


## Rape in War: Prosecuting the Islamic State of Iraq and the Levant and Boko Haram for Sexual Violence Against Women

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# Rape in War: Prosecuting the Islamic State of Iraq and the Levant and Boko Haram for Sexual Violence Against Women

David Sverdlov†

Introduction .....	333
I. The Islamic State of Iraq and the Levant, Boko Haram, and the Yazidis .....	335
A. Brief Overview of the Islamic State of Iraq and the Levant .....	335
B. Brief Overview of the Yazidis .....	336
C. Contact Between the Islamic State and the Yazidis .....	337
D. Boko Haram .....	340
E. Abduction of Women and the Chibok Girls .....	341
II. Rwandan and Yugoslavian Genocides .....	343
A. Rape in the Bosnian Genocide .....	343
B. The Rwandan Genocide .....	346
III. The Genocide Convention .....	348
A. Law of Rape .....	348
B. Application of the Rome Statute .....	351
C. Application of the Genocide Convention .....	352
D. Application to Boko Haram .....	354
IV. Who Should the ICC Charge? .....	356
A. Islamic State Militants .....	356
B. Boko Haram Militants .....	358
Conclusion .....	358

## Introduction

“Women’s lives and their bodies have been the unacknowledged casualties of war for far too long.”<sup>1</sup> In just the last three decades, militants—on almost every continent—have raped hundreds of thousands of women.<sup>2</sup> Nevertheless, international legal bodies have brought few rapists to justice. Since 2000, international tribunals have convicted only five men and

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1. Press Release, Amnesty Int’l, Women’s Lives and Bodies—Unrecognized Casualties of War (Dec. 8, 2004).

2. *Wars Overlooked Victims*, THE ECONOMIST, Jan. 15, 2011, at 54.

women in Rwanda, twenty-three men in the former Yugoslavia,<sup>3</sup> and one person from the Congo for using rape as a weapon of war.<sup>4</sup> As such, rape remains the least-condemned war crime; thousands of unpunished rapists continue to walk free, and in some cases, on the same streets as their victims.<sup>5</sup>

The Islamic State of Iraq and the Levant (ISIL) and the smaller affiliates such as Boko Haram are the most recent and unpunished perpetrators who use rape as a weapon of war.<sup>6</sup> Since invading northern parts of Iraq in 2014, ISIL forced at least six thousand Yazidi women into sexual slavery, three thousand of whom remain enslaved.<sup>7</sup> Likewise, Boko Haram has abducted about five hundred women in Nigeria and forced at least some of them into marriages and slave-like domestic servitude.<sup>8</sup> But no ISIL or Boko Haram militants have been prosecuted for using rape to commit genocide, a crime against humanity, or a war crime.

It is important not to leave justice wanting and these women unrecognized. To that end, international organizations must ensure legal prosecution of both ISIL and Boko Haram under either the Genocide Convention or the non-genocidal crimes of the Rome Statute. This Note will explore legal precedent on prosecuting rape as a weapon of war and recommend whether it is feasible to prosecute ISIL or Boko Haram under Articles VI and VII of the Rome Statute. To do so, this Note will rely on the precedents established during the prosecutions of Rwandan and Yugoslavian war criminals. Part II will provide a brief overview of ISIL, the Yazidis, and Boko Haram's histories. Part III will provide facts on the Rwandan Hutu treatment of female Tutsis and the Bosnian Serb treatment of Bosnian Muslim women during their respective genocides and the legal precedent from the tribunals that dealt with both events. Part IV will evaluate the known facts regarding ISIL and Boko Haram under legal precedent and conclude that ISIL leaders can be prosecuted for *genocidal* rape, but Boko Haram leaders must be prosecuted under different crimes in the Rome Statute. Part V provides suggestions for which militants to charge. Part VI is the conclusion.

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3. Heidi Nichols Haddad, *Mobilizing the Will to Prosecute: Crimes of Rape at the Yugoslav and Rwandan Tribunals*, 12 HUM. RTS. REV. 109, 118 (2011).

4. Kevin Sieff, *In Historic Ruling, International Court Cites Rape in War Crimes Conviction of Ex-Congo Official*, WASH. POST (Mar. 21, 2016), [https://www.washingtonpost.com/world/africa/international-court-adds-rape-to-war-crimes-list-in-congo-conviction/2016/03/21/2e7f4320-ef72-11e5-85a6-2132cf446d0a\\_story.html](https://www.washingtonpost.com/world/africa/international-court-adds-rape-to-war-crimes-list-in-congo-conviction/2016/03/21/2e7f4320-ef72-11e5-85a6-2132cf446d0a_story.html) [<https://perma.cc/X9SE-RPHE>].

5. HUMAN RIGHTS WATCH, *SHATTERED LIVES: SEXUAL VIOLENCE DURING THE RWANDAN GENOCIDE AND ITS AFTERMATH* (1996), [https://www.hrw.org/sites/default/files/reports/1996\\_Rwanda\\_%20Shattered%20Lives.pdf](https://www.hrw.org/sites/default/files/reports/1996_Rwanda_%20Shattered%20Lives.pdf) [<https://perma.cc/7GM7-FFMS>].

6. Press Release, *Fight Against Sexual Violence in Conflict Reaches "New Juncture"*, Security Council Told (Apr. 15, 2015), <https://www.un.org/press/en/2015/sc11862.doc.htm> [<https://perma.cc/5LRN-DPKK>].

7. Rukmini Callimachi, *Enslaving Young Girls, The Islamic State Builds a Vast System of Rape*, N.Y. TIMES, Aug. 14, 2015, at A1.

8. CAROLINE VARIN, *BOKO HARAM AND THE WAR ON TERROR* 78-79 (2016).

## I. The Islamic State of Iraq and the Levant, Boko Haram, and the Yazidis

### A. Brief Overview of the Islamic State of Iraq and the Levant

The Islamic State of Iraq and the Levant (ISIL) is a Sunni insurgent group that controls about 65,500 square miles of Syria and Iraq and a population of about six million people.<sup>9</sup> The group began almost two decades ago not as ISIL, but rather as Jama'at al-Tawhid wal-Jihad (Jama'at), a Jordan-based organization, founded by Abu Musab al-Zarqawi in 1999.<sup>10</sup> Zarqawi, a former street thug, embraced Islam after his parents introduced him to religion in an attempt to help him leave the criminal world.<sup>11</sup> But his Islam was radical, even compared to other terrorist groups such as al-Qaeda, and he sought to imbue his organization with such ideals. His beliefs included an extreme interpretation of the Islamic practice of excommunicating heretical Muslims, the overthrow of the Jordanian government, and staunch anti-American beliefs.<sup>12</sup> Because of his radical stance, the group attracted little popular support, remaining small and not even on the CIA's radar for the first few years of its existence.<sup>13</sup>

Jama'at started to change from its small origins to a well-known fighting group after the United States' invasion of Iraq in 2003.<sup>14</sup> Under Zarqawi's leadership, Jama'at was responsible for a large number of attacks on U.S. forces.<sup>15</sup> The scale of its attacks gained it fame in the Middle East and attracted the attention of Osama bin-Laden, the leader of al-Qaeda. Prior to the Iraq War, bin-Laden wanted little to do with Jama'at because he viewed the group as too extreme, so he limited himself to providing it with start-up funds for a training camp.<sup>16</sup> Once the war with American forces broke out, bin-Laden recognized that he could not sit on the sidelines, and risk ruining his reputation as a fighter against Western imperialism.<sup>17</sup> But he had a problem: there was no al-Qaeda franchise in Iraq.<sup>18</sup> As such, bin-Laden could not afford to keep Jama'at out, so despite his ideological disagreements with Zarqawi, bin-Laden proposed a formal alliance.<sup>19</sup> Jama'at

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9. *The Islamic State and the Crisis in Iraq and Syria in Maps*, BBC (Nov. 30, 2016), <http://www.bbc.com/news/world-middle-east-27838034> [<https://perma.cc/U96J-25ZC>].

10. See *Mapping Militant Organizations: The Islamic State*, STANFORD U. (Aug. 4, 2016), <http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/1> [<https://perma.cc/MV88-3SGM>]; see also Aaron Y. Zelin, *The War Between ISIS and al-Qaeda for Supremacy of the Global Jihadist Movement*, WASH. INST. FOR NEAR EAST POL'Y 1 (2014), [http://www.washingtoninstitute.org/uploads/Documents/pubs/ResearchNote\\_20\\_Zelin.pdf](http://www.washingtoninstitute.org/uploads/Documents/pubs/ResearchNote_20_Zelin.pdf) [<https://perma.cc/G4BU-T78S>].

11. See Joby Warwick, *BLACK FLAGS: THE RISE OF ISIS* 49 (2015).

12. See *id.* at 22-23.

13. *Id.* at 75-76.

14. *Id.* at 71.

15. See HUMAN RIGHTS WATCH, *A FACE AND A NAME: CIVILIAN VICTIMS OF INSURGENT GROUPS IN IRAQ* 36 (2006), <https://www.hrw.org/sites/default/files/reports/iraq1005.pdf> [<https://perma.cc/E7LE-3QBA>].

