

The UN Commission of Inquiry on Syria: An Intersectional Analysis of its Jurisprudence on Disappearances, Sexual Violence and Genocide

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The UN Special Procedures which includes Independent Experts, Special Rapporteurs, Working Groups and Commissions of Inquiry play an important role in producing credible analytical reports regarding various kinds of human rights violations around the globe.

The output of the Special Procedures does not always get the attention that it deserves. Some of the best reports produced by the Special Procedures are examples of credible international fact finding reports that not only have a strong factual analysis of human rights violations, but also generate new perspectives and frameworks within which human rights can be understood.

The Commission of Inquiry on Syria is one example of sustained fact finding over five years which has generated new perspectives and frameworks within which human rights can be understood. The Commission of Inquiry was constituted by a resolution of the Human Rights Council with a mandate to ‘investigate all alleged violations of international human rights law’, to ‘establish the facts and circumstances that may amount to such violations’ and ‘to identify those responsible’ for such violations in Syria since ‘March 2011’.¹ Since its inception, the Commission on Syria has made over 25 public interventions including regular reports, oral updates, press releases and thematic reports.

A look at the conflict through the output of the Commission of Inquiry allows us to understand a key function which the Human Rights Council discharges i.e. the setting up of international fact finding bodies which can produce reports and analysis which can both mould public opinion and become invaluable resources when the question of justice and accountability for the crimes committed in Syria finally arises.

¹ The members of the Commission of Inquiry are Paul Sergio Pinheiro, Karne Koning Abu Zayd, Carla del Ponte and Vitiit Muntarbhorn.

The trajectory of the Syrian conflict is from a peaceful uprising in 2011 to a brutal armed conflict between multiple forces representing diverse tendencies. By 2013 the Commission was documenting not only violations by state actors but also by armed groups such as the ISIS and Jabhat Al Nusra which were perpetrating violations as brutal as those by the regime.

The brutal violations documented by the Commission includes mass disappearances, mass detention, sexual violence on women and men, attacks on medical facilities and sieges of entire residential areas of cities which are deemed to host enemy populations. The Reports are horrifying in the brutal details and they painstakingly document how civilians have not been spared by all combatants and how women and children have been specifically targeted. All sides to the conflict are guilty of these crimes that the report characterizes as war crimes and crimes against humanity.

This article will analyse three important issues on which the documentation of the Commission is deepening a new normative understanding, namely, the policy of enforced disappearances, sexual violence as a continuum and genocide.

Enforced Disappearances in Syria: Impact on families

The crime of enforced disappearances has two aspects to it. Firstly, there is a deprivation of liberty against the concerned persons will. Secondly, enforced disappearances are characterized by the refusal to give information on the fate or whereabouts of the arrested person. The denying of information on the deprivation of liberty is the factor that distinguishes enforced disappearances from other offences.²

Syria being under emergency rule since 1963 has had a long history of using enforced disappearances as a key tool to repress dissent.³ When confronted with the peaceful uprising in 2011, the Syrian government again used the tool of disappearances. In a country wide pattern, as the Report by the Commission notes, 'adult males – have been seized by the Syrian security and armed forces, as well as by pro-Government militias, during mass arrests, house searches, at checkpoints and in hospitals.'⁴

The mass nature of disappearances is indicated by the testimonies. As the Commission notes, 'consistent testimonies reveal a pattern; the vast majority of those disappeared in 2011 and early 2012 were young men. In addition, documentation shows that disappearances were a form of reprisal against family members of protestors. As the conflict evolved it became a tactic of war with cities becoming scenes of mass arrests and disappearance. In another horrifying development, 'wounded civilians perceived to be affiliated with the opposition are being disappeared from hospitals.' In short, disappearances are a policy of the Syrian regime being used to fulfill multiple objectives.

Conforming to the textbook definition of an enforced disappearance, the government refused to release any details of those who were abducted to the family members. In a section aptly titled 'without a trace' the thematic paper on disappearances released by the Commission notes how 'despite the organized nature of the arrests and detention,

² Lisa Ott, Enforced Disappearances in international law, Intersentia, Cambridge, 2011. P.21.

