PROSECUTING GENOCIDE:

European Union Obligations in the Age of Daesh

SUMMARY

Daesh, also known as ISIS/ISIL, is committing genocide against religious and ethnic minorities, targeting women and girls in particular. The time is now for the EU to fulfil its international legal obligations to prevent and prosecute genocide. This means the EU must recognize this ongoing genocide, take steps to prevent and suppress it, and call for and facilitate its prosecution.

1. Daesh is perpetrating genocide

Reports and verified information obtained from UN agencies,¹ human rights organizations,² local communities³ and media⁴ clearly demonstrate that Daesh (also known as Islamic State, IS, ISIS, or ISIL) is perpetrating all of the five explicit crimes of genocide listed in the Genocide Convention and the Rome Statute of the International Criminal Court: (1) killing; (2) causing serious bodily or mental harm; (3) deliberately inflicting conditions to destroy a group; (4) preventing births within a group; and (5) transferring children from one group to another group.

While reports indicate that Daesh targets various ethnic and religious minorities, no group has been subjected to the destruction that the Yazidi have suffered. What's more, within the Yazidi community, women and girls have been methodically targeted by specific, ongoing crimes.

2. Daesh's genocide continues for women and girls

Daesh's genocide is carried out in different ways against men and women, boys and girls: men and elderly women are killed, boys are converted and recruited, young women and girls are kidnapped, bought, sold, used as sex slaves, repeatedly raped, forcibly converted, forcibly married, forcibly impregnated, and made to undergo forcible abortions.⁶

In fact, Daesh's sexual and gender-based violence is part of its larger ideology and state-building strategy. Both are defined by gender inequality and dominance over the lives of women and children to secure the continuity and future of the "Caliphate".

The consideration of "genocide" is often—wrongly limited to mass killings. In fact, whether genocide is occurring (by mass killing or otherwise) depends on the perpetrator's intent to destroy a particular group. Daesh's intent to destroy the Yazidi people has been documented and established, including through their own public statements. Thus Daesh's clear intent to destroy this ethnic group, coupled with its acts of rape, enslavement and forcible transfer of women and girls in captivity, constitute genocide. Failing to name them as such (or calling them war crimes, crimes against humanity, or even "ethnic cleansing") denies women equal protection under the law, including the Genocide Convention and Rome Statute of the International Criminal Court.

We were registered. ISIS took our names, ages, where we came from and whether we were married or not. After that, ISIS fighters would come to select girls to go with them. The youngest girls I saw them take was about 9 years old. One girl told me that "if they take you, it is better that you kill yourself."

—Yazidi girl aged 12 at capture, held for 7 months, sold 4 times. 17

3. The European Union must recognize the ongoing genocide by Daesh

Daesh's genocide against the Yazidi has been acknowledged by the European Parliament; the UN Commission of Inquiry on Syria; the governments of the United States and Iraq; and others. Of particular note are the findings from the UN Commission of Inquiry in Syria:

ISIS has committed, and continues to commit, the crime of genocide, as well as multiple crimes against humanity and war crimes, against the Yazidis.

The genocide committed against the Yazidis has not primarily been accomplished through killings, though mass killings of men and women have occurred. Rather ISIS seeks to destroy the Yazidis in multiple ways, as envisaged by the drafters of the 1948 Genocide Convention. ISIS has sought, and continues to seek, to destroy the Yazidis through killings; sexual slavery, enslavement, torture and inhuman and degrading treatment, and forcible transfer causing serious bodily and mental harm; the infliction of conditions of life that bring about a slow death; the imposition of measures to prevent Yazidi children from being born, including forced conversion of adults, the separation of Yazidi men and women, and mental trauma; and the transfer of Yazidi children from their own families and placing them with ISIS fighters, thereby cutting them off from beliefs and practices of their own religious community, and erasing their identity as Yazidis. The public statements and conduct of ISIS and its fighters clearly demonstrate that ISIS intended to destroy the Yazidis of Sinjar, in whole or in part.9

Despite these unequivocal findings, and despite

international legal obligations to act, the European Union and its Member States have yet to recognize and take concerted action to prevent, suppress and prosecute against this ongoing genocide.

4. The EU has legal obligations to prevent and punish genocide

The EU's obligations under international law are clear: customary international law binds the EU, an international legal entity, to do all it can to prevent, suppress and prosecute ongoing genocide. The urgency of EU action cannot be overstated: crimes continue to be perpetrated against the women and girls still in captivity and Daesh's trade in women and girls continues unabated.

THE EU'S OBLIGATION TO PREVENT AND SUPPRESS DAESH'S ONGOING GENOCIDE

International law not only prohibits the commission of genocide, but also sets out obligations to take all possible measures to prevent and suppress genocide committed by others.

These obligations are triggered when a state or international organization knows (or should have known) of a serious risk of genocide. They are obligations of means, not results;¹² in other words, inaction cannot be justified by action having low chances of success. States and international organizations can incur responsibility for their failures where they "manifestly fail [...] to take all measures to prevent genocide within their power, and which might have contributed to preventing genocide."¹³

In addition, whether a state or international organization has fulfilled these obligations depends

on the amount of influence that state or international organization has over the commission of genocide. The EU is one of the world's largest foreign policy actors and has a multitude of avenues though which it can and must act to prevent genocide.