16. See Zelin, *supra* note 10, at 2; Warwick, *supra* note 11, at 75.

17. See Warwick, *supra* note 11, at 174.

18. See *id.*

19. See *id.*

accepted the proposal and became al-Qaeda in Iraq (AQI).<sup>20</sup> The group then merged with other Islamic insurgents in Iraq in 2006 to become the Islamic State of Iraq (ISI).<sup>21</sup>

ISI's power increased further after the Syrian rebellion against Bashar al-Assad.<sup>22</sup> When hostilities began, ISI sent militants into Syria, who operated as a quasi-independent network known as Jabhat al-Nusra li Ahl as-Sham (al-Nusra).<sup>23</sup> ISI and al-Nusra operated separately for two years, until al-Baghdadi, ISI's new leader, called for re-unification.<sup>24</sup> The al-Nusra leadership, as well as leaders of al-Qaeda, rejected the proposed re-unification, whereas members of al-Nusra defected, re-merged with ISI, and formed the current Islamic State of Iraq and the Levant (ISIL).<sup>25</sup> As a result of the disagreement on the merger, ISIL disaffiliated from al-Qaeda and became an independent organization for the first time.<sup>26</sup> With its new-found independence, ISIL began an immediate campaign of expansion, conquering about ten million people and 90,800 square kilometers of Syria and Iraq, including the major cities of Fallujah, Raqqa, and Mosul.<sup>27</sup> During this campaign, ISIL took control of the Nineveh region, which included the town of Sinjar, where it first came into contact with the Yazidi population.<sup>28</sup>

## B. Brief Overview of the Yazidis

The Yazidis are a small group of ethnic Kurds, who number about 500,000 to 700,000 people throughout the world.<sup>29</sup> Most of them live in the Nineveh region of Iraq, in particular the town of Sinjar.<sup>30</sup> Although the exact origins of Yazidism are unknown, scholars believe that the religion began in the twelfth century when Sufi leader Adi Ibn Musafir came to the region and combined elements of Islam with the pre-Islamic practices of the people living there.<sup>31</sup> The result was Yazidism: a monotheistic religion

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20. See *id.*

21. See Zelin, *supra* note 10, at 3.

22. Lucy Rodgers et al., *Syria: The Story of the Conflict*, BBC (Mar. 11, 2016), <http://www.bbc.com/news/world-middle-east-26116868> [<https://perma.cc/D4VP-LEKS>].

23. Rania Abouzeid, *The Jihad Next Door*, POLITICO (June 23, 2014), [http://www.politico.com/magazine/story/2014/06/al-qaeda-iraq-syria-108214\\_full.html#.WAZnq5MrK8o](http://www.politico.com/magazine/story/2014/06/al-qaeda-iraq-syria-108214_full.html#.WAZnq5MrK8o) [<https://perma.cc/3A64-MHNL>].

24. *Id.*

25. *What is ISIS?*, BBC (Dec. 2, 2015), <http://www.bbc.com/news/world-middle-east-29052144> [<https://perma.cc/P3CJ-M767>].

26. See WARWICK, *supra* note 11, at 285.

27. See James Verini, *Surviving the Fall of ISIS*, NAT'L GEOGRAPHIC (Oct. 16, 2016), <http://news.nationalgeographic.com/2016/10/islamic-state-isis-iraq-mosul-syria-offensive> [<https://perma.cc/K2A3-FJRK>]; see also VARIN, *supra* note 8.

28. See Callimachi, *supra* note 7, at A12.

29. See Avi Asher-Schapiro, *Who are the Yazidis, the Ancient, Persecuted Religious Minority Struggling to Survive in Iraq*, NAT'L GEOGRAPHIC (Aug. 11, 2014), <http://news.nationalgeographic.com/news/2014/08/140809-iraq-yazidis-minority-isis-religion-history> [<https://perma.cc/MJ9Q-JXHS>]; U.S. Dep't of St., Int'l Religious Freedom Rep. for 2012 2 (2012), <http://www.state.gov/j/drl/rls/irf/2012religiousfreedom/index.htm?year=2012&id=208390#wrapper> [<https://perma.cc/6GW3-HPQ5>].

30. See *id.*

31. See GERARD RUSSELL, *HEIRS TO THE FORGOTTEN KINGDOM* 58 (2014).

with elements of Zoroastrianism, Mithraism, Mathdaism, and other elements of the area's oral traditions.<sup>32</sup>

The persecution of the Yazidis at the hands of Islamic populations is not new. From at least the sixteenth century, Ottoman and Kurdish authorities incited violence against the Yazidis out of a profound suspicion that the Yazidis worshipped the devil and fear that the Yazidis sought to establish power.<sup>33</sup> In recent times, Saddam Hussein, the former President of Iraq, razed traditional Yazidi villages and forced the Yazidis from the surrounding mountains to move to the town of Sinjar.<sup>34</sup> The Yazidis themselves recount that their group has been subjected to seventy-two persecutions since its inception.<sup>35</sup> In short, ISIL's most recent attack on the Yazidis follows a long string of attacks on the group, but the difference now is the magnitude and the additional enslavement of women.<sup>36</sup>

### C. Contact Between the Islamic State and the Yazidis

In August 2014, ISIL invaded the Sinjar region, and not long after, reports of mass executions began to circulate.<sup>37</sup> During these mass murders, ISIL gave Yazidis the option of converting or being killed.<sup>38</sup> In one instance, five hundred Yazidis refused conversion and ISIL buried them, some still alive, in a mass grave.<sup>39</sup> Another mass grave in Syria holds the remains of hundreds of bodies from a single tribe, which is now known to have been almost entirely exterminated.<sup>40</sup> As of August 2016, seventy-two mass graves containing fifteen thousand bodies have been found.<sup>41</sup> As a result of the violence, tens of thousands of Yazidis have fled north into Kurdistan, west to Europe, or to other countries.<sup>42</sup> There is little doubt now that ISIL either wanted to expel the Yazidis—at least the men—from its territorial confines or to exterminate them. The UN Human Rights Council and the United States Holocaust Museum recognize these events as a

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32. See Asher-Schapiro, *supra* note 29.

33. Emma Green, *The Yazidis, A People Who Fled*, THE ATLANTIC (Aug. 13, 2014), <http://www.theatlantic.com/international/archive/2014/08/the-yazidis-a-people-who-fled/375964> [<https://perma.cc/EKP4-RTA4>].

34. Asher-Schapiro, *supra* note 29.

35. RUSSELL, *supra* note 31, at 41.

36. See generally RUSSELL, *supra* note 31.

37. See Ahmed Rasheed, *Iraq Says Islamic State Killed 500 Yazidis, Buried Some Victims Alive*, REUTERS (Aug. 10, 2014), <http://www.reuters.com/article/us-iraq-security-yazidis-killings-idUSKBN0GA0FF20140810> [<https://perma.cc/3HZC-4TXU>].

38. *Id.*

39. *Id.*

40. Kareem Shaheen, *Up to 15,000 ISIS Victims Buried in Mass Graves in Syria and Iraq—Survey*, THE GUARDIAN (Aug. 30, 2006), <https://www.theguardian.com/world/2016/aug/30/up-to-15000-bodies-may-be-buried-in-mass-graves-in-syria-and-iraq-survey>.

41. *Id.*

42. Raya Jalabi, *Who Are the Yazidis and Why Is ISIS Hunting Them*, THE GUARDIAN (Aug. 11, 2014), <https://www.theguardian.com/world/2014/aug/07/who-yazidi-isis-iraq-religion-ethnicity-mountains> [<https://perma.cc/RT9D-B8G7>].

genocide against the Yazidis.<sup>43</sup>

The mass sexual enslavement of Yazidi women accompanied these killings. As ISIL invaded the Sinjar region, it abducted at least 5,270 women.<sup>44</sup> One year later, in 2015, international organizations estimated that 3,144 women remained slaves.<sup>45</sup> Now, these organizations estimate that throughout ISIL's reign, *at least* six thousand Yazidi women have spent some time in bondage.<sup>46</sup> It is unlikely that the number of enslaved women will decrease any time soon. In the summer of 2016, ISIL created new restrictions, forcing women to register in a database.<sup>47</sup> ISIL uses the database at checkpoints to stop escaping Yazidi women.<sup>48</sup> The number of successful escapes has gone down to an average of thirty-nine per month, compared to almost one hundred per month when ISIL first took over.<sup>49</sup> These numbers alone indicate that ISIL has engaged in one of the most successful mass sexual enslavements of women in the Middle East.<sup>50</sup>

ISIL has been successful in its mass enslavement of Yazidi women in part because of the institutions it has set up to facilitate the enslavement, including legal institutions. ISIL needed its courts to make rulings and provide justifications for resurrecting the practice and facilitate the complex questions of owning and trading slaves. First, the courts used ancient Islamic religious sources to bring back the practice.<sup>51</sup> The main justification put forward came from an Islamic law that allows fighters to enslave people who had been defeated in a legal jihad and taken as "spoils of war."<sup>52</sup> Spoils of war, the judges clarified, did not refer to all captured people, but rather just those who could be classified as "Mushrikin" [pagans], in contrast to "People of the Book."<sup>53</sup> ISIL courts then ruled that Yazidis are "Mushrikin" because of their alleged polytheistic beliefs, although the Yazidis are monotheistic, that the women could be enslaved. On the other hand, "People of the Book," such as Jews and Christians,

43. See generally U.N. Hum. Rts. Council, "They Came to Destroy": ISIS Crimes Against the Yazidis, (June 15, 2016), [http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A\\_HRC\\_32\\_CRP.2\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A_HRC_32_CRP.2_en.pdf) [<https://perma.cc/KD98-SSNG>]; U.S. HOLOCAUST MEMORIAL MUSEUM, "OUR GENERATION IS GONE": THE ISLAMIC STATE'S TARGETING OF IRAQI MINORITIES IN NINEWA 12, <https://www.ushmm.org/m/pdfs/Iraq-Bearing-Witness-Report-111215.pdf> [<https://perma.cc/8H9Z-TAZ4>].

44. Callimachi, *supra* note 7.

45. See *id.*

46. See *id.*

47. *ISIS Tightens Grip on Scores of Female Sex Slaves*, BUS. INSIDER (July 5, 2016, 4:06 PM), <http://www.businessinsider.com/isis-is-tightening-its-grip-on-yazidi-women-and-children-forced-to-become-sex-slaves-2016-7> [<https://perma.cc/AYp9-SAJM>].

48. *Id.*

49. *Id.*

50. SIDDHARTH KARA, *SEX TRAFFICKING: INSIDE THE BUSINESS OF MODERN SLAVERY* 19 (2009).

51. *Slavery in Islam*, BBC (Sept. 7, 2009), [http://www.bbc.co.uk/religion/religions/islam/history/slavery\\_1.shtml](http://www.bbc.co.uk/religion/religions/islam/history/slavery_1.shtml) [<https://perma.cc/ZDW6-D7VD>].

