities. Thus, by subjecting women to sexual violence, the perpetrator destroys the fabric and the social bonds of the targeted ethnic or religious group. Examples of the above-mentioned pattern of conduct can be retraced in the genocides that occurred in Yugoslavian and Rwanda. In both cases sexual violence was systematically implemented as a tool to “humiliate, subordinate, or emotionally destroy entire communities; to cause chaos and terror; to make people flee; and to ensure the destruction or removal of an unwanted group by forcible impregnation by a member of a different ethnic

group."[756] As admitted by the Serbian leaders rape was a "weapon of war" which targeted "her body and its reproductive capabilities,"[757] it was an inherent part of a strategy which aimed at destroying a community to create a "great Serbia, a religiously, culturally, and linguistically homogenous Serbian nation"[758] and leading toward the inevitable destruction of the entire ethnic community.

The available jurisprudence is scant. As a matter of fact, sexual violence faced enormous challenges to be recognized as a proper and distinct crime. For a very long time, sexual violence has been perceived more as a "moral crime"[759] or an "outrage of honor"[760] rather than a grave breach which deserved legal condemnation. The denial of justice led to an under classification of the act which was recognized as an act "that tended to focus on perceived violations of the victim's honor or dignity, rather than the physical and mental trauma brought about by an assault."[761] As many critics have pointed out, the starting point would be recognizing rape as "an effective method of isolating and humiliating women and men of the same culture. This isolation achieves effective genocide as it may mark women as 'spoiled' and unsuitable for traditional marriage and family life."[762] In this process of acknowledgment, the ad hoc tribunals for the former Yugoslavia and Rwanda played a pivotal role for their interpretation of Article II of the Genocide Convention. Article II of the Genocide Convention will be taken as point of departure. It will be investigated whether rape can fall under some of the provisions enlisted in the *actus reus* of genocide. More precisely, to determine whether rape can constitute an act of cultural genocide, provisions (b), (c), (d) of Article II of the Genocide Convention will be considered.

First of all, the acts of rape committed against women fall under provision (b) of the Genocide Convention referred to acts which cause "serious bodily or mental harm to members of the group.[763] Within numerous instances, both the physical and the psychological damage caused by rape result in the alienation of the victims, their isolation from the community or in other cases in the inability or refusal of the victim to procreate, thereby engendering severe consequences for the community at large. Forced impregnation is another consequence of rape and another cause of mental harm since it "interfere with autonomous reproduction"[764]due to the trauma

[756] SHORT, J., "Sexual Violence as Genocide: The Developing Law of the International Criminal Tribunals and the International Criminal Court", Michigan Journal of Race and Law, v. 8, 2003, p. 504.
[757] Ibidem, p. 504.
[758] Ibidem, p. 504.
[759] Ibidem, p. 508.
[760] Ibidem.
[761] Ibidem.
[762] Ibidem, p. 509.
[763] Article II (b) of the *Genocide Convention*, op. cit.
[764] FISHER, S.-K. "Occupation of the Womb: Forced Impregnation as Genocide." *Duke Law Journal*, vol. 46, no. 1, 1996, pp. 91–133 in SHORT, J., "Sexual Violence as Genocide, op. cit., p. 511.

experienced. In this regard the ICC provided its own definition of forced pregnancy which was not elaborated neither by the ICTY nor the ICTR. Article 7(2)(f) of the Statute defines forced pregnancy as "the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law."[765] Forced pregnancy represents a genocidal act since it forces women "to carry and often give birth to babies of a different ethnic group resulting in severe mental and bodily harm."[766] Thus, also this act, which can be a direct consequence of rape, meets the requirement of provision (b) and (c).

The repercussions stemming from the forced impregnation are multifaceted. Firstly, the consequent psychological trauma hinders the ability to engage in normative sexual or childbearing experiences within the ethnic group to which the victim belongs. Therefore, the victim is prevented from conducting a normal life and the community is deprived of the crucial procreative function of women. Thus, it can be stated that the mental harm experienced by the victims disrupts both the personal well-being and it also undermines the foundations of the ethnic group as the reproductive role is undermined. In other cases, the physical damages inflicted prevent women from the possibility of carrying other children. However, this practice can also fall under provision (c) as it deliberately inflicts on the group conditions of life calculated to bring about its physical destruction in whole or in part.[767]

This was revisable also in the pattern of conduct adopted by Serbs in the former Yugoslavia. As reported by a witness who was detained in a camp in the town of Doboj, in northern Bosnia, women who remained pregnant as a result of the rapes inflicted upon them were detained in holding camps until the end of pregnancy.[768] The aim was to ensure that the woman carried the pregnancy to term and it was part of the strategy used to "dilute" the Muslim population. This is connected to cultural stigma. In all patriarchal societies where the family name passes on through the male, regardless of religion or ethnicity a child born from rape will be inevitably considered the son of the perpetrator. By doing so, the perpetrators accomplish their primary objective which is that of annihilating a group by mining its social and cultural foundations. This is revisable also in the experience of the Yazidi women. The atrocities perpetrated caused them severe psychological conditions which has instilled in them a pervasive sense of fear and vulnerability. This had an impact on relationships both with the other members of their society or family and

[765] Article 7(2)(f) of the Rome Statute, op. cit.
[766] BOON, K., "Rape and Forced Pregnancy under the ICC Statute: Human Dignity, Autonomy, and Consent", *Columbia Human Rights Law Review,* No.32, 2001, p. 656 in SHORT, J., "Sexual Violence as Genocide", op. cit., p. 523.
[767] Article II (c) of the *Genocide Convention*, op. cit.
[768] SHORT, J., "Sexual Violence as Genocide", op. cit., p. 512.

with their partners. The repercussions can also be retraced in the sphere of intimacy and emotional connection. Also, the stigma and the victim-blaming attitude suffered within the community had an impact at the mental level. This extended also to the entire group, leaving an impact on its social cohesion and well-being.

In some cases, another cause behind the impossibility to procreate emanates from the fear of transmitting life-threatening and sexually transmittable diseases, notably HIV. In the *Prosecutor v Kayishema and Ruzindana*[769], the Court stated that "inflictions of conditions of life do not need to be through the use of method that would lead to an immediate death."[770] Thus, the voluntary transmission of HIV falls into provision (d) since it is used with the precise aim of preventing the reproduction of the group. After rape for Yazidi women recreating their lives result an almost impossible perspective. As already discussed, both for cultural reasons but also for health reasons since the trauma inflicted or the contraction of sexually transmitted diseases which result in devastating consequences for the survival of the community. In particular the spread of HIV appeared to be a common consequence of the systematic rapes inflicted to women which has an impact both on the women victim of rape since it provokes the prolonged deterioration of health but also to the community since it affects the reproductive health leading to an inevitable decline in birth rates and population growth. Furthermore, in an ethnic group that cast enormous importance on virginity and chastity before marriage rape can inevitably constitute an act inflicted with the intent to bring about the destruction of the group.[771] The victims are in fact considered unmarriageable and "shameful for the whole family"[772] and for this reason ostracized.

When analyzing the Yazidi case, a further element must be considered. Under "Islamic law, significant stigma attaches to victims of sexual violence. This stigma breaks up families, ostracizes victims, and in some cases, leads to the murder of victims by their family or communities."[773] For this reason, it is common among Muslim communities, to perceive rape victims as "undesirable, and unfit for marriage."[774] As a matter of fact, the social repercussions for women who have been subjected to rape are profound and far-reaching due to the cultural

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[769] *The Prosecutor v. Clément Kayishema and Obed Ruzindana (Trial Judgement)*, International Criminal Tribunal for Rwanda (ICTR), ICTR-95-1-T, 21 May 1999.
[770] Ibidem, para. 116.
[771] 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, *Comillas Journal of International Relations*, No. 18, 2020, p. 60.
[772] Amnesty International, *Escape from Hell: Torture and Sexual Slavery in Islamic State Captivity in Iraq* 5, 2014, in "Daesh's Gender-Based Crimes against Yazidi Women and Girls Include Genocide", Global Justice Center. Available at: https://globaljusticecenter.net/files/CounterTerrorismTalkingPoints.4.7.2016.pdf.
[773] SHORT, J., "Sexual Violence as Genocide", op. cit., p. 509.
[774] Ibidem.

prejudices and misconceptions related to honor and purity. On one side, for unmarried women the first direct consequence is the social exclusion from future marriage prospects, at least within the community. On the other side, married women who survived rape must face the rejection of their husbands and the isolation from the community. This act meets the requirement set out in provision (c).

Lastly, rape and sexual violence on Yazidi women imposing measures intended to prevent births within the group. As already mentioned, in patriarchal society where the ethnicity is determined by the father, forced impregnation caused by rape determines the inevitable destruction of the cultural roots of the community. In Akayesu the Court specified that "during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group."[775] This was reinforced by ISIS propaganda. In an issue of the ISI magazine Dabiq it was explained that "the child of the master has the status of the master."[776] Among the Yazidi community children born as a result of rapes are considered as enemies while women are stigmatized and punished though social rejection and isolation. Rape can also be a way to intentionally prevent births since it causes a psychological damage which can affect the reproductive system preventing women from the possibility of having other children. This is also connected to provision (b) since it is the result of mental harm. In other cases, rape and forced impregnation can cause physical damages especially in young victims which were not able to carry a pregnancy yet.

All in all, it can be stated that rape and sexual violence committed against Yazidi women meet the requirements set out in provisions (b), (c), and (d) of Article II of the Genocide Convention for the reasons that have been enlisted. Notably, the provisions under which rape fall are the ones in which the physical element is not a necessary element to determine the crime. This outlines two important aspects. Firstly, rape can be considered an act of genocide through the expansion of the actus reus. Secondly, that the crime of rape would better fall under the category of cultural genocide if a legal conceptualization will be provided in the future. For clarity's sake it must be underlined that the consideration of women only in relation of their functionality within the group is not a way to dehumanize the woman itself or to consider women only for their function within the community, but it is only done for analysis purposes.

[775] *The Prosecutor v. Jean-Paul Akayesu*, Trial Judgement, ICTR, op. cit., 507.
[776] *The Revival of Slavery Before the Hour*, Dabiq Magazine, pp. 14-17, in "Daesh's Gender-Based Crimes", op. cit., p. 3.

3.3-The Importance of Women in the Preservation of Cultural Heritage

The atrocities perpetrated against Yazidi women open a wide discussion related first of all to the pivotal role that women play in the protection of intangible cultural heritage, secondly to the importance of providing protection to women in post-conflict as persons and as bearers of the survival of the community, and lastly how the protection of women and the preservation of culture are interrelated concept.

In many different cultures, in particular among ethnic minorities, women still play a subordinate role which emerges in particular in matters related to intangible cultural heritage. In patriarchal societies, like the Yazidi one, men held positions of power and authority, and this reflects also on various aspects of Yazidi culture. This is particularly evident in the religious practices. Rituals, beliefs, traditions, have shaped every aspect of their culture. The patriarchal system in here revisable in the transmission of religious orders, which are an inherent part of their intangible culture, and that pass through the male line, from father to son. Men occupy leadership roles from which women are completely excluded. Despite that, women are of paramount importance since they are the majority of the community and the main responsible for the parenting. Thus, they result to be essential for the transmission of cultural heritage. As the custodians of childbirth, they are inevitably and unquestionably in charge of carrying their culture forward to the next generations.

Despite that, most of the legal instruments which deal with the protection and preservation of tangible and intangible cultural heritage, these seem to be still silent when it comes to gender equality issues. While in recent years many instruments recognizing the importance of safeguarding cultural heritage for future generations they often fall short in addressing explicitly to the importance of gender equality in this context. In this sense, particularly noteworthy is the Stockholm Action Plan on Cultural Policies[777] to "give recognition to women's achievements in culture and development"[778] while also ensuring their "participation in the formulation and implementation of cultural policies at all levels."[779] In the same way the 2005 UNESCO

[777] United Nations Educational, Scientific and Cultural Organization, *Action Plan on Cultural Policies for Development*, April 1998.
[778] Ibidem, para 8.
[779] Ibidem.

Convention which states that "Parties shall endeavor to create in their territory an environment which encourages individuals and social groups: to create, produce, disseminate, distribute and have access to their own cultural expressions, paying due attention to the special circumstances and needs of women as well as various social groups, including persons belonging to minorities and indigenous peoples."[780]

What is important is acknowledging the fact that women cannot be considered as passive recipients of cultural traditions. They play a fundamental role in the safeguarding of heritage. This represents another factor which must be considered when it comes to provide protection and assistance to women in post-conflict situations. As stated by the UN report, after being captured Yazidi women were separated from men. While the majority of the latter where immediately killed, women were subjected to heinous acts such as rape and sexual violence as it has been already reported. As the main survival of this genocide, they will embody and transmit the very essence of their people's identity and they will be pivotal in passing down their traditions, customs, and practices to future generations. In this way, the Yezidi women can both "save the Yezidi culture and challenge stigmas that preceded the conflict".[781] As a matter of fact, empowering women as active agents in heritage protection challenges traditional gender norms.

The role women play in the preservation and protection of cultural heritage is not limited to the remembrance of the past. As a matter of fact, women represent the cornerstone of communities being themselves able to pass down traditions, customs and values to the future generations and contributing to maintain the cultural fabrics and their societies. Women hold an indispensable position in the preservation and sustenance of cultural heritage and their contribution carries profound significance which extends to various realms: language, values, beliefs among others.[782]

Despite that, until the moment of writing this field remains unexplored and the multifaceted impact that women have on cultural heritage is overlooked. Two are the main elements that should be acknowledged from a legal perspective. On one side, that "memories, oral histories and understanding of shrines are considered vitally important by local people and provide a focus for the construction of community cohesion, particularly on visits during holydays and festivals."[783]

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[780] See as reference Article 7 concerning Measures to Promote Cultural Expressions in the 2005 Convention on Diversity of Cultural Expressions held by UNESCO cited in DE VIDO, S., *Mainstreaming Gender in the Protection of Cultural Heritage*, 2017, p. 453.
[781] DE VIDO, S., "Protecting Yazidi Cultural Heritage through Women: An International Feminist Law Analysis", *Journal of Cultural Heritage*, 33, 2018, p. 269.
[782] United Nations Educational, Scientific and Cultural Organization, *International editorial meeting and future activities in the domain Iran National Commission for UNESCO, Tehran June 2001,* p. 2.
[783] Preserving Yazidi heritage and identity' project, *British Council*, Available at https://www. britishcouncil.org/arts/culture-development/cultural-protection-fund/projects/ preservingyazidiheritage in DE VIDO, S., "Protecting Yazidi Cultural Heritage through Women", op. cit., p. 267.

On the other, that women as the main survivals can both play a pivotal role in the persecution of the atrocities committed by providing a "feminist approach to justice"[784] which in turn would represent a form of formal recognition of their role as principal "agents and interpreters of history."[785]

For this reason, UNESCO has demonstrated a special commitment in the recognition of the instrumental role of women. Since the 28th session of UNESCO General Conference held in 1995 women have been indicated as one of the priority groups in its program, aligning with the objectives set forth in the Beijing Declaration and Platform for Action.[786] However, these programs have mainly focused on the importance of improving women in the health and educational domains while filing in providing adequate recognition to the contribution of women to culture and its preservation. Further steps have been made during the abovementioned Intergovernmental Conference on Cultural Policies for Development which was organized in Stockholm in 1998 as a result of the recommendation contained in the UNESCO Report "Our Creative Diversity".[787] However, once again the topic of women and culture was tackled in a general manner. The same can be revised in the UNESCO Universal Declaration on Cultural Diversity adopted in 2001 during the 31st session of the Organization's General Conference.[788]

The Report carried out in the aftermath of the Tehran meeting held in June 2001 results particularly relevant since it showcased a series of instances concerning the various domains in which women play a particular role which range from knowledge, health, family and socialization, material and artisanal culture, artistic expression, religious expression, oral literature, and economic life. However, also this reasoning fails in recognizing some practices as exclusive to women, while preferring to adopt a general perspective which embraces a broader societal framework.