³ Human Rights Watch, A wasted decade Human Rights in Syria during Bashar Al Asad's first ten years in power, <https://www.hrw.org/report/2010/07/16/wasted-decade/human-rights-syria-during-bashar-al-asads-first-ten-years-power>

⁴ Without a trace: enforced disappearances in Syria, www.ohchr.org/Documents/HRBodies/HRCouncil/.../ThematicPaperEDInSyria.pdf

authorities often failed to record the personal details of detainees, including those who died in detention, making it difficult to trace them and inform their families.’⁵

Consequently, as the Commission notes, ‘women standing outside detention centres and holding photographs of their disappeared male relatives, have become an enduring image of suffering in Syria. It is an image which speaks to the essence of the violation of enforced disappearance: the taking of a loved one, the desperate search for information through official and unofficial channels, and the torment of those left behind. Those who wait are often the only visible trace of the violation.’⁶

This search for any sign of the missing loved one emerges most poignantly in the testimony of an interviewee who was released after a court hearing in Damascus in 2013 and was ‘confronted with hundreds of people waiting outside the court, begging for news of their loved ones, in the hope that he had seen them in detention.’

The search by families for their loved one is not without repercussions in Syria. In Syria, ‘silence and fear shroud enforced disappearances’ and ‘interviewees reported that they could not approach the authorities because of a well founded fear of reprisal. Families revealed that attempts to locate the relatives would expose them to a fate similar to their loved ones and may subject the disappeared to greater danger. A young man whose brother disappeared in December 2012 in Homs explained, ‘Families constantly pray for their relatives, but will not risk sending another family member to detention.’⁷

Thus these disappearances leave families in an impossible state of fear and anguish. ‘Not knowing whether the disappeared is still alive, and if so in what state of health and under what conditions, causes a level of grief impossible to convey. The secrecy surrounding the fate of the disappeared has the effect of intimidating and punishing families by leaving them in a state of uncertainty and mental distress. This mental anguish may rise to the level of torture or inhuman treatment and makes entire families the victims of enforced disappearances.’⁸

Apart from mental distress which may rise to the level of torture, family members also face the ‘economic consequences of disappearances’. ‘The desperation of families has left them vulnerable to extortion. Some pay bribe to those who, often falsely claim they can provide information.’ ‘The absence of the main breadwinner creates financial difficulties that add to the extreme vulnerability of families. Women and children face specific hardships. The uncertainty created by the disappearance of their husbands or fathers has social and legal consequences including on the status of marriage, right to inheritance and social welfare, and the management of the property of the disappeared person. Children of disappeared experience acute suffering with the loss of a parent.’⁹

The documentation of the Commission gives flesh to the theory that the victims of a disappearance are multiple, and disappearances themselves are a ‘complex and cumulative violation’¹⁰. What the documentation is urging us to take seriously is not only the fact that enforced disappearance could involve multiple rights violations caused to those who are

⁵ Ibid.

⁶ Ibid.

⁷ Ibid.

⁸ Ibid.

⁹ Ibid.

¹⁰ Lisa Ott, *op.cit.* p.15.

disappeared¹¹, but also multiple violations which are caused to the family members.

This emerges powerfully in the iconic image of Syrian women with photographs of their disappeared male relatives. The family members of the disappeared also suffer a series of rights violations which could include torture or inhumane treatment, arbitrary detention and the violation of their right to peaceful enjoyment of their family life.

It is the jurisprudence on how family members are affected by disappearances which the documentation of the Commission gives fresh blood to.

In international law, *The Convention Against Enforced Disappearances* under Article 18 guarantees 'relatives of the person deprived of liberty, their representatives or their counsel' the right to information regarding the person deprived of liberty. Article 20(2) also guarantees 'the right to a prompt and effective judicial remedy as a means of obtaining without delay the information' regarding the detainees. This provision enshrines the family members right to truth regarding the details of the detention of their loved one. However the suffering of families due to the disappearance does not find explicit legal recognition.

It is the jurisprudence of the *Inter-American Court of Human Rights* which most powerfully crystallizes the norm that the suffering caused to family members as a consequence of a disappearance is legally actionable.