52. See U.N. Hum. Rts. Council, *supra* note 41, at ¶ 154.

53. Richard Spencer, *Thousands of Yazidi Women Sold as Sex Slaves "For Theological Reasons"*, *Says ISIL*, TELEGRAPH (Oct. 13, 2013, 1:13 PM), <http://www.telegraph.co.uk/news/worldnews/islamic-state/11158797/Thousands-of-Yazidi-women-sold-as-sex-slaves-for-theological-reasons-says-Isil.html> [<https://perma.cc/5JCJ-X5RC>].

could be subject to taxes and other legal punishments, but not enslavement.<sup>54</sup> Thereafter, according to ISIL courts, the law boiled down to: a person who conquers a pagan could take that pagan as a slave because she is a spoil of war.<sup>55</sup>

ISIL courts then revamped laws dealing with slave transactions. The courts drafted and notarized sales contracts for slaves and documents for willing, disposing of, and freeing a slave.<sup>56</sup> ISIL courts also made specific prohibitions on the transfer of slaves. Brothers were forbidden to transfer slaves between one another.<sup>57</sup> And ISIL fighters could not transfer slaves to non-ISIL fighters, in order to ensure that slaves would remain classified as “spoils of war.”<sup>58</sup> This harkens back to the law, which allows only someone who *conquers* another person to take that person as a slave.<sup>59</sup> Since non-ISIL fighters are not involved in the fighting against the Yazidis, those men fall outside of the parameters of the law. But according to the United Nations Human Rights Council’s Report, ISIL fighters regularly break these laws because the financial incentives to sell slaves to non-fighters are high.<sup>60</sup> Also, ISIL courts created reversion laws to ensure that slaves were not freed if an owner died intestate. In such cases, slaves revert to the common ownership of ISIL and can once again be placed on the market.<sup>61</sup>

Laws also govern when and between whom sex is permitted. Masters can neither have sexual relations with a pregnant slave, nor with both a mother and her child, but they can have sex with children in the event that the child has reached puberty.<sup>62</sup> Fathers and sons cannot share slaves.<sup>63</sup> The law even instructs slave masters to show “compassion” to slaves, although this rule is clearly not taken seriously.<sup>64</sup>

ISIL has also set up a slave market in order to enhance the business end of its slave enterprise. The slave trade is run in an efficient and pre-planned manner in order to ensure profits.<sup>65</sup> A set process from capture to trade exists: When women are first captured, a fleet of pre-arranged buses takes them to halls, prisons, and other holding areas.<sup>66</sup> These holding areas are set up in advance with mattresses and other amenities for a cer-

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54. See U.N. Hum. Rts. Council, *supra* note 43, at ¶ 162.

55. *Id.* at ¶ 76.

56. Callimachi, *supra* note 7.

57. See U.N. Hum. Rts. Council, *supra* note 43, at ¶ 75.

58. *Id.*

59. *Id.* at ¶ 76.

60. *Id.* at ¶ 76.

61. *Id.* at ¶ 62.

62. Reuters, *ISIL Issues Rules for Sex Slavery in the “Caliphate”*, THE TELEGRAPH (Dec. 29, 2015, 10:27 PM) <http://www.telegraph.co.uk/news/worldnews/islamic-state/12073762/Isil-issues-rules-for-sex-slavery-in-the-caliphate.html> [https://perma.cc/7XT3-3F8R].

63. *Id.*

64. *Id.*

65. Callimachi, *supra* note 7, at A12.

66. *Id.*



tain number of women.<sup>67</sup> Once ISIL brought the women, it uses a specific methodology of inventorying and labeling them.<sup>68</sup> From the pen, the women are brought to a slave market to be sold retail or wholesale. The purchasers are other Muslims who want slaves or people who wish to purchase the women's freedom.<sup>69</sup> Prices are set as high as \$150 and as low as \$25,<sup>70</sup> and sometimes, the women are gifted to the commanders.<sup>71</sup> The result is profit and an advertisement tool; images from the market are used to attract foreign Islamist fighters.<sup>72</sup>

Despite this horrific process, some victims have escaped. Two thousand five hundred women are now safe and receiving treatment in Europe,<sup>73</sup> while others have escaped to Kurdish-held territories.<sup>74</sup> Yet the fear and trauma that ISIL created remains strong.<sup>75</sup> The victims fear not only that the captors will come to Yazidi safe zones and re-take them as prisoners, but also that ISIL men will escape punishment.<sup>76</sup> As one Yazidi escapee remarked, "[t]he day Mosul falls, I fear ISIS men, like the one who kept me, will just shave off their beards and escape to the West."<sup>77</sup>

#### D. Boko Haram

Boko Haram is a radical Islamist insurgent group that was founded in 2002 by Muhammad Yusuf in Nigeria.<sup>78</sup> Yusuf, like Zarqawi, believed in a radical form of Islam—so radical that when twelve Northern Nigerian states voted to institute Sharia law, he protested the action because it was decided by a *democratic* vote, which he viewed as a forbidden innovation, and conducted by a Nigerian government, which he saw as permeated with corruption.<sup>79</sup> He also sought to take advantage of the tensions that had plagued Nigeria's religious populations, which is divided between the fifty percent Christian and forty percent Muslim populations, to inspire the

67. *Id.*

68. *Id.*

69. *Id.*, at A1.

70. Ford Sypher, *Rape and Sexual Slavery Inside an ISIS Prison*, THE DAILY BEAST (Aug. 28, 2014), <http://www.thedailybeast.com/articles/2014/08/28/rape-and-sexual-slavery-inside-an-isis-prison.html> [<https://perma.cc/SK27-JTBX>].

71. Reuters, *supra* note 62.

72. Callimachi, *supra* note 7, at A12.

73. Lara Whyte, *Germany Opens Its Doors to Yazidi Women and Children Enslaved by ISIS*, THE GUARDIAN (Mar. 2, 2016, 2:00 PM), <https://www.theguardian.com/global-development/2016/mar/02/germany-opens-doors-yazidi-women-children-northern-iraq-enslaved-isis> [<https://perma.cc/24K9-8PXR>].

74. Green, *supra* note 33.

75. Christina Lamb, "They Have Suffered Something so Terrible, Their Eyes Will Always Haunt You," THE TIMES (Oct. 23, 2016, 12:01 AM), <http://www.thetimes.co.uk/article/they-have-suffered-something-so-terrible-their-eyes-will-always-haunt-you-kt3nthm0t> [<https://perma.cc/N727-4R6Q>].

76. *Id.*

77. *Id.*

78. See VARIN, *supra* note 8, at 209.

79. J. Peter Pham, *Boko Haram's Evolving Threat*, Africa Security Brief, AFR. CTR. FOR STRATEGIC STUD. 2 (Apr. 2012)

Muslims to form a caliphate.<sup>80</sup> But like Jama'at, most people did not look at Boko Haram's radical stances with favor, and as a result, it was unable to gather a large following, launching just occasional attacks for about seven years.<sup>81</sup>

In 2009, however, Boko Haram launched an insurgency against the Nigerian government to fulfill its goal of overthrowing the Nigerian government and establishing a caliphate.<sup>82</sup> In 2011, the group launched 196 sophisticated attacks and robbed over one hundred banks for a total of seven million dollars.<sup>83</sup> At that time, Boko Haram also stepped up its attacks against Christians, killing fifty and launching attacks on twenty churches.<sup>84</sup> Also, just as Jama'at was able to fight and train in Iraq and Syria, Boko Haram received similar training in Mali.<sup>85</sup> When Islamists seized control of a large part of Mali in 2012, Boko Haram sent its troops into the battle.<sup>86</sup> Its troops thus gained experience for the battle against the Nigerian government. In 2015, Boko Haram declared its allegiance to ISIL and renamed itself the Islamic State of West Africa.<sup>87</sup>

Despite the similarities that Boko Haram shares with ISIL, it has been unable to replicate its success. In part, this is due to the success of Nigerian forces, allied with forces from Chad and Cameroon, in holding off the terrorist group.<sup>88</sup> In 2009, for example, when Boko Haram first began its sophisticated attacks, the police responded with an operation that killed Yusuf and more than eight hundred Boko Haram members.<sup>89</sup> Also, united African forces have been able to force Boko Haram out of most of its strongholds, whereas ISIL continues to control Raqqa, Mosul, and other areas.<sup>90</sup> As a result, Boko Haram has for the most part been constrained to the Mandara Mountains and the Sambisa Forest, and it has been unable to expand its support.<sup>91</sup>

#### E. Abduction of Women and the Chibok Girls

Boko Haram's campaigns against the Nigerian government have included the abduction of women and the systematic targeting of

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80. *Nigeria Demographics*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/ni.html> [<https://perma.cc/S9C3-9CMV>].

81. *Id.*

82. *Id.* at 4.

83. See VARIN, *supra* note 8, at 64.

84. *Id.* at 65.

85. *Id.* at 71-73.

86. *Id.*

87. *Id.* at 3.

88. *Id.* at 97-112.

89. *Id.* at 62.

90. *Mapping Militant Organizations: Boko Haram*, STAN. U. (Aug. 26, 2016), <http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/553?highlight=boko+haram> [<https://perma.cc/TG23-E8KY>].

91. *Who are Nigeria's Boko Haram Islamist Group?*, BBC (Nov. 24, 2016), <http://www.bbc.com/news/world-africa-13809501re> [<https://perma.cc/UP45-4XDD>].

schools.<sup>92</sup> Since 2009, it has abducted about five hundred women, including 276 girls in one attack on a school in the town of Chibok in the Borno State; these girls are known as the “Chibok Girls.”<sup>93</sup> But despite Boko Haram’s recent pledge of allegiance to ISIL, its reasons for targeting women and its subsequent treatment of them do not parallel ISIL’s treatment of the Yazidis.

Whereas ISIL targets the Yazidis because it views the ethnic group as pagan,<sup>94</sup> the reasons behind Boko Haram’s targeting of Nigerian women are far from clear. There are multiple rational reasons that could explain the targeting, including that the targeted girls have all been schoolchildren, Christian, or under the auspices of the Nigerian government. I will address each reason in turn.