Ultimately, recognizing, and empowering women as key agents in cultural heritage preservation not only enhances the effectiveness of conservation efforts but also contributes to advancing

[784] DE VIDO, S., "Protecting Yazidi Cultural Heritage through Women", op. cit., p. 267.
[785] ZAJOVIC´, S., "The Women's court – a feminist approach to justice: review of the process of organising of the women's court, in women's court: about the process", Centre for Women's Studies, Women in Black, Belgrade, 2015 in DE VIDO, S., "Protecting Yazidi Cultural Heritage through Women", op. cit., p. 267.
[786] United Nations, *Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women*, 27 October 1995.
[787] *United Nations Educational, Scientific and Cultural Organization*, "Our creative diversity: report of the World Commission on Culture and Development", 1995.
[788] *United Nations Educational, Scientific and Cultural Organization*, "Universal Declaration on Cultural Diversity Adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization at its thirty-first session on 2 November 2001", 2001.

gender equality and promoting a more inclusive and diverse understanding of cultural heritage as a shared and dynamic aspect of our collective identity.

Chapter 4- The Destruction of Cultural Heritage as Part of Cultural Genocide

1-The Definition of Cultural Heritage Under International Law

The definition of cultural heritage is an evolving concept that has undergone significant transformations across various Conventions. Notably, the United Nations Educational, Scientific and Cultural Organization (hereinafter UNESCO) provided a pivotal role in shaping how people identify and protect the diverse aspects of cultural heritage. This sub-chapter will explore the evolution of the concept through the most relevant UNESCO Conventions and other international treaties that have progressively created a more comprehensive definition while also contributing to the preservation and promotion of cultural heritage.

The 1954 Hague Convention[789] represented the first attempt to establish a comprehensive definition aimed at providing a higher degree of protection. Thus it defined cultural heritage as cultural property that had to cover, "irrespective of origin or ownership: movable or immovable property of great importance to the cultural heritage of every people", this includes "monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above" but also "museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict."[790] This definition was influenced by the looting of Jewish properties by the Nazis during WWII.[791] However, the definition encountered skepticism due to its perceived limited scope. The relatively narrow approach was perceived as inadequate to encompass the different dimensions of cultural heritage that extend beyond the physical possessions. Moreover, criticism also concerned the fact that the definition focused only to

[789] UN Educational, Scientific and Cultural Organization (UNESCO), *Convention for the Protection of Cultural Property in the Event of Armed Conflict (Hague Convention)*, 14 May 1954.
[790] Ibidem, art. 1.
[791] FORREST, C., *International Law and the Protection of Cultural Heritage*, 1st ed., Routledge, 2010, p. 21.

damages that can be caused to the cultural heritage during armed conflicts, implicitly neglecting the vulnerability of culture to other forms of threat that go beyond the context of warfare. As a result, it was not amended under the framework of the 1999 Protocol to the Convention.[792][793]

The devastation inflicted upon cultural heritage during the war led to a deeper recognition of the profound significance that cultural heritage holds. This growing awareness led to the establishment of the 1964 International Charter for the Conservation and Restoration of Monuments and Sites[794], commonly known as the Venice Charter. This international document, which developed during the 9th International Congress of Architects and Technicians of Historic Monuments, laid out principles and guidelines for the preservation, restoration and conservation of historic monuments and sites. The Venice Charter was adopted by the International Council on Monuments and Sites (hereinafter ICOMOS) in 1965, "an international assembly of architects and specialists of historic buildings."[795] ICOMOS did not provide a comprehensive definition of cultural heritage but exerted substantial influence in the development of other legal instruments for the protection of culture. Notably, it contributed to the creation of the 1972 World Heritage Convention[796] and the 2001 Convention on the Protection of the Underwater Cultural Heritage.[797]

Particularly relevant is the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.[798] In Article 1 it states that cultural property is "property which, on religious or secular grounds, is specifically designated by each state as being of importance for archaeology, prehistory, history, literature, art or science." [799] The Article divided cultural property into distinct categories while conferring to individual countries the authority to determine the specific cultural objects that they consider to be worthy of inclusion in such categories. Even though the classification provided is intentionally vague to respect the individuality of each nation's identity and history, the Convention was highly criticized for its lack of specificity especially concerning its non-exhaustive categories.

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[792] Ibidem, footnote 94, p. 21.
[793] *Second Protocol to the Hague Convention*, 1954, op. cit.
[794] International Council on Monuments and Sites (ICOMOS)*, International Charter for the Conservation and Restoration of Monuments and Sites*, 1964.
[795] Nota 95
[796] UN Educational, Scientific and Cultural Organization (UNESCO), *Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention)*, 16 November 1972.
[797] UN Educational, Scientific and Cultural Organization (UNESCO), *Convention on the Protection of the Underwater Cultural Heritage,* 2 November 2001.
[798] UN Educational, Scientific and Cultural Organization (UNESCO), *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, 14 November 1970.
[799] Ibidem, art. 1.

This broadness is revisable also in several UNESCO Recommendations. The general character was deliberate and stemmed from the intention to accommodate the diverse forms of cultural heritage. However, this intentional broadness brought about challenges in terms of interpretation. This led to criticism concerning the absence of detailed definitions. This initial vagueness is revisable for instance in the 1968 UNESCO Recommendation Concerning the Preservation of Cultural Property Endangered by Public or Private Works[800] in which property is defined as "the product and witness of the different traditions and of the spiritual achievements of the past and thus is an essential element in the personality of the peoples of the world".[801] While the 1967 UNESCO Recommendation Concerning the International Exchange of Cultural Property[802] which aimed at facilitating the exchange of cultural properties between countries while ensuring the protection of the properties themselves, described cultural property as "items which are the expression and testimony of human creation and of the evolution of nature which, in the opinion of the competent bodies in individual States, are, or may be, of historical, artistic, scientific or technical value and interest".[803] The 1978 Recommendation for the Protection of Movable Cultural Property[804] by "cultural property" it meant "all movable objects which are the expression and testimony of human creation or oh evolution of nature and which are of archeological, historical, artistic, scientific or technical value or interest."[805] Particularly noteworthy is the incorporation of the concept of "testimony of human creation" which signifies the acknowledgment of the object's inherent value.

Initially, the primary aim of the legal instruments created in the field of cultural protection was that of counteracting the unlawful trafficking of cultural heritage. Overtime, this initial focus on property evolved into a broader understanding that cultural heritage encompasses more than just physical objects. The term "property" which appeared to prioritize only the commercial value, thereby subordinating cultural value to a secondary status[806] started to be progressively replaced by the term "heritage". This transition allowed for a broader incorporation of elements beyond mere physical objects, encompassing also places and practices.

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[800] UN Educational, Scientific and Cultural Organization (UNESCO), Recommendation Concerning the Preservation of Cultural Property Endangered by Public or Private Works, 19 November 1968.
[801] Ibidem, p. 139.
[802] UN Educational, Scientific and Cultural Organization (UNESCO), Recommendation Concerning the International Exchange of Cultural Property, 26 November 1976.
[803] Ibidem, part. 1, para. 1.
[804] UN Educational, Scientific and Cultural Organization (UNESCO), Recommendation for the Protection of Movable Cultural Property, 28 November 1978.
[805] Ibidem, part.1, para. 1.
[806] FORREST, C., *International Law and the Protection of Cultural Heritage*, op. cit., p. 24.

The first time that the term "heritage" was adopted in a definitional context was in the 1956 UNESCO Recommendation on International Principles Applicable to Archaeological Excavations.[807] However, the definition was restricted to the domain of "archeological heritage" and it exclusively referred to the nexus between objects and its scientific utility.[808] The term was used with the same intention by the Council of Europe in the Convention on the Protection of the Archeological Heritage[809] adopted in 1969 which used it in reference to "all remains and objects, or any other traces of human existence, which bear witness to epochs and civilizations for which excavation or discoveries are the main source or one of the main sources of scientific information, shall be considered as archaeological objects."[810] The meaning started to be broadened in 1992 when the Convention was revised[811] and in which the importance of preserving archeological heritage as "an instrument for historical and scientific study"[812] was reiterated. Moreover, it was also emphasized the importance that it plays for the "collective memory",[813] in particular "to help to retrace the history of mankind and its relationship with the natural environment."[814]

The concept of "cultural heritage" made its first appearance in the 1972 World Heritage Convention.[815] Article 1 marks a discernible departure from the prior conceptualization of cultural heritage as a form of property connected with the concept of private ownership.[816] Notably, while the definition remains restricted, encompassing only monuments, groups of buildings and sites it nevertheless represents a notable stride forward for two main reasons. Firstly, it introduces a distinct notion of culture whose importance stem from the value it bears. Secondly, it focuses on the importance of identifying, protecting, conserving, presenting, and transmitting it to the future generations.[817] Even though a progression toward the complete substitution of "property" with "heritage" started to be evident, in some cases the differentiation between the two terms continued to be challenging. This is evident in the 1985 European Convention on Offences Related to Cultural Property[818] where the cultural heritage was considered a subset of cultural property while

[807] UN Educational, Scientific and Cultural Organization (UNESCO), Recommendation on International Principles Applicable to Archaeological Excavations, 5 December 1956.
[808] FORREST, C., *International Law and the Protection of Cultural Heritage*, op. cit., p. 25.
[809] Council of Europe, *Convention on the Protection of the Archeological Heritage (Valletta Convention)*, ETS no. 066, 20 November 1970.
[810] Ibidem, Art. 1.
[811] Council of Europe, *Convention on the Protection of the Archeological Heritage (Revised)*, ETS no. 143, 16 January 1992.
[812] Ibidem, Art. 1(1).
[813] Ibidem.
[814] Ibidem, 1(2)(i).
[815] UNESCO, *World Heritage Convention*, 1972, op. cit.
[816] FORREST, C., *International Law and the Protection of Cultural Heritage*, op. cit., footnote 110, p. 25.
[817] UNESCO, *World Heritage Convention*, 1972, op. cit., Art. 4.
[818] Council of Europe, *European Convention on Offences Related to Cultural Property*, ETS. No. 119, 23 June 1985.

its usage in the 1995 UNIDROIT Convention[819] was contested and negatively labelled as "emotive language".[820] For this reason, it was replaced with the term "cultural object". This compromise reflected the intricate negotiations on the preservation and protection of culture.

The first UNESCO Conventions and Recommendations presented a common issue. By predominantly focusing on the tangible heritage, they exclude the broader value of cultural heritage and the relationship between culture and the associated communities. This approach overlooked the fact that cultural heritage extends beyond tangible objects; it encompasses the intangible aspects that define a people's lives and their unique expression of culture. As underlined during the Conference of Ministers responsible for the Cultural Heritage in 1995 "being based on architectural and archaeological heritage, these definitions focus on the physical side, completely ignoring the question of the function in contemporary society."[821]

The fourth UNESCO Convention on the Protection of Underwater Cultural Heritage[822] did not provide relevant contribution in this context, it rather results to be even more limited since it is constrained the ambit to a specific context. A significant step forward was marked by the adoption of the fifth UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage.[823] It considered the importance of intangible cultural heritage "as a mainspring of cultural diversity and a guarantee of sustainable development."[824] This also outlines once again how Conventions are deeply influenced by the historical context in which they are drafted. The Convention itself underlines the fact that it recognizes "the processes of globalization and social transformation."[825] The recognition of the importance of preserving and protecting the intangible cultural heritage which encompasses living traditions, practices, representations, expressions, knowledge, skills, and the importance of transmitting them "from generation to generation"[826] represents a shift in perspective toward a more comprehensive approach.

To have a more all-encompassing definition of cultural heritage, all the definitions provided should be considered. Through these definitions what is revisable is an evolution of the conceptual

[819] International Institute for the Unification of Private Law (UNIDROIT), Convention on Stolen or Illegally Exported Cultural Objects, 24 June 1995.
[820] FORREST, C., *International Law and the Protection of Cultural Heritage*, op. cit., p. 26.
[821] FORREST, C., *International Law and the Protection of Cultural Heritage*, op. cit., p. 28.
[822] UNESCO, *Convention on the Protection of the Underwater Cultural Heritage,* 2001, op. cit.
[823] UN Educational, Scientific and Cultural Organization (UNESCO), *Convention for the Safeguarding of the Intangible Cultural Heritage*, 17 October 2003.
[824] FORREST, C., *International Law and the Protection of Cultural Heritage*, op. cit., p. 367.
[825] UNESCO, *Convention for the Safeguarding of the Intangible Cultural Heritage*, 2003, op. cit., p. 3.
[826] Ibidem, art. 2(1).

understanding which has transitioned from cultural property to cultural heritage and then the concept was further broadened to encompass intangible cultural heritage.

1.2-The Protection of Cultural Heritage During Armed Conflicts

Whether as a form of cultural genocide or committed with the intent to intimidate the enemy, the destruction of cultural heritage is a recurrent phenomenon amidst periods of conflicts. Attempts to prevent the destruction or damage of cultural heritage date back to 1625 when Hugo Grotius in *De Jure Belli ac Pacis* urged the adoption of measures to protect "things of artistic value" such as "colonnades, statutes and the like."[827] One of the earliest efforts made by international humanitarian law to provide protection to the cultural heritage through specific provisions was the Lieber Code of 1863.[828] The Code was drafted by the international lawyer Francis Lieber. It contains one hundred and fifty-seven provisions dealing with several legal issues that must be considered during armed conflicts.[829] It results particularly remarkable since it underlined the importance of protecting the civilians and their cultural property.

This urgency was worded in Article 22 which stated that "the unarmed civilian is to be spared in person, property and honor as much as the exigencies of war will admit".[830] While Section II, which concerns the Public and Private Property of the Enemy, a specific range of properties was enshrined in ad hoc provisions. As a matter of fact, this is revisable in Article 34 which highlights how, during a war, institutions of charitable character such as churches and hospitals, or institutions related to the promotion of knowledge such as public schools, universities, academies of learning or observatories, museums of the fine arts, or of a scientific character, should not be subjected to appropriation by the opposing State.[831] Article 34 was expanded through Article 35

[827] O'KEEFE, R., "The Protection of Cultural Property in Armed Conflict", Cambridge University Press, 2006, p. 6 in BRAMMERTZ et al., "Attacks against Cultural Heritage as a Weapon of War: Prosecutions at the ICTY", *Journal of International Criminal Justice*, Volume 14, Issue 5, 2016, p. 1146.
[828] Lieber, F., "Instructions for the Government of Armies of the United States in the Field, (Lieber Code)", 1863.
[829] GESLEY, J., "The Lieber Code – the First Modern Codifications of the Laws of War", Library of Congress Blogs, 2018, available at: https://blogs.loc.gov/law/2018/04/the-lieber-code-the-first-modern-codification-of-the-laws-of-war/
[830] *Lieber Code*, 1863, op. cit., art. 22.
[831] Ibidem, art. 34.

by including "classical works of art, libraries, scientific collections, or precious instruments, such as astronomical telescopes, must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded."[832] However, the Code was subject of criticism for not providing effective protection. Notably, Article 36 was matter of debate. It stated that cultural property can be "removed and seize"[833] if provided by a peace treaty, introducing in this way the principle of military necessity.[834] This created a tension between the necessity of safeguarding cultural assets and the exigency of achieving military goals and exacerbated the problem of inadequacy of protection. Already defined in Article 14 of the Lieber Code as "the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war"[835], the concept was further expanded in the 1945 Convention which tried to incorporate it while reaching a balance between military interests and safeguarding of cultural property. Despite that, this principle is still contested.