In *Blake v. Guatemala*, the Court held that in cases that involve the forced disappearance of persons, the violation of the right to psychological and moral integrity of the victims next of kin is a direct consequence of the disappearance, which causes them by the fact itself, serious suffering that is further aggravated by the state authorities continued refusal to provide information on the victims whereabouts or to open an effective investigation to find the truth.¹²

In *Trujillo Oroza v. Bolivia*, the Court held that the victim's mother's health suffered as a consequence of the disappearance of her son, and the prevailing impunity in the case and that the other members of the victim's family (his step father and his two brothers) suffered moral damage due to the facts of the case and that the suffering continued in view of the victims continued disappearance.¹³

In *Radilla Pacheco v. Mexico*, the Court stated that it can declare the violation of the right to mental and moral integrity of the next of kin of the victims of certain violations of human rights applying a presumption *juris tantum* regarding mothers and fathers, sons and daughters, spouses and life partners ... as long as this corresponds to the particular circumstances of the case. In the case of those direct relatives it is the state who shall invalidate such presumption.¹⁴

¹¹ Including the right to life, the right to be free of arbitrary detention, the right to recognition before the law and the right to freedom from torture.

¹² *Blake v Guatemala*, Judgement of January 24, 1998. (Merits)

¹³ cf. Antonio Augusto Cancado Trindade, *Enforced Disappearances of persons as a violation of jus cogens: The contribution of the jurisprudence of the Inter-American Court of Human Rights*, *Nordic Journal of Human Rights* 81(2012)507-536

¹⁴ Lisa Ott, *op. cit.* p.92. Also See *Cantuta v. Peru* and *Castro v. Bolivia* for the proposition that factors such as the 'necessity to move to another area or country and other impact of the disappearance on the social and labour relations of the family or the altering of family dynamics' can be taken into account to determine if family members could become victims of disappearances as well.

It should also be noted that the African Commission of Human Rights in *Amnesty International v. Sudan* has also found that, 'refusing to inform the family whether the individual is being held and his or her whereabouts is an inhuman treatment for both the detainee and the family concerned.'¹⁵

It's essential that when the crimes committed in Syria are accounted for, disappearances are dealt with and more specifically the harm that disappearances do to family members is dealt with as well. The documentation of the Commission of Inquiry aids a deeper understanding of the harm that disappearances inflict not just on victims but also on their families. The images of Syrian women with pictures of their loved ones who have been disappeared must not be forgotten and must indeed find legal recognition in any post conflict situation, drawing heavily upon the wider jurisprudence of the *Inter American Court of Human Rights* as well as the *African Court of Human Rights*.

Re-imagining the Protection of the family Resolution at the Human Rights Council

The documentation of the Commission of Inquiry also gestures towards another line of intersectional analysis. By pointing strongly to the impacts on the family of the phenomenon of disappearances, the question implicitly raised, is how can this documentation contribute to re-imagining the discourse on the protection of the family?

The protection of the family resolution has traditionally been cosponsored by strong opponents of SOGI rights including Russia, Egypt and other members of the Organisation of Islamic Cooperation (OIC). It has hence been perceived as a counter response to the emergence of the discourse on SOGI at the UN level. Within this analysis the rhetoric of 'protection of the family' has everything to do with promoting a heterosexist and hence exclusionary definition of the family and hence the resolution must be unequivocally opposed.

Another important feminist and child rights critique of resolutions to protect the family is that it aims to protect an institution and not individuals. This protection of the institution of the family ignores power differentials and hierarchies within the family, thereby invisibilizing violence and hierarchy.

Both these critiques have had little purchase in the Human Rights Council and are currently marginal as the resolution has over the Council sessions, received greater and greater support.¹⁶

The question which the documentation of the Syrian Commission of Inquiry raises is whether there is not a genuine case to be made for the protection of the family, particularly from policies such as enforced disappearances which destroy the network of relationships within the family and cause irrevocable damage to the family unit?

Taking on board the concerns expressed by LGBTI groups as well as women's groups, the family should be understood in an inclusive fashion, going beyond ties of blood and marriage alone. Diverse forms of family deserve protection, particularly when some state policies

¹⁵ African Commission on Human and Peoples' Rights, Comm. No. 48/90, 50/91, 52/91, 89/93 (1999).