The reason that Boko Haram might target girls for being schoolchildren is because one of the group’s principle missions is to end Western education.<sup>95</sup> The name itself, “Boko” [Education] “Haram” [Forbidden] is meant to denote the fact that the group believes all Western education is sinful.<sup>96</sup> As such, the group has engaged in a systematic targeting of schools, destroying 211 schools in Borno, twenty-one schools in Yobe, as well as attacking the Federal Government College and an agricultural college.<sup>97</sup> These attacks have left many men and women dead and undermined access to education in Nigeria, where education resources are already scarce.<sup>98</sup> Boko Haram insurgents believe that Nigerians will stop sending children to non-Koranic schools if the group succeeds in staging attacks and abducting women.<sup>99</sup> So, perhaps, Boko Haram’s goal in abducting schoolgirls is not to establish a slave market, but rather to force Nigerians to stop sending children to non-Koranic schools.

Religious affiliation might be another reason why Boko Haram chose to target the Chibok girls. Chibok is located in Borno State, which has a large Christian population and accordingly, ninety percent of the Chibok Girls were Christian.<sup>100</sup> Furthermore, when Boko Haram abducted the girls, its militants separated Christians from Muslims and gave the Christians a choice of converting to Islam or facing conditions of domestic servitude, whereas the militants allowed most Muslim abductees to leave.<sup>101</sup> This reason would fit well with Boko Haram’s goal of establishing a caliphate and inflaming tensions between Christians and Muslims.

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92. HUMAN RIGHTS WATCH, “THOSE TERRIBLE WEEKS IN THEIR CAMP”: BOKO HARAM VIOLENCE AGAINST WOMEN AND GIRLS IN NORTHEAST NIGERIA I (2014), <https://www.hrw.org/report/2014/10/27/those-terrible-weeks-their-camp/boko-haram-violence-against-women-and-girls> [<https://perma.cc/77AV-72V3>].

93. *Id.*

94. Spencer, *supra* note 53.

95. VARIN, *supra* note 8, at 72-73.

96. *Id.* at 59.

97. See HUMAN RIGHTS WATCH, *supra* note 92, at 17.

98. *Id.*

99. *Id.*

100. *Id.* at 27.

101. *Id.* at 20.

A final reason why Boko Haram might be targeting women is simply to get back at the Nigerian government, which had engaged in a campaign of targeting the wives of Boko Haram leaders.<sup>102</sup> This reason is also plausible because Boko Haram sees itself at war with an illegitimate Nigerian state and would want to hurt the government as the government had hurt the group. Any of these reasons could be behind Boko Haram's attacks.

Boko Haram does not treat the Nigerian abductees the way ISIL treats the Yazidis either. Although Boko Haram leaders stated that the girls would be sold as slaves at the time of abduction, the word "slave" does not seem to have the same connotation as in the case of the Yazidis.<sup>103</sup> Nor has Boko Haram revamped laws to facilitate enslavement as ISIL did.<sup>104</sup> Boko Haram forced most of the Nigerian abductees to do manual labor such as cook, clean, and perform other household chores,<sup>105</sup> whereas the emphasis on sexual relations was not as prevalent.<sup>106</sup> This is not to say that sexual assault does not occur; credible rape cases are documented and forced marriages are prevalent, but there is no evidence that such cases are widespread. The Human Rights Watch report on Boko Haram points out that the "commanders appeared to make some effort to protect women from sexual assault" *before* entering forced marriages.<sup>107</sup>

The possible reasons for the disparate treatment are multifold. Perhaps it is because the Nigerian abductees are mostly Christian and thus still "People of the Book." Perhaps it is because ISIL, seeing itself more as a global empire, needs an effective advertising tool to recruit foreign fighters into its ranks, whereas Boko Haram for the most part is limited to Nigeria and the general area of West Africa.<sup>108</sup> Alternatively, it could be the case because Boko Haram wants to create institutions for enslavement, but it has not been able to retain sufficient power over territories as ISIL has. Boko Haram might fear that the creation of true slave markets could trigger too large of a reprisal from African forces, just as the greatest reprisal against Boko Haram so far was after the abduction of the Chibok girls. These discrepancies and their effect on the prosecution of Boko Haram will be further discussed in Part IV.

## II. Rwandan and Yugoslavian Genocides

### A. Rape in the Bosnian Genocide

The Bosnian Genocide occurred during the Yugoslav Wars of the

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102. Benjamin Maiangwa & Daniel E. Agbibo, *Why Boko Haram Kidnaps Women and Young Girls in North-East Nigeria*, CONFLICT TRENDS, Jan. 2014, at 52.

103. See HUMAN RIGHTS. WATCH, *supra* note 92, at 20.

104. See generally *id.* at 18-37.

105. *Id.* at 26.

106. Jason Burke, *Third of Students Abducted by Boko Haram "Unwilling to Leave Captors"*, THE GUARDIAN (Oct. 18, 2016, 11:41 AM), <https://www.theguardian.com/world/2016/oct/18/third-of-students-abducted-by-boko-haram-unwilling-to-leave-captors> [<https://perma.cc/5KU8-MZMY>].

107. HUMAN RIGHTS. WATCH, *supra* note 92, at 33.

108. *Id.* at 4.

1990s.<sup>109</sup> Yugoslavia had been a multi-ethnic federation composed of Slovenes, Croats, Serbians, Bosnians, Albanians, Macedonians, and others.<sup>110</sup> Despite these tremendous ethnic differences, the state had been held together in large part due to Yugoslavia's dictator, Josip Broz Tito.<sup>111</sup> When Tito died in 1980, tensions between the ethnic groups escalated, in particular as Yugoslavia faced an economic crisis.<sup>112</sup> As the state fell apart, Serbian nationalists, such as Slobodan Milosevic, stepped into power.<sup>113</sup> These nationalists capitalized on the fear and growing xenophobia until hostilities between the former republics broke out.<sup>114</sup>

When total war erupted between the Bosnian Muslims and the Serbs, the rape of Bosnian Muslim women followed.<sup>115</sup> Much like with ISIL, the Serbian rape of the Bosnian Muslim "other" did not just occur as a result of random events, but rather as a planned campaign. In most cases, Serbian soldiers would take over a town and then kill the men, such as in Srebrenica.<sup>116</sup> After the slaughter, the Serbs would take the women onto buses and transport them to concentration camps and other holding facilities, which were set up in advance.<sup>117</sup> Sometimes the rape began before women even reached the camps.<sup>118</sup> Testimonies of Bosnian Muslim women revealed that Serbian soldiers would stop the buses at checkpoints and pull the most attractive women off the buses for roadside rape.<sup>119</sup> Once the buses reached the camps, few were spared.<sup>120</sup> Some of these camps, such as Foča and Buk Bijela, were created for the explicit purpose of providing a forum for Serbian soldiers to commit sexual assault.<sup>121</sup> And the rape occurred not just at the rape camps, but also at Omarska, Trnopolje, and other camps, as well as in private homes, apartments, sports halls, and schools.<sup>122</sup>

Testimonies from the International Criminal Tribunal for the Former Yugoslavia (ICTY) revealed gruesome scenes. According to witnesses, the rich and educated women were raped first.<sup>123</sup> Gang-rapes, sexual assaults, and rapes through means of objects occurred, and some victims were even

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109. See EDINA BEĆIREVIĆ, GENOCIDE ON THE DRINA RIVER 81-83 (2014).

110. *Id.* at 16.

111. *Id.*

112. *Id.* at 29.

113. *Id.*

114. *Id.*

115. See generally BEĆIREVIĆ, *supra* note 109.

116. SAMANTHA POWER, "A PROBLEM FROM HELL": AMERICA AND THE AGE OF GENOCIDE 403 (2002).

117. *Id.*

118. *Id.* at 404.

119. *Id.*

120. *Id.*

121. HUMAN RIGHTS WATCH, BOSNIA AND HERCEGOVINA, "A CLOSED, DARK PLACE": PAST AND PRESENT HUMAN RIGHTS ABUSES IN FOCA (1998), <https://www.hrw.org/legacy/reports98/foca> [<https://perma.cc/6RYL-CHJP>].

122. Ed Vulliamy, *Bosnia's Victims 20 Years On: Survivors of a Nightmare with No Reckoning*, THE GUARDIAN (Apr. 7, 2012, 7:08 PM), <https://www.theguardian.com/world/2012/apr/08/bosnia-camps-ed-vulliamy> [<https://perma.cc/5KZV-2SXZ>].

123. BEĆIREVIĆ, *supra* note 109, at 123.

sold off to Serbian soldiers.<sup>124</sup> In buildings where women were held, Serbs had “unfettered” access to the halls where they were located;<sup>125</sup> the soldiers could choose whomever to assault, and sometimes the commanders would order them to do so.<sup>126</sup> Judge Florence Mumba, one of the presiding judges, described the defendants’ actions in *Kunarac* as a “nightmarish scheme of sexual exploitation.”<sup>127</sup>

During the rapes, the rapists would reveal the purposes behind their campaign of sexual assault.<sup>128</sup> Victims testified that the soldiers would accuse them of being Ustashi or Turks.<sup>129</sup> Victims also testified that the Serbian soldiers wanted to inseminate the women with Serbian seed in order to eliminate the Muslim nation.<sup>130</sup> This insemination idea caught on among the Serbian soldiers because there was a belief that religion passed through the father.<sup>131</sup> When the violence came to an end, the European Union estimated that 20,000 women had been raped, whereas the Bosnian sources estimated that the number of women having been raped was closer to 50,000.<sup>132</sup> As Samantha Power, the former United States Ambassador to the United Nations wrote:

They [Serbs] forced fathers to castrate their sons or molest their daughters; they humiliated and raped (often impregnating) young women. Their [Serbs] was a deliberate policy of destruction and degradation: destruction so this avowed enemy race [Bosnian Muslims] would have no homes to which to return; degradation so the former inhabitants would not stand tall—and thus would not dare again stand—in Serb-held territory.<sup>133</sup>

The ICTY was precedent-setting with respect to rape because three criminals, Dragoljub Kunarac, Radomir Kovac, and Zoran Vukovic, became the first to be tried for rape as a crime against humanity under Article 5(g) of the Tribunal.<sup>134</sup> The court found that the Serbs had engaged in a sys-

124. *Id.*

125. Prosecutor v. Kunarac, Case Nos. IT-96-23-T & IT-96-23/1-T, Judgment, ¶ 1.10 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001), <http://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf> [<https://perma.cc/NQ4G-G86V>].