The extensive devastation witnessed during the First and Second World War urged a global effort to establish an international legal framework to protect cultural heritage during armed conflicts. A more specific legal framework was established through the adoption of the 1899 and 1907 Hague Conventions Concerning the Laws and Customs of War on Land[836] which were completed through their annexes, known as Hague Regulations. Article 23(g) of the 1907 Hague Conventions (also known as Convention IV) prohibits the destruction or seizure of "the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war."[837] The Convention also provided that "in sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments"[838], their eventual seizure and destruction must be "subject of legal proceedings".[839] However, during the drafting of the Hague Conventions emerged the importance of not limiting the military's ability to achieve its goals which resulted in the inclusion of the principle of military necessity in several provisions.[840] A further step was taken in 1935 with the

[832] Ibidem, art. 35.
[833] Ibidem, art. 36.
[834] FORREST, C., *International Law and the Protection of Cultural Heritage*, op. cit., p. 66.
[835] *Lieber Code*, 1863, op. cit., art. 14.
[836] International Conferences (The Hague), *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land,* 29 July 1899 and International Conferences (The Hague), *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, 18 October 1907.
[837] *Hague Convention (IV)*, 1907, op. cit., art. 23(g).
[838] Ibidem, art. 27.
[839] Ibidem, art. 56
[840] This can be revised in art. 15, art. 23, art. 54 of the *Hague Convention (IV)*, 1907, op. cit.

drafting of the Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, also known as the Roerich Pact[841] which was adopted by the Pan-American Union. The aim was promoting cooperation to protect artistic, scientific, and cultural institutions and provided no exception based on military necessity. The Treaty remains effective in the United States, Brazil, Chile, Cuba, Columbia, Dominican Republic, El Salvador, Guatemala, Mexico, and Venezuela.[842]

In the aftermath of WWII, the action of international law intensified. The Nuremberg Military Tribunal provided a first response. Following Article 46 and 56 of the 1907 Hague Regulation in 1945 the Tribunal's Charter incorporated in Article 6(b)[843] relative to war crimes, the "plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity."[844]Another step forward was made in 1949 with the adoption of the Geneva Conventions.[845] However, the protection of cultural property was not distinctively covered. As a matter of fact, prohibition of destruction is generally addressed in Article 53 of Convention IV[846] which results once again limited in its scope once again for the inclusion of the military necessity principle. In Protocol II to the Conventions,[847] Article 85(5) specifies that attacks toward "works of art or places of worship which constitute the cultural or spiritual heritage" [848] shall be considered as war crimes.

The endeavor to provide effective protection to cultural heritage both during and after conflicts materialized in 1954 with the adoption of the Hague Convention.[849] In Article 1 (c) it provided a list of cultural properties in need of protection, this included "museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a)" and also "centers containing a large amount of cultural property" also labelled as "centers containing monuments."[850] However, the

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[841] *Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (Roerich Pact),* 15 April 1935.
[842] FORREST, C., International Law and the Protection of Cultural Heritage, op. cit., p. 72.
[843] United Nations, Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement"), 8 August 1945, Art. 6(b).
[844] Ibidem.
[845] ICRC, First Geneva Convention, 1949, op. cit; ICRC, Second Geneva Convention, 1949, op. cit.; ICRC, Third Geneva Convention, 1949, op. cit.; ICRC, Fourth Geneva Convention, 1949, op. cit.
[846] ICRC, Fourth Geneva Convention, 1949, op. cit., Art. 53.
[847] International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 UNTS 609, 8 June 1977.
[848] Ibidem, Art. 85(5).
[849] UN Educational, Scientific and Cultural Organization (UNESCO), Convention for the Protection of Cultural Property in the Event of Armed Conflict (Hague Convention), 14 May 1954.
[850] Ibidem, Art. 1(c)

provision was considered inadequate both for providing a non-exhaustive list and for including buildings devoid of cultural value. The Convention set out in Article 2 its primary objective which consists in "the protection of cultural property", its safeguarding and respect.[851] It also became narrower in scope. It devoted Chapter II to delineate the grounds for granting "special protection" to a limited number of refuges and centers aimed at sheltering movable and immovable cultural property,[852] provided that "they are situated at an adequate distance from any large industrial center or from any important military objective constituting a vulnerable point"[853] or they are not "used for military purposes".[854] However, the provision has been criticized for resulting paradoxical in the way it was worded. Notably, many States have pointed out how "an adequate distance" makes the provision inapplicable and how this should not be used as a criterion for excluding elements of cultural property from protection.[855]

Besides that, Article 8 implies the creation of a refuge for immovable property or the relocation of the movable one. The transportation must occur with special precautions and no force or violence must be employed by the opposing party during the relocation process. To this end, international oversight is needed[856] and a distinct emblem must be affixed to the transporting vehicle to signal the material's status as cultural property[857] under the guidelines provided under Article 16 and 17.[858] In case of immovable cultural property, the same emblem must be placed in an armlet that the specialized military force assigned for the safeguarding of the site.[859] References to the use of the emblem or Blue Shield, the distinctive element to identify both property under the general and the specific protection regime, are revisable both in Article 6 and 10.[860] Article 8(4) provides that in case of immovable cultural property, ad hoc armed custodians, who cannot be take part in the conflict, oversee its protection.[861] In this case the personnel must be identifiable as described in Article 21 of the Regulations for the Execution of the Convention. It must be noted that protection is effective for the cultural property which has been enlisted in the Register of

[851] Ibidem, Art. 2.
[852] Ibidem, Art. 8.
[853] Ibidem, Art. 8(1)(a)
[854] Article 8(1)(b).
[855] FORREST, C., *International Law and the Protection of Cultural Heritage,* op. cit., p. 98.
[856] UNESCO, *Hague Convention*, 1954, op. cit., Art. 12(2).
[857] Ibidem, Art. 12(2), and Art. 16 for the characteristics that the emblem must present.
[858] Ibidem, Art. 16 and 17.
[859] Ibidem, Art. 21.
[860] Ibidem, Art. 6 and 10.
[861] Ibidem, art. 8(4).

Cultural Property under Special Protection.[862]It is up to the director-general of UNESCO to decide which cultural element shall be included.[863]

The Convention integrated with a series of Regulations[864] was perceived as a proper protective regime for that time. However, this was disproved by a series of conflicts occurred in the aftermath of the entry into force of the Convention that demonstrated the fragility of this legal instrument and the necessity for its enhancement. In the 1960s, the Six Day War involving Israel and the Arab States, initiated a trail of devastation and harm to cultural heritage. In the late 20th century, in Cambodia during the Vietnamese occupation, the temples of Angkor Wat dating back to the 12th century and other religious sites, suffered damage and looting.[865] These are only a few examples in which the protective efficacy of the 1954 Convention demonstrated shortcomings.

A step forward was represented by the implementation of the two Protocols to the Geneva Conventions of 1949.[866] The two Additional Protocols result particularly noteworthy for including specific and explicit provisions concerning the protection of cultural property. This is revisable in Article 52 of the First Additional Protocol which provides that "civilian objects shall not be the object of attack or reprisals" and attacks shell be restricted solely to military objectives.[867] However, it must be noted that this prohibition does not imply the complete protection of civilian property. The ambiguity which makes the provision ineffective concerns the definition of what constitutes a "military objective". In Article 52(2) military objectives are limited to those which by nature, location, purpose, or use make an effective contribution to military action.[868] This does not guarantee a complete protection of cultural property since the provision can be subjected to different interpretations when it comes to decide whether a specific target should be considered a legitimate military object or not. A step forward is revisable in Article 53. After recognizing and referring to the provisions enshrined in the 1945 Hague Convention it prohibits:

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[862] Ibidem, art. 8(6).
[863] UN Educational, Scientific and Cultural Organization (UNESCO), *Convention for the Protection of Cultural Property in the Event of Armed Conflict (Hague Convention)*; *Regulations for the Execution of the Convention*, 14 May 1945, art. 15.

[865] The Role of Conflict in the Looting and Destruction of Cambodian Temples in the Late 20th Century, Real Archeology, 26 October 2017, available at: https://pages.vassar.edu/realarchaeology/2017/10/26/the-role-of-conflict-in-the-looting-and-destruction-of-cambodian-temples-in-the-late-20th-century/
[866] International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I);* International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II)*, 8 June 1977.
[867] ICRC, *Additional Protocol I*, 1977, op. cit., art. 52
[868] Ibidem, art. 52(2).

"1-to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples;

2- to use such objects in support of the military effort;

3- to make such objects the object of reprisals."[869]

The provisions are mirrored in Article 16 of the Additional Protocol II to the Convention which extends the protection to the above-mentioned cultural property in non-international conflicts and eliminates the principle of military necessity.[870] However, since Article 53 does not interfere with the 1954 Hague Convention, it allows States that are signatories of both the 1954 Hague Convention and Additional Protocol I to the 1949 Geneva Conventions to invoke the principle of "military necessity" as set out in Article 4(2) of the Hague Convention.[871] The 1977 Additional Protocols laid the basis for a broader set of rules in the protocols. Furthermore, these provisions became the foundations for a more comprehensive system which materialized in the Second Protocol to the 1954 Hague Convention that were adopted by UNESCO in 1999.[872] The Second Protocol to the Convention provided an elevation in the standards of safeguarding by substituting the previous "special protection" with a new paradigm worded as "enhanced protection", as stated in Article 4.[873] Three are the criteria that have to be met to receive "enhanced protection". First of all, cultural heritage must be "of the greatest importance for humanity"; secondly, it must be "protected by adequate domestic legal and administrative measures recognizing its exceptional cultural and historic value and ensuring the highest level of protection" and lastly it must be "not used for military purposes or to shield military sites and a declaration has been made by the Party which has control over the cultural property, confirming that it will not be so used."[874] It further charged the Committee for the Protection of Cultural Property in the Even of Armed Conflict[875] to determine whether an element of cultural property meets those criteria or not.

The Protocol also provided a clarification concerning the concept of "military necessity" in Article 6(a) as it was required in 1996 by the Final Communiqué on Cultural Heritage Protection in Wartime and in state of Emergency. Article 6 set out two cumulative provisions which were worded as follows: a waiver to the principle of military necessity can be applied when "(i) that

[869] Ibidem, art. 53.
[870] ICRC, *Additional Protocol II,* 1977, op. cit., art. 16.
[871] FORREST, C., *International Law and the Protection of Cultural Heritage,* p. 110.
[872] UNESCO, *Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*, 26 March 1999.
[873] Ibidem, art. 4.
[874] Ibidem, art. 10.
[875] As provided by Article 24, the Committee is made up of twelve Parties which are elected by the Meeting of the Parties. Its functions are set out in Article 27.

cultural property has, by its function, been made into a military objective; and (ii) there is no feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that objective."[876] This limits the invocation of the provision to circumscribed cased in which no alternative is available and for this reason they were positively welcomed.

In 1972 UNESCO adopted the Convention Concerning the Protection of the World Cultural and Natural Heritage.[877] Notably, Article 6 established the creation of an Intergovernmental Committee for the Protection of the Cultural and Natural Heritage of Outstanding Universal Value, known as the World Heritage Committee, composed by fifteen State Parties to the Convention elected by the other State Parties[878]. The Convention requires States to provide a list of the cultural and natural heritage which will be included in the so-called World Heritage List which will be updated every two years.[879]Cultural property elements which necessitate rapid assistance are instead included in the list of World Heritage in Danger.[880] UNESCO's commitment in providing effective protection is revisable in particular in Article 13(2) in which it set out the possibility to advance requests for international assistance in any moment.[881]

Despite the protection provided by these legal mechanisms the recent conflict between Eritrea and Ethiopia, the conflicts in the Balkans and the Gulf during the 1990s and early 2000s, and the devastating attacks perpetrated by the Islamic State in Syria and Iraq are only some of the numerous examples that have demonstrated how the status of cultural heritage is still precarious. Attacks toward cultural objects have prompted the outrage of the international community but only one persecution for attacks toward cultural heritage has been carried out so far.

[876] UNESCO, Second Protocol to the Hague Convention, 1999, op. cit., art. 6. For the definition of "military objective" see as reference Article 52(2) of the ICRC, *Additional Protocol II,* 1977, op. cit.
[877] UNESCO, *World Heritage Convention*, 1972, op. cit.
[878] Ibidem, art. 6.
[879] Ibidem, art. 11(2).
[880] Ibidem, art. 11(4).
[881] Ibidem, art. 13(2).

1.3- Individual Criminal Responsibility for Cultural Crimes

This sub-chapter will start with the analysis of the normative context, and it will then proceed with the analysis of the case law concerning the applicability of such norms. Unlike State responsibility, individual criminal responsibility is more adequately regulated within treaty regimes. It was in particular in the aftermath of WWII that the criminalization of individuals responsible for the destruction of cultural heritage intensified.

The criminalization of the destruction of cultural heritage operated by individuals in the context of armed conflicts dates to the Nuremberg Trials. The Nuremberg principles, formulated by the International Law Commission and affirmed by the UN General Assembly through Resolution 95 (I) in 1946[882] recognized the "plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity" among the war crimes.[883] Notably, the Nuremberg Tribunal was the first ad hoc international criminal Tribunal to prosecute an individual for the destruction of cultural property. The case refers to the prosecution of the Nazi official Alfred Rosenberg who was held responsible for various crimes including the plunder of museums and libraries.[884] It provided the basis for the future developments in the field of individual criminal responsibility for cultural crimes in armed conflicts.

It was then the international humanitarian law which tried to counteract the issue of impunity of cultural crimes. As a matter of fact, most of the treaties analyzed in the previous sub-chapters contains specific provisions for the prosecution and punishment of individuals who perpetrate cultural heritage crimes. This is revisable in Article 28 of the 1954 Hague Convention which requires State parties "to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention."[885] The provision is supported by Article 85(4)(d) of Protocol I to the Geneva

[882] UN General Assembly, *Affirmation of the Principles of International Law recognized by the Charter of the Nurnberg Tribunal*, A/RES/95, 11 December 1946.
[883] Ibidem in WIERCZYŃSKA, K., JAKUBOWSKI, A., "Individual Responsibility for Deliberate Destruction of Cultural Heritage: Contextualizing the ICC Judgment in the *Al-Mahdi* Case", *Chinese Journal of International Law*, Volume 16, Issue 4, December 2017, p. 703.
[884] DIJKSTAL, J. H., "Destruction of Cultural Heritage before the ICC: The Influence of Human Rights on Reparations Proceedings for Victims and the Accused", *Journal of International Criminal Justice*, Volume 17, Issue 2, May 2019, p. 394.
[885] UNESCO, *Hague Convention*, 1945, op. cit., art. 28.