¹⁶ The resolution on the protection of the family in the 26th Session of the Human Rights Council received 26 yes, 14 no and 6 abstentions. In the 29th Session of the Human Rights Council it received 29 yes, 14 no and 4 abstentions. In the 33rd Session of the Human Rights Council, there were 33 yes, 12 no and 3 abstentions.

seem to deliberately target the very stability and structure of the family.

There needs to be an acknowledgment on all sides of the debate that the family is an impossibly contradictory institution providing at the same time security and a sense of self and potentially deeply exclusionary at the same time. The way forward must be to protect diverse forms of family, particularly when the stability and structure of diverse family forms is under serious attack.

One hopes that future resolutions on the protection of the family at the Human Rights Council take on board the complex crime of disappearances which at heart is a fundamental attack on the stability and structure of the family itself.

Sexual violence as a continuum affecting both women and men

The Syrian Commission of Inquiry documents sexual violence as a continuum which is used as an instrument of war, both against the bodies of women as well as men.¹⁷ Traditionally sexual violence has been seen as an issue which affects only women. While women suffer disproportionately from sexual violence, emerging documentation and analysis shows that men too are victims of sexual violence. The use of sexual violence against men is often a hidden crime because of the additional shame and stigma attached to sexual violence suffered by men. The documentation of the Commission of Inquiry has visibilized this aspect of sexual violence against men, used during armed conflict in its first, third, fifth, seventh, tenth and latest Report.

The Commission does not separate out sexual violence against men from sexual violence against women but rather sees the violence as a part of a continuum, inflicted to exercise power and destroy the autonomy of those the regime considers rebels and subversives be they men or women.

As the first report of the Commission noted

“Several testimonies reported the practice of sexual torture used on male detainees. Men were routinely made to undress and remain naked. Several former detainees testified to reported beatings of genitals, forced oral sex, electroshocks and cigarette burns to the anus in detention facilities... Several of the detainees were repeatedly threatened that they would be raped in front of their family and that their wives and daughters would also be raped”.¹⁸

The fifth Report of the Commission notes

“In the case of pro-government forces, sexual violence was committed during house searches, at checkpoints and in detention centres, often as part of interrogations by intelligence services. One woman detained in Latakia described how she was threatened with gang rape during her interrogation. She also described other detainees being stripped naked while subjected to electric shocks. In Branch 285,

¹⁷ It should also be noted that the focus on ‘men’ and ‘women’ has the unfortunate effect of invisibilising forms of gender expression that may not fit the rigid categories of male and female. This is a direct result of the definition in Article 7(3) of the Rome Statute which clearly states that ‘For the purpose of this Statute, it is understood that the term ‘gender’ refers to the two sexes, male and female, within the context of society. The term ‘gender’ does not indicate any meaning different from the above.’

¹⁸ <https://daccess-ods.un.org/TMP/4906749.12929535.html>

the rape and sexual abuse of male detainees by their interrogators was reported. There were no indications of action taken by senior commanders to investigate, prevent or punish acts of sexual violence”.¹⁹

The Seventh report of the Commission notes

“Sexual torture, including the tying of genitals, has been systematically perpetrated against men and boys in custody in Damascus, Homs and Aleppo. In November 2012, a man was raped in Al Khatib security branch, Damascus. In January 2013, at the Homs Security Branch, security agents beat and electrocuted the genitals of a 17-year-old boy and raped him while others watched... Men were tortured and raped on the grounds of their sexual orientation at government checkpoints in Damascus. In 2011, six homosexual men were beaten viciously with electric cables by security agents and threatened with rape. In October 2012, a man was stopped by security because his partner’s brother was a member of the FSA. The man was taken to a rural area, where cigarettes were stubbed on his body and he was gang raped”.²⁰

The latest report of the Commission in September 2016 again reiterates the reality of sexual violence against men

“Male detainees are frequently subjected to sexual violence. Many stated that cellmates had been raped with objects and received electric shocks to their genitals. A man, held in an Air Force Intelligence branch in Hama in 2013, stated that cellmates had been raped with knives and other implements, which caused physical injuries. Another detainee, held in Dayr az-Zawr from mid-2011 to the spring of 2012, was stripped naked and hung by his wrists from the ceiling in a room with a female detainee, who was similarly naked and hung from her wrists. “We stood naked and humiliated in front of each other,” he said”.²¹

International law has only belatedly begun to recognise the fact that sexual violence is an integral aspect of the three international crimes: crimes against humanity, war crimes and genocide. The jurisprudential breakthroughs were achieved in the decisions of the International Criminal Tribunals in Rwanda and Yugoslavia.

