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Citation: Zammit Borda, A. (2024). Putting Reproductive Violence on the Agenda: A Case Study of the Yazidis. *Journal of Genocide Research*, 26(1), pp. 94-114.
doi: 10.1080/14623528.2022.2100594

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Permanent repository link: <https://openaccess.city.ac.uk/id/eprint/28375/>

Link to published version: <https://doi.org/10.1080/14623528.2022.2100594>

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Putting Reproductive Violence on the Agenda: A Case Study of the Yazidis

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ABSTRACT

Reproductive violence has been documented in many conflicts, even though it may not have been labelled as such. Nevertheless, there is no established definition of reproductive violence in international criminal law and practice. While acts of reproductive violence have been prosecuted as crimes against humanity, there have not yet been any successful international prosecutions as genocide. This article will use the 2014 genocide against the Yazidis as a case study to examine the knowledge and accountability gaps that arise from the lack of definition of reproductive violence in the current state of play. It argues that formally defining reproductive violence is important not just for fair labelling and to fulfil the principle of legality but, most importantly, from the perspective of the victims, to accurately characterize the full nature of the harm inflicted on them.

ARTICLE HISTORY



Received 14 March 2022
Accepted 1 July 2022

KEYWORDS

Reproductive violence;
sexual violence; genocide;
crimes against humanity;
Yazidis

Introduction

In the early hours of 3 August 2014, Islamic State of Iraq and the Levant (ISIL / Daesh) fighters laid siege to the Sinjar region of northern Iraq, which was home to the majority of the world's Yazidi population.¹ Several reports of atrocities, including of killings, rape and sexual and gender-based violence began to emerge and to make international headlines. Some of the reported atrocities appeared to be specifically targeting the reproductive capacity of the Yazidis; however, these were usually labelled as acts of sexual violence.² In one case, for instance, an ISIL "doctor" sat on the stomach of a 19-year-old pregnant Yazidi woman aiming to kill her unborn child, saying, "this baby should die because it is an infidel; I can make a Muslim baby."³ This article will focus on the definition and labelling of reproductive violence in the context of international crimes, focusing especially on the 2014 genocide

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¹ United Nations Human Rights Council and Independent International Commission of Inquiry on the Syrian Arab Republic, "They Came to Destroy: ISIS Crimes Against the Yazidis," 15 June 2016, para. 1.

² For an exception, see Rukmini Callimachi, "To Maintain Supply of Sex Slaves, ISIS Pushes Birth Control," *The New York Times*, 12 March 2016, sec. World, <https://www.nytimes.com/2016/03/13/world/middleeast/to-maintain-supply-of-sex-slaves-isis-pushes-birth-control.html>.

³ United Nations High Commissioner for Human Rights, "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," 27 March 2015, para. 39.

against the Yazidis as a case study. As will be discussed, while acts of reproductive violence have started being prosecuted as crimes against humanity, there have not yet been any successful international prosecutions as genocide. This may in part stem from the lack of a clear recognition of this type of violence as separate and distinct category.

Reproductive violence in the context of mass atrocities has a long history. The Nazis, for instance, notoriously undertook forced sterilization in concentration camps and, in the former Yugoslavia, reports emerged of forced pregnancy being undertaken in “rape camps.”⁴ This subject is not, however, just of historic interest. Acts of reproductive violence have been documented in many conflicts, even though they may not have been labelled as such.⁵ In recent times acts of reproductive violence have been committed, amongst others, against the Yazidis, as this article will discuss, and against the Uyghurs in China.⁶

This article is organized in two parts. The first part will consider the lack of attention to acts of reproductive violence in international criminal justice. It will argue that, in part because of the lack of a formal definition of this category of violence, acts of reproductive violence have generally been mislabelled as (peripheral acts of) sexual violence⁷ or they have been overlooked altogether. The article then considers some of the tensions around agreeing a formal definition of reproductive violence. It argues that, in spite of such tensions, it would be important to define and recognize reproductive violence as a distinct category of violence that seeks to assert ownership and domination over the reproductive capacity of people and groups, often in the service of an ideology of racial or ethnic superiority. In the second part, the article will then focus on the genocide committed against the Yazidis as a case study, shedding more light on the patterns of reproductive violence that were committed against this protected group since August 2014.

The Lack of Attention to Reproductive Violence in International Criminal Justice

As Grey and Altunjan have noted, there is no established, formal definition of reproductive violence in international criminal law (ICL) and practice, and the term is only starting to be used by scholars and practitioners in this field.⁸

⁴ Tanja Altunjan, *Reproductive Violence and International Criminal Law*, 1st ed., 2021 edition (T.M.C. Asser Press, 2021), 81, 139; Klejda Mulaj, “Constructions of Genocide Denial and Remembrance: Fractured National Identity in Postgenocide Bosnia,” in *Postgenocide: Interdisciplinary Reflections on the Effects of Genocide*, ed. Klejda Mulaj (Oxford, New York: Oxford University Press, 2021), 174; Beverly Allen, *Rape Warfare: The Hidden Genocide in Bosnia-Herzegovina and Croatia* (Minneapolis: University Of Minnesota Press, 1996), 63; Anne Tierney Goldstein, *Recognizing Forced Impregnation as a War Crime Under International Law* (The Center for Reproductive Law & Policy, 1993).

⁵ Rosemary Grey, “Reproductive Crimes in International Criminal Law,” Legal Studies Research Paper Series (The University of Sydney Law School, August 2020), 6, <http://ssrn.com/abstract=3563920>.

⁶ Adrian Zenz, *Sterilizations, IUDs, and Mandatory Birth Control: The CCP’s Campaign to Suppress Uyghur Birthrates in Xinjiang* (The Jamestown Foundation, June 2020), <https://jamestown.org/product/sterilizations-iuds-and-mandatory-birth-control-the-ccps-campaign-to-suppress-uyghur-birthrates-in-xinjiang/>; Bill Bostock, “China is Forcibly Sterilizing Uighur Women and Giving Them Unwanted Abortions in a Mission to Purge the Muslim Minority, Report Says,” *Business Insider*, <https://www.businessinsider.com/china-forcibly-sterilizing-uyghur-women-xinjiang-abortions-contraception-ap-2020-6> (accessed 13 October 2021); Loretta Ross, *Reproductive Justice: An Introduction* (Oakland, California: University of California Press, 2017), 14.

⁷ While there are differing definitions of “sexual violence,” and this term has not been sufficiently defined, it is used in this article to refer to “to violent acts committed with a sexual component, i.e. violence exercised in a sexualized manner.” See Altunjan, *Reproductive Violence and International Criminal Law*, 7; Women’s Initiatives for Gender Justice, “Sexual Violence (Un)Defined,” *Women’s Initiatives for Gender Justice*, <https://4genderjustice.org/home/campaigns/defining-sexualviolence/sexual-violence-undefined/> (accessed 22 June 2022).

⁸ Grey, “Reproductive Crimes in International Criminal Law,” 3; Altunjan, *Reproductive Violence and International Criminal Law*, 97.

In the context of the crime of genocide, acts of reproductive violence have been criminalized as measures intended to prevent births under Article 6(d) of the Rome Statute of the International Criminal Court (ICC), which mirrors the language of Article II(d) of the Genocide Convention.⁹ In the context of crimes against humanity and war crimes, even though the Rome Statute of the ICC has recognized and defined two discrete acts of reproductive violence, namely “forced pregnancy” and “enforced sterilization,” those crimes are usually categorized as sexual violence.

While, therefore, ICL instruments have not yet formally recognized reproductive violence as a distinct category of harm, the legal scholarship has put forward some helpful definitions.¹⁰ The definition put forward by Grey, and further elaborated by Altunjan, is particularly pertinent in this regard. Grey has defined reproductive violence as:

violence which involves a violation of reproductive autonomy or which is directed at people because of their reproductive capacity.¹¹ [Definition A]

The relative strengths and limitations of this definition will be considered in more detail below. However, this section will firstly consider the implications of the lack of a formal definition of reproductive violence. It will then go on to consider some of the tensions around agreeing one.

Several consequences flow from the fact that, in the current state of play, there is no formal definition or explicit recognition of reproductive violence as a specific type of harm in ICL instruments. Both in principle and practice, the harm arising from reproductive violence is not sufficiently recognized and distinguished from other categories of violence, most notably, sexual violence. This, in turn, leads to both knowledge and accountability gaps. By mislabelling acts of reproductive violence as instances of sexual violence, those acts continue to be seen as peripheral to other, more established sexual crimes, such as rape, and may not receive the systematic attention that they deserve.