Conventions which sets out that crimes against cultural and spiritual heritage can be considered as grave breaches of the Protocol, when committed willfully.[886] It further specifies that these acts shall be regarded as war crimes[887] thus entailing individual criminal responsibility.[888]

Furthermore, five specific serious violations to the Protocol which entail individual criminal responsibility are enlisted in Article 15(1) of the Second Protocol to the Hague Convention. These violations include: 1) making cultural property under enhanced protection the object of attack; 2) using cultural property under enhanced protection or its immediate surroundings in support of military action; 3) extensive destruction or appropriation of cultural property protected under the 1954 Hague Convention and the Protocol; 4) making this cultural property the object of attack; 5) theft, pillage, or misappropriation of, or acts of vandalism directed against cultural property."[889] Moreover, it requires States to take all the necessary measures "to establish as criminal offences under its domestic law the offences set forth" in this Article and to punish them with "appropriate penalties" while complying with general principles of law and international law which provides the possibility of extending "individual criminal responsibility to persons other than those who have committed the act."[890]While from Article 17 to Article 21 the Protocol provides comprehensive procedural rules concerning prosecution, extradition, mutual legal assistance, the grounds for refusals of requests of extradition and mutual legal assistance and other necessary measures for other violations of the cultural property protected under the Convention.[891]

In 2003 the UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage[892] was adopted to provide a response to the destruction of the Buddhas of Bamiyan in Afghanistan. The Declaration deals with individual criminal responsibility in Article VII, specifying that it is incumbent on States the obligation to prosecute individuals for criminal acts toward cultural property according to general international law.[893] It further specifies that importance "to establish jurisdiction over, and provide effective criminal sanctions against, those persons who commit, or order to be committed, acts of intentional destruction of cultural heritage of great importance for humanity, whether or not it is inscribed on a list maintained by UNESCO or another international organization."[894] It is noteworthy how these provisions entail some form of State responsibility,

[886] ICRC, *Additional Protocol I*, 1977, op. cit., art. 85(4)(d).
[887] Ibidem, art. 85(a).
[888] ICC Statute, op. cit., art. 25.
[889] UNESCO, *Second Protocol to the Hague Convention*, 1999, op. cit., art. 15(1).
[890] Ibidem, art. 15(2).
[891] Ibidem, articles from 17 to 21.
[892] UN Educational, Scientific and Cultural Organization (UNESCO), *Declaration Concerning the International Destruction of Cultural Heritage*, 17 October 2003.
[893] Ibidem, art. VII.
[894] Ibidem.

even though not explicitly mentioned, with the only exception of Article VI of UNESCO Convention.[895]

At the regional level, the Convention on Offences relating to Cultural Property adopted by the Council of Europe on 17th May 2017,[896] in Article 10 requires States to consider "the unlawful destruction or damaging of movable or immovable cultural property, regardless of the ownership of such property" and "the unlawful removal, in whole or in part, of any elements from movable or immovable cultural property" as a criminal offence when committed intentionally.[897]The importance that cultural heritage plays is recognized also by the ICC which in its Preamble it states that "all peoples are united by common bonds, their cultures pieced together in a shared heritage"[898], a sentence that in some ways anticipates a consequent commitment of the ICC in the persecution of cultural crimes. The Statute at Article 8(2)(b)(ix) states that the intentional "attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives"[899] which occur both in international and national conflicts are considered as war crimes[900], thus they entail individual criminal responsibility which fall under the jurisdiction of the ICC.[901] In Article 30(1) it outlines how the mental element must be combined with the intent and knowledge[902] to fulfil the elements of the crime.[903]

Following the Nuremberg principles, the ICTY provided its own contribution. Article 3 of the ICTY Statute, which is applicable both in international and non-international conflicts, provides that the Tribunal has jurisdiction to prosecute individuals for the violations of laws or customs of war.[904] These violations include in provision (d) a limited list of cultural crimes which include the "seizure of destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science."[905] Thus, an individual can be prosecuted for the above-mentioned cultural crimes provided that the principles

[895] Article VI of UNESCO Declaration is the only explicit provision which refers to State responsibility.
[896] Council of Europe, *European Convention on Offences Related to Cultural Property*, op. cit.
[897] Ibidem, Art. 10.
[898] ICC Statute, op. cit., Preamble.
[899] Ibidem, Art. 8(2)(b)(ix) and Art. 8(2)(e)(iv).

[901] Ibidem, Art. 5 and Art. 8(1).
[902] Ibidem, Art. 30(1).
[903] In Elements of Crime, it is stated that the perpetrator must be aware of the factual circumstances and that those circumstances established the existence of an armed conflict. Elements of Crimes, op. cit., Art. 8(2)(a)(iv).
[904] UN Security Council, *Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002)*, 25 May 1993, Art. 3.
[905] Ibidem, Art. 3(d).

set out in Article 7 concerning individual criminal responsibility are met.[906]Despite that, developments concerning the application of international criminal law in matter of individual criminal responsibility for cultural heritage crimes, through its international tribunals are scant. Notably, the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL) and the Cambodia War Crimes Court (ECCC), have jurisdiction over cultural crimes.[907] However, the jurisdiction remains still too limited,[908] a factor which contributes to the impunity of the perpetrators. For the purposes of the present analysis the ICC mainly through the Al-Mahdi case[909] and the ICTY jurisprudence gain prominence since they have demonstrated a proactive approach. Notably, the ICTY provides a consistent case law.

In *Prosecutor v. Slobodan Milošević,*[910] the indicted was persecuted for the wanton destruction or damage of Kosovo Albanian religious and cultural sites, cultural monuments, and Muslim sacred sites, for having shelled, burned and dynamited the Mosques of the province.[911]These acts perpetrated by the indicted were found in violation of Article 3(d) and he was considered responsible under Article 7(1) and 7(3) of the ICTY Statute.[912]The same legal reasoning was adopted in the P*rosecutor v. Radovan Karadžić & Ratko Mladić* case[913] in which the defendants were accused for the "widespread and systematic damage and destruction of Muslim and Roman

[906] Ibidem, Art. 7. It refers to "a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute", this person can be a "Head of State or Government or as a responsible Government official", while in the case the order was committed by a subordinate, the superior has criminal responsibility "if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof", while the individual that "acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires."

[907] The SCSL has the power to prosecute persons who committed or ordered the commission of serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II. Reference to cultural heritage is made in Article 5 (Crimes under Sierra Leonean Law). The ECCC, under Article 7 of its Statute, has the power to bring to trial all suspects most responsible for the destruction of cultural property during armed conflict pursuant to the 1954 Hague Convention for Protection of Cultural Property in Event of Armed Conflict, and which were committed during the period from 17 April 1975 to January 6, 1979. There is no reference to the destruction of cultural property, but the ICTR has the power to prosecute persons committing or ordering to be committed serious violations of Article 3 Common to the GCs and of AP II.

[908]WIERCZYŃSKA, K., JAKUBOWSKI, A., "Individual Responsibility", op. cit., p. 702.

[909] *The Prosecutor v. Ahmad Al Faqi Al Mahdi,* Judgement and Sentence*,* Trial Chamber, International Criminal Court (ICC), ICC-01/12-01/15, 27 September 2016.

[910] *Prosecutor v. Slobodan Milosevic (Decision on Motion for Judgement of Acquittal)*, International Criminal Tribunal for the former Yugoslavia (ICTY), IT-02-54-T, 16 June 2004.

[911] Ibidem, para. 68(d).

[912] UN Security Council, *Statute of the International Criminal Tribunal for the Former Yugoslavia*, op. cit., Art. 7(1) and Art. 7(3) concerning individual criminal responsibility.

[913] P*rosecutor v. Radovan Karadžić & Ratko Mladić,* Indictment, International Criminal Tribunal for The Former Yugoslavia, IT-95-5-I, 2 October 1995.

Catholic sacred sites"[914], and in the *Prosecutor v. Mićo Stanišić amd Stojan Župljanin* case[915], in which Stanišić and Župljanin where accused under the same articles for the "intentional destruction of Mosques and other religious and cultural buildings."[916]

The jurisprudence of the ICTY provided also an expansion of the requisites necessary for determining the individual criminal responsibility of the indicted, making Article 3(d) more specific. This is revisable in the in *Blaskic* case[917], in which the Trial Chamber added a further requirement by stating that criminal acts must be addressed "to institutions which may clearly be identified as dedicated to religion or education and which were not being used for military purposes at the time of the attacks. In addition, the institutions must not have been in the immediate vicinity of military objectives."[918] Furthermore, for the Court there must be a nexus between the damages or destruction carried out and the conflict which must have occurred in "a precise geographical region where an armed conflict is taking place at a given moment."[919]

In the *Prosecutor v Mladen Naletilic and Vinko Martinović*,[920] the Trial Chamber argued that a criminal act toward culture can fall under Article 3(d) if it fulfills some specific requirements. First of all, "the destruction must have been directed at an institution dedicated to religion"; secondly, the damaged or destroyed property must not be "used for military purposes"; lastly, the perpetrator must have acted with "intent to destroy that property".[921] Similar requirements were set out by the Trial Chamber in the Strugar case.[922] While the Appeals Chamber further expanded Article 3(d) of the ICTY Statute and specified that the intent can be both direct and indirect.[923] The Chamber worded this by stating that acts can be made "either deliberately or through recklessness."[924] While the Appeals Chamber recognized Article 3(d) as "lex specialis with

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[914] Ibidem, para. 30.
[915] *Prosecutor v Mićo Stanišić and Stojan Župljanin*, Judgement, International Criminal Tribunal for The Former Yugoslavia (ICTY), IT-08-91-T, 27 March 2013 in ELLIS, M.S., "The ICC's Role in Combatting the Destruction of Cultural Heritage", *Case Western Reserve Journal of International Law*, vol 49, Issue 1, 2017, p. 45.
[916] Ibidem.
[917] *Prosecutor v. Tihomir Blaskic*, Judgment, International Criminal Tribunal for The Former Yugoslavia (ICTY), IT-95-14-A, para. 686, 29 July 2004 in ELLIS, M.S., "The ICC's Role", op. cit., p. 47.
[918] *Prosecutor v. Tihomir Blaskic,* Judgement, ICTY, op. cit., para. 185, in ELLIS, M.S., "The ICC's Role", op. cit., p. 52.
[919] *Prosecutor v. Tihomir Blaskic,* Judgement, ICTY, op. cit., para. 69 in ELLIS, M.S., "The ICC's Role", op. cit., p. 49.
[920] *Prosecutor v. Naletilić & Martinović*, Trial Judgment, International Criminal Tribunal for The Former Yugoslavia (ICTY), IT-98-34-T, 31 March 2003.
[921] *Prosecutor v. Naletilić & Martinović*, Trial Judgment, ICTY, op. cit., paras. 604-605 in ELLIS, M.S., "The ICC's Role", op. cit., p. 49.
[922] *Prosecutor v. Pavle Strugar*, Trial Judgment, International Criminal Tribunal for The Former Yugoslavia (ICTY), IT-01-42-T, 31 January 2005, para. 312.
[923] *Prosecutor v. Pavle Strugar*, Appeal Judgement, International Criminal Tribunal for The Former Yugoslavia (ICTY), IT-01-42-A, 17 July 2008, para. 311.
[924] Ibidem, para. 270.

respect to the offence of unlawful attacks on civilian objects."[925] Establishing the *mens rea* of individual responsibility is a requirement explicitly set out also in the *Prosecutor v. Mladen Naletilic and Vinko Martinovic* case.[926] As a matter of fact, the Trial Chamber outlined that to ascertain the individual responsibility "the perpetrator must have acted with the intent to destroy the protected property or in reckless disregard of the likelihood of its destruction."[927]

In several cases, cultural destruction was made to fall under other categories of crimes namely crimes against humanity and genocide. Concerning genocide this represents an important step forward in the recognition of the fact that attacks towards cultural heritage are not only destructive on a physical level, but they have wider implications concerning the preservation of identity, history, and the cultural fabrics of a community. In the *Prosecutor v Dario Kordic and Mario Cerkez,*[928] the ICTY argued that "an attack on the identity of people and as such, it manifests a nearly pure expression of the notion of 'crimes against humanity,' for all of humanity is indeed injured by the destruction of a unique religious culture and its concomitant cultural objects."[929]

This is revisable in *Prosecutor v. Kupreškić* case.[930] The Trial Chamber made fall the attacks toward cultural heritage under the label of crimes against humanity when committed in a widespread and systematic way.[931] While in the *Kordic and Cerkez* case the Trial Chamber after recalling Article 27 of the Hague Regulations, Article 53 of Additional Protocol I, considered the attacks toward religious objects as an "attack on the identity of people" which amounts to crimes against humanity for the extensive impact that this has on humanity as a whole.[932] In particular in *Stanišić & Župljanin*[933] the Court outlined the requirements that must be met to consider the destruction of cultural property as a crime against humanity. These elements entail: "(a) the destruction or damage of religious or cultural property occurs on a large scale; (b) the destruction or damage of religious or cultural property is not justified by military necessity; and (c) the perpetrator acted with the intent to destroy or damage the religious or cultural property or in reckless disregard of the likelihood of its destruction or damage."[934] While in *Prosecutor v.*

[925] Ibidem, para. 277.
[926] *Prosecutor v. Naletilić & Martinović*, Trial Judgment, ICTY, op. cit.
[927] Ibidem, para. 577.
[928] *Prosecutor v. Kordic and Cerkez*, Trial Judgment, International Criminal Tribunal for The Former Yugoslavia (ICTY), IT-95-14/2-T, 26 February 2001.
[929] Ibidem, para. 20.
[930] *Prosecutor v. Kupreškić et al.*, Trial Judgment, International Criminal Tribunal for The Former Yugoslavia (ICTY), IT-95-16-T, 14 January 2000.
[931] Ibidem, para. 544.
[932] *Prosecutor v. Kordic and Cerkez*, Trial Judgment, ICTY, op. cit., para. 207 in ELLIS, M.S., "The ICC's Role", op. cit., p. 49.
[933] *Prosecutor v Mićo Stanišić and Stojan Župljanin*, Trial Judgment, International Criminal Tribunal for The Former Yugoslavia (ICTY), IT-08-91-T, 27 March 2013.
[934] Ibidem, para. 88.

Radislav Krstić case[935], the Court invoked the individual criminal responsibility for genocide after considering the destruction of the mosques as part of the intent.

The jurisprudence of the ICTY which documents a cumulative count of eleven cases in which the Court has prosecuted individuals for having committed crimes against cultural heritage, has been partially reported for the significant role it could play in shaping forthcoming legal proceedings.

1.4- Determining State Responsibility for Cultural Crimes

The topic of state responsibility for the destruction of cultural heritage is a challenging one. Notably, while effective international systems for punishing individual criminal responsibility have been developed over the past two decades, equivalent legal mechanisms are still lacking when it comes to address the responsibility of states for international crimes.[936] This is particularly evident when it comes to assess state responsibility for violations of cultural heritage obligations. The substantive obligations set out in the cultural property treaties are in fact not integrated with specific norms to ascertain the responsibility of states.

Considering this legal vacuum, this sub-chapter will analyze whether general international norms on State Responsibility could represent a valuable response.[937] In particular, it will be inquired whether these principles could be used as secondary rules for the violation of the obligations set out in the main treaties on the protection of cultural property.[938] For clarity's sake, the sub-chapter will not delve into the specifics of the various forms of reparation and countermeasures that can

[935] *Krstić Case*, Trial Judgement, ICTY, op. cit., para. 580.
[936] FRANCIONI, F., VRDOLJAK, A. F., *The Oxford Handbook of International Cultural Heritage Law,* Oxford University Press, 2020, p. 616.
[937] The Draft Articles on State Responsibility were set out by the International Law Commission (ILC) in 2001. Despite not being binding in themselves, they are recognized as general principles of international law.
[938] The distinction between primary and secondary rules was formulated by the Special Rapporteur Ago for the first time during the 32nd Session of the International Law Commission (ILC), see as reference Report of the Commission to the General Assembly on the work of its thirty-second session, *Yearbook of the International Law Commission,* vol. 2, part. 2, 1980, para. 23.

be adopted as a response when a state fails to fulfill its obligations, since this would require a separate dedicated analysis.