126. *Kunarac*, Case Nos. IT-96-23-T & IT-96-23/1-T, Testimony of Witness 50 (Int’l Crim. Trib. for the Former Yugoslavia March 29–30, 2000), <http://www.icty.org/sid/188> [<https://perma.cc/8GVQ-UWHX>].

127. Press Release, Int’l Crim. Tribunal for the Former Yugoslavia, Judgment of Trial Chamber II in the Kunarac, Kovac and Vukovic Case (Feb. 22, 2001), <http://www.icty.org/en/press/judgement-trial-chamber-ii-kunarac-kovac-and-vukovic-case> [<https://perma.cc/4SJS-RQ9F>].

128. HUMAN RIGHTS WATCH, HUMAN RIGHTS WATCH GLOBAL REPORT ON WOMEN’S RIGHTS 13 (1995), <https://www.hrw.org/sites/default/files/reports/general958.pdf> [<https://perma.cc/499V-PRQ7>].

129. *Id.*

130. ANNE-MARIE L.M. DE BROUWER, SUPRANATIONAL CRIMINAL PROSECUTION OF SEXUAL VIOLENCE: THE ICC AND THE PRACTICE OF THE ICTY AND THE ICTR 58 (2005).

131. *Id.* at 59.

132. NIALL FERGUSON, THE WAR OF THE WORLD: HISTORY’S AGE OF HATRED 630 (2006).

133. POWER, *supra* note 116, at 251.

134. Press Release, Int’l Crim. Tribunal for the Former Yugoslavia, Sentencing Judgment in the Kunarac, Kovac, and Vukovic (Foca) Case (June 12, 2002), <http://www.icty.org/en/press/sentencing-judgement-kunarac-kovac-and-vukovic-foca-case> [<https://perma.cc/5GRR-CCF5>].

tematic attack against the Bosnian Muslims; that the Serbs attacked Muslims for no reason other than their ethnic identities; that Bosnian Muslims were not armed, scared to sleep in their homes, and forced to flee; and that the Muslims were subject to long periods of imprisonment which included brutal beatings and rape.<sup>135</sup> Furthermore, soldiers such as Kunarac had taken advantage of their access to the Partizan Sports Hall and Kalinovik Primary School,<sup>136</sup> where women were coerced and assaulted.<sup>137</sup> ICTY convicted all three defendants for using rape as a crime against humanity.<sup>138</sup> Although the verdict was not genocide, Powers wrote “such crimes constituted crimes against humanity and might well be considered genocide under the convention.”<sup>139</sup>

## B. The Rwandan Genocide

The background of the Rwandan Genocide can be traced to the beginning of the 1900s, when the Europeans engaged in the “Scramble for Africa.”<sup>140</sup> As a result of that campaign, Belgium colonized Rwanda.<sup>141</sup> Upon the Belgians’ arrival, Rwanda had three main ethnic groups, which included the “Hutus” and “Tutsis.”<sup>142</sup> For centuries, the differences between the groups hinged on the Hutus being farmers and of lower class and the Tutsis being pastoralists and of higher class.<sup>143</sup> This distinction was not fixed: a Hutu could become a Tutsi.<sup>144</sup> But the Belgians changed this definition and incorporated anthropological sciences of the time: Tutsis were re-classified as a superior group on the basis of racial characteristics, such as light-skin, whereas Hutus were seen as inferior because of their dark skin and short stature.<sup>145</sup> As such, the Belgians gave the Tutsis control of the government.<sup>146</sup>

The Hutus refused to accept this arrangement and revolted in 1959, expelling 300,000 Tutsis to neighboring countries.<sup>147</sup> The former Tutsis re-settled, for the most part, in Uganda where they formed a resistance group known as the Rwandan Patriotic Front (RPF).<sup>148</sup> In 1990, the RPF attacked Rwanda from Southern Uganda,<sup>149</sup> which led to the beginning of a war that lasted until 1993, when the fighting groups signed the Arusha

135. *Kunarac*, Case Nos. IT-96-23-T & IT-96-23/1-T, Trial Judgment, ¶ 571, ¶ 573, ¶ 574.

136. *Id.* at ¶ 1.10, ¶ 1.11.

137. *Id.* at ¶ 592.

138. *Id.* at ¶ 687, ¶ 782, ¶ 822.

139. POWER, *supra* note 116, at 483.

140. KINGSLEY CHIEDU MOGHALU, *RWANDA’S GENOCIDE: THE POLITICS OF GLOBAL JUSTICE* 10 (2005).

141. *Id.*

142. SCOTT STRAUS, *THE ORDER OF GENOCIDE: RACE, POWER, AND WAR IN RWANDA* 20-21(2006).

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 24.

Accords.<sup>150</sup> But the peace did not last; in 1994, the plane of Rwanda's Hutu President Juvenal Habyarimana was shot down and hostilities resumed.<sup>151</sup>

Rape followed the outbreak of hostilities, just like in the former Yugoslavia. Tutsi women were subjected to gang rape, torture, and rape through means of an external object.<sup>152</sup> The Hutus even forced some women into quasi-enslavement, in the form of forced marriage, where realities were similar to slave conditions.<sup>153</sup> Testimonies from the International Criminal Tribunal on Rwanda (ICTR) revealed that the rapists made statements during intercourse, which evoked pre-war anti-Tutsi propaganda, such as, "We want to see if a Tutsi woman is like a Hutu woman."<sup>154</sup> One survivor, for example, testified that when a Hutu raped her, the rapist told her that the Hutus did not want to kill all the Tutsi women on the spot, but rather to let them die of grief.<sup>155</sup> When the violence came to an end, experts estimated that Hutus had raped between 250,000 and 500,000 Tutsi women during just one hundred days.<sup>156</sup> Rene Degni-Segui, the Special Rapporteur on Rwanda, stated in his report to the United Nations that, "rape was the rule and its absence the exception."<sup>157</sup> The ICTR, like the ICTY, also set legal precedent for rape. But this time it was with the first conviction for rape under the Article 2 of the Genocide Convention.<sup>158</sup> The defendant, Jean-Paul Akayesu had been a leader of Taba, a Rwandan commune.<sup>159</sup> The court found that Akayesu knew of the sexual assaults that occurred in his commune; that he provided tacit encouragement to the rapists; and that he did so as part of the systematic attack on the Tutsi people.<sup>160</sup> And then, in a departure from the ICTY proceedings, the court accepted the argument of the chief prosecutor, Pierre Prosper, that Akayesu's actions and inactions amounted to genocide.<sup>161</sup> Prosper's argument will be recounted in the next section. As such, ICTR judged Akayesu's attack to be part and parcel of the Hutu attempt to destroy the Tutsi.<sup>162</sup> This ruling set historical precedent for the prosecution of rape as genocide.

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150. MOGHALU, *supra* note 140 at 14-15.

151. *Id.* at 16.

152. See generally Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998), <http://unictr.unmict.org/sites/unictr.org/files/case-documents/ictr-96-4/trial-judgements/en/980902.pdf> [<https://perma.cc/XRY7-QGMU>].

153. *The Genocide*, FOUND. RWANDA, <http://www.foundationrwanda.org/thegenocide.aspx> (last visited May 12, 2017) [<https://perma.cc/8E9L-SLGL>].

154. MOGHALU, *supra* note 140, at 18.

155. *Id.* at 35.

156. FERGUSON, *supra* note 132.

157. U.N. Commission on Hum. Rts., *Report on the Situation of Human Rights in Rwanda Submitted by Mr. Rene Degni-Segui, Special Rapporteur of the Commission on Hum. Rts.*, ¶ 20, E/CN.4/1996/68 (Jan. 29, 1996).

158. See generally Akayesu, Case No. ICTR-96-4-T, Judgment.

159. *Id.* at ¶ 54.

160. *Id.* at ¶ 706.

161. POWER, *supra* note 116, at 485.

162. Akayesu, Case No. ICTR-96-4-T, Judgment, at ¶ 169.



### III. The Genocide Convention

#### A. Law of Rape

The International Criminal Court has adopted the Rome Statute's elements of rape as a crime against humanity in Article 7(1)(g)-1 to establish the *actus rea* and *mens rea* of the physical act of rape. So prior to looking at elements of Article 2 of the Genocide Convention, the Rome Statute's elements for Article 7(1)(g)-1 must be met, which state:

1. 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.
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.<sup>163</sup>

There are some notable aspects of the statute that have departed from some of the case law, which are worth mentioning before proceeding to the application. With respect to § 1, the statute specifically calls for "penetration, however slight" of the victim. This is different from the ICTR's decision in *Akayesu*, which stated that "elements of the crime of rape cannot be captured in a mechanical description of objects and body parts."<sup>164</sup> Therefore, § 1 is a more difficult burden for the prosecutor to prove than in some of the previous cases, although the Court in *Bemba* clarified that the penetration can be oral, in addition to anal or vaginal.<sup>165</sup>

With respect to § 2, the former half of the statute allows for determining non-consent in individual circumstances, whereas the latter half allows the court to infer non-consent from the existence of a "coercive environment." These separate inquiries are the results of a split in the ICTY and ICTR case laws as well.<sup>166</sup> In *Akayesu*, *Musema*, and *Niyitegeka* at the ICTR and *Kunarac* at the ICTY, the tribunals looked only at the inherent coercive conditions of time, not individual consent.<sup>167</sup> But in *Semanza*, the tribunal looked to non-consent in individual circumstances.<sup>168</sup> Later, in *Gacum-*

163. INT'L CRIM. CT., ELEMENTS OF CRIMES 8 (2011), <https://www.icc-cpi.int/NR/rdon-lyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf> [<https://perma.cc/BUG6-6F8L>].

164. *Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 597.

165. *Prosecutor v. Bemba Gombo*, ICC-01/05-01/08, Judgment, ¶ 100, ¶ 101 (Mar. 21, 2016).

166. Catherine MacKinnon, *Defining Rape Internationally: A Comment on Akayesu*, 44 COLUM. J. TRANSNAT'L L. 940, 943 (2005-2006).

167. *Id.* at 950.