This approach may also lead to an accountability gap and, as Altunjan has argued, the issue of reproductive violence “has been conspicuous by its absence in international criminal prosecutions, even in situations where such violence had allegedly taken place.”¹² Indeed, it is notable that acts of reproductive violence have remained largely marginal to the practice of international criminal courts.¹³ For instance, although references to forced pregnancy emerged in the context of the International Criminal Tribunal for the former Yugoslavia (ICTY),¹⁴ the prosecution did not bring specific charges and the issue of reproductive violence was not seriously argued at that Tribunal.¹⁵ According to a

⁹ Similar language also appeared in the statutes of the International Criminal Tribunal for the former Yugoslavia, and for Rwanda.

¹⁰ Altunjan, *Reproductive Violence and International Criminal Law*, 97.

¹¹ Rosemary Grey, “The ICC’s First ‘Forced Pregnancy’ Case in Historical Perspective,” *Journal of International Criminal Justice* 15, no. 5 (1 December 2017): 906, <https://doi.org/10.1093/jicj/mqx051>; Altunjan, *Reproductive Violence and International Criminal Law*, 98.

¹² Altunjan, *Reproductive Violence and International Criminal Law*, 97; Alyssa C. Scott, “Prosecution of Reproductive Crimes Committed during the Halabja Attack in the Iraqi High Tribunal,” *Publicist* 6, no. 1 (2010): 11, 27.

¹³ Grey, “Reproductive Crimes in International Criminal Law,” 2.

¹⁴ See S. Verrall, “The Picture of Sexual Violence in the Former Yugoslavia Conflicts as Reflected in ICTY Judgments,” in *Prosecuting Conflict-Related Sexual Violence at the ICTY*, ed. Baron Serge Brammertz and Michelle Jarvis (Oxford, New York: Oxford University Press, 2016), 328; Grey, “The ICC’s First ‘Forced Pregnancy’ Case in Historical Perspective,” 916.

¹⁵ William A. Schabas, *Genocide in International Law: The Crime of Crimes* (Cambridge University Press, 2009), 199.

former ICTY prosecutor, the reasons for that omission were not clear.¹⁶ This may have been, however, because acts of reproductive violence were not considered sufficiently distinct, and therefore important, to merit specific prosecution.

In ICL, depending on the context, acts of reproductive violence may constitute underlying acts of genocide, crimes against humanity and/or war crimes. The language of Article II(d) of the Genocide Convention that deals with reproductive violence (“imposing measures intended to prevent births within the group”) has been adopted verbatim by various international criminal courts and tribunals, including the ICC. However, it has not yet formed the basis of a successful international prosecution for genocide.¹⁷ At a domestic level, however, acts of reproductive violence were prosecuted as genocide, *inter alia*, in the *Eichmann* trial. In that trial, the District Court of Jerusalem convicted Eichmann for measures he took “calculated to prevent births among Jews, by directing that births be banned and pregnancies terminated among Jewish women in the Terezin Ghetto, with intent to exterminate the Jewish People.”¹⁸

In the context of crimes against humanity and war crimes, the ICC Trial Chamber in *Ongwen* was called, for the first time, to consider charges of forced pregnancy. The Chamber delivered its judgment in February 2021, entering convictions on this count.¹⁹ While this case served to draw attention to the phenomenon of forced pregnancy in armed conflict, there still remains much work to be done to “surface” and correctly label other acts of reproductive violence.

This is so, in part, because of a reluctance of some States to distinguish acts of reproductive violence from sexual violence. This emerged clearly during the arduous negotiations over the crime of forced pregnancy at the Rome Diplomatic Conference for an ICC. Some States argued that a crime of forced pregnancy was unnecessary because its elements were already covered by the crimes of rape and unlawful detention in the Statute.²⁰ Other States, however, supported by women movements and feminist legal scholars, pushed for an explicit recognition and criminalization of forced pregnancy as a separate crime.²¹ But even after the crimes of forced pregnancy and enforced sterilization were adopted, the prevailing approach has been to treat them as acts of sexual violence. For instance, the Office of the Prosecutor of the ICC has used the term “sexual

¹⁶ Verrall, “The Picture of Sexual Violence,” 329.

¹⁷ Helen Fein, “Genocide and Gender: The Uses of Women and Group Destiny,” *Journal of Genocide Research* 1, no. 1 (1 March 1999): 56; While this article focuses on individual criminal responsibility, allegations of reproductive violence were also submitted to the International Court of Justice in the context of State responsibility. However, the Court found that there was insufficient evidence to sustain those claims. See ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Judgment 26 February 2007). More recently, an informal tribunal, the Uyghur Tribunal, made preliminary findings of genocide on the basis of reproductive violence, in the context of State responsibility. However, at the time of writing, the full judgment had not yet been released. See Uyghur Tribunal, *Preliminary Judgment* (9 December 2021).

¹⁸ *District Court of Jerusalem, Israel, Attorney General v. Adolf Eichmann*, No. Criminal Case No. 40/61 (Judgment 11 December 1961). While the Court was applying a domestic law, in relation to the crime of genocide, this law mirrored the language of the Genocide Convention.

¹⁹ The Trial Chamber noted: “This is the first time forced pregnancy is to be considered by a trial chamber of this Court.” See International Criminal Court, *The Prosecutor v. Dominic Ongwen*, No. ICC-02/04-01/15 (Trial Judgment 4 February 2021). At the time of writing, this case was being appealed: see International Criminal Court, “Ongwen Case: Hearing on the Defence Appeals against Verdict and Sentence – Practical Information,” *International Criminal Court*, <http://www.icc-cpi.int/news/ongwen-case-hearing-defence-appeals-against-verdict-and-sentence-practical-information> (accessed 22 June 2022).

²⁰ International Criminal Court, *The Prosecutor v. Dominic Ongwen* paragraph 2719.

²¹ Altunjan, *Reproductive Violence and International Criminal Law*, 210.

crimes” to refer to all crimes listed in Articles 7(1)(g),²² 8(2)(b)(xxii),²³ and 8(2)(e)(vi)²⁴ of the ICC Statute, which include reproduction-related crimes.²⁵ This approach is also frequently reflected in the legal scholarship. For instance, in their seminal work on women and armed conflict, Gardam and Jarvis provide a list of acts of sexual and gender violence that also contains acts of reproductive violence.²⁶ Some other works of mainstream legal scholarship have, however, begun to distinguish reproductive violence as a separate category.²⁷

A concern with avoiding “redundancy” is, therefore, one factor for which some States have been reluctant to recognize reproductive violence. Another significant factor, however, is the perceived link between reproductive violence and the highly controversial subject of reproductive rights. At least since the 1968 Teheran Declaration, the debate over reproductive rights in the international arena has been a polarizing subject,²⁸ or as Freedman and Isaac put it, “a highly explosive issue.”²⁹ In such an environment, neither side wants to be seen as making concessions, anxious that this may lead to a slippery slope. While, in principle, reproductive violence in the context of international crimes may be seen as a separate issue from the broader debate on reproductive rights, some States seem to take the view that the two are closely linked.

It is not surprising that during the Rome Statute negotiations, it was discussions around the crime of forced pregnancy that elicited “the harshest opposition and for which compromise could only be found in the last minute.”³⁰ One of the key anxieties of the Holy See and other States that originally opposed forced pregnancy as a distinct crime was that it would constitute “a threat to domestic laws criminalizing abortions, or [they] feared that it would establish an international right to abortion.”³¹ In the final analysis, those fears were alleviated through, *inter alia*, the language of Article 7(2)(f) of the Rome Statute (which defines forced pregnancy as a crime against humanity) and, in particular, the inclusion of the phrase “[t]his definition shall not in any way be interpreted as affecting national laws relating to pregnancy.” While that compromise paved the way for the adoption of the crime of forced pregnancy, it would be wishful thinking to suggest that those old anxieties have today dissipated. On the contrary, they will likely be reignited in relation to attempts to formally define the category of reproductive violence and its associated

²² Namely, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.

²³ Namely, committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions.

²⁴ Namely, committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions.

²⁵ Office of the Prosecutor of the International Criminal Court, “Policy Paper on Sexual and Gender-Based Crimes,” June 2014, para. 17, <https://www.icc-cpi.int/iccdocs/otp/otp-policy-paper-on-sexual-and-gender-based-crimes-june-2014.pdf>; Altunjan, *Reproductive Violence and International Criminal Law*, 98.

²⁶ Judith Gardam and Michelle Jarvis, “Women and Armed Conflict: The International Response to the Beijing Platform for Action,” *Columbia Human Rights Law Review* 32, no. 1 (2001 2000): 12; Jane Freedman, *Gender, Violence and Politics in the Democratic Republic of Congo* (Farnham, Surrey, England ; Burlington, VT: Routledge, 2015), 62.

²⁷ See, for instance, Carsten Stahn, *A Critical Introduction to International Criminal Law* (Cambridge, United Kingdom ; New York, NY, USA: Cambridge University Press, 2018), 64.

²⁸ Grey, “Reproductive Crimes in International Criminal Law,” 9.

²⁹ L. Freedman and S. Isaacs, “Human Rights and Reproductive Choice,” *Studies in Family Planning* 24, no. 1 (1993): 20.