Despite not including a specific norm on State responsibility, the main international legal instruments dealing with the protection of cultural heritage, that have been previously analyzed, set out a series of obligations in which an implicit form of State responsibility can be revised. The 1954 Hague Convention was the first instrument adopted after WWII which considered States as the main responsible for the protection of their own cultural heritage being them "in the best possible position to provide the most effective protection regime."[939] For this reason, it set out a series of positive and negative obligations both in wartimes but also in peacetimes since "protection cannot be effective unless both national and international measures have been taken to organize it in time of peace".[940] Already in the preamble it obliges States "to take all possible steps"[941] to safeguard cultural property "against the foreseeable effects of an armed conflict."[942] However, if on one side it located upon States the responsibility to create a solid framework, on the other it refrained from outlining specific actions to be undertaken, living this to the discretion of each State in order to respect State sovereignty and financial possibilities.

The Convention implemented some provisions, pivotal for the present analysis. Article 4[943] provided three negative obligations. Firstly, it provided that "the High Contracting Parties undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties".[944] Secondly, they are required to refrain from any use of the property "for purposes which are likely to expose it to destruction or damage in the event of armed conflict."[945] Lastly, they shall refrain "from any act of hostility, directed against such property".[946] It also provides that the Article can be waived in case of military necessity.[947] While in Article 7(a) it introduced some positive obligations. It provided that the High Contracting Parties shall integrate some instructions "to foster in the members of their armed forces a spirit of respect for the culture and cultural property of all peoples."[948] To achieve this, they commit to entitle specific "armed forces, services or specialist personnel" in order to "secure respect for cultural property and to co-operate with the civilian authorities responsible for safeguarding it."[949]

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[939] FORREST, C., International Law and the Protection of Cultural Heritage, p. 87.
[940] UNESCO, Hague Convention, 1945, op. cit., Preamble.
[941] Ibidem.
[942] Ibidem, Art. 3.
[943] Ibidem, Art. 4.
[944] Ibidem.
[945] Ibidem.
[946] Ibidem.
[947] Ibidem.
[948] Ibidem, Art. 7(a).
[949] Ibidem.

In Article 8, States are required to place under special protection refuges and centers containing movable and immovable cultural property.[950]

Obligations to State were set out also in the First Protocol to the Convention. In Article 1 it was stated that the High Contracting Parties are required "to prevent the exportation, from a territory occupied by it during an armed conflict, of cultural property"[951]; "to take into its custody cultural property imported into its territory either directly or indirectly from any occupied territory";[952] "to return, at the close of hostilities, to the competent authorities of the territory previously occupied, cultural property which is in its territory."[953] While Article 10(a) of the II Protocol to the Hague Convention provides that States shall place under "enhanced protection cultural heritage of greatest importance for humanity."[954] In Article 38 the Protocol considered necessary to underline that all the provisions dealing with the concept of individual criminal responsibility shall not "affect the responsibility of States under international law, including the duty to provide reparation."[955] Therefore, this implies that, in case of violations, State responsibility can be ascertained through general provisions of international law.[956] A very similar concept has been included in Article 25(4) of the ICC Statute.[957]

Article 4 of The World Heritage Convention also provided a contribution. It required that each State Party to the Convention in object shall recognizes that the "duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage [...] belongs primarily to that State." [958] A very similar provision is revisable also in Article 8 of the 2001 UNESCO Underwater Heritage Convention[959] and Article 11 of the 2003 UNESCO Convention for the Safeguarding of Intangible Cultural Heritage.[960]

Concerning Protocol I to the Geneva Conventions, in Section V, Article 91 specifies that in case of a breach of the obligations set out in the Convention a Party to the conflict "shall, if the case

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[950] Ibidem, Art.8.
[951] UNESCO, *First Protocol to the Hague Convention,* Art. I (1).
[952] Ibidem, I(2).
[953] Ibidem, I(3).
[954] UNESCO, *Second Protocol to the Hague Convention,* Art. 10(a).
[955] Ibidem, Art. 38.
[956]FRANCIONI, F., VRDOLJAK, A. F., '*The Oxford Handbook of International Cultural Heritage Law',* Oxford University Press, 2020, p. 608.
[957] ICC Statute, op. cit., Art. 25(4).
[958] UNESCO, *World Heritage Convention*, op. cit., Art. 4.
[959] UNESCO, *Convention on the Underwater Cultural Heritage*, op. cit., Art. 8. It argues that "States Parties may regulate and authorize activities directed at underwater cultural heritage within their contiguous zone.
[960]UNESCO, *Convention for the Safeguarding of Intangible Cultural Heritage,* op. cit., Art. 11. It provides that each State Party shall: (a) take the necessary measures to ensure the safeguarding of the intangible cultural heritage present in its territory; (b) identify and define the various elements of the intangible cultural heritage present in its territory, with the participation of communities, groups, and relevant non-governmental organizations.

demands, be liable to pay compensation."[961] However, neither the First Protocol nor the Second explicitly refer to State responsibility. Despite that, the First Protocol in Article 53[962] and the Second Protocol in Article 16[963], by following the general rules of interpretation set out in Article 31 of the Vienna Convention on the Law of the Treaties, recognize the 1954 Hague Convention as *lex specialis*. This can be interpreted as a recognition of the legal vacuum concerning certain topics which are instead covered by the Hague Convention which gains primacy in cases of ambiguity of absence of specific useful provisions. This includes the recognition also of Article 38 to cover State responsibility.

Notably, the only provision which explicitly recognizes the responsibility of States is Article IV of the UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage. This provides that "a State that intentionally destroys or intentionally fails to take appropriate measures to prohibit, prevent, stop, and punish any intentional destruction of cultural heritage of great importance for humanity, whether or not it is inscribed on a list maintained by UNESCO or another international organization, bears the responsibility for such destruction, to the extent provided for by international law."[964] Although the Declaration is a non-binding legal instrument it contributes to customary international law.

Through this analysis it can be stated that although State responsibility persists as a weak legal framework compared to the one on individual criminal responsibility, it is undeniable that most of the provisions emphasize the primary responsibility of States for protecting cultural heritage both located under their jurisdiction[965] and the one located under the territory of another State.[966]

Despite the legal vacuum, some specific general provisions of international law can be used to determine State responsibility provided that, when there is a substantive violation, it must be ascertained that the conduct of the State results in a wrongful act. The first relevant provision is Article 1 of the Draft Articles which outlines that "every internationally wrongful act of a State entails the international responsibility of that State", specifying that a wrongful act consists in "one or more actions or omissions or a combination of both." There are no opposite opinions regarding the non-applicability of this principle to the violations of the obligations set out in the treaties concerning the protection of cultural property. Another important provision is Article 12 of the Draft Articles which states that international obligations can have different origins. They

[961] ICRC, *I Protocol to the Geneva Conventions*, op. cit., Art. 91.
[962] Ibidem, Art. 53.
[963] ICRC, *II Protocol to the Geneva Conventions*, op. cit., Art. 16.
[964] UNESCO, *Declaration Concerning the Intentional Destruction of Cultural Heritage*, op. cit. Art. IV.
[965] UNESCO, *World Heritage Convention*, op. cit., Art. 4.
[966] Ibidem, Article 6(3).

can be "established by a customary rule of international law, by a treaty or by a general principle applicable within the international legal order."[967] A breach can arise in cases of "an act or an omission or a combination of acts and omissions." To provide an example, in the case of procedural obligations such as Article 10 of the Hague Convention, the breach can stem both from active actions or from the mere failure to fulfill the obligation to mark cultural property in this case with the required emblem, even if no harm or damage results from this omission.[968]

Article 40 specifies that to trigger State responsibility the violation must be "gross and systematic", and it can only be a violation of "peremptory norms".[969] This can appear to be an obstacle since violations of cultural property norms have not yet been recognized as such. However, the case law and some international treaties can provide a useful tool to overcome the obstacle since they have treated cultural property violations as serious breaches in practice, despite the absence of universally recognized peremptory norms in this domain. This is revisable in the Strugar case[970] in which the Court considered that due to the "great importance to the cultural heritage of every people" the attacks toward cultural property are serious violations of international humanitarian law.[971]The same was affirmed by the ICC in the Al-Mahdi judgement[972] and in the Stela of Matara case[973] in which the Eritrea-Ethiopia Claims Commission found Ethiopia responsible for its destruction. While in the Temple of Preah Vihear[974] judgement held in 2003 the ICJ prohibited the destruction of cultural property as an erga omnes obligation that binds both States where the cultural property is located and States acting in proximity of this property.[975] All in all, the absence of explicit norms entailed within the international treaties concerning the protection of cultural heritage does not prevent states from being held responsible for cultural crimes. Existing general principles of international law coupled with obligations

[967] *Draft Articles on Responsibility of States for Internationally Wrongful Acts,* op. cit., Art. 12.
[968] VIGNI, P., "State Responsibility for the Destruction of Cultural Property", German Yearbook of International Law, v. 61(1), 2018, p. 18.
[969] Ibidem, Art. 40.
[970] In the Strugar case, the Tribunal upheld that the deliberate and conscious attacks against cultural sites entail war crimes that cannot be considered as less serious breaches of international law than crimes against humanity. See as reference *Prosecutor v. Pavle Strugar*, Trial Judgment, ICTY, op. cit., para. 214.
[971] Ibidem, para. 232.
[972] *The Prosecutor v. Ahmad Al Faqi Al Mahdi,* Trial Chamber VIII, ICC, paras. 14-18.
[973] *Eritrea-Ethiopia Claims Commission – Partial Award: Central Front – Eritrea's Claims 2, 4, 6, 7, 8 and 22*, Reports of International Arbitral Awards, Decision 28 April 2004 in VIGNI, P., "State Responsibility for the Destruction of Cultural Property", op. cit., p. 14.
Para. 113.
[974] ICJ, *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand),* Judgment, 11 November 2013, ICJ Reports 2013.
[975] Ibidem, para. 106.

which stem from international treaties can provide a basis for attributing state responsibility in cases involving cultural crimes.

Another significant legal instrument which can provide a prompt response is the Responsibility to Protect. Recent initiatives of the UNSC and the Council of Europe have underlined how, despite not being a specific legal instrument implemented to address cultural crimes, it could encompass not only the safeguarding of human life but also the preservation of cultural heritage, being these two aspects inextricably intertwined. This vision has been supported during the UNESCO experts meeting on the "Responsibility to Protect" held in 2015.[976] During this meeting it was outlined how UNESCO Member States shall "encourage and help States to exercise their responsibility to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity through protecting cultural heritage situated in their territory from intentional destruction and misappropriation."[977]This evidently requires an expansion of the scope of the legal instrument in object. UNESCO experts have based their reasoning on the principle of dual accountability enshrined in the formulation of the Rome Statute which recognizes the primary responsibility of States to prosecute international crimes and gives the ICC the right to exercise jurisdiction only when the national legal systems fail to provide justice.[978]

Responsibility is attributed primarily to States also in UNSC Resolution 2347[979]. The UNSC urges its Member States "to introduce effective national measures at the legislative and operational levels where appropriate, and in accordance with obligations and commitments under international law and national instruments, to prevent the trafficking of cultural property and related offences."[980] At the regional level, the Council of Europe in the Convention on Offences relating to Cultural Property (also known as Nicosia Convention)[981], appointed States parties "to establish their jurisdiction over individual criminal responsibility arising from the offences which have been perpetrated either in their territory or by their nationals."[982]The Convention has been implemented with the aim of protecting cultural heritage during conflicts, in particular in territories of Iraq and Syria.

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[976] UNESCO, "International Expert Meeting on the Responsibility to Protect Applied to the Protection of Cultural Heritage", in WIERCZYŃSKA, K., JAKUBOWSKI, A., "Individual Responsibility for Deliberate Destruction of Cultural Heritage", op. cit., p. 719.
[977] Ibidem.
[978] Rome Statute, ICC, Art. 17 and Art. 53.
[979] UN Security Council, *Security Council Resolution 2347 (on destruction and trafficking of cultural heritage by terrorist groups and in situations of armed conflict)*, S/RES/2347, 2017.
[980] Ibidem, para. 9.
[981] Council of Europe, *Convention on Offences relating to Cultural Property (Nicosia Convention)*, 3 May 2017. The Convention was adopted on 3rd May, but it has not entered into force yet.
[982] Ibidem, Art. 10 in VIGNI, P., "State Responsibility for the Destruction of Cultural Property", German Yearbook of International Law, v. 61(1), 2018, p. 10.

2- ISIS Systematic Destruction of Cultural Heritage in Syria and Iraq

The Middle East has been victim of a long trail of attacks directed toward its cultural heritage which have left scars on the tapestry of its identity. Despite having been repeatedly condemned by the international community no justice has yet been provided. The sub-chapter aims at providing an overview on the cultural destruction caused by the Islamic State in the territories of Syria and Iraq during 2014 and 2015 and at describing how this widespread violence was part of a genocidal campaign which aimed at destroying the social fabrics of the communities targeted.

Concerning Syria, its tangible cultural heritage was destroyed as part of the iconoclast campaign initiated by the Islamic State. The attacks targeted mainly the city of Palmyra, formally recognized as a World Heritage Site by UNESCO in 2008. The city was besieged in May 2015 and razed to the ground. ISIS bombarded all the historical monuments in the Valley of the Tombs, while the Roman Triumphal Arch was levelled.[983] Furthermore, with the declared intent to "break idols that the infidels used to worship" the militants destroyed the temples of Baal'shamin and Bel.[984] Their destruction went beyond the physical loss, and it extended to the very core of the Syrian identity.

Simultaneously, the Islamic State carried out the same iconoclastic campaign also in the territories of Iraq where churches, shrines, cemeteries, mosques, artifacts, libraries, museums were systematically destroyed with the intent to erase the identity of the minority communities which inhabited those areas. Yazidis, Christians, and Turkmans[985] suffered the main consequences but also Muslim groups such as Sufis and Shiites were targeted, the former for being polytheists, the latter for rejecting the preaching of the pure Islam.[986] The Nineveh Province and its capital Mosul, where the majority of Christians and Assyrian communities lived, were devastated and people forced to leave.[987] The same wanton destruction was undertaken in the Sinjar region, the homeland of the Yazidi community. Most of their tangible cultural heritage were razed to the ground. The monastery of Mar Behnam and Sarah was looted in February 2014; the Shrine of Baate and the religious sites located in the Nineveh Province were destroyed in August 2014; the Assyrian and

[983] BRAMMERTZ et al., "Attacks against Cultural Heritage as a Weapon of War: Prosecutions at the ICTY", *Journal of International Criminal Justice*, Volume 14, Issue 5, 2016, p. 1143.
[984] DOPPELHOFER, C., "Will Palmyra Rise Again? – War Crimes Against Cultural Heritage and Post-War Reconstruction", 2016, p. 2, available at: http://www.ohchr.org/EN/Issues/CulturalRights/Pages/IntentionalDestruction.aspx.
[985] BACHMAN, J., *Cultural Genocide. Law, Politics, and Global Manifestations,* op. cit., p. 210.
[986] Islam of the first caliphs. STEIN, p. 170.
[987] Ibidem, p. 209.

