

Outcomes from the Global Justice Center

BRAIN TRUST

Reconciling International Laws on Genocide and Counter-Terrorism

I. Summary & Background

On June 12, 2017, the Global Justice Center convened a Brain Trust of legal experts to consider how to reconcile the legal obligations to prevent, suppress and punish genocide with counter-terrorism measures directed towards ISIS.

Evidence supports that ISIS has been engaged in an ongoing genocide against the Yazidis (and potentially other groups) since 2014. Over 3,000 Yazidi women and children remain in captivity. Today we may be witnessing yet again a failure of the international community to prevent, suppress and punish genocide.

While there are strong global measures aimed at stopping ISIS, such as Security Council Resolutions and counter-terrorism efforts, they have largely ignored erga omnes legal obligations related to genocide. This has resulted in a diminishing of the special protections of the Genocide Convention, including for women and girls. The failure to effectively respond to ISIS's genocide of the Yazidis has revealed growing gaps between evolving law on genocide and responses to genocide, the latter now largely dealt with under the counter-terrorism framework.

To investigate these gaps, Brain Trust participants took part in four different conversations, each designed to examine distinct legal questions on: (1) the duty to prevent genocide; (2) the duty to punish genocide; (3) international counterterrorism efforts; and (4) ISIS's genocide of the Yazidi community.

This Brain Trust was conceptualized as the first in a series of meetings and discussions seeking to foster a better legal understanding of how international obligations on genocide can be translated to action and is a part of the Global Justice Center's larger project on Gender and Genocide. More information on this project can be found at <http://bit.ly/2ujS8Nu>.

The following highlights and synthesizes key themes, points and conclusions from the day's discussions. None of the comments herein should be attributed to any particular participant nor do they necessarily reflect the views of all participants. Furthermore, this brief has been prepared by the Global Justice Center and has not been reviewed or approved by the participants.

DATE:

June 12, 2017

9:00 AM – 6:30 PM

VENUE:

Debevoise & Plimpton LLP

919 3rd Avenue

New York, NY 10022

II. Summary of Discussions

A. DUTY TO PREVENT AND SUPPRESS GENOCIDE

Participants were asked to examine the duty to prevent and suppress genocide in light of essential changes in the international community since entry into force of the Genocide Convention in 1948. In particular, a central challenge for enforcement of genocide law is the incongruity of the Convention's state-based framework with modern realities. Indeed, recent history has seen commissions of genocide by non-state armed actors and responses to genocides by international organizations.

Participants first discussed the frequent conflation of legal and moral obligations to prevent genocide. It was noted that while some governments felt a strong moral obligation to act when faced with genocide, they did not understand the legal obligation to prevent. Other participants pointed out that certain governments clearly understand the duty to prevent and, as a result, intentionally avoid formal recognition of genocide to avoid pressures to act. In these cases, it was recalled that there is a lack of understanding among military actors as to what the duty to prevent requires and likewise a concern that it may affect their ongoing operations. Participants contrasted this lack of clarity with the