168. *Id.*

*bitsi*, the ICTR sided with *Akayesu* and inferred non-consent through “coercive conditions.”<sup>169</sup> And in March 2016, in *Bemba*, the ICC said that it interpreted this part of the statute in light of *Akayesu*.<sup>170</sup> Therefore, the ICC will most likely continue interpreting § 2 under *Akayesu*, and individual consent will not need to be proven if a “coercive environment” exists.<sup>171</sup>

§ 3 and § 4 have not been subject to the same split case law as the other two sections of the statute, and thus can be applied as is.

Article VI of the Rome Statute provides that:

Genocide means any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.<sup>172</sup>

A person who rapes with the specific intent to destroy a people can be convicted under Article 2 (b), (c), or (d).<sup>173</sup> What it means to “destroy” an ethnic group is not clear from the statute, but Chief Prosecutor Pierre Prosper’s argument in *Akayesu* sheds light on how the court applies this prong. At the ICTR, Prosper argued that a group could remain physically intact, but be left so “marginalized or so irrelevant to society that it would, in effect, be destroyed.”<sup>174</sup> It would thus seem that Prosper’s argument is a qualitative and quantitative question of how and how much the victimized group can continue to contribute to societies and cultures around it after it has been attacked. Assuming that future international tribunals accept this rationale as precedent, it can be useful in assessing whether ISIL and Boko Haram militants have sought to destroy their victims.

Article VII of the Rome Statute defines “Crimes Against Humanity” as any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;

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169. Prosecutor v. Gacumbitsi, Case No. ICTR-2001-64-A, Judgment, ¶ 148 (July 7, 2006), [http://hrlibrary.umn.edu/instree/ICTR/GACUMBITSI\\_ICTR-01-64/GACUMBITSI\\_ICTR-2001-64-A\\_appeals.pdf](http://hrlibrary.umn.edu/instree/ICTR/GACUMBITSI_ICTR-01-64/GACUMBITSI_ICTR-2001-64-A_appeals.pdf) [<https://perma.cc/W4J5-2W6X>].

170. *Bemba Gombo*, ICC-01/05-01/08, Judgment, ¶ 103.

171. *Id.* ¶ 106.

172. Convention on the Prevention and Punishment of the Crime of Genocide, art. 6, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

173. *See id.*

174. POWER, *supra* note 116, at 486; *see* THIERRY CRUVELLIER, COURT OF REMORSE: INSIDE THE INT’L CRIM. TRIBUNAL FOR RWANDA 28 (2010).

- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, 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 Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.<sup>175</sup>

In the comments, the Statute clarifies a few somewhat ambiguous points that might be of consequence to the discussion in this paper, including:

- (a) “Attack directed against any civilian population” means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;
- (b) “Enslavement” means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
- (c) “Persecution” means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.<sup>176</sup>

At the outset, it is important to note the difference between genocide and crimes against humanity. According to Professor Philippe Sands, the difference between the two crimes is not related to the scale of the crime, but rather the intention behind its perpetration.<sup>177</sup> Whereas the genocide prong of the Rome Statute is meant to protect *groups* against destruction, crimes against humanity focuses on the systematic killing of a large number of *individuals*.<sup>178</sup> As such, the difference between the two crimes boils down to whether a group or collective have been targeted as opposed to individual civilians. Nevertheless, these crimes often overlap and are

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175. Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 172, at art. 7.

176. *Id.*

177. Robert Coalson, *What's the Difference Between "Crimes Against Humanity" and "Genocide"*, THE ATLANTIC (Mar. 19, 2013), <https://www.theatlantic.com/international/archive/2013/03/whats-the-difference-between-crimes-against-humanity-and-genocide/274167/> [https://perma.cc/ND9E-7PG4].

178. *Id.*

charged at the same time, as was the case in *Akayesu*.<sup>179</sup>

## B. Application of the Rome Statute

In the case of ISIL, the ICC should prosecute major ISIL leaders, such as al-Baghdadi, for rape under Article 2(b) of the Genocide Convention. Prosecutors must first make sure that these leaders are liable for the physical act of rape under Article 7(1)(g)-1 of the Rome Statute. Under 7(1)(g)-1, the courts should be able to establish each element.

With respect to § 1, evidence of physical invasion of a victim, Yazidi survivors have testified about their experiences to Human Rights Watch,<sup>180</sup> in front of Congress,<sup>181</sup> in front of the United Nations,<sup>182</sup> and to various other institutions.<sup>183</sup> Also, hundreds of Yazidis are being treated in Europe for physical and mental ailments, some of whom might be open to coming to court.<sup>184</sup> The ICTR in *Akayesu* convicted the defendant based on testimonies from twenty seven witnesses, and a comparable amount of Yazidis most likely would be willing to come forward.<sup>185</sup> Also, despite the higher burden on the prosecutor to establish “penetration,” there should be no issue here because ISIL’s purpose in enslaving the Yazidi women was to engage in sexual gratification.<sup>186</sup> Other humiliating acts, such as those that occurred in Rwanda, which might have been difficult to fit under “penetration,” do not seem to be as present with ISIL, if at all.

With respect to § 2, coercion of the individual or coercive environment, the Court can find a coercive environment in the facts that ISIL sold women on a market and subjected them to a registration system, and their widespread slaughter of Yazidi men. In *Kunarac*, consent was vitiated on the basis of brothel-like conditions in which Serbian soldiers had “unfettered” access to the rooms of Bosnian women in the Partizan Sports Hall and Kalinovik School.<sup>187</sup> In *Gacumbitsi*, the Court established that defendant’s utterances that women should be killed in the case of resistance also

179. See generally *Akayesu*, Case No. ICTR-96-4-T, Judgment.

180. *Iraq: ISIS Escapees Describe Systematic Rape*, HUM. RTS. WATCH (Apr. 14, 2015, 11:45 PM), <https://www.hrw.org/news/2015/04/14/iraq-isis-escapees-describe-systematic-rape> [https://perma.cc/CGB4-L345].

181. Ryan Browne, *Escaped ISIS Sex Slave Tells Congress of Horrors*, CNN (June 21, 2016, 4:40 PM), <http://www.cnn.com/2016/06/21/politics/escaped-yazidi-slave-isis-us-fight> [https://perma.cc/99GL-7D4Y].

182. Charlotte Alter, *Yezidi Woman Testifies an American ISIS Fighter Held Her as a Sex Slave*, TIME (Oct. 7, 2015, 3:50 PM), <http://time.com/4063993/yezidi-woman-isis-american-fighter-sex-slave> [https://perma.cc/S4C8-6GTK].

183. Sarah Malm, “*The Saddest Thing I Remember Was This Little Girl, 12 Years Old. They Raped Her Without Mercy*”: *Dressed in Traditional Wedding Gowns, Yazidi Sex Slaves Relive Their Torture by ISIS*, DAILY MAIL (Jan. 18, 2016, 2:04 PM), <http://www.dailymail.co.uk/news/article-3404894/The-saddest-thing-remember-little-girl-12-years-old-raped-without-mercy-Dressed-traditional-wedding-gowns-Yazidi-sex-slaves-relive-torture-ISIS.html> [https://perma.cc/2UP5-SJME].

184. Jalabi, *supra* note 42.

185. *Akayesu*, Case No. ICTR-96-4-T, Judgment, at ¶ 696.

186. *Id.*

187. *Kunarac*, Case Nos. IT-96-23-T & IT-96-23/1-T, Judgment, ¶¶ 1.10-1.11.

vitiated consent.<sup>188</sup> Here, ISIL slave owners have full power over their slaves and can subject them to abuse and prevent them from leaving the home.<sup>189</sup> But it is important to note that if the Court reverts to *Semanza*, it could get caught in a back-and-forth over each rape and whether there was individual consent. This does not seem likely, though, because that standard is illogical, and neither *Gacumbitsi* nor *Bemba* adopted it.<sup>190</sup>

With respect to § 3, conduct committed as part of systematic and widespread attack, the Court will find ample evidence. First, seven mass graves of Yazidis have been found.<sup>191</sup> Second, out of all the minorities who lived in the Nineveh province, where Sinjar is located, before the war, almost none remains.<sup>192</sup> And the attack on the Yazidis bears similarities to the events that occurred in Bosnia and Rwanda. Like the Bosnian Muslims, the Yazidis were not armed when attacked; thousands of Yazidis fled out of their fear of remaining in their homes; and then the Yazidis suffered a wide pattern of abuse, including murder and sexual enslavement.<sup>193</sup> Also, like the Rwandan Tutsis, the Yazidis were the sole group targeted for mass killing and rape, despite ISIL attacking other minorities, such as Christians, Turkmen, Shabak, Sabaeen-Mandaean, and Kaka'i people.<sup>194</sup> The Report of the Holocaust Memorial Museum singles out only the Yazidis as victims of genocide.<sup>195</sup>

With respect to § 4, knowledge of the systematic attack, ISIL leaders will be unable to plead ignorance given the range of attacks and institutions set up to make the enslavement successful, as was recounted in the Part II.

### C. Application of the Genocide Convention

With the physical elements of rape established, the Court can proceed to the more difficult claim—that the rape of the Yazidis constituted a genocide. The Court should find that at least some ISIL leaders had the general intent to cause serious bodily suffering and mental harm to the Yazidi people under Article 2(b) of the Genocide Convention through the use of rape and the specific intent to destroy the Yazidi people, in whole or in part, through such rape.

To establish ISIL's general intent to cause suffering and serious bodily harm to the Yazidis, the Court can look to multiple facts. First, the militants gave the Yazidis a choice to convert to Islam rather than be subjected to bondage, which indicates that ISIL wanted to impose suffering as punishment for refusing conversion.<sup>196</sup> Second, the sexual violence in and of

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188. *Gacumbitsi*, Case No. ICTR-2001-64-A, Judgment, at ¶ 48.

189. *Id.* ¶ 148, ¶ 155.

190. Shaheen, *supra* note 40.

191. U.S. HOLOCAUST MEMORIAL MUSEUM, *supra* note 43, at 21.

192. *Id.*

193. *Kunarac*, Case Nos. IT-96-23-T & IT-96-23/1-T, Judgment, ¶ 571-74.