Mesopotamian artifacts that were safeguarded in the Mosul Museum were vandalized in February 2015 along with the historical manuscripts contained in the main library which suffered significant damage; in an escalation of violence the sanctity of St. George Monastery cemetery in Mosul was desecrated.[988]

More specifically, on 3rd August 2014, the Islamic State launched a devastating assault on the ancestral homeland of the Yazidi community in the region of Sinjar. In a distressing twist of events, the Kurdish forces entrusted with the region's security abandoned the area as also the Yazidis did, in an attempt to find refuge in the Sinjar mountains. The Yazidi tangible heritage was left vulnerable to the brutal onslaught of ISIS militants. The attacks represented more than a military operation, resulting more in a violation of the sanctity of their ancestral lands. Yazidi cultural heritage was mainly composed by religious sites, places of worship, sanctuaries, and mausoleums where Yazidis performed pious duties.[989] However, for the community every stone, plant, and building and even the surrounding mountains owes a deep spiritual meaning and historical significance.[990]

Giving the practical difficulties due to the complexities of the conflict, conducting a comprehensive fieldwork was challenging. It has been estimated that around sixty-eight sanctuaries and shrines has been completely destroyed. Among these the shrines of Sheykh Hasan in Gabara village, Sheykh Man in Jiddala village, Malak Fakhrad-din in Sikeeniya, Mahma Rasha in Solagh, all in the Sinjar area, and Sheykh Amadin (Imad al-Din) in Welat village in Sheykhan.[991] These cultural and religious sites were the core of Yazidi's identity. The Assyrian cultural heritage suffered the same devastation. In this case, ISIS started by inflicting economic oppression on the Christian community. It then proceeded with the destruction of the Nineveh Palin, the center of the cultural and religious life of the Assyrian population. On August 2014 ISIS attacked the villages of Telkef, Batnaya, Baqufa, Mar Oraha[992] and gradually destroyed other thirty-one villages and all the churches and shrines they found. Other cultural properties such as the gates and walls of Nineveh, and the site of Nimrud which hold immense historic, cultural, and archeological value were demolished in a deliberate attempt to erase the collective memory of the community. The Assyrian that during WWI had already suffered a genocide on behalf of the Turkish and Kurdish forces saw what remained of their culture and identity completely erased. The violent attacks included the destruction of the community businesses, houses and properties

[988] Ibidem, p. 210.
[989] Ibidem, p. 213.
[990] AÇIKYILDIZ, B., *The Yezidis*, op, cit., pp. 115-117.
[991] BACHMAN, J., *Cultural Genocide. Law, Politics, and Global Manifestations,* op. cit., p. 213.
[992] Ibidem, p. 215.

that were marked with the Arabic letter *nūn* used to identify them.[993] Monasteries were blown up,[994] thirty churches were completely or partially destroyed in Mosul while a total amount of forty churches and monasteries in Nineveh Plain were knocked down, religious statutes were dismantled, century-old manuscripts were burned, the Christian cemeteries in Bartella, Qaraqosh, Telkeppe, and Bashiqa were desecrated and destroyed as well. The same fate was reserved for the other minorities which inhabited the Syrian and Iraqi territories conquered by the Islamic State.

While the attacks were justified by the Islamic State by invoking religious conservatism and perceived idolatry, it became evident that the indiscriminate destruction undertaken by the militants was determined by a different interplay of intentions. The criminal acts were part of a broader strategy which aimed at cutting ties that bound the minority communities to their ancestral land and traditions, erasing their tangible heritage to annihilate them as a community to create a homogenous group based uniquely on the Sharia law. Those acts have been repeatedly described as cultural cleansing or cultural genocide by the international community. Despite that the acknowledgment of the physical destruction of the tangible cultural heritage is not accompanied by a recognition of the huge impact that this has on the minorities involved. What must be acknowledged is the fact that heritage does not exist in isolation, but it is a fundamental part of the cultural fabric that shapes the lives of people. Museums, shrines, and monuments and every other element of culture form part of the collective memory, identity, and sense of belonging of a community. For all these reasons the following sub-chapter will focus on the destruction of the cultural heritage of the Yazidi community and on the impact that this has had on the community itself. Based on this it will demonstrate how those acts should be labelled as genocidal.

[993] Ibidem.
[994] BACHMAN, J., *Cultural Genocide. Law, Politics, and Global Manifestations,* op. cit., p. 217.

2.1-ISIS Destruction of Yazidi Cultural Heritage as Cultural Genocide

As already analyzed throughout the thesis, the Islamic State undertook a devastating genocidal campaign which involved a systematic destruction of Yazidi cultural heritage both tangible and intangible. The present sub-chapter aims at demonstrating how the atrocities perpetrated fall more properly under the category of genocide considering the repercussions that these had on the Yazidi minority, in particular it should be incapsulated in the future into the more appropriate crime of cultural genocide if this will be legally conceptualized.

In most of the studies available is evident how the attention was devolved on reporting the sole destruction of physical heritage sites. Notably, there is an evident absence of discussion concerning the impact that these acts have on the intangible aspects of culture. The same gap is revisable in most of the international treaties concerning the protection of cultural heritage analyzed so far. For instance, UNESCO World Heritage List has been criticized for emphasizing the material manifestation of culture[995] while disregarding the role that tangible cultural heritage plays within a community. Progressively, there has been a recognition of the fact that the importance of cultural heritage lies in the rituals, ceremonies and practices that are inextricably connected with it. These developments are revisable in the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage adopted in 2003.[996]

It must be acknowledged that beyond the physical destruction of cultural sites and artifacts there is the connected erasure of the intangible heritage practices which are the means through which a community transmits traditions, expresses identity, and fosters a sense of belonging. This is revisable in the experience of the Yazidi minority. Although the origins of the Yazidis are still blurred, from the information available it can be asserted that from the 12th century CE they settled in the Lalish Valley, in Northern Iraq, which became the cultural and spiritual epicenter[997] of the community. This area along with Mount Sinjar, situated in the Nineveh Province, progressively became the heart of Yazidi faith where members of the community undertook regular pilgrimages, where they practiced religious rituals, and where they gathered for worshipping the divine.

[995] ISAKHAN, B., and SHAHAB, S., "The Islamic State's destruction of Yezidi heritage", op. cit., p. 6.
[996] UN Educational, Scientific and Cultural Organization (UNESCO), *Convention for the Safeguarding of the Intangible Cultural Heritage*, 17 October 2017.
[997] ISAKHAN, B., and SHAHAB, S., "The Islamic State's destruction of Yezidi heritage", op. cit., p. 9.

Another element that must be considered is the fact that Yezidism is an orthopraxy religion[998] meaning that it focuses less on the strict adherence of specific doctrinal beliefs but more on the active engagement in religious practices, rituals, festivals, and pilgrimages and in the adoption of behavioral norms. Pilgrimages and festivals took places annually in the shrines and temples both in Sinjar and in the Lalish Valley where people gathered in the sacred sites to perform religious rituals and communal feasts. These festivals hold socio-political significance within the community. On one side, they served as bridges connecting the community members dispersed across different regions. On the other, these were important platforms to discuss economic and political matters, to engage in decision-making discussions, conflict resolutions. In these festivals Yazidis had the possibility to establish closer connections with the other members, to establish new friendships and seek potential life partners. For a closed community like that of the Yazidis, these places were fundamental for the survival of the group. Thus, the destruction of all the shrines and of every other element of Yazidi cultural property determined not only an inestimable cultural loss but also the consequent impossibility to exercise all the practices and rituals connected to them and this inevitably determined the rupture of the social fabrics and the erasure of the community itself.

The close bond between the Yazidis and their culture emerges also in a series of interviews that have been conducted on a group of Yazidis respondents coming from the Syrian and Iraqi territories conquered by the Islamic State between 2014 and 2015. Despite this represent a small-*n* study due to the difficulties in penetrating inside the territory, the interviews gathered result to be fundamental both to prove the indivisible bond between Yazidis and culture and the gravity of the repercussions caused to the community after the destruction of their tangible and intangible cultural heritage. As a matter of fact, witness IN030 explained that "the shrines have been destroyed to destroy the Yazidi identity.[999] The same was argued by witness IN014 which confirmed through its attacks, ISIS wanted to erase everything that connected them with their culture and heritage since Sinjar was an ancestral homeland for the Yazidis.[1000] Beside the destruction, the mass displacement of the Yazidis deeply contributed to the process of uprooting. The impossibility to practice their own religion and to preserve their culture will have a deep impact on the future generations. As underlined by witness IN014, for a minority which is victim of genocide the priority is the survival.[1001] Thus, in a complex process of redefinition of the

[998] KREYENBROEK, P., Yezidism: Its Background, Observances and Textual Tradition, New York: Edwin Mellen Press, 1995, p. 18, in ISAKHAN, B., and SHAHAB, S., "The Islamic State's destruction of Yezidi heritage", op. cit., p. 10.
[999] ISAKHAN, B., and SHAHAB, S., "The Islamic State's destruction of Yezidi heritage", op. cit., p. 14.
[1000] Ibidem.
[1001] Ibidem.

communal essence, adaptation to the new circumstances and treatment of the psychological toll of displacement, preserving and redefining culture becomes secondary. This has a deep impact on the young and future generations that born or grow up in a completely different environment with little knowledge of their own religion, heritage, and culture.[1002] Notably, denying the access to meaningful cultural sites will have a long-lasting impact on future generations which will jeopardize the survival of the group itself. For the reasons explained it can be stated that these acts can be considered as acts "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part" thus falling under Article II, paragraph (c) of the Genocide Convention. The available jurisprudence demonstrates how Court have progressively considered the attacks toward culture as part of genocide.

In *Prosecutor v. Karadžić and Mladić*[1003] the Court argued that "the intent may also be inferred from the perpetration of acts which violate, or which the perpetrators themselves consider to violate, the very foundation of the group – acts which are not in themselves covered by the definition of genocide but which are committed as part of the same pattern of conduct."[1004] The same was argued also by the ICTR in the Akayesu case.[1005] The ICTY went further in affirming that "the destruction of mosques or Catholic Churches is designed to annihilate the centuries long presence of the group or groups; the destruction of the libraries is intended to annihilate a culture which was enriched through the participation of the various national components of the population."[1006] In *Porsecutor v. Nikola Jorgić* the Düsseldorf Higher Regional Court "the intent to destroy a group meant the intent to destroy a group as a social unit".[1007] This was confirmed by the German Federal Court of Justice and the Federal Constitutional Court,[1008] but it also found support by the General Assembly Resolution 47/121 which considered the ethnic cleansing that occurred in Bosnia as a form of genocide,[1009] and finally by the European Court of Human Rights which considered the interpretation as not in violation of Article 7(1) of the Convention.[1010]

[1002] Testimony of witness IN014 in ISAKHAN, B., and SHAHAB, S., "The Islamic State's destruction of Yezidi heritage", op. cit., p. 14.
[1003] *Karadžić & Mladić Case,* (Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence), op. cit.
[1004] Ibidem, para. 94.
[1005] *The Prosecutor v. Jean-Paul Akayesu*, op. cit. para. 524.
[1006] *Karadžić & Mladić Case,* (Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence), op. cit., para 94.
[1007] *Jorgić Case*, Trial Judgement, Higher State Court of Dusseldorf, op. cit., pp. 94-95.
[1008] *Jorgić Case*, Appeals Judgment, Federal Court of Justice, 3StR 215/98, 30 April 1999, in *Case of Jorgić v. Germany*, European Court of Human Rights, App. No. 74613/01, 12 July 2007, para. 23, p. 12.
[1009] UN General Assembly, *The Situation in Bosnia and Herzegovina,* 1993, op. cit. para. 41 cited in *Case of Jorgić v. Germany*, European Court of Human Rights, op. cit., para. 27.
[1010] *Jorgić v. Germany*, European Court of Human Rights, op. cit., para. 96.

In *Prosecutor v. Krstić,*[1011] the ICTY after having interpreted the Convention considering the *nullum crimen sine lege* principle, and the fact that international customary law narrows the definition of genocide to include only acts which lead to the physical and biological destruction of the group, it underlines that " where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group."[1012] This reasoning was endorsed by the ICJ.[1013] Based on this, the Trial Chamber considered the "destruction of mosques and houses belonging to members of the group" as evidence of the intent.[1014] This was confirmed by the Appeal Chamber that by referring to the *Jelisić* case stated that "other culpable acts systematically directed against the same group" can be used as evidence of the intent.[1015] Judge Shahabuddeen in his dissenting opinion confirmed this finding. Notably, he underlined that concerning the present case "the razing of the principal mosque confirms an intent to destroy the Srebrenica part of the Bosnian Muslim group".[1016]The Court took a bolder stance when it declared that "the physical destruction of a group is the most obvious method, but one may also conceive of destroying a group through purposeful eradication of its culture and identity resulting in the eventual extinction of the group as an entity distinct from the remainder of the community."[1017] This results to be extremely relevant since it proves the fact that the cultural element can be used not only to prove the intent. The Court has in fact provided a wider interpretation of the actus reus of genocide including cultural destruction. Through the case law that has been reported it can be stated that the acts perpetrated against the Yazidi cultural heritage can be used to prove the dolus specialis of genocide, but they can also fall under provision (c) of the Genocide Convention through a broader interpretation of the a*ctus reus* that some Courts have already adopted.

One further element can be considered: the mental harm inflicted upon the minority. The mass displacement of the Yazidis, which was a direct consequence of the genocidal campaign inflicted on them, and the destruction of their built environment[1018]had a profound psychological impact on the community, since it leads to the erasure of the memory, social experience, worship, and cultural practice of the group with a consequent sense of loss and disorientation. Yazidis were

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[1011] *Krstić Case*, Trial Judgement, ICTY, op. cit.
[1012] Ibidem, para. 580.
[1013]*Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v. Serbia)*, ICJ, 2007, op. cit., para. 190.
[1014] *Krstić Case*, Trial Judgement, ICTY, op. cit., para. 580.
[1015] *Krstić,* Appeal Judgement, ICTY, op. cit., para. 33.
[1016] Partial Dissenting Opinion by Judge Shahabuddeen in *Prosecutor v. Radislav Krstić*, Appeals Judgment, ICTY, op. cit., para. 53.
[1017] *Krstić Case*, Trial Judgement, ICTY, op. cit., para. 580.
[1018] BACHMAN, J., *Cultural Genocide. Law, Politics, and Global Manifestations,* op. cit., p. 214.

forced to leave their homeland and their holy places. Some became internally displaced people and are now scattered in other regions of Iraq with a consistent number in the neighboring Kurdish region. Others became refugees and welcomed in makeshift camps mainly in Germany, Belgium, Georgia, France, Sweden, Turkey and small numbers in Canada, United Kingdom, the Netherlands, Norway, and Denmark.[1019] The displacement Yazidis were subjected to, was not a mere physical relocation, but a process of uprooting of cultural and historical connections they had with the land. Due to the impossibility to practice their religion and rituals Yazidi perceived a rupture with their traditions which caused them a sense of disorientation and suffering. Witness IN028 explained how the shrines, other cultural sites, and the land itself represented places where Yazidis could find their mental and psychological rest, they represented the link between them and God and the place where they could bury their loved ones.[1020] Detached from their familiar landscape and uprooted from their own culture they experienced distress and a complex emotional upheaval. The consequences experienced by the Yazidi minority made the acts perpetrated by the Islamic State to fall under provision (b) of the Genocide Convention. Thus, only through the recognition and the legal conceptualization of the crime of cultural genocide, these acts will reach full justice.

All in all, in the case law that has been analyzed has emerged a willingness of the Courts in considering attacks toward cultural heritage at least as evidence of the intent to prove genocide. By doing this, it has been demonstrated how the erasure of the cultural heritage of a group can determine its annihilation even without the physical element. However, the fact that despite the evidence that has been reported concerning the intent of the Courts in providing justice to cultural crimes, no genocide conviction based solely on the destruction of the cultural heritage of a given group has yet been provided. It must be considered that despite the influential role that the case low that the international Courts play, their judgments do not bind other national or international Courts to follow the same legal reasoning. Thus, the examples provided can play a fundamental role in future proceedings and for future developments concerning the inclusion of the cultural element within the genocide provision through an expansion of the *actus reus* but also for developing an auspicated conceptualization of a more appropriated provision on cultural genocide.