³⁰ Altunjan, *Reproductive Violence and International Criminal Law*, 196.

³¹ *Ibid.*, 201.

acts.³² In light of these challenges, trying to achieve consensus over a formal definition and recognition of reproductive violence in ICL instruments and practice will be “extremely difficult.”³³ Nevertheless, there are compelling reasons for pursuing that agenda.

To begin with, the argument that sexual violence already adequately captures the harms of reproductive violence is simply inaccurate. While some acts of reproductive violence (such as forced impregnation) may be closely linked to acts of sexual violence (such as rape), there is nothing “sexual” about many other acts of reproductive violence such as enforced sterilization or forced abortions – these acts are not committed in a “sexualised manner.”³⁴ The concept of reproductive violence, therefore, is *not* coextensive with sexual violence. Rather, reproductive violence is primarily concerned with violence that targets “the victim’s reproductive system, organs, process, or capacity to reproduce” and, as such, does not necessarily contain a sexual component.³⁵ As a result, while theories of conflict-related sexual violence may help shed some light on aspects of reproductive violence, there are also important limitations to their explanatory powers in this area.

For instance, one theory of sexual violence in armed conflict seeks to explain wartime rape as a “letting loose” of men’s natural desires when war releases them from the normal restrictions and rules of society and social behaviour.³⁶ At its most basic, this “sexed” theory suggests that men rape women as a means to satisfy their sexual needs.³⁷ In the context of sexual violence, this theory has been significantly criticized for being essentialist and reinforcing the idea of a natural male and female behaviour.³⁸ Moreover, its relevance to reproductive violence would appear limited, as it would not explain why certain acts that are not motivated by sexual “lust,” such as enforced sterilizations, occur.

Another theory relating to sexual violence that could shed light on aspects of reproductive violence is the concept of “militarized masculinities.” Within this theory, such violence is seen to stem from particular forms of masculinities which are encouraged by and built through militarization.³⁹ Men (and women to a lesser extent) are seen to learn violence through the militarization which produces soldiers who are ready and willing to kill the enemy and protect the nation.⁴⁰ Militarized masculinities, which are produced through the militarization of societies during conflict, are said to embody values such as male domination over women, including sexual domination, and thus encourage men to engage in acts of violence against women and, in certain circumstances,

³² This issue has most recently been brought to the fore in the US with the reported imminent overturn of the landmark *Roe v. Wade* decision, which has rekindled old anxieties: see Politico, “Exclusive: Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows,” <https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473> (accessed 21 June 2022). See also “US Prepares for Potential End of the Landmark *Roe v Wade* Ruling – Live,” *The Independent*, 21 June 2022, <https://www.independent.co.uk/news/world/americas/us-politics/roe-v-wade-abortion-ruling-2022-live-b2105617.html>.

³³ Grey, “Reproductive Crimes in International Criminal Law,” 3.

³⁴ As noted earlier, if one understands sexual violence as “violence exercised in a sexualized manner.” see Altunjan, *Reproductive Violence and International Criminal Law*, 7.

³⁵ Altunjan, *Reproductive Violence and International Criminal Law*, 9.

³⁶ Maria Eriksson Baaz and Maria Stern, *Sexual Violence as a Weapon of War?: Perceptions, Prescriptions, Problems in the Congo and Beyond*, 1st ed. (London; New York, NY: Uppsala, Sweden: Zed Books Ltd, 2013).

³⁷ Altunjan, *Reproductive Violence and International Criminal Law*, 28.

³⁸ Freedman, *Gender, Violence and Politics*, 64.

³⁹ Christine Chinkin, “Rape and Sexual Abuse of Women in International Law,” *European Journal of International Law* 5, no. 3 (1 January 1994): 328.

⁴⁰ Cynthia Cockburn, “The Continuum of Violence: A Gender Perspective on War and Peace,” in *Sites of Violence: Gender and Conflict Zones*, ed. W. Giles and J. Hyndman (Berkeley: University of California Press, 2004).

men.⁴¹ In reproductive violence, the application of militarized masculinities may be seen, for instance, in the context of forced pregnancy, where women are reduced to mere “incubators or breeders” of desired children.⁴² The act of controlling a victim’s reproductive functions is the ultimate form of domination and ownership. For instance, according to Goldstein, forcibly impregnating women during war entails a power attaching to the right of ownership, which constitutes a form of enslavement:

the forced conscription of a woman’s body to produce and incubate a child desired by a “hostile power” enslaves her as much as the forced conscription of her hands or back for that power’s war effort.⁴³

Other acts of reproductive violence may also be underpinned by such an attempt to dominate and/or assert ownership over the victim’s reproductive capacity. Acts such as forced sterilizations, mutilation of reproductive organs (including the removal of wombs), forced castration and forced abortions, for instance, whether committed against women, men or, in some instances, children,⁴⁴ all entail the imposition of the perpetrator’s power and domination over the victim’s reproductive system, organs, process, or capacity to reproduce.

Another theory of sexual violence in mass atrocity is that such violence could be used as a war strategy. Strategic rape and sexual violence in armed conflict was specifically addressed by United Nations Security Council resolution 1820 (2008), which notes that such violence may be used as a tactic of war to humiliate, dominate, instil fear in, disperse and/or forcibly relocate civilian members of a community or ethnic group.⁴⁵ According to Benshoof, strategic rape targets girls and women “to destroy, or dominate female sexual and reproductive organs, and female victims suffer distinct modes of lethality and injuries from such rapes.”⁴⁶ Eisenstein makes the point that rape as a war strategy is an “integral form of war rather than an effect of war,” and that women’s bodies are the battlefield on which this war is waged, as “murderous misogyny” is transformed into an organized military policy.⁴⁷ Several organizations, including the United Nations⁴⁸ and the International Committee of the Red Cross,⁴⁹ have developed definitions of when sexual violence in armed conflict could constitute a war strategy.

This narrative of strategic rape overlaps with the explanations of militarized masculinities, in that, for instance, “rape is seen as a strategic way to humiliate and feminise enemy men by showing them that their masculinity is not strong enough to protect their women.”⁵⁰ In relation to reproductive violence, Goldstein has noted that forced

⁴¹ Freedman, *Gender, Violence and Politics*, 55.

⁴² Goldstein, “Recognizing Forced Impregnation,” 15; Allen, *Rape Warfare*, xiii.

⁴³ Goldstein, “Recognizing Forced Impregnation,” 27–28.

⁴⁴ District Court of Jerusalem, Israel, Attorney General v. Adolf Eichmann paragraph 158.

⁴⁵ United Nations Security Council, “Resolution 1820 (2008),” 19 June 2008, Preamble.

⁴⁶ Janet Benshoof, “The Other Red Line: The Use of Rape as an Unlawful Tactic of Warfare,” *Global Policy* 5, no. 2 (2014): 2, <https://www.globaljusticecenter.net/documents/JB%20Global%20Policy%20Article.The%20Other%20Red%20Line%205.21.14.pdf>.

⁴⁷ Zillah Eisenstein, *Sexual Decoys: Gender, Race and War in Imperial Democracy*, 1st ed. (Melbourne: Zed Books, 2006), 28.

⁴⁸ See Stop Rape Now, “Analytical & Conceptual Framing of Conflict-Related Sexual Violence,” 2011, 2, <http://www.stoprapenow.org/uploads/advocacyresources/1321456915.pdf>.

⁴⁹ International Committee of the Red Cross and Red Crescent, “ICRC Frame of Reference on Sexual Violence in Armed Conflict and Other Situations of Violence” (ICRC (Geneva), 2009).

⁵⁰ Freedman, *Gender, Violence and Politics*, 65.

impregnation may be used as a strategy of war, as it is invariably done with the purpose of intimidating or coercing women.⁵¹ It may be used as a method to express contempt for its victims; it intensifies and prolongs their “physical and emotional pain and makes it more difficult for them to resume any semblance of normal life.”⁵² Other acts of reproductive violence may equally be used to intimidate or coerce their victims. In particular, forced sterilization and/or forced castration may be used as a method to humiliate, dominate, instil fear in, disperse and/or forcibly relocate the target groups or victims.