194. See U.S. HOLOCAUST MEMORIAL MUSEUM, *supra* note 43 at 18, 20-21.

195. See *id.* at 20-21.

196. See *id.* at 16.

itself constitutes the commission of serious bodily and mental harm.<sup>197</sup> Third, although ISIL attacked other groups, the sole group that they targeted for widespread murder and sexual enslavement—on the basis of their identity—was the Yazidis.<sup>198</sup> And lastly, in the instances where ISIL did not enslave the Yazidi women, they killed them along with the Yazidi men.<sup>199</sup> Therefore, the Court should find that a general intent to cause serious bodily and mental harm to the Yazidis existed.

When establishing ISIL's specific intent to cause the *destruction* of the Yazidis in whole or in part, the Court can look into numerous facts about ISIL's actions. The Court can see ISIL's motives in some of its own publications in *Dabiq*, its English language magazine. In *Dabiq*, ISIL stated that the Yazidis' polytheistic religion could not exist along-side ISIL."<sup>200</sup> Also, evidence exists that ISIL researched the Yazidis before its attack on Sinjar and concluded that the Yazidis had to be killed or converted, in contrast to Christians and Jews who could continue to practice their religions.<sup>201</sup>

The Court can then look to the Yazidis and ask whether the Yazidi women can contribute to their surrounding cultures or societies. There is little doubt that Yazidis under ISIL rule have no such power of contribution. ISIL subjects the women to the absolute will of their masters, making them unable to leave their homes or see their families.<sup>202</sup> The sole reason for their existence, in the eyes of their captors, is to provide sexual gratification to their owners. And it is important—if not crucial—to note that had ISIL not taken the Yazidi women for sexual gratification, ISIL would probably have killed them along with the Yazidi men. In fact, the mass graves hold both the bodies of men and women and at least one grave has been discovered, which holds older women, presumably those who were not fit for enslavement.<sup>203</sup> Like the Rwandan Tutsis, life for Yazidi women has devolved into simple torture, and ISIL kills those whom it does not see as fit for torture. Therefore, given that Yazidi women face either death or sexual enslavement, the Court should find that ISIL intended the Yazidis' destruction.

The last task of the court is to determine whether the genocide was perpetrated against the Yazidis "in whole or in part." As we saw in Srebrenica, localized genocide is possible; not all the members of a group need to die or be raped for it to be considered a genocide.<sup>204</sup> Under this prong, the Court should have few problems establishing a localized genocide. Thousands of women remain enslaved and unable to live meaningful lives.<sup>205</sup> The quantitative problem that we will see with Boko Haram is not

197. *See id.*

198. *See id.* at 21.

199. *Id.*

200. *Id.* at 20.

201. *Id.*

202. U.N. Hum. Rts. Council, *supra* note 43, ¶ 48.

203. *See id.*

204. BROWER, *supra* note 130, at 75.

205. Sewell Chan & Somini Sengupta, *Woman Who Escaped Islamic State Captivity Wins Human Rights Prize*, N.Y. TIMES, Oct. 11, 2016, at A5.

present here. Therefore, the Court should find that ISIL's rape of the Yazidi women constitutes a genocide.

The ICC will most likely charge ISIL militants for non-genocidal crimes as well under Article VII of the Rome Statute. For example, sufficient evidence exists to bring other charges against ISIL for sexual crimes, including crimes against humanity for rape under Article 7(1)(g)-1, sexual slavery under Article 7(1)(g)-2, sexual violence under Article 7(1)(g)-6, other inhumane acts under Article 7(1)(k), and various War Crimes under Article VIII. These charges can be brought against ISIL militants in conjunction with—or as an alternative to—charging genocide, because the rape of the Yazidis occurred as a widespread and systematic attack against their ethnic group. As I discussed above, ISIL researched the Yazidis before the attack began, then targeted the group in a series of mass murders, and enslaved Yazidi women at each step.<sup>206</sup> The Yazidis were, and remain, a civilian population that did not threaten the surrounding Islamic population. ISIL forced the Yazidis to undergo multiple attacks, and stripped their freedom. Therefore, if the ICC does not bring genocide claim, then they should find ISIL guilty of crimes against humanity.

#### D. Application to Boko Haram

In the case of Boko Haram, the ICC will not be able to prosecute its major leaders for rape under Article VI of the Rome Statute. Although at least some Boko Haram leaders might have overseen incidents of rape or perpetrated sexual assault themselves, the Court will find little evidence that Boko Haram committed the attacks with the intent of destroying, in whole or in part, a national, ethnic, racial, or religious group.

With respect to the question of whether Boko Haram has targeted a specific group, the answer is not clear because Boko Haram has communicated multiple different messages. As I discussed in the section on Boko Haram's background, it is not clear whether the group is targeting school-children, government supporters, or Christians. The former two groups do not work under Article VI because neither is a national, ethnic, racial, or religious group under the statute. Targeting Christians would work, but the evidence is unclear as to whether that is happening. Although Boko Haram has attacked Christian sites and killed Christians in a handful of incidents, and there are tensions between Muslims and Christians in Nigeria, there is also evidence that the group has attacked and killed non-Christians, including Muslims who support the Nigerian government.<sup>207</sup> The separation of Christians from Muslims in the case of the Chibok girls is just one incident in six years, rather than a widespread and systematic attack. Therefore, no conclusive evidence that Christians are the specific group that Boko Haram is after exists.

And even if the court could establish that Boko Haram was just after Christians, it would run into the "in whole or in part" prong of the statute.

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206. See U.S. HOLOCAUST MEMORIAL MUSEUM, *supra* note 43, at 20.

207. Pham, *supra* note 79, at 4.

As I mentioned, the ICTY recognized the possibility of *localized* genocide with its convictions against Serbian war criminals for the killing of eight thousand Muslims in Srebrenica.<sup>208</sup> But the ICTY left open the question of how localized is *too* localized; in other words, the issue is still open as to whether a genocide can be too small. Is the kidnapping of about three hundred Nigerian schoolchildren enough? On the one hand, at least some of these girls have been forced into marriages similar to those that made up the genocide claims in *Gacumbitsi*.<sup>209</sup> Also, it might be unconscionable to tell someone who suffered through such a horror that the event is not genocide just because the group of targeted people was not large enough.<sup>210</sup> On the other hand, the Court would be dealing with quite a small group of people—just a fraction of the number of people killed at Srebrenica. Further precedent is thus needed, but the Court seems unwilling to allow the definition of genocide to be stretched this far.

Lastly, the Court would not satisfy the last and most difficult prong of the statute—the specific intent to destroy a people. Boko Haram, like ISIL, is not against the existence of Christians.<sup>211</sup> While it does subject Christians to taxes and other humiliating laws, it does not force them to convert or face either murder or enslavement as ISIL does with the Yazidis.<sup>212</sup> In other words, ISIL prevents Yazidis from being Yazidi, whereas Boko Haram only makes Christians face roadblocks to practicing their religion, not an outright prohibition. Therefore, although at least some Boko Haram members have raped or assaulted at least some of the Nigerian abductees, a genocidal rape claim against Boko Haram will fail.

Nevertheless, the fact that a prosecutor against Boko Haram could not win on a genocide claim does not mean that Boko Haram should not be prosecuted. Rather, Boko Haram can be indicted under either the same crimes against humanity in Article VII of the Rome Statute or general war crimes under Article VIII as ISIL. Boko Haram militants could be charged under the enslavement (c), forcible transfer of population (d), rape (g), and other inhumane acts (k) prongs of the crimes against humanity Article of the Rome Statute. But the ICC most likely will not charge the militants under torture (f) because *Bemba* ruled that rape subsumed the allegations of torture.<sup>213</sup> The crimes against humanity prong of the Rome Statute would work in the case of Boko Haram because such a prong allows a charge to be brought against a group that engages in a widespread and systemic attack against *any* civilian population. Therefore, the problem of deciding who Boko Haram is targeting, whether its Christians, schoolchildren, or those under the auspices of the Nigerian government, does not affect such a charge as it would with genocide. Furthermore, given that

208. BROUWER, *supra* note 130, at 75.

209. *Id.* at 54.

210. See Menachem Rosensaft, *The Srebrenica Massacre Must be Recognized as a Genocide*, HUFFINGTON POST (July 15, 2016), [http://www.huffingtonpost.com/menachem-rosensaft/the-srebrenica-massacre-m\\_b\\_7805728.html](http://www.huffingtonpost.com/menachem-rosensaft/the-srebrenica-massacre-m_b_7805728.html) [<https://perma.cc/6DJN-345M>].

211. See VARIN, *supra* note 8, at 85–87.

212. U.S. HOLOCAUST MEMORIAL MUSEUM, *supra* note 43, at 21.

213. *Bemba Gombo*, ICC-01/05-01/08, Judgment, ¶¶ 204–05.



Boko Haram engaged in an insurgent effort for almost a decade, there would be sufficient proof to show that multiple and systematic attacks occurred against civilians.

#### IV. Who Should the ICC Charge?

##### A. Islamic State Militants

Perhaps the most important question that ICC prosecutors must deal with is who to charge for using rape as a weapon of war. This question presents particular difficulties for ISIL as a terrorist organization because some of its main leaders remain unknown or are classified for security reasons.<sup>214</sup> Nevertheless, at least some current information can be used to pinpoint specific ISIL militants who have had a large role in facilitating the enslavement, including Abu Bakr al-Baghdadi, Turki al-Binali, and Abu Mohammed al-Ani. This list is not exhaustive, but still helps provide a starting point for the prosecution against ISIL.

Abu Bakr al-Baghdadi became the head of the Islamic State after the death of Abu Musab al-Zarqawi.<sup>215</sup> He was born in 1971 to a religious Sunni Muslim family in Iraq.<sup>216</sup> Little credible information about his time as an adolescent exists; however, at some point, he earned a degree in Islamic Studies from the Islamic University in Baghdad, served as an Islamic preacher, and formed a small terrorist organization that never gained prominence.<sup>217</sup> In 2005, al-Baghdadi became better known to American forces when he was captured in Iraq and interned at the Bucca detention camp for four years.<sup>218</sup> At the prison, Baghdadi was deemed a model inmate and not a significant threat.<sup>219</sup> But prison changed him.<sup>220</sup> Bucca brought Sunni extremists and other Muslims together, providing a space for indoctrination.<sup>221</sup> One inmate wrote, "Bucca was a factory. It made us all. It built our ideology."<sup>222</sup> So in 2010, after being released from prison, the new extremist al-Baghdadi took over the Islamic State in

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214. Jacques Neriah, *The Structure of the Islamic States (ISIS)*, JERUSALEM CTR. FOR PUB. AFF. (Sept. 8, 2014), <http://jcpa.org/structure-of-the-islamic-state> [https://perma.cc/RJW6-DCA3].