[1019] *Destroying the soul of the Yazidi,* RASHID International, Yazda et EAMENA Project, 2019, p. 29.
[1020] ISAKHAN, B., and SHAHAB, S., "The Islamic State's destruction of Yezidi heritage", op. cit., p. 14.

3-The Protection of Culture Through International Human Rights Law

Throughout the time, international human rights law started to devote increasing attention to the protection of culture to try to fill the gap that international criminal law had left with the non-inclusion of cultural genocide in the 1948 Genocide Convention. Notably, this body of law has been playing a pivotal role in the resurgence of cultural genocide discourses, emphasizing the role that cultural protection can play in the prevention of genocide. The increase attention that international human rights law has placed on the developing of human cultural rights is revisable in a series of provisions that have been progressively incorporated in its treaties.

First of all, Article 27(1) of the UDHR[1021] which set out the right to freely participate in the cultural life of the community which has been reproduced in the 1966 International Covenant on the Economic, Social and Cultural Rights (ICESCR) under Article 15(1)(a)[1022] but worded as "the right of everyone to take part in the cultural life" and complemented through Article 2(1) of the same Covenant which requires States to implement this and the other obligations set out, with the "maximum" of the resources which they dispose.[1023] In the same line, the International Covenant on Civil and Political Rights (ICCPR) included Article 27[1024] which requires States in which ethnic, religious, or linguistic minorities exist, to not deny them the right to enjoy their culture, to profess their religion and to use their language.[1025] Furthermore, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) incorporated the right "to equal participation in cultural activities" under Article 5(d)(e)(vi).[1026] Notably, also the Convention on the Rights of the Child (CRC)[1027] has formulated the right to education as a more general duty to respect the child's cultural identity, while incapsulating the same right also in Article 30 which specifically addresses to minorities, and which formulates the provision in negative as an obligation not to deny the enjoyment of "his or her own culture"[1028].

[1021] *Universal Declaration of Human Rights,* UN General Assembly, op. cit., Art. 27(1).
[1022] *International Covenant on Economic, Social and Cultural Rights,* UN General Assembly, op. cit., Art. 15(1)(a).
[1023] Ibidem, Art. 2(1).
[1024] UN General Assembly, *International Covenant on Civil and Political Rights,* op. cit., Art. 27.
[1025] Ibidem.
[1026] *International Convention on the Elimination of All Forms of Racial Discrimination*, UN General Assembly, op. cit., Art 5(d)(e)(vi).
[1027] *Convention on the Rights of the Child*, UN General Assembly, United Nations, Treaty Series, vol. 1577, 20 November 1989.
[1028] Ibidem, Art. 30.

At the regional level, the "rights to the benefits of culture" is enshrined in the 1988 Protocol of San Salvador.[1029] Furthermore, the American Declaration of the Rights and Duties of Man (ICESCR)[1030] encapsulated the duty of everyone to preserve culture as the highest expression of the spiritual development in Article 15.[1031] While the American Convention on Human Rights (ACHR) outlines the right to enjoy cultural rights already in its preamble.[1032] The right to culture is formulated in a narrower way in Article 8 of the European Convention on Human Rights which has translated it into the "right for private and family life"[1033] which requires a broad interpretation for a deeper understanding of its meaning. This also underlines how in cases in which specific provisions concerning cultural rights have not been implemented the gap has been filled by adding a cultural dimension to already-existing provisions. Lastly, the African Charter on Human and People's Rights (ACHPR)[1034] included the right to take part to cultural right in Article 17(2), and the right to cultural development in Article 22.[1035]

The list is not exhaustive, but it aimed at demonstrating the progressive attention that international human rights law has devoted to the development of cultural rights which have progressively lost the label of secondary rights. Despite the undeniable progresses, there are still some issues. Notably, the persistence of an individualistic perspective which prevent the recognition of the fact that "a group right is a right held by a group as a group rather than by its members severally."[1036] Up to date, the collectivization of rights has been more extensively applied within genocide discourses. As a matter of fact, it is undeniable that the Genocide Convention is about the "group's right to life".[1037] Despite that it failed in providing protection to the "rights set forth in the Universal Declaration of Human Rights". For this reason, the collectivization of human rights, and in particular the conceptualization of the "right to group existence", that would inevitably extend to include the non-physical component, would represent an important step forward in the protection of the survival of the group interpreted not only from a mere physical perspective. Without a proper definition of group existence the cultural component cannot be excluded as a

[1029] *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador")*, Organization of American States, op. cit., Art. 14.
[1030] *American Declaration of the Rights and Duties of Man*, Inter-American Commission on Human Rights (IACHR), 2 May 1948.
[1031] Ibidem, Article 15.
[1032] *American Convention on Human Rights, "Pact of San Jose",* Organization of American States (OAS), 22 November 1969, Preamble.
[1033] *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Council of Europe, op. cit., Art. 8.
[1034] *African Charter on Human and Peoples' Rights ("Banjul Charter")*, Organization of African Unity (OAU), op. cit.
[1035] Ibidem, Art. 22.
[1036] JONES, P., "Group Rights", Stanford Encyclopedia of Philosophy, 2008, in NOVIC, E., *The Concept of Cultural Genocide*, op. cit., p. 102.
[1037] NOVIC, E., *The Concept of Cultural Genocide*, op. cit., p. 112.

fundamental element for the existence of the group itself. Based on this, it can be stated that the protection of cultural rights in general, as articulated in international human rights law provides assistance to a possible future development in the conceptualization of cultural genocide by covering the material element of it. This is revisable once again in the above-mentioned Article 27 of the ICCPR[1038] and its prevention of forced assimilation, with a particular focus is given to the preservation of the identity of minorities. By doing this, human rights can emerge as a counterpart of cultural genocide.

"The right to group existence" is a principle which finds its roots in Resolution (96)1[1039] that considered genocide as the denial of this right, but also in the African Charter which included it within the provision concerning the right to self-determination.[1040] The same right was included in the Declaration on the Rights of Persons Belonging to National or Ethnic Religious, and Linguistic Minorities.[1041]However, some issues persist. The ways in which the group existence should be understood has not received clear responses yet. The jurisprudence available util this moment provides some aid. In *Awas Tingni* case,[1042] in the application of Article 21 of the American Convention of Human Rights,[1043] the Inter-American Court of Human Rights emphasized its collective dimension and argued: "disregarding the ancestral right of the members of the indigenous communities to their territories could affect other basic rights, such as the right to cultural identity and to the very survival of the indigenous communities and their members."[1044]

The concept of cultural genocide in the international human rights field has also been frequently interpreted as "the right to cultural identity". This has been recognized in Article 1 of the International Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities[1045] and in Article 33(1) of the UNDRIP[1046] while in the Declaration on Race

[1038]*International Covenant on Civil and Political Rights,* UN General Assembly, op. cit., Art. 27.
[1039] *The Crime of Genocide*, UN General Assembly, 11 December 1946, A/RES/96.
[1040] *African Charter on Human and Peoples' Rights ("Banjul Charter")*, Art. 20(1).
[1041]*Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, UN General Assembly, 3 February 1992, A/RES/47/135, Art. 1(1).
[1042] *Mayagma (Sumo) Awas Tingni Community*, Judgment on Merits, Reparations, and Costs, Inter-American Court of Human Rights, Case No. 79, 31 August 2001, para. 148 in NOVIC, E., *The Concept of Cultural Genocide*, op. cit., p. 115.
[1043] *American Convention on Human Rights, "Pact of San Jose",* Organization of American States (OAS), op. cit., Art. 21 in *Mayagma (Sumo) Awas Tingni Community*, Judgment on Merits, Reparations, and Costs, op. cit., para. 143.
[1044] Ibidem.
[1045]*Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, UN General Assembly, A/RES/47/135, 3 February 1992, Art. 1.
[1046]*United Nations Declaration on the Rights of Indigenous Peoples: resolution adopted by the General Assembly*, UN General Assembly, A/RES/61/295, 2 October 2007, Art. 33(1).

and Racial Prejudice[1047], adopted by UNESCO it was described as "the right of all groups to their own cultural identity and the development of their distinctive cultural life" and it outlined that "it rests with each group to decide in complete freedom on the maintenance, and, if appropriate, the adaptation or enrichment of the values which it regards as essential to its identity."[1048] Judge Cançado Trindade connected this right to the right to life in different instances. He underlined how an attack against cultural identity is "an attack to the right of life *lato sensu*" and a State cannot release itself from the due diligence duty to safeguard this right.[1049] This demonstrated how discussions related to "identity" are likely to increasing influence how the framework of protecting cultural rights is interpreted and enforced.

There is an increasing recognition of the role that cultural heritage plays for individuals and communities which extends beyond the destruction of artifacts and practices, but it affects individuals' well-being, identities and memories and compromise their future. This has led to an increasing knowledge of the close relationship between cultural heritage and human rights. Recognizing this means also acknowledging the human dimension of cultural genocide and endorsing the existence of "a right of access to and enjoyment of cultural heritage as part of international human rights law."[1050] In practice, this is revisable in the Commentary on Article 15(1) of ICESCR set out by the UN Committee on Economic, Social and Cultural Rights that has underlined "the right of everyone, individually or in association with others or within a community or group (...) to have access to their own cultural and linguistic heritage and to that of others", "the obligations to respect and protect cultural heritage in all its forms" and to "respect and protect cultural heritage of all groups and communities".[1051] This was also emphasized by the Special Rapporteur which stated that speaking of cultural heritage in the context of human rights means considering cultural heritage in all its aspects.[1052]

Undoubtedly, the growing interconnectedness of international human rights law and international criminal law are providing important developments in the recognition of the cultural component of genocide. This close connection is revisable in Declaration on the Prevention of Genocide set out by the Committee on the Elimination of Racial Discrimination (CERD)[1053], a human rights

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[1047] *Declaration on Race and Racial Prejudice*, General Conference of the United Nations Educational, Scientific and Cultural Organization, 27 November 1978.
[1048] Ibidem, Art. 5.
[1049] S*awhoyamaxa Indigenous Community,* Separate Opinion of Judge Cançado Trindade, para. 33 in NOVIC, E., *The Concept of Cultural Genocide*, op. cit., p. 120.
[1050] UN Human Rights Council, *Report of the Independent Expert in the Field of Cultural Rights*, 21 March 2011, A/HRC/17/38, para. 78, in NOVIC, E., *The Concept of Cultural Genocide*, op. cit., p. 133.
[1051] Ibidem, para. 6 in NOVIC, E., *The Concept of Cultural Genocide*, op. cit., p. 134.
[1052] Ibidem.
[1053] *Declaration on the Prevention of Genocide,* Committee on the Elimination of Racial Discrimination (CERD), UN Doc. CERD/C/66/1, 11 March 2005, para. 3.

instrument with the aim of establishing some indicators able to determine whether there are violations of human rights and/or cultural rights which can determine a risk of genocide. The same was done through an action plan created by the UN Special Adviser on the Prevention of Genocide which aimed at detecting whether such violations could become "massive or serious".[1054] This connection between different branches of law will be fundamental in a future conceptualization of cultural genocide which will benefit from the contribution of two different legal perspectives.

4-The Recognition of the Destruction of Cultural Heritage as Cultural Genocide: The Prosecutor v. Al Mahdi

The Prosecutor v. Ahmad Al Faqi Al Mahdi[1055] (hereinafter Al Mahdi) case is emblematic since it demonstrated the commitment of the international community to provide justice to cultural crimes. As a matter of fact, at the moment of writing this represents the sole example in which an act of destruction of the cultural heritage as a war crime has taken center stage in a case held in front of the ICC.

The case was referred to the ICC on 18th July 2012[1056] on behalf of the Malian Government.[1057] After an admission of guilt made by the indicted in Trial Chamber VIII, on 27th September

[1054] "Report of the Secretary-General on the implementation of the Five Point Action Plan and the activities of the Special Adviser of the Secretary-General on the Prevention of Genocide", UN Secretary-General, A7HRC/7/37, 18 March 2008.
[1055] *The Prosecutor v. Ahmad Al Faqi Al Mahdi,* Judgement and Sentence, Trial Chamber, ICC, op. cit.
[1056] ELLIS, M.S., "The ICC's Role", op. cit., p. 25.
[1057] Mali ratified the Rome Statute on 16 August 2000. Thus, as a State party to the Statute it could refer the case to the ICC.

2016[1058]pursuing Article 65 of the ICC Statute,[1059] Al Mahdi was convicted of war crimes for having intentionally attacked protected cultural objects, thus acting in violation of Article 8(2)(iv) of the Statute which includes under the label of war crimes intentional "attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives.[1060] This represented the first time in which Article 8(2)(iv) was applied and in which the Court delivered a judgement exclusively related to a crime related to deliberate attacks toward protected cultural heritage.[1061]

The facts relate to the armed conflict which broke out in Mali in January 2012. In the conflict two factions were involved. On one side, the Malian armed forces and on the other side the Islamic rebels Ansar Dine and Al-Qaeda in the Islamic Maghreb (usually referred to with the acronym AQIM). [1062] The latter gained control over the territory of Timbuktu, in the northern part of Mali where they imposed their religious and political edicts, an Islamic police force and tribunal[1063], a media emission, and a morality brigade called the *Hesbah,*[1064] an institution responsible for the enforcement of the Islamic law for which Al-Mahdi assumed the role of the head from April to September 2012.[1065] He was appointed by Asnar Dine, the group of which he became a member, to provide guidance and advice to the tribunal due to his expertise in religious matters. As a matter of fact, Al-Mahdi possessed extensive knowledge in Islam having himself received an education based on Quran teachings which led him toward a comprehensive understanding of its content.[1066] Al-Mahdi was also in charge of monitoring the mausoleums and the cemeteries of Timbuktu. These religious sites hold significant religious and cultural value and are for this reason deeply intertwined with the life of the local people.[1067] They served both as places of prayer and pilgrimage from people who reach them from and outside Mali.[1068] The purpose of this monitoring was to prevent people from continuing these practices.

[1058] The Chamber was constituted on the admission of guilt which was made during the Trial which was held between 22nd and 24th August 2016. See as reference STEWART, D. P., "International Decisions", *The American Society of International Law*, 2017, p. 126.
[1059] ICC Statute, op. cit., Art. 65. The Article in object sets out the procedural measures related to the admission of guilt.
[1060] ICC Statute, op. cit., Art. 8(2)(iv).
[1061] WIERCZYŃSKA, K., JAKUBOWSKI, A., "Individual Responsibility", op. cit., p. 696.
[1062] Ibidem.
[1063] STEWART, D. P., "International Decisions", *The American Society of International Law*, 2017, p. 126.
[1064] *The Prosecutor v. Ahmad Al Faqi Al Mahdi,* Judgement and Sentence, Trial Chamber, ICC, op. cit., para. 31.
[1065] Ibidem, para. 33.
[1066] Ibidem, paras. 9 and 32.
[1067] Ibidem, para. 34.
[1068] STEWART, D. P., "International Decisions", *The American Society of International Law*, 2017, p. 131.