In addition to feminist theories of sexual violence, theories from ethnic and racial studies may also shed light on the phenomenon of reproductive violence in the context of mass atrocities. For instance, reproductive violence may be viewed as violence committed in the service of an ideology of racial or ethnic superiority.⁵³ As Allen notes, such an approach often reflects an ignorance about genetics.⁵⁴ Nevertheless, it may constitute, depending on circumstances, a form of ethnic cleansing (e.g. forced pregnancy with the intent of affecting the ethnic composition of any population), of “deferred” ethnic cleansing (e.g. enforced sterilization to prevent future births of a particular ethnicity) or, indeed, of genocide, when committed with the necessary intent to destroy a protected group. This point emerged clearly from the evidence during the *Eichmann* judgment that, *inter alia*, referred to a Nazi programme to sterilize the children of mixed marriages.⁵⁵ There was nothing sexual about such a programme: the violence against these children was not exercised in a “sexualized manner,” it was rather intended to prevent births within the group. Nor was there anything sexual about the programme of termination of pregnancies of women from the Kovno Ghetto and from Terezin.⁵⁶ Similarly, there was nothing sexual about Nazi interest in sterilizing “enemies of the German Reich, such as Russians, Poles and Jews,” in order to be able to exploit the working capacity of the sterilized persons, “while averting the danger that they might multiply.”⁵⁷

The harms caused by acts of reproductive violence are therefore separate and distinct from the harms of sexual violence. Certain acts of reproductive violence, such as forced pregnancy or mutilation of reproductive organs, may entail physical or psychological torture.⁵⁸ Such acts may also be used to demoralize the victims and deprive them of personal dignity and family privacy.⁵⁹ In certain circumstances, reproductive violence may also amount to a form of enslavement, particularly when women are used “as incubators or breeders of desired children.”⁶⁰ Moreover, as noted, reproductive violence may also be underpinned by extreme xenophobia and may be committed in the service of an ideology of racial or ethnic superiority, as part of the commission of genocide, crimes against humanity and/or war crimes.

In view of the specific harm of reproductive violence, continuing to label such violence as sexual in nature may be counterproductive. It may contribute to downplaying and

⁵¹ Goldstein, “Recognizing Forced Impregnation,” 16.

⁵² *Ibid.*, 14.

⁵³ *Ibid.*, 15.

⁵⁴ Allen, *Rape Warfare*, 87.

⁵⁵ District Court of Jerusalem, Israel, Attorney General v. Adolf Eichmann paragraph 158.

⁵⁶ District Court of Jerusalem, Israel, Attorney General v. Adolf Eichmann at 159.

⁵⁷ *Ibid.*, para. 158.

⁵⁸ Goldstein, “Recognizing Forced Impregnation,” 14.

⁵⁹ *Ibid.*, 14–15.

⁶⁰ *Ibid.*, 15.

obscuring the specificities of this type of violence.⁶¹ For instance, even though it has long been possible to prosecute acts of reproductive violence as crimes against humanity under catch-all clauses and more general provisions of ICL, this opportunity has rarely been seized in practice. As Grey notes, acts of reproductive violence were side-lined in *Case 002/02* at the Extraordinary Chambers in the Courts of Cambodia.⁶² Even though extensive evidence emerged of forced marriages, including where strangers were forced to engage in sexual intercourse for the purpose of reproduction – to give birth to more “workers” and “soldiers” for the State – no charges for those acts were brought.⁶³ Similarly, and as previously noted, no charges were brought at the ICTY in relation to reports of forced pregnancy in the Balkans.⁶⁴ And at the ICC, particularly in relation to its earlier cases, evidence of reproductive violence, such as of forced abortions, that emerged in the course of the *Lubanga* trial, was also not charged.⁶⁵

All of this points to the need to formally recognize reproductive violence in international criminal law and practice. This is because, as Cook and Cusack have argued, “the ability to eliminate a wrong is contingent on it first being ‘named’.”⁶⁶ Otherwise, the current situation will persist whereby acts of reproductive violence, except for those that have already been criminalized, are treated as subsidiary to other crimes.⁶⁷ Elaborating on this point, and writing in relation to forced pregnancy, the ICC Trial Chamber in *Ongwen* held:

the proper characterisation of the evil committed, that is to say, calling the crime by its true name, is part of the justice sought by the victims. It is not enough to punish it merely as a combination of other crimes (e.g. rape and unlawful detention), or subsumed under the generic “any other form of sexual violence.”⁶⁸

In its reasoning, the Trial Chamber explained that this was important to fulfil the principle of fair labelling. This principle requires a clear distinction between all types of offences, so that they may be classified, defined, and labelled in order to reflect fairly the nature and degree of seriousness of the crime.⁶⁹ It is also important to fulfil the principles of *nullum crimen sine lege* and *nulla poena sine lege*, the latter of which requires that a person shall not be punished if the law does not prescribe punishment. Coupled with requirements for specificity, certainty, foreseeability and accessibility, these principles give effect to the principle of legality.⁷⁰ Formally recognizing and defining acts of reproductive violence

⁶¹ Altunjan, *Reproductive Violence and International Criminal Law*, 3.

⁶² Grey, “Reproductive Crimes in International Criminal Law,” 2.

⁶³ Extraordinary Chambers in the Courts of Cambodia, *Case 002/02*, No. 002/19-09-2007/ECCC/TC (Judgment 27 March 2019).

⁶⁴ Altunjan, *Reproductive Violence and International Criminal Law*, 81, 139; Mulaj, “Constructions of Genocide Denial and Remembrance,” 174; Allen, *Rape Warfare*, 63.

⁶⁵ Altunjan, *Reproductive Violence and International Criminal Law*, para. 287. However, as noted, the Ongwen trial, which at the time of writing was pending appeal, was the first to buck this trend.

⁶⁶ Rebecca J. Cook and Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (University of Pennsylvania Press, 2011), 39.

⁶⁷ Altunjan, *Reproductive Violence and International Criminal Law*, 216.

⁶⁸ International Criminal Court, *The Prosecutor v. Dominic Ongwen* paragraph 2722.

⁶⁹ Hilmi M Zawati, *Fair Labelling and the Dilemma of Prosecuting Gender-Based Crimes at the International Criminal Court* (Oxford University Press, 2014), 68; James Chalmers and Fiona Leverick, “Fair Labelling in Criminal Law,” *Modern Law Review* 71 (2008): 217.

⁷⁰ This principle is necessary to provide effective safeguards against arbitrary prosecution, conviction and punishment: see Mohamed Shahabuddeen, “Does the Principle of Legality Stand in the Way of Progressive Development of Law?” *Journal of International Criminal Justice* 2, no. 4 (1 December 2004): 1008, <https://doi.org/10.1093/jicj/2.4.1007>.

is therefore desirable, to promote adherence with the legality principle, which in turn could facilitate future prosecutions of such violence.

It is also important to formally recognize and define acts of reproductive violence from the perspective of the victims. This is because such explicit recognition would foster the specific stigmatization of reproductive violence and would enable a more accurate characterization of the full nature of the harm inflicted on them.⁷¹ This, in turn, would assist victims and their representatives seeking accountability, reparation, and truth.⁷²

It is for these reasons that it is necessary to distinguish and correctly label reproductive violence. This approach may also have important practical implications, as it would raise further awareness of this kind of violence in criminal investigations and prosecutions which, in turn, may lead investigators to look out for evidence of such violence (e.g. in victim interviews, medical records, policy documents, demographic studies and other sources).

A definition of reproductive violence should focus on the fact that such violence is intended to prevent births within the group and/or to target the victim's reproductive system, organs, process, or capacity to reproduce, and to inflict "physical or psychological injury, based on a belief that [the victim's] reproductive capacity is a resource to be commandeered for political, ideological or economic ends."⁷³ Arriving at a definition of reproductive violence and specifically enumerating the acts that fall within this category of violence is important, therefore, to explicitly recognize the unique harm entailed in those acts. As Altunjan notes, this would enhance the expressive function of ICL. It would also acknowledge the victims' experiences and highlight the unique harms they suffered.⁷⁴ It would further open up the space to address, or at least acknowledge, the specific features of this category of violence, such as its longitudinal and intergenerational impact on victims.⁷⁵ Finally, and importantly, defining and explicitly criminalizing acts of reproductive violence would open up avenues for the practical acknowledgement of victims' experiences through the instruments of victim participation at the ICC, as well as possible reparations.⁷⁶

Seeking to overcome the hesitancy of some States to agree a formal definition of reproductive violence will remain an uphill struggle. There is, however, room for cautious optimism. The arduous diplomatic work that was undertaken in relation to forced pregnancy may have helped pave the way for the criminalization of reproductive violence more generally.⁷⁷ In this respect, forced pregnancy was perhaps the most controversial of all acts of

⁷¹ Michelle Jarvis and Kate Vigneswaran, "Challenges to Successful Outcomes in Sexual Violence Cases," in *Prosecuting Conflict-Related Sexual Violence*, ed. Serge Brammertz and Michelle Jarvis (Oxford, New York: Oxford University Press, 2016), 11–12.

⁷² For a discussion of the emerging right to truth in the context of criminal accountability, see Aldo Zammit Borda, *Histories Written by International Criminal Courts and Tribunals: Developing a Responsible History Framework*, *International Criminal Justice Series* (T.M.C. Asser Press, 2021), 64, <https://doi.org/10.1007/978-94-6265-427-3>.

⁷³ Grey, "Reproductive Crimes in International Criminal Law," 5.