Key to this belated acknowledgement of sexual violence, has been the seminal *Akayasu* judgment, which came to the conclusion that the rape of Tutsi women by Hutu militia was perpetrated with the specific intent to destroy the Tutsi community and hence came within the definition of genocide.

“These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole... Sexual violence was a step in the process of destruction of the Tutsi group -

¹⁹ *ibid.*

²⁰ *ibid.*

²¹ <http://www.ohchr.org/EN/HRBodies/HRC/IIICISyria/Pages/IndependentInternationalCommission.aspx>

destruction of the spirit, of the will to live, and of life itself".²²

The jurisprudence of the International Criminal Tribunal for Yugoslavia (ICTY) has shed light on the sexual violence committed against men. In *Prosecutor v. Cesic*²³, the defendant, a member of the Bosnian Serb police was convicted of rape as a crime against humanity for forcing two brothers to perform sexual acts on each other in the Luka detention camp. In *Prosecutor v Simic*²⁴ the court found Simic and Todorovic guilty of committing sexual assaults on male detainees in the same detention center. In *Prosecutor v Tadic*²⁵, Dusko Tadic was found guilty of sexual mutilation of a male detainee.

The reason sexual violence inflicted on men and women has to be viewed as a continuum is because the rationale for the infliction of this almost unthinkable is to 'exert power and dominance over the victim and potentially the victims community'.²⁶ It is also exercised for purposes of 'domination, degradation or destruction of a person's autonomy'.²⁷

If one sees sexual violence through this lens, then the act itself is 'not limited to physical invasion of the human body and includes actions directed at a persons sexual and reproductive health or identity such as sexual harassment, forced incest, castration, enforced sterilization, sexual mutilation, enforced nudity, enforced masturbation, genital violence including beating of the genitals and electric shocks to the genital area and other forms of sexual humiliation'.²⁸

What the developing international jurisprudence is gesturing towards is understanding rape as a crime of violence and not a crime of passion and hence having a conceptual linkage to the other sexual crimes which are perpetrated during armed conflict. If the reason for sexual violence is to exercise domination even though the impact of sexual violence on men and women will be different, the purposes for which it is employed are the same.

As such, what the facts presented by the Commission of Inquiry urge us to do is to take sexual violence committed on both men and women with the same seriousness. In a sense, the Rome statute understands this impulse as rape, which is one of the acts under crimes against humanity, is gender neutral. Some of the acts of sexual violence perpetrated may come under the heading of torture, which is also a gender neutral crime. Hence there is a legal basis to recognise the sexual crimes committed against both women and men.²⁹

However, the obstacles to prosecuting sexual crimes committed against men are likely to be quite large due to a lack of social recognition of the nature of these crimes. It is in this context that one hopes that the documentation of the Commission of Inquiry will pave the way for a more 'general recognition that men can also be victims of gender based crimes

²² *Prosecutor v. Jean Paul Akayesu*, International Criminal Tribunal for Rwanda, (para 732), <http://unictr.unmict.org/en/cases/icty-96-4>

²³ Case No.: IT-95-10/1-S, <http://www.icty.org/case/cesic/4>

²⁴ Case no.:IT-95-9, <http://www.icty.org/case/simic>

²⁵ IT-94-1, <http://www.icty.org/case/tadic>

²⁶ Dustin Lewis, Unrecognised victims: Sexual violence against men in conflict settings under international law,

²⁷ Wisc. L. J (2009) 1-49.

²⁸ Solange Mouthan, Sexual Violence Against Men and international law: Criminalising the unmentionable, Int. Cr. L. Rev 13(2013) 665-697.

²⁹ Ibid.