215. Terrence McCoy, *How Isis Leader Abu Bakr al-Baghdadi Became the World's Most Powerful Jihadist Leader*, WASH. POST (June 11, 2014), [https://www.washingtonpost.com/news/morning-mix/wp/2014/06/11/how-isis-leader-abu-bakr-al-baghdadi-became-the-worlds-most-powerful-jihadi-leader/?utm\\_term=.962658f23264](https://www.washingtonpost.com/news/morning-mix/wp/2014/06/11/how-isis-leader-abu-bakr-al-baghdadi-became-the-worlds-most-powerful-jihadi-leader/?utm_term=.962658f23264) [https://perma.cc/Q82U-2YFY].

216. *Id.*

217. *Id.*

218. *Id.*

219. Brad Parks, *How a US Prison Camp Helped Create ISIS*, N.Y. POST (May 30, 2015, 9:38 PM), <http://nypost.com/2015/05/30/how-the-us-created-the-camp-where-isis-was-born> [https://perma.cc/U3YC-FJ4R].

220. *Id.*

221. *Id.*

222. William McCants, *The Believer: How an Introvert with a Passion for Religion and Soccer Became Abu Bakr al-Baghdadi Leader of the Islamic State*, BROOKINGS INST. (Sept. 1, 2015), <http://csweb.brookings.edu/content/research/essays/2015/thebeliever.html> [https://perma.cc/KY4T-F7QA].

Iraq, which al-Qaeda still controlled at the time.<sup>223</sup>

Baghdadi has now been in charge of ISIL for the last seven years.<sup>224</sup> He has been responsible for—and retains absolute power over—the group’s institutional structure, appointing governors, ministers, and judges.<sup>225</sup> In that vein, he has also had the final word on the legal and business institutions created to facilitate the enslavement of the Yazidi women.<sup>226</sup> As such, al-Baghdadi’s power is similar to the defendant in *Akayesu* who, as bourgmestre (mayor) of the Taba commune, had ultimate authority over an area in which sexual assault was perpetrated. Furthermore, there is at least some evidence that al-Baghdadi himself raped women who he took as slaves, including American hostage Kayla Mueller.<sup>227</sup> There should be no issue prosecuting al-Baghdadi for genocidal rape and other crimes.

Turki al-Binali is ISIL’s chief religious advisor, also known as the Grand Mufti.<sup>228</sup> Al-Binali was born in Bahrain, and he studied at Dubai’s Islamic and Arabic Studies College and later at other Islamic universities.<sup>229</sup> After he joined ISIL in 2013, the terrorist organization made al-Binali the head of its Research and Fatwa Department.<sup>230</sup> In that role, he published pamphlets that provided ISIL with justification for enslaving and raping Yazidi women.<sup>231</sup> The same department also issued a pamphlet titled “Questions and Answers on Taking Captives.”<sup>232</sup> Many consider Al-Binali as one of the up-and-coming leaders of ISIL.<sup>233</sup> Likewise, Abu Mohammed al-Ani is the head of the Islamic State’s Judicial Authority, which deals with all judicial matters.<sup>234</sup> As was discussed in Section II, ISIL’s courts have also been instrumental in providing the legal rules governing the personal and business interactions between masters and slaves. As such, given al-Ani’s position as head of the authority, an international tribunal can infer his power over, and direct involvement in, enforcing laws against the Yazidis. There is no evidence that either al-Binali or al-Ani have

223. See McCoy, *supra* note 215.

224. See Carlo Munoz, *With Leaders Fleeing or Killed on Battlefield, Islamic State Fighters in Tactical Confusion*, WASH. TIMES (Mar. 8, 2017), <http://www.washingtontimes.com/news/2017/mar/8/abu-bakr-al-baghdadi-isis-still-alive-pentagon> [<https://perma.cc/G5PF-3Z68>].

225. Neriah, *supra* note 214.

226. McCants, *supra* note 222.

227. *Id.*; Pamela Brown, *Officials: ISIS Leader Sexually Abused U.S. Hostage*, CNN (Aug. 15, 2015, 12:57 PM), <http://www.cnn.com/2015/08/14/us/isis-leader-sexual-abuse-u-s-hostage> [<https://perma.cc/2PAB-3UQ5>].

228. Eric Schmitt et al., *Drone Strike Has ISIS Turning to “Deep Bench”*, N.Y. TIMES, Sept. 1, 2016, at A8.

229. Associated Press, *The Millennial ISIS Preacher Radicalizing the Next Generation of Jihadis*, N.Y. POST (Jan. 28, 2015, 9:54 AM), <http://nypost.com/2015/01/28/meet-isis-30-year-old-preacher-of-bloody-rampages> [<https://perma.cc/4P4E-W77W>].

230. *Id.*

231. *Id.*

232. MALCOLM NANCE, *DEFEATING ISIS: WHO THEY ARE, HOW THEY FIGHT, WHAT THEY BELIEVE* 250 (2016).

233. Associated Press, *supra* note 229.

234. Neriah, *supra* note 214.

raped Yazidis themselves, but that should not stop the prosecution given the essential role that both have had in facilitating the enslavement.

But prosecuting both judicial officers could raise an interesting question that has not been seen since the Nazi Judges' trial: if judges only enforce the law of a despotic regime, in particular when that regime threatens all people who engage in non-compliance, should international tribunals prosecute those judges? At the Judges' Trial, twelve former Nazi judges were charged and convicted with "judicial murder and other atrocities . . . and then utilizing the emptied forms of legal process for the persecution, enslavement and extermination on a large scale."<sup>235</sup> But the distinction between the Nazi Judges' Trial and what could become the trial of former ISIL judges is that the Nazis did not discipline any judges for not towing the Nazi line, whereas ISIL has killed or tortured judges for rulings seen as inappropriate.<sup>236</sup> Therefore, whether it is permissible to discipline ISIL judges who act under at least some compulsion for enforcing brutal laws will be a new question for the international tribunals to decide.

#### B. Boko Haram Militants

Abubakar Shekau was born in northeast Nigeria about forty years ago.<sup>237</sup> He has been the head of Boko Haram since 2009, when Mohammed Yusuf was killed.<sup>238</sup> Like the other militants, little is known about Shekau's life, but those in Nigeria who are familiar with him have described Shekau as ruthless, crazy, and a sadist.<sup>239</sup> After the abduction of the Chibok girls, Boko Haram released a video in which Shekau claimed to be responsible for the abduction of the girls and threatened to sell the girls on the market.<sup>240</sup> He has also been responsible for attacks in Nigeria that do not involve the abduction and rape of girls.<sup>241</sup> Therefore, he should be brought to justice in the event that the ICC brings charges against Boko Haram for using rape as a weapon of war.

#### Conclusion

The last three decades have been a mixed bag for the international courts concerning trials on rape. On the one hand, the ICTY, ICTR and ICC prosecutions of rape have been a resounding triumph. For the first

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235. *Subsequent Nuremberg Proceedings, Case #3, The Just. Case: U.S. v. Altstoetter*, U.S. HOLOCAUST MEMORIAL MUSEUM, <https://www.ushmm.org/wlc/en/article.php?ModuleId=10007073> (last visited May 14, 2017) [<https://perma.cc/J5X4-HPTG>].

236. Andrew F. March & Mara Revkin, *Foreign Affairs: "Caliphate of Law"* (Apr. 15, 2015), <https://mararevkin.wordpress.com/2015/04/15/caliphate-of-law> [<https://perma.cc/DT95-XP3V>].

237. Colin Freeman, *Boko Haram's Abubakar Shekau: The "Craziest Commander of All"*, TELEGRAPH (May 12, 2014, 7:54 PM), <http://www.telegraph.co.uk/news/world-news/africaandindianocean/nigeria/10826012/Boko-Harams-Abubakar-Shekau-The-craziest-commander-of-all.html> [<https://perma.cc/SRR4-AQ5D>].

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

time in human history, men and women have been indicted and convicted under the Genocide Convention and Rome Statute for raping or overseeing the rape of women during times of war. Justice has been achieved for at least some women. But on the other hand, there have been just twenty-nine convictions, while even the most conservative estimates of the number of raped women would range into the low hundreds of thousands. Nevertheless, the ICC is still in its outset and limited in its police powers to bring war criminals to justice; and admittedly, many war criminals have been prosecuted in local courts. Yet, the number of convictions for rape as a weapon of war is still far too low.

As Iraqi troops encircle Mosul and other successes against ISIL occur, the ICC has the chance to bring ISIL leaders to justice for using rape against the Yazidi people as a weapon of genocide and as crimes against humanity.<sup>242</sup> ISIL leaders have engaged in or supported the rape of the Yazidis, had the general intent to cause serious bodily or mental harm to the Yazidis through the use of rape, and had the specific intent to destroy the Yazidis. Furthermore, ISIL militants have engaged in the forcible transfer, sexual enslavement, and torture of Yazidi civilians.

In regards to Boko Haram, the ICC will also have the chance to bring its leaders to justice, but not under the genocide convention. Boko Haram has not targeted one of the specific groups enumerated in the genocide convention, its localized actions are too small to be considered a genocide, and it did not have the specific intent to inflict destruction on a group. Boko Haram can still be prosecuted; the terrorist group still committed rape, torture, sexual enslavement, and the forcible transfer of civilians. Therefore, the ICC should still prosecute Boko Haram leaders under the Article VII and Article VIII of the Rome Statute.

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242. See Tim Arango et al., *Hungry, Thirsty, and Bloodied in Battle to Retake Mosul from ISIS*, N.Y. TIMES, Dec. 19, 2016, at A1.