⁷⁴ Altunjan, *Reproductive Violence and International Criminal Law*, 214–15; Michelle Jarvis, "Overview: The Challenge of Accountability for Conflict-Related Sexual Violence Crimes," in *Prosecuting Conflict-Related Sexual Violence*, ed. Serge Brammertz and Michelle Jarvis (Oxford, New York: Oxford University Press, 2016), 2.

⁷⁵ Eithne Dowds, *Feminist Engagement with International Criminal Law: Norm Transfer, Complementarity, Rape and Consent* (Oxford; New York: Hart Publishing, 2020), 46; Nicola Jones et al., "The Fallout of Rape as a Weapon of War," June 2014, <https://www.odi.org/publications/8464-fallout-rape-weapon-war>.

⁷⁶ Altunjan, *Reproductive Violence and International Criminal Law*, 215.

⁷⁷ On the role of social pressure in international negotiations, see Giovanni Mantilla, *Lawmaking under Pressure: International Humanitarian Law and Internal Armed Conflict* (Cornell University Press, 2020), 6.

reproductive violence. And, as the Rome Statute negotiations have shown, it was possible to reach agreement. In comparison, the next step – that is, agreeing a formal definition of this category of violence and of other, discrete acts not currently criminalized – would appear to be less controversial. Other acts of reproductive violence, such as mutilation of reproductive organs, forced castration,⁷⁸ forced birth control or contraception, separation of the sexes, prohibition of marriages,⁷⁹ forced breastfeeding and forced abortions,⁸⁰ are unlikely to be viewed as posing a threat to domestic laws or customs on reproduction.⁸¹ On the contrary, these acts would likely be viewed with universal opprobrium. As a consequence, calls for their explicit recognition and criminalization are more likely to fall on sympathetic ears.

Defining Reproductive Violence

There is, therefore, value in pursuing an agenda that challenges the systematic mislabeling of acts of reproductive violence. An important aspect of that agenda would be to develop a workable definition of reproductive violence that, to the extent possible, is perceived as noncontroversial. At present, the most appealing definition in the literature is the one put forward by Grey (Definition A). In articulating her support for this definition, Altunjan makes the following observations:

[i]t does not focus solely on the objective physical effects of a violent act or solely on the perpetrators' subjective motivation for committing it. Instead, it combines these two aspects. A violent act can be considered reproductive violence in two scenarios: (1) when the act—objectively—harms the victim's reproductive capacity and thus causes a violation of his or her reproductive autonomy, or (2) when the perpetrator specifically targets the victim's reproductive capacity and thus—subjectively—intends to cause a violation of the victim's reproductive autonomy.⁸²

Altunjan notes how one of the key harms of reproductive violence is its assault on reproductive autonomy. This point was underscored several times in the *Ongwen* trial, in relation to the crime of forced pregnancy. In its judgment, the ICC Trial Chamber held that this crime is grounded in:

the woman's right to personal and reproductive autonomy and the right to family. [...] The crime of forced pregnancy depends on the unlawful confinement of a (forcibly made) pregnant woman, with the effect that the woman is deprived of reproductive autonomy.⁸³

The above statements of the ICC, emphasizing the victim's personal and reproductive autonomy and the right to family, were made in the context of forced pregnancy as a crime against humanity and/or war crime. It is notable that Definition A does a very good job in applying the emphasis on reproductive autonomy to a broader category of acts of reproductive violence. However, given the politically contentious nature of reproductive autonomy and its potential to elicit controversy amongst some States, the

⁷⁸ Altunjan, *Reproductive Violence and International Criminal Law*, 9.

⁷⁹ ICTR, *The Prosecutor v. Jean-Paul Akayesu*, No. ICTR-96-4-T (Judgment 2 September 1998).

⁸⁰ Grey, "Reproductive Crimes in International Criminal Law," 1.

⁸¹ With the exception, perhaps, of States with coercive family planning policies.

⁸² Altunjan, *Reproductive Violence and International Criminal Law*, 98.

⁸³ ICC, *Prosecutor v. Dominic Ongwen*, No. ICC-02/04-01/15 (Decision on the confirmation of charges against Dominic Ongwen 23 March 2016).

definition could arguably be rendered more acceptable by including compromise language, namely the specific intent requirement and the sentence on national laws, from Article 7(2)(f) of the Rome Statute.⁸⁴ This is because the language in that sub-paragraph represents, as the *Ongwen* Trial Chamber put it, a “delicate compromise” that was achieved after very difficult negotiations.⁸⁵ Making that hard-fought, compromise language applicable to other acts of reproductive violence, therefore, may serve to make the overall definition of such acts potentially less controversial / more appealing to States.

Slightly different considerations, however, would apply to acts of reproductive violence as underlying acts of genocide. This is because, since the adoption of the Genocide Convention in 1948, reproductive violence as genocide has been codified in an international treaty, which has received widespread acceptance and whose definition was mirrored in subsequent international instruments, such as the Rome Statute. It is therefore prudent to stick verbatim to the widely-accepted language of this Convention. This is an important point that is not sufficiently reflected in Definition A.

Taking into account the above considerations, therefore, and building on Definition A, the following extended definition of reproductive violence may be put forward:

- (a) Reproductive violence is violence intended to target the reproductive system, organs, process, or capacity to reproduce of people or groups.
- (b) In the context of the crime of genocide, it is defined as imposing measures intended to prevent births within the group.⁸⁶
- (c) In the context of crimes against humanity and/or war crimes, it is defined as violence which involves a violation of reproductive autonomy or which is directed at people because of their reproductive capacity. It may be committed with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy.
- (d) Reproductive violence encompasses, but is not limited to: forced pregnancy, forced sterilization, mutilation of reproductive organs, forced castration, forced birth control or contraception, separation of the sexes, prohibition of marriages, forced breastfeeding and forced abortions. [Definition B]

⁸⁴ Namely, “with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy.”

⁸⁵ International Criminal Court, *The Prosecutor v. Dominic Ongwen* paragraphs 2718, 2721.

⁸⁶ In *Akayesu*, the Trial Chamber further elaborated on these measures as follows: 507. [...] the Chamber holds that the measures intended to prevent births within the group, should be construed as sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages. In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group 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. 508. Furthermore, the Chamber notes that measures intended to prevent births within the group may be physical, but can also be mental. For instance, 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. See ICTR, *Prosecutor v. Jean-Paul Akayesu*, No. ICTR-96-4-T (Judgment 2 September 1998).

In the first paragraph, Definition B provides a general definition of reproductive violence, as an umbrella category of acts that target reproductive systems, etc. of people or groups. In the second and third paragraphs, Definition B distinguishes between reproductive violence as genocide, and as crimes against humanity / war crimes. This nuance is necessary in order to recognize the distinct mental and material elements of the different categories of crime. In relation to genocide, the language has been taken verbatim from Article II(d) of the Genocide Convention. According to Jessberger, this sub-paragraph covers a form of biological genocide directed to the destruction of the group through the removal of the group's ability to reproduce.⁸⁷ In relation to crimes against humanity / war crimes, the compromise language from Article 7(2)(f) of the Rome Statute was added to Definition A. Importantly, the sentence "[t]his definition shall not in any way be interpreted as affecting national laws relating to pregnancy" was also included. This is because, to paraphrase the *Ongwen* Trial Chamber, although this final sentence does not add a new element to the offence, it may serve to allay concern that criminalizing acts of reproductive violence may be seen as legalizing abortion.⁸⁸

In a detailed analysis of the negotiations relating to this "rather curious" sentence ("[t]his definition shall not in any way ..."), submitted by way of an *amici curiae* brief by Dr Rosemary Grey, Global Justice Center, Women's Initiatives for Gender Justice and Amnesty International, it is noted that this sentence "is merely stating the obvious: the ICC has no authority to directly amend, nullify or void national legislation."⁸⁹ According to Cate Steains, an Australian diplomat who coordinated the negotiations on this matter, this sentence:

was inserted as an additional measure to reassure the Catholic and Arab countries [which had expressed concerns about this crime] that the inclusion of forced pregnancy would not interfere in the legal right of States to regulate nationally with respect to pregnancy (anti-abortion laws).⁹⁰

Admittedly, by retaining this sentence in the definition of reproductive violence, we are accepting the *status quo* where different jurisdictions may have disparate national laws relating to pregnancy and abortion. However, such an approach is necessary because it is important, if the definition of reproductive violence is to gain any traction, to keep the criminal law question of defining reproductive violence on the one hand, and the human rights question of national laws relating to abortion on the other, separate.

Finally, the fourth paragraph provides an indicative list of acts of reproductive violence. It is considered that, taken as a whole, Definition B strikes a balance between focusing attention on the specific harm of this distinct category of violence, while being largely modelled on the compromise language of existing legal frameworks, thereby hopefully improving its chances of being perceived as noncontroversial and possibly being adopted in more formal instruments of ICL.

⁸⁷ Florian Jessberger, "The Definition and the Elements of the Crime of Genocide," in *The UN Genocide Convention: A Commentary*, ed. Paola Gaeta (Oxford University Press, 2009), 101.