THE EU'S OBLIGATION TO PUNISH DAESH'S ONGOING GENOCIDE

In addition to the obligation to prevent genocide, international law requires the prosecution or punishment of genocide.¹⁵

The most viable venue for punishment of Daesh's genocide is the International Criminal Court (ICC). However for this to happen, the UN Security Council must refer the case to the ICC, which has not yet happened due to opposition from Russia and China. One important step the EU could take would be to support pending requests of Yazidi groups for the ICC to open a preliminary examination of Daesh's crimes, including genocide, committed by foreign terrorist fighters from ICC member states. ¹⁶ Similarly,

there have been no attempts to establish an ad hoc tribunal covering crimes in Iraq or Syria. So far, domestic prosecutions of Daesh fighters have failed to include genocide.

To date, there have been scarcely any steps at the international level to investigate or prosecute Daesh fighters, religious leaders, recruiters or supporters for committing genocide, conspiring to commit genocide, directly and publically inciting others to commit genocide, attempting to commit genocide, or being complicit in genocide.

The evidence is clear that since at least August 2014, Deash has been engaged in a concerted genocidal campaign against the Yazidi. Over 3,200 women and children remain in captivity and genocidal acts continue to this day.

The EU must take global leadership, recognize genocide and most importantly, take all the steps within its means to prevent, suppress and punish this ongoing genocide. The time for the EU to speak out – and act – is now.

Recommendations:

- **1.** The High Representative of the EU for Foreign Affairs and Security Policy should recognize this ongoing genocide against the Yazidi.
- **2.**The High Representative should call for the suppression of this genocide, and encourage Member States to do all in their power to suppress it.
- **3.** The External Action Service and/or the European Commission should support pending requests of Yazidi groups requesting that the ICC open a preliminary examination of the crimes perpetrated by Daesh.
- **4.** The Eurojust Genocide Network should facilitate and coordinate Member States' efforts to punish this genocide and prosecute its perpetrators.
- **5.**The EU and its Member States should work cooperatively at the United Nations, and in particular at the Security Council, to prevent and suppress genocide.
- **6.** The EU should support and encourage the domestic prosecutions of Daesh fighters for genocide in Member States, including under a theory of universal jurisdiction.
- **7.** Any EU counter-terrorism measures, including acts to implement the EU Regional Strategy for Syria and Iraq as well as the ISIL/Daesh Threat and the Paris Action Plan, should incorporate the EU's duties to prevent, suppress and punish genocide.

ENDNOTES:

- 1. OHCHR, Report on the human rights situation in Iraq in light of abuses committed by the so-called ISIL and associated groups, U.N. Doc. A/HRC/28/18 (13 Mar. 2015).
- 2. United States Holocaust Memorial Museum, 'Our Generation is Gone': The Islamic State's Targeting of Iraqi Minorities in Ninewa, Nov. 2015.
- 3. Yazda, Free Yazidi Foundation, Kurdistan Regional Government, Article 15 Submission to the Office of the Prosecutor of the Int'l Criminal Court, ISIL: Nationals of ICC states parties committing genocide and other crimes against the Yazidis, September 2015.
- 4. R. Callimachi, To Maintain Supply of Sex Slaves, ISIS Pushes Birth Control, New York Times, 12 Mar. 2016.
- 5. Ind. Int'l Commission of Inquiry on the Syrian Arab Republic, "They came to destroy": ISIS Crimes Against the Yazidis, ¶ 162 (15 June 2016).
- 6. Global Justice Center, Letter and Annex in Support of Filing OTP-CR-397/15, 17 Dec. 2015; Ind. Int'l Commission of Inquiry on the Syrian Arab Republic, "They came to destroy": ISIS Crimes Against the Yazidis, U.N. Doc. A/HRC/32/CRP.2, ¶¶ 114-15, 118-21 (15 June 2016).
- 7. E. Saltman & M. Smith, "Til Martydom Do Us Part": Gender and ISIS Phenomenon, Inst. for Strategic Dialogue, p. 18 (2015).
- 8. Ind. Int'l Commission of Inquiry, "They came to destroy", ¶ 162; European Parliament resolution of

- 4 February 2016 on the systematic mass murder of religious minorities by the so-called 'Daesh/Daesh,' ¶ 2 (2016/2529(RSP)); US Sec. of State John Kerry, Remarks on Daesh and Genocide, Mar. 17, 2016; OHCHR Summary of UN Human Rights Council session on Iraq, Sept. 2014, http://bit.ly/1Met8ip; U.S. Holocaust Mem'l Museum, at 20-21 (2015).
- 9. Ind. Int'l Commission of Inquiry, "They came to destroy", ¶¶ 201-202
- 10. Reservations to Convention on Prevention and Punishment of Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 23 (28 May 1961).
- 11. Application of the Convention on the Prevention and Punishment of the Crime of Genocide Case (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), International Court of Justice, 26 Feb. 2007, ¶ 430.
- 12. Id. at ¶¶ 430, 461.
- 13. Id. at ¶ 430.
- 14. Id. at ¶ 430.
- 15. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 278 U.N.T.S. 1951, art. I.
- 16. Yazda, Free Yazidi Foundation, Kurdistan Regional Government, Article 15 Submission (Sept. 2015).
- 17. Ind. Int'l Commission of Inquiry, "They came to destroy", p. 10.