The situation exacerbated in June 2012 when the leaders of the armed groups decided to proceed with the destruction of the religious sites. After an initial reluctance, Al-Mahdi consciously agreed and intentionally participated to the attacks carried out between around 30th June and 11 July 2012.[1069] He arranged the logistic, provided instructions and necessary tools to carry out the attack, and actively participated in the attacks which involved the destruction of ten religious sites, which were not military objectives and that were all UNESCO World Heritage protected sites, with the sole exception of the Sheikh Mohamed Mahmoud Al Arawani Mausoleum.[1070] It must be underlined that there are no provisions within the ICC Statute which expressly requires that a cultural object must be officially recognized as such by UNESCO. However, their recognition is frequently used by Courts and Tribunals as a significant and contributing factor to indicate that the cultural object requires specific legal protection.[1071] By specifying this the Chamber acknowledges the value of the cultural property that has been destroyed, and how its destruction affects the international community at large. As a matter of fact, after gathering the testimonies of P-431 (a Malian expert in cultural matters) and P-151 (a UNESCO witness),[1072] the Chamber recognized that "the targeted buildings were not only religious buildings but had also a symbolic and emotional value for the inhabitants of Timbuktu is relevant in assessing the gravity of the crime committed."[1073]

After having been arrested on 18th September 2015, the ICC Office of the Prosecutor on 17th December 2015 charged the indicted for violations to Article 8(2)(e)(iv).[1074] While the final judgment was delivered by the Chamber VIII of the ICC held on 27th September 2016 after Al-Mahdi admission of guilt. The Chamber recognized that considering the *modus operandi* through which the attacks have been carried out, Al-Mahdi acted with intention. For the same reason, following Article 25(3)(a) of the Statute[1075] the Chamber defined him as a co-perpetrator, considering that this definition "would fully and accurately reflect the Accused's individual criminal responsibility."[1076] The Chamber, after having evaluated the aggravating and mitigating

[1069] *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Judgement and Sentence, Trial Chamber, ICC, op. cit., para. 31.
[1070] Ibidem, para. 39.
[1071] STEWART, D. P., "International Decisions", *The American Society of International Law*, 2017, p. 131.
[1072] *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Judgement and Sentence, Trial Chamber, ICC, op. cit., para. 78.
[1073] Ibidem, p. 79.
[1074] Ibidem, paras. 1 and 2.
[1075] ICC Statute, op. cit. Art. 25(3)(a). The Article in object provides that "in accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: (a) commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible.
[1076] *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Judgement and Sentence, Trial Chamber, ICC, op. cit., para. 59.

factors, convicted Al-Mahdi of war crime for having attacked and destroyed protected sites, violating Article 8(2)(e)(iv) and 25(3)(a) and sentenced Al-Mahdi to nine years of imprisonment.[1077]

The judgement of Al-Mahdi can be considered a landmark case since it represents the first instance in which the Court has found an individual guilty of having deliberately attacked and destroyed protected cultural property. For the purposes of the present analysis, this case acquires importance for possible future legal proceedings against ISIS members for the attacks toward the Yazidi cultural heritage, and more in general for providing a more efficient enforcement of justice concerning cultural crimes that are frequently associated with armed conflicts but that to date have been rarely addressed by international tribunals. The Chamber itself outlined how the existing corpus of case law concerning attacks toward culture provides "insufficient guidance", outlining how the available jurisprudence of the ICTY is limited.[1078] The reasons for this limitation is that the applicable laws under the ICTY jurisdiction were mainly focused on the "destruction and willful damage"[1079] and thus on the consequences rather than on the attack on cultural objects. The scarcity of legal precedents provided an incomplete analytical framework for prosecuting such crimes.

However, if on one side the guilty plea of the indicted was considered by the Court as a mitigating factor since contributed to the rapid resolution of this case, thus "saving the Court's time and resources and relieving witnesses and victims of what can be a stressful burden of giving evidence in Court"[1080] on the other it was a limiting factor. The length of the proceedings amounted to seven months, a too limited time to provide for instance specific criteria to determine the historical or religious significance of a specific site. Apart from relying on Article 8(2)(e)(iv), the Chamber did not engage in an in-depth analysis about the specific legal standards to confirm the status of a specific cultural site that could have been useful for future cases, being the importance or the value attached to a particular cultural site frequently based on subjective rather than objective criteria.

However, it provided a deep contribution to counteract future impunity of individuals. Some more elements are worthy of attention. First, the Court recognition of the value of cultural heritage, for the community involved and for the humanity at large. Notably, the Court used the recognition of the multiplicity of the victims as a parameter to recognize the gravity of the crime.[1081] Secondly,

[1077] Ibidem, p. 49.
[1078] Ibidem, para. 16.
[1079] Ibidem. The Court refers to Art. 3(d) of the ICTY Statute which results to be too limited.
[1080] Ibidem, para. 100.
[1081] STEWART, D. P., "International Decisions", *The American Society of International Law*, 2017, p. 128.

the statements of the ICC Prosecutor Fatou Bensouda that seem an implicit recognition of the crime of cultural genocide. As a matter of fact, in reference to the cultural crimes committed in Mali she argued that destroying Timbuktu cultural heritage means "to erase an element of collective identity built through the ages it is to eradicate a civilization's landmark. It is the destruction of the roots of an entire people, which irremediably affects its social attitudes, practices and structures."[1082] Furthermore, she considered those acts as "a profound attack on the identity, the memory and, therefore, the future of entire populations" by affecting profoundly and irremediably its social practices and structures."[1083] Furthermore, after the destruction of the mausoleums she pointed out how "it became impossible for the inhabitants of Timbuktu to devote themselves to their religious practices [...] which were deeply rooted in their lives [...] and signified the deepest and most intimate part of a human being: faith."[1084]Through these statements Judge Bensouda pointed out the inextricable link between the community and its culture and the gravity of the acts perpetrated. In light of the analysis carried out it can be stated that based on the jurisprudence provided and the interpretation of Judge Bensouda the crimes perpetrated inevitably cause consequences that fall under provision (c) of Article II of the Genocide Convention. Furthermore, the Court considered the emotional value[1085] that the mausoleums had and how their destruction psychologically killed the community and used it as a further element to assess the gravity of the crime. It can be stated that the recognition of the mental harm caused falls under provision (b) of Article II of the Genocide Convention.

This was a further proof of the importance of recognizing the cultural annihilation of a group as a genocidal act since it inevitably leads to the annihilation of the group itself. The present case law has demonstrated the urgency of providing justice to cultural crimes which will be possible only through the inclusion of the cultural component within the *actus reus* of Article II of the genocide convention or through a proper legal conceptualization of the crime of cultural genocide. The case is pivotal for promoting the development of a judicial culture that would guarantee justice for the communities whose cultural heritage is under threat, and it would be a deep

[1082] *The Prosecutor v. Ahmad Al Faqi Al Mahdi,* Statement of the Prosecutor of the International Criminal Court, International Criminal Court (ICC), ICC-01/12-01/15, 22 August 2016 in ELLIS, M.S., "The ICC's Role", op. cit., p. 29.
[1083] Ibidem.
[1084] ICC Office of the Prosecutor, "Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at the Opening of the Confirmation of Charges Hearing in the Case Against Ahmad Al-Faqi Al Mahdi", 1 March 2016 in PINTON, S., "The ICC Judgement in Al Mahdi: Heritage Communities and Restorative Justice in the International Criminal Protection of Cultural Heritage", Seattle Journal for Social Justice, 2020, p. 356.
[1085] *The Prosecutor v. Ahmad Al Faqi Al Mahdi,* Judgement and Sentence, Trial Chamber, ICC, op. cit., para. 79.

achievement for the international community as a whole being "cultural heritage the mirror of humanity".[1086]

[1086] PINTON, S., "The ICC Judgement in Al Mahdi", op. cit., p. 357.

Conclusion

The thesis has proposed a comprehensive analysis of the concept of cultural genocide within the realm of international law. Through the examination of its legal taxonomy, and the analysis of the case law, it wanted to emphasize the evolving and ambiguous nature of genocide itself that with the passage of time is increasingly incorporating the cultural component as a possible cause of destruction of a specific group. To this end, the thesis wanted to demonstrate that while the crime of genocide has traditionally been associated with the physical destruction, the annihilation of a particular group can manifest just as profoundly through the deliberate eradication of its culture.

The thesis had a twofold aim. First of all, it wanted to underline how the concept of cultural genocide has never been completely disregarded as a possible crime, despite its exclusion from different legal instruments. Proposals concerning the introduction of the cultural component in specific provisions to encapsulate within already existing international law instruments or its conceptualization as a crime of its own have been advanced multiple times. As pointed out throughout the thesis, although negative outcomes that have been reached up to this moment, it is undeniable that developments have been made. Secondly, and connected with the first aim is to provide evidence at the practical level, and thus through the available jurisprudence of the International Criminal Court and the International Criminal Tribunals that the physical element is not a necessary requirement to criminalize specific acts as genocidal. The case law has resulted pivotal in this sense to show the willingness of the Courts in expanding the *actus reus* of genocide to include the cultural component.

The path towards this recognition, as elucidated in the first chapter, has been fraught with challenges, complexities, and ambiguities. From the origins of the term – which dates to 1944 when Raphael Lemkin conceptualized it and introduced it into his seminal work "Axis Rules"[1087] –, to its fluctuating presence within the Genocide Convention[1088] and subsequent human rights instruments, it has been traced the intricate legal taxonomy of cultural genocide from its inception to its contemporary relevance. Raphael Lemkin was the first in 1944 to set out eight techniques of cultural genocide[1089] and proposed a comprehensive and multi-layered approach which influenced the future developments in this field. Its influence is revisable in UNGA Resolution 180(III)[1090] which created the basis for creating the draft of the Genocide Convention. The

[1087] LEMKIN, R., *Axis Rule in Occupied Europe*, op. cit.
[1088] Genocide Convention, *General Assembly*, 1948, A/RES/3/260, op. cit.
[1089] NOVIC, E., *The Concept of Cultural Genocide*, op. cit., pp. 18-19.
[1090] UN General Assembly, *Draft Convention on Genocide*, A/RES/180, op. cit.

analysis of the preparatory works of the Genocide Convention, of the inclusion of the cultural component in the first draft Article and its partial exclusion form the final text is pivotal. The aim was to point out first of all how the partial exclusion was the result of the prevalence of the interests of States more than a denial of the disastrous effects that the attacks toward culture can have. Secondly, it has been pointed out how the final outcome is an ambiguous article in which traces of the initially included cultural genocide have been preserved though provision (e), but also provisions (b) and (c) raise doubts as it has emerged multiple times and through different cases analyzed in the present work. The Prosecutor v. Mladic and Karadzic[1091] and Jorgic case[1092] are only two of the multiple cases that have been cited to demonstrate how Courts have frequently made the destruction of cultural elements fall under the offence of genocide. The analysis then proceeded by investigating the developments of cultural genocide in other legal instruments. Notably, draft Article 7 of the UNDRIP[1093] has been analyzed since it is frequently and wrongly considered as an unsuccessful evolution of the recognition and protection of cultural rights. For this reason, it has been underlined how cultural genocide and ethnocide have not been erased but substituted with the concept of "forced assimilation", used since Lemkin's conceptualization interchangeably with cultural genocide.

The second chapter has introduced the case law. The discourses concerning the evolution of the concept of cultural genocide and the importance of providing a legal conceptualization of this crime has been applied to the experience of the Yazidi minority. The Yazidis, a heterodox minority located in the areas of Iraq, Turkey, Syria, and Iran[1094] has been victim of heinous attacks by the Islamic States which has systematically targeted its members both physically and culturally. The analysis proceeded by presenting the main actors involved and a focus on the Yazidi religion, used as an expedient at the basis for the genocidal campaigns experienced by the minority. In absence of a legal codification of cultural genocide, the chapter, after having ascertained the fact that Yazidis can be considered a protected group under international law and ISIS cannot be classified as a State, has demonstrated how the attacks perpetrated against the minority can fall under Article II of the Genocide Convention. However, for the purposes of the

[1091] *Karadžić & Mladić Case,* (Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence), op. cit.
[1092] *Jorgić Case*, Trial Judgement, Higher State Court of Dusseldorf, op. cit.; *Jorgić Case*, Appeals Judgment, Federal Court of Justice, 3StR 215/98, 30 April 1999; *Jorgić v. Germany*, European Court of Human Rights, App. No. 74613/01, 12 July 2007.
[1093] United Nations Declaration on the Rights of Indigenous Peoples: resolution adopted by the General Assembly, *UN General Assembly,* op. cit.
[1094] ALLISON, C., "The Yazidis", *Oxford Research Encyclopedia of Religion*, *op. cit.*

present analysis, the chapter has focused on the intent of ISIS of erasing the culture of the group with the precise intent of destroying the group itself.

Particular attention has been devoted to the crime of rape. Following the case law, notably the Stakic and the Akayesu cases, it has been demonstrated how rape fall under Article II(b) for the psychological consequences it inflicts on the victims, but also under provision (c) since it prevents the continuity of the group, being membership determined by the identity of the father. The attention then focused on provision (e) referred to the forced transfer of children to another group. The provision is applied to the practice of ISIS of transferring girls in the headquarters to register them and prepare them to become sex workers; and the transfer of young boys in schools and training camps to eradicate them from their culture. Provisions (b), (c) and (e), as previously explained, represent the focus of the analysis since they do not explicitly consider the physical element as an essential element to classify some actions as genocidal, thus endorsing the fact that the attacks which target the culture of a group can fall under the genocidal label.

The third chapter focused on crime of rape. It has been demonstrated how. After tracing the evolution of the concept of rape through legal lens, and analyzing how different branches of international law, namely international humanitarian, human rights and criminal law have implemented legal instruments to protect victims and punish the perpetrators, the chapter provided the basis to answer the question of whether rape can be considered part of cultural genocide. The Akayesu case has been used for the evolutive interpretation that the Court has provided. In this judgement rape has been made to fall under Article II(b) of the Genocide Convention while clarifying that the harm does not need to be "permanent and irremediable".[1095] This creates a legal precedent that can be used in the future to prove that the physical element is not necessarily required. The Court made rape also to fall under provision (d) specifying that measures to prevent birth can be physical but also mentally. The Court stated that "rape amounts to genocide as any other act"[1096] provided that these acts are perpetrated with the intent to destroy the group. Once again, the crime of rape is then associated with the experience of the Yazidi women.

The fourth and last chapter focused on the attacks toward the tangible and intangible cultural heritage. After providing a definition of cultural heritage from a legal perspective, the analysis concentrated on the main international legal instruments for the protection and preservation of culture. As this chapter extensively examined, the Islamic State orchestrated a harrowing genocidal campaign that targeted the Yazidi community's cultural heritage, encompassing both

[1095] *The Prosecutor v. Jean-Paul Akayesu*, op. cit. para. 524.
[1096] *The Prosecutor v. Jean-Paul Akayesu*, Trial Judgement, ICTR, op. cit., para. 731.

tangible and intangible aspects. This concluding chapter serves as a culmination of the research. It sheds light on how these heinous acts align more fittingly with the parameters of genocide. Furthermore, it underscores the necessity of eventually classifying these atrocities as cultural genocide should the legal framework evolve to encompass this perspective. Moreover, it outlined how it is paramount to recognize that the devastation inflicted by the Islamic State extends beyond the physical obliteration of cultural sites and artifacts. It extends to the deliberate erasure of intangible heritage practices, which creates the social fabrics of a community, facilitating the transmission of traditions, the expression of identity, and the nurturing of a sense of belonging.

As demonstrated throughout this study, cultural genocide stands as a poignant reminder of the profound impact that the intentional destruction of a group's heritage, traditions, and identity can have on both individuals and entire communities. The recognition of cultural genocide as a distinct form of atrocity is still far, but it is important to underline how this would surely be pivotal to reshape the landscape of international law, drawing attention to the importance of safeguarding cultural diversity and the fundamental rights of all peoples.

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