⁸⁸ International Criminal Court, *The Prosecutor v. Dominic Ongwen* paragraph 2721.

⁸⁹ International Criminal Court, *Amici Curiae Observations on the Rome Statute's definition of "forced pregnancy"* by Dr Rosemary Grey, Global Justice Center, Women's Initiatives for Gender Justice and Amnesty International, No. No. ICC-02/04-01/15 A A2 (23 December 2021).

⁹⁰ *Ibid.*, para. 14.

Having thus suggested a working definition of reproductive violence, the next part will consider some aspects of this category of violence in the context of the crime of genocide against the Yazidis. This is being done in order to reinforce the point that, without proper formal recognition and definition, acts of reproductive violence will often remain unseen. Indeed, for instance, in the reporting of the crimes against the Yazidis since August 2014, while the focus has been on killings, sexual violence and slavery, acts of reproductive violence have received decidedly less attention.⁹¹ Empirical research with Yazidi respondents has shown that this small religious minority wanted to see “fair trial[s] for the perpetrators followed by punishment upon conviction.”⁹² To fulfil these expectations, however, justice and accountability initiatives – if/when they finally happen – would have to cover the full spectrum of the violence committed against this group, including reproductive violence. As argued above, therefore, formally defining acts of reproductive violence remains an important objective, not least to fulfil the expectations of accountability, reparations and truth of the Yazidis.

Reproductive Violence against the Yazidis

Amongst the violence committed by various parties to the conflict in Syria and Iraq, the atrocities committed by ISIL fighters have shocked the world for their “level of depravity.”⁹³ And while ISIL have targeted several minorities in the region,⁹⁴ their campaign against the Yazidis stands out for its brutality, resulting from their depiction of this religious group as pagans, infidels and “peacock worshippers.”⁹⁵ The UN Commission of Inquiry for Syria found that ISIL committed genocide against the Yazidis;⁹⁶ a finding that was corroborated in November 2021, when the Higher Regional Court of Frankfurt found a former member of ISIL guilty of having committed genocide against the Yazidis.⁹⁷ Indeed, ISIL’s violence was so far-reaching that the Commission of Inquiry found evidence of breaches under every sub-paragraph of Article II of the Genocide Convention. However, the next part will focus on reproductive violence under sub-paragraph (d), namely imposing measures intended to prevent births within the group.⁹⁸

⁹¹ See, for instance, United Nations, “Northern Iraq: UN Rights Experts Urge Action to Avoid Mass Atrocity, Potential Genocide,” *UN News*, 12 August 2014, <https://news.un.org/en/story/2014/08/474982-northern-iraq-un-rights-experts-urge-action-avoid-mass-atrocity-potential>.

⁹² David Matyas et al., “What Justice for the Yazidi Genocide?: Voices from Below,” *Human Rights Quarterly* 42 (1 February 2020): 21, <https://doi.org/10.1353/hrq.2020.0000>.

⁹³ Samantha Hechler, “Prosecuting Islamic State Members for Sexual and Gender-Based Crimes Committed against Yazidi Women and Girls Note,” *Cardozo Journal of International and Comparative Law*, no. 3 (2017 2016): 620.

⁹⁴ For a discussion of ISIL attack against Christians, see Sarah Myers Raben, “The ISIL Eradication of Christians and Yazidis: Human Trafficking, Genocide, and the Missing International Efforts to Stop it Section II,” *Brazilian Journal of International Law*, no. 1 (2018): 245.

⁹⁵ Emily Chertoff, “Prosecuting Gender-Based Persecution: The Islamic State at the ICC Notes,” *Yale Law Journal*, no. 4 (2017, 2016): 1058–59. See also United Nations Assistance Mission for Iraq (UNAMI) Human Rights Office and United Nations Office of the High Commissioner for Human Rights, “Report on the Protection of Civilians in Armed Conflict in Iraq,” 6 September 2014, para. 19.

⁹⁶ United Nations Human Rights Council and Independent International Commission of Inquiry on the Syrian Arab Republic, “They Came to Destroy,” para. 106 et seq. See also Vian Dakhil, Aldo Zammit Borda, and Alexander R.J. Murray, “‘Calling ISIL Atrocities Against the Yazidis by Their Rightful Name’: Do They Constitute the Crime of Genocide?” *Human Rights Law Review* 17, no. 2 (1 June 2017): 261–83.

⁹⁷ 5th Senate (State Security Senate [Staatschutzsenat]) of the Higher Regional Court (OLG) Frankfurt/Main, Taha Al-J, No. 5–3 StE 1/20 – 4 – 1/20 (Judgment 30 November 2021).

⁹⁸ Not all reported acts of reproductive violence against the Yazidis will be discussed here. For a more extensive discussion of such acts see: United Nations Human Rights Council and Independent International Commission of Inquiry on the Syrian Arab Republic, “They Came to Destroy”.

Forced Birth Control

Several reports have indicated that Yazidi women and girls who were captured by ISIL fighters on and after 3 August 2014 were subjected to brutal treatment, including reproductive violence.⁹⁹ In this context, the Research and Fatwa Department of Islamic State (Diwan al-Iftaa wa al-Buhuth) published a 27-point pamphlet setting down directives for the treatment of captured Yazidi slaves.¹⁰⁰ These directives assumed that Yazidi slaves were to be treated as chattel and the “property” of their ISIL captors. Amongst others, two ways in which ISIL fighters asserted their ownership over the Yazidis were by imposing: (a) forced contraception (in the form of pills and/or injections); and, in cases of Yazidis who were captured while pregnant and/or in cases where the forced contraception measures failed, (b) forced abortions.

According to one analysis, the extremely low pregnancy rates amongst Yazidi victims in spite of widespread rapes indicate that contraceptives were used extensively:

[t]he low percentage of pregnant women (around 5% of 700 Yazidi women) at a northern Iraqi clinic of the UN indicates that contraceptives are frequently used. Indeed, IS has forced victims to take birth control so that they do not get pregnant [...].¹⁰¹

In this respect the Commission of Inquiry for Syria found that many Yazidi women and girls reported that they were forced to take birth control, in the form of pills and injections, by their fighter-owners. According to one report:

[o]ne Yazidi girl, aged 18 and unmarried at the time of capture, was bought by a Libyan fighter and held in an oil field compound in Dayr Az-Zawr. She was raped daily throughout her time with this fighter, and described being forced to take pills every day.¹⁰²

Far from being an isolated incident, from an analysis of various reports based on victim interviews, a consistent and systematic pattern emerges of ISIL fighters forcing Yazidi women and girls to take contraception. For instance, writing in relation to another incident, Callimachi notes:

[s]oon after buying her, the [ISIL] fighter brought the [Yazidi] teenage girl a round box containing four strips of pills, one of them colored red. [...] “Every day, I had to swallow one in front of him. He gave me one box per month. When I ran out, he replaced it. When I was sold from one man to another, the box of pills came with me,” explained the girl, who learned only months later that she was being given birth control. [...] More than three dozen Yazidi women who recently escaped the Islamic State and who agreed to be interviewed for this article described the numerous methods the fighters used to avoid pregnancy, including oral and injectable contraception, and sometimes both.¹⁰³

⁹⁹ Ibid., para. 14.

¹⁰⁰ Nikita Malik, *Trafficking Terror: How Modern Slavery and Sexual Violence Fund Terrorism* (Henry Jackson Society, 2017), 23, <https://henryjacksonsociety.org/publications/trafficking-terror-how-modern-slavery-and-sexual-violence-fund-terrorism/>.

¹⁰¹ Malik, “Trafficking Terror,” 28; Dienneke De Vos, “Can the ICC Prosecute Forced Contraception?” 14 March 2016, <https://me.eui.eu/dienneke-de-vos/blog/can-the-icc-prosecute-forced-contraception/>.

¹⁰² United Nations Human Rights Council and Independent International Commission of Inquiry on the Syrian Arab Republic, “They Came to Destroy,” para. 69.

¹⁰³ Callimachi, “To Maintain Supply of Sex Slaves, ISIS Pushes Birth Control.” Chertoff described Callimachi’s article as “emblematic”: see Chertoff, “Prosecuting Gender-Based Persecution,” 1052. See also Cathy Otten, “A Broken Homecoming,” *Foreign Policy* (blog), <https://foreignpolicy.com/2019/05/02/a-broken-homecoming-isis-rape-yazidi/> (accessed 2 October 2019).