It may not be possible to think of gender outside the binary of male and female due to Art 7 (3) of the Rome Statute which notes:

For the purpose of this Statute, it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above.

that will lead the way for prosecutors to investigate allegations of such occurrences and judges to develop definitions and constitutive elements of gender based crimes that leave room for male victims.³⁰

In the time going forward, as the Syrian civil war inches towards a ceasefire, the question of accountability will become increasingly important. When accountability is sought to be fixed for grave crimes, thanks to the documentation of the Commission of Inquiry, the sexual violence can be seen as a continuum affecting both women and girls as well as men and boys.

Genocide of the Yazidis: Can the logic of genocide law be extended to also protect sexual minorities?

While the Syrian regime headed by Bashar Al Assad has committed horrific crimes against its own people amounting to both crimes against humanity and war crimes, the only group to yet commit what has been characterized as the ‘crime of crimes’, namely genocide, is ISIS. The 2016 Report of the Commission of Inquiry on Syria, for the first time, makes an argument that ISIS, in addition to committing war crimes and crimes against humanity, has also committed and, is committing an ongoing genocide against the Yazidi people.

In its Report titled, *‘They came to destroy’*, the Commission powerfully documents how ISIS is intentionally destroying a religious group, namely the Yazidis. The elements of the intent to destroy are derived from the way ISIS implemented its policy vis a vis those it captured, for example the entire Yazidi population in the Sinjar region of Northern Iraq. Those captured were divided into three groups: men and boys aged approximately 12 and above; women and children; and boys aged seven and above. As the Commission notes, ‘each group suffered distinct and systematic violations, sanctioned under ISIS’s ideological framework.’ What this translated into was summary execution of men and older boys who refused to convert to Islam, the sale of women and girls to ISIS fighters as slaves, and the forcible conscription of young Yazidi boys as cadre for ISIS’s armed forces.

ISIS engaged in acts of killing Yazidi men and boys and selling into slavery and raping Yazidi women, all with the specific intent of destroying the Yazidi community. In all the crimes committed by ISIS in the Sinjar region, according to the Commission, the only group who was targeted for systematic extermination was the Yazidis. The Christians for example were allowed to continue to live in the Sinjar region as long as they paid a religious tax (jizya) as they were, according to ISIS, ‘people of the book’.³¹ However the Yazidis not being ‘people of the book’ were targeted for elimination from the territory of the Caliphate.

Thus the Commission concludes that ISIS had the ‘intent to destroy, in whole or in part a national, ethnic, racial or religious group’ which is the essence of the crime of genocide. ‘ISIS commits the crime of genocide against individual Yazidis, as an incremental step in their overall objective of destroying this religious community.’

³⁰ Solange Mouthan , *op. cit.*

³¹ The Christian minority while not the targets of genocide were definitely the targets of persecution which means the ‘intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity’. If persecution is systematic and widespread, then it’s possible to make the case that a crime against humanity was committed with respect to the Christian community.

In its analysis the Commission is able to demonstrate that all the acts contemplated under the Genocide Convention as part of the crime of genocide have been committed by ISIS.³² Thus the focus is not only on killing members of the group but also sexual violence, sexual mutilation, torture, enslavement, prevention of pregnancy, transferring of children from their parents to ISIS custody etc. In the Commission's analysis all these acts are intentionally inflicted to destroy the group, namely the Yazidis.

While there is no argument that the Yazidis are a protected group under the international legal framework defining genocide, the question is can the protection be extended to other groups targeted by ISIS?

One other group who is similarly targeted for extermination by ISIS are what the 10th Report of the Commission of Inquiry characterizes as sexual minorities. 'Sexual minorities have been executed by ISIS and Jabhat Al-Nusra. The Commission continues to investigate reports of ISIS fighters throwing gay men off high buildings, and their being beheaded by Jabhat Al-Nusra.'³³

Documentation by Outright International indicates that since the birth of ISIS across Syria and Iraq, 41 people till now have been executed because they were suspected to be homosexual.³⁴ Clearly the numbers are nowhere in the range of the destruction visited on the Yazidi community, however what is to be remembered is that for understanding the crime of genocide, the key element accompanying the *actus reus* (killing, enslavement, etc.) is the *mens rea* (intent to destroy the group in whole or in part).

As scholar Payam Akhwan notes, 'Genocide is unique because of its element of *dolus specialis* (special intent). It is this *mens rea* that gives genocide its speciality and distinguishes it from ordinary crimes and other international crimes and makes it the crime of crimes.'³⁵

When ISIS's crimes are characterized as genocide, the understanding which one brings to the rationale of these crimes is that they are the product of an ideological thinking which believes that the world would be better without a particular group of people in it and that by destroying those they consider impure, the perpetrators are creating a more perfect society. It is precisely this mode of thinking about the world when it is accompanied by the acts prescribed under the legal definition of genocide that the crime of genocide seeks to punish. As Payan Akhwan put it succinctly, 'the crime of genocide is intent rather than result oriented in terms of its relationship to harm'³⁶

Seen from this perspective, the crimes of ISIS against sexual minorities should also be investigated as to whether they as a group are similarly targeted for destruction. One should note that at this point there is very little documentation of the bureaucracy within which the

³² Article II of the Convention on Prevention and Punishment of Genocide defines genocide: In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing 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.

³³ 10th Report of the Commission of Inquiry,

³⁴ <https://www.outrightinternational.org/content/timeline-publicized-executions-alleged-sodomy-islamic-state-militias>

³⁵ Payan Akhwan, *Reducing genocide to law*, Cambridge University Press, Cambridge, 2014. p.46.

³⁶ *ibid.* p.45.

sexual minority population is targeted for extermination. One of the few documentations of the way the death sentence is carried out is the one by Outright International who document 41 cases of homosexual men who were executed after a trial in which the accused were found to have violated the commandments of the Shariat.

To give two illustrative examples³⁷

On August 2, 2015, the Islamic State's Information Office in Hama Province (Syria) issued a video and photo report about the execution of three men on sodomy accusations and for spreading homosexuality. The Islamic State in its video stated that it is carrying out "the imposition of religious punishment against those who spread corruption on earth," specifically in this case "promoting the acts of the people of Lot amongst Muslims," thereby trying to change the "innate character of the Muslims."

A translation of the only judgment by an ISIS court which sentences two persons to death is worth citing in full.

The Islamic State
Neinava Province
Islamic Court
Serial number : 1111
Date: 17-5-1436
3-8

Praised be the Lord of the Universe and prayers and peace be upon our Mater Mohammad and upon all his household and his disciples.And now:

The Almighty God has sent prophets and messengers and sent down books and legislated punishment to protect the five fundamental necessities which included religion, lives, belongings, honor, and wisdom. One of these five necessities is honor. The Almighty God, in order to protect honor, has imposed punishments for adultery and the acts committed by Prophet Lot. [The Prophet peace and prayers be upon him] had said "if you find a person who has committed the act of the people of Lot, you should kill him, whether they are the top or the bottom."

In front of the Islamic court of the Neinava province, it was proved that:

1- [name blurred]

And

2- [name blurred]

Have repeatedly committed the act of the people of Lot, based on their own confessions. Therefore the Islamic Court will carry out the God's punishment on them, to punish them for their deeds and to teach a lesson to those who witness it. The God is able of managing his affairs but most people are unaware. The seal of the Islamic State, department of

³⁷ <https://www.outrightinternational.org/content/timeline-publicized-executions-alleged-sodomy-islamic-state-militias>

The judgment itself indicates that the death sentence, within ISIS' logic is not arbitrary and irrational but rather a punishment for the violation of the prohibition in the Shariat on engaging in the 'act of Lot'. Repeatedly engaging in the 'act of Lot' as proved by the confessions of the accused is a violation of 'honour', which is one of the 'five fundamental necessities' which God aims to protect by imposing the punishment of death for those who violated this commandment. Hence the death penalty is the result of violating what according to ISIS is a violation of the God ordained fundamental necessity of defending honour.

What the judgment shows in chilling detail is that there is a legal and religious sanction for eliminating those found to be engaging in homosexual acts. As with the Yazidis, the killing of homosexuals is not an arbitrary vengeful act but the outcome of a 'religious' logic clothed in a specifically 'legal' form which prescribes the elimination of homosexuals.

The importance of analyzing the bureaucratic legality within which extermination is ordered and executed cannot be underestimated. It bears recalling that the first work to coin the term genocide, Raphael Lemkin's *Axis Rule in Occupied Europe* was a detailed analysis of the laws, decrees and proclamations targeting the occupied population living under Nazi rule. Central to Lemkin's argument is that genocide was a product of Nazi legality.³⁸

The legalized murder of homosexuals by ISIS is reminiscent of another forgotten holocaust, namely the Nazi persecution and destruction of the first homosexual sub-culture in the modern world i.e. in Weimar, Germany. Apart from the genocide perpetrated against the Jews, the Nazis also systematically aimed to eliminate Communists, the disabled and the homosexual community. Referring to the systematic manner in which the homosexual community was eliminated, Grau says that "the declared aim of the Nazi regime was to eradicate homosexuality. To this end homosexual were watched, arrested, registered, prosecuted and segregated; they were to be re-educated, castrated and [-] if this was unsuccessful - exterminated."³⁹

Is genocide the 'crime of crimes'?

What the Report of the Commission reminds us is of the inadequacy of genocide law as according to the legal definition, the 'crime of crimes' can only be perpetrated against 'racial, ethnical, religious and national groups'. The fact that other collectivities cannot be victims of genocide, especially when the intent to destroy that collectivity is clearly present, is a serious limitation of the definition of genocide both in the *Convention on Prevention and Punishment of the Crime of Genocide* as well as the *Rome statute*. If genocide is to retain its status as the 'crime of crimes' its essential that it also protect other collectivities who have been historically targetted for destruction as well as collectivities who may be so targetted in the future.

However even assuming that genocide law in a future incarnation covers an open list of groups who may be targetted for extermination, the question as to why should a crime

³⁸ Raphael Lemkin, *Axis Rule In Occupied Europe*, Law Book Exchange Limited, Clark, 2005.

³⁹ Grau, Gunter (ed.), *Hidden Holocaust?*, Cassell, London, 1995.

committed against a collectivity necessarily be seen as more serious than crimes committed against numerous individuals who are not a collectivity, remains.⁴⁰

If one refers back to the situation in Syria, clearly the crimes committed by the regime including disappearances, sieges, attacks on medical facilities and indiscriminate aerial bombardment dwarf in sheer quantitative impact the crimes of ISIS. However these crimes would fall within the legal definition of a 'crime against humanity' and 'war crimes' and would not come within the legal definition of genocide. If we consider that the regime is responsible for the vast majority of deaths and displacement in Syria, the moral *cul de sac* into which a focus on genocide as the 'crime of crimes' can lead us becomes apparent.

Philippe Sands in a marvelous book part legal history part personal history incisively traces the history of the two terms genocide with its focus on the group and crime against humanity with its focus on the individual to two eminent legal scholars- Raphael Lemkin and Hersch Lauterpacht respectively. Both men had a personal stake in the development of these terms as they both lost their close family in the holocaust. The difference between the two viewpoints was that for Lauterpacht, the individual was the focal point and the reason for the atrocity was not an ingredient of the offence. What was important was the atrocity was perpetrated on a 'civilian population' and that it was 'widespread and systematic'. However for Lemkin, the focus was on the reason, i.e. the intentional destruction of the collectivity.

While 'genocide' is a powerful way of capturing a crime like no other, namely the intentional destruction of an entire human group there are clearly limitations to the concept. Firstly the groups who are protected are too narrowly defined and secondly atrocities regardless of scale if they are committed without genocidal intent will always be seen as a lesser crime to genocide. This has ethical moral and socio-legal implications.

Thus while genocide may be the appropriate way of analyzing the harm visited on the Yazidi community, the term itself as currently defined lacks the suppleness to respond to different realities. As the Syrian civil war teaches us there is a gap between the 'material seriousness' of the crimes committed by the regime and the 'juridical seriousness' with which those crimes are likely to be treated as long as genocide continues to be seen as the 'crime of crimes'.⁴¹

⁴⁰ See Payan Akhawan, *Reducing genocide to law*, Cambridge University Press, Cambridge, 2014.

⁴¹ Ibid.