In situations where Yazidi women and girls were already pregnant when captured and/or became pregnant in captivity, they were, in some cases, forced to have abortions. A number of such forced abortions have been reported.¹⁰⁴ Thus, the introduction to this article referred to an instance of forced abortion demanded by an ISIL “doctor.” That was not an isolated incident. In some cases, Yazidi women and girls were told that they had to abort their previous unborn children because only ISIL fighters could make Muslim babies.¹⁰⁵ In other cases, the UN High Commissioner for Human Rights found that:

[w]itnesses reported that a doctor conducted abortions on two women in a school in Ba’aj, Ninewa; they were two and three months pregnant, respectively. Prior to the abortion, one witness reportedly heard an ISIL fighter stating: “we do not want more Yezidis to be born”. Both women received an injection and were made to take pills.¹⁰⁶

There have been reports of ISIL fighters jointly and repeatedly using sexual violence (rapes) and reproductive violence (forced abortions) against Yazidi women to impose their powers of ownership and domination, with the intention of prolonging the trauma and suffering. Thus, for instance, Malik notes that “a woman was forced to go through an abortion so that she could continue to be raped.”¹⁰⁷ Such forced abortions were ultimately intended to destroy the group. As one ISIL fighter uttered, before forcing a Yazidi woman to abort her child, “we do not want more Yezidis to be born.”¹⁰⁸

Forced Impregnation Intended to Prevent Births within the Group

There is significant evidence that the forced impregnation of Yazidi women and girls by ISIL fighters was intended as a measure to prevent new Yazidi births within the group.¹⁰⁹ However, before assessing this evidence, it is necessary to address an apparent contradiction, in that, it may seem contradictory that ISIL’s ideology at once sought to prevent births (through forced birth control) and to create births (through forced impregnation). Both of these measures, however, were consistent with the same destructive ideology. By treating Yazidi women and girls as nothing more than “sexual containers,”¹¹⁰ ISIL fighters were able to impose forced birth control to continue to rape and dehumanize their victims. The perpetrators were, however, also safe in the knowledge that, where such birth control measures to fail, any children born of rape would be rejected by their group. The perpetrators intended, in Fisher’s powerful imagery, to “occupy their victims’ wombs.”¹¹¹ Indeed, such forced impregnation had “prophetic” significance in ISIL’s ideology: one of the signs of the Hour was that “the slave girl gives birth to her master.”¹¹² In light of this, ISIL fighters systematically required Yazidi women to give a

¹⁰⁴ De Vos, “Can the ICC Prosecute Forced Contraception?”

¹⁰⁵ Malik, “Trafficking Terror,” 28.

¹⁰⁶ United Nations High Commissioner for Human Rights, “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,” para. 41.

¹⁰⁷ Malik, “Trafficking Terror,” 28.

¹⁰⁸ Such utterances may provide important circumstantial evidence of genocidal intent: see ICTR, Prosecutor v. Gacumbitsi, No. ICTR-2001-64-T (Trial Judgment 17 June 2004).

¹⁰⁹ Hechler, “Prosecuting Islamic State Members,” 608.

¹¹⁰ Eda Erdener, “The Ways of Coping with Post-War Trauma of Yazidi Refugee Women in Turkey,” *Women’s Studies International Forum* 65 (1 November 2017): 62.

¹¹¹ Siobhan Fisher, “Occupation of the Womb: Forced Impregnation as Genocide,” *Duke Law Journal* 46, no. 1 (1 October 1996): 93.

¹¹² “The Revival of Slavery Before the Hour,” *Dabiq (Issue 4)*, no. 4 (2014): 15.

urine sample to be tested for the hCG hormone, whose presence indicated pregnancy. The Yazidi women and girls:

awaited their results with apprehension: A positive test would mean they were carrying their abuser's child; a negative result would allow Islamic State fighters to continue raping them.¹¹³

In *Akayesu*, the Trial Chamber held that, in patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group 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.¹¹⁴ This was the case here. By seeking to rape and forcibly impregnate Yazidi women and girls, ISIL fighters intended that such women and girls would give birth to children who would consequently not belong to their mother's group. The children would rather be considered Muslim or mixed race.¹¹⁵ This belief was underpinned by laws in Iraq that provided that children would automatically be registered as Muslim if one of the parents was Muslim, and there was no exception for children born of rape.¹¹⁶

Beyond the formal laws, moreover, ISIL fighters were fully aware of the very high value placed by Yazidi religion on endogamy and that this would mean that the raped mothers and children would be rejected by their group:

[a]ccording to Yezidi customs, marriage with members of other faiths and sexual relations outside marriage are not accepted. Such practices are considered to be shameful for the whole family, and in the past women and girls believed to have had relations with men of other faiths have been victims of so-called "honour killings."¹¹⁷

In practice,¹¹⁸ rather than being rejected, the mothers were welcomed back into their group, following an appeal made by Yazidi leaders.¹¹⁹ Indeed, in an unprecedented move, the Yazidi religious and secular authorities amended rules that existed for 800 years: "[t]hey reacted in the sense of human rights and the traumatic experiencing of genocide, and took back the women and girls."¹²⁰

This humane approach was not, however, extended to the children born of rape. On the contrary, in April 2019, the High Spiritual Councillor of the Yazidi announced that children conceived in ISIL captivity and born to Yazidi women were not to be taken into the Yazidi community.¹²¹ This ruling gave rise to a profound schism in Yazidi society between traditionalists and modernizers. The ruling was supported by a significant number of conservative Yazidis. In their view, accepting children born in captivity would "dilute the

¹¹³ Callimachi, "To Maintain Supply of Sex Slaves, ISIS Pushes Birth Control."

¹¹⁴ ICTR, *The Prosecutor v. Jean-Paul Akayesu* paragraph 507.

¹¹⁵ Fisher, "Occupation of the Womb," 113–14.

¹¹⁶ Otten, "A Broken Homecoming."

¹¹⁷ Amnesty International, "Escape from Hell: Torture and Sexual Slavery in Islamic State Captivity in Iraq," 23 December 2014, 13, <https://www.refworld.org/docid/549d73ef4.html>.

¹¹⁸ Importantly, it is not necessary for the measures intended to prevent births within the group to have been successful in order for this violence to be prosecuted.

¹¹⁹ Human Rights Watch, "News, Iraq: ISIS Escapees Describe Systematic Rape—Yezidi Survivors in Need of Urgent Care," 14 April 2015, <https://www.hrw.org/>; Yazda – Global Yazidi Organisation, "10 Steps to Ensure Justice, Reparations, Recovery and Return for the Yazidis," 2019, sec. 7, https://docs.wixstatic.com/ugd/92f016_f42fada811934fc99b1c8518ada417ca.pdf.

¹²⁰ Jan Ilhan Kizilhan, "Changes in the Yazidi Society and Religion after the Genocide—A Growing Rapprochement with Human Rights?" *Open Journal of Social Sciences* 7, no. 7 (9 July 2019): 14.

¹²¹ Kizilhan, "Changes in the Yazidi Society and Religion after the Genocide."

purity of the Yazidi bloodline.”¹²² In her research on this issue, Otten found that the conservative Yazidis viewed the children born in captivity:

as the physical manifestations of their fathers’ crimes. One Yazidi man wrote on Facebook: ‘The blood of these children isn’t pure and shouldn’t be mixed with the blood of the Yazidis.’ A Yazidi who lost 23 members of his family in the 2014 attack wrote, ‘We as families of the victims should be able to decide not to welcome these children.’

The issue of children born in ISIL captivity thus brought deep divisions in Yazidi society. In practice, many Yazidi women and girls had to make a stark choice between their children or their group.¹²³ There has been extensive testimonial evidence of Yazidi mothers having to abandon their children at orphanages because they needed to get back to their community and there was “no chance for their babies to be accepted by their families and community.”¹²⁴

Violence Intended to Prevent Future Procreation

The *Akayesu* trial Chamber held that measures intended to prevent births within the group may be physical or mental when, for instance, members of a group can be led, through the use of violence, threats or trauma, not to procreate.¹²⁵ This ground is important because it focuses attention on the longitudinal and intergenerational impact of genocide.¹²⁶ Reproductive violence, when committed with destructive intent, may be intended to leave physical and mental scars on victims long after the violence has ended. Individual survivors can suffer from a mass of physical, psychological, social and economic consequences – many of which persist for decades. Ultimately, the violence may serve to destroy families, communities, and entire groups.¹²⁷ Of course, however, a key challenge for prosecuting this ground would be proving that the violence was *intended* to make the victim refuse to procreate (as distinct from having that effect).¹²⁸

With respect to the Yazidis, ISIL policy does not appear to have *expressly* directed that victims should be raped with the intention that they will subsequently refuse to procreate. However, when one examines the patterns of violence from a gender studies framework, it becomes plausible that ISIL fighters had this intention in mind. Gender studies would draw attention to the fact that the continued survival of the women and girls after suffering the severe trauma of repeated rapes and related violence may be a measure “intended by the perpetrators of genocide as part of an overarching plan to destroy a group.”¹²⁹ Indeed, genocidal rape survivors are at an extreme disadvantage, subject to continuing internal injuries and sexually transmitted diseases, stigmatization as rape

¹²² Otten, “A Broken Homecoming.”

¹²³ Kizilhan, “Changes in the Yazidi Society and Religion after the Genocide,” 14; CurrentTrigger News, “Horrific: Iraq is Silently Registering Raped Yazidi Women’s Children as Muslims,” 2 June 2019, <http://www.currenttriggers.com/world/horrific-iraq-yazidi/>.

¹²⁴ Serri Mahmood, “Challenges of Children Born by ISIS Rape in Iraq” (Master of Advanced Studies in Humanitarian Action, Centre for Education and Research in Humanitarian Action, University of Geneva, 2016), 24, <https://www.cerahgeneve.ch/files/1715/0963/3793/WP49-Challenges-Children-Born-by-ISIS-Rape-Iraq.pdf>.

¹²⁵ ICTR, *The Prosecutor v. Jean-Paul Akayesu* paragraph 507.

¹²⁶ See Klejda Mulaj, ed., *Postgenocide: Interdisciplinary Reflections on the Effects of Genocide* (Oxford: OUP Oxford, 2021).

¹²⁷ Jonathan M. H. Short, “Sexual Violence as Genocide: The Developing Law of the International Criminal Tribunals and the International Criminal Court,” *Michigan Journal of Race & Law* 8 (2003, 2002): 510.

¹²⁸ Grey, “Reproductive Crimes in International Criminal Law,” 19.

¹²⁹ Elisa von Joeden-Forger, “Gender and the Future of Genocide Studies and Prevention,” *Genocide Studies and Prevention: An International Journal* 7, no. 1 (1 April 2012): 90.

victims, and conflicting feelings toward babies of their rapists. Fein notes that rape survivors in Rwanda described themselves as “the living dead.”¹³⁰ Perpetrators seem to know (and to intend) that, when female victims of rape are allowed to live, in the context of a genocidal attack, the consequences of violence extend well beyond the genocide:

[t]he long-term physical, psychological, and socio-political effects of wartime rape are well-known. [...] In many cases women rape victims are rejected by their families and communities, are unable to find work, and remain left to raise children born of war alone and in abject poverty.¹³¹

There is circumstantial evidence that ISIL fighters intended their repeated rape and violence against Yazidi women and girls to cause deep-seated trauma to their victims in order for those victims subsequently to refuse to procreate. Yazidi women and girls were systematically taunted by ISIL fighters with references to their “honor” having been permanently tainted.¹³² These taunts were serious and traumatic in and of themselves. However, they were even more so in the context of Yazidism and its emphasis on endogamy. Through the use of repeated rape and related violence, ISIL fighters were not “only” abusing their victims sexually, they also wanted to inflict permanent damage to the Yazidis’ reproductive system, organs, process, or capacity to reproduce, in order, ultimately, to destroy the group. Yazidi women and girls were regularly taunted that they had been permanently tainted and that they would be stigmatized and rejected by their group.¹³³ This point is poignantly captured in Nadia Murad’s memoirs, when she reflects:

[t]he rape was the worst part. It stripped us of our humanity and made thinking about the future – returning to Yazidi society, marrying, having children, being happy – impossible. We wished they would kill us instead. [...] ISIS knew how devastating it was for an unmarried Yazidi girl to convert to Islam and lose her virginity, and they used our worst fears – that our community and religious leaders wouldn’t welcome us back – against us.¹³⁴

It is true that, subsequently, the Yazidi leaders issued a decree welcoming the Yazidi women and girls back into the community. However, for Article II(d) of the Genocide Convention to be fulfilled, the actual result of the measures is not relevant. What is relevant is that the perpetrator *intended* the measures to prevent births. Besides, unfortunately, with respect to a number of Yazidi women and girls, the trauma persisted long after the violence.¹³⁵ For instance, an Amnesty report found that the women and girls who escaped ISIL captivity were “in a situation of acute emotional distress.”¹³⁶ Similarly, the Commission of Inquiry found that, while many of the Yazidi women and girls interviewed bore

¹³⁰ Erdener, “The Ways of Coping,” 62.

¹³¹ von Joeden-Forgery, “Gender and the Future,” 93.

¹³² Yazda – Global Yazidi Organisation, “An Uncertain Future for Yazidis: A Report Marking Three Years of an Ongoing Genocide,” September 2017, 15–16, <https://www.yazda.org/reports-and-publications>.

¹³³ M. Cherif Bassiouni and Peter Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (Transnational Publishers, 1996), 586.

¹³⁴ Nadia Murad, Jenna Krajeski, and Amal Clooney, *The Last Girl: My Story of Captivity and My Fight Against the Islamic State*, 1 ed. (S.I.: Virago, 2017), 161.

¹³⁵ Amnesty International, “Refworld | Escape from Hell,” 13; Otten, “A Broken Homecoming.” Ibrahim and others have identified several factors for this stigma and rejection persisting: see Hawkar Ibrahim et al., “Trauma and Perceived Social Rejection among Yazidi Women and Girls Who Survived Enslavement and Genocide,” *BMC Medicine* 16, no. 1 (13 September 2018): 1. This is reminiscent of Hester’s comments, in the *Scarlet Letter*, that the shame and agony was “too deeply branded. Ye cannot take it off”: Nathaniel Hawthorne, *The Scarlet Letter* (Routledge, 1851), 84.

¹³⁶ Amnesty International, “Refworld | Escape from Hell,” 13.

physical wounds and scars of the abuse they suffered, just as apparent was the mental trauma they were enduring:

[m]ost spoke of thoughts of suicide, of being unable to sleep due to nightmares about ISIS fighters at their door. “I wish I was dead. I wish the ground would open and kill me and my children”, said one woman, held for 17 months. Many reported feeling angry and hopeless. “I don’t sleep, I don’t eat, my body feels very heavy”, said one 17-year old girl who had been held for more than a year.¹³⁷

It is also telling that ISIL fighters did not limit their violence to adults, but brutally and systematically targeted Yazidi girls of all ages, some as young as nine.¹³⁸ The pattern of these rapes against women and children indicates ISIL’s destructive intent against the Yazidis. This pattern of violence, including the targeting of very small children, suggests that ISIL fighters intended to cause permanent physical and psychological harm to the group, leading the victims to subsequently refuse to procreate. Indeed, as a result of this trauma, Yazidi survivors have frequently reported suicidal thoughts,¹³⁹ and there have sadly been several reports of Yazidi girls committing suicide.¹⁴⁰ The Commission of Inquiry found that, in practice, the acute psychological distress and trauma of ISIL’s violence had the effect, unfortunately, of leading some Yazidi women and girls to subsequently refuse to procreate:

the Yazidi women and girls under treatment did not want to marry, or to contemplate relationships with men now or in the future. This was compounded by a sense that they had lost their honour.¹⁴¹

Conclusion

As the Yazidi case study clearly demonstrates, therefore, the issue of reproductive violence in mass atrocity is not, unfortunately, just of historic interest. Rather, acts of reproductive violence continue to occur in many situations of mass atrocity, even though they may not be labelled as such. The Yazidi case study also brings to the fore the serious and specific harm of reproductive violence and the urgent need to clearly recognize, define and criminalize such harm as a distinct category of violence.

It is therefore important to correctly label reproductive violence in the language of ICL. As has been argued, this is necessary not only from a fair labelling perspective, but also to fulfil the principle of legality. Moreover, it is especially important from the perspective of the victims, in order to accurately characterize the full nature of the harm inflicted on them, to foster the stigmatization of this kind of violence, and to facilitate accountability, reparations and truth. An important aspect of this agenda is to offer a definition of reproductive violence that is sufficiently inclusive and noncontroversial to be acceptable for

¹³⁷ United Nations Human Rights Council and Independent International Commission of Inquiry on the Syrian Arab Republic, “They Came to Destroy,” para. 77.

¹³⁸ *Ibid.*, para. 69.

¹³⁹ Christine Dickson, “Slipping through the Cracks: Expanding Re-Identification Procedures to Help Yazidi Sex Trafficking Survivors Student Scholarship,” *Seattle Journal for Social Justice*, no. 3 (2018 2017): 1006.

¹⁴⁰ Amnesty International, “Refworld | Escape from Hell,” 8; United Nations Human Rights Council and Independent International Commission of Inquiry on the Syrian Arab Republic, “They Came to Destroy,” para. 53.

¹⁴¹ United Nations Human Rights Council and Independent International Commission of Inquiry on the Syrian Arab Republic, “They Came to Destroy,” para. 145.

States. The working definition developed in this article is intended to make a small but important contribution to that agenda.

Acknowledgments

The author would like to thank the Honourable Ms. Vian Dakhil, a Member of the Iraqi Parliament, and Mr Haval Al-Hakari, for their support in gathering information for this article. He would also like to thank the peer reviewers for their very helpful comments. Any errors or omissions are the author's own.

Disclosure statement

The author is a member of the Yazidi Justice Committee, which has investigated allegations of genocide committed against the Yazidis from early 2013 (<https://www.yazidijustice.com/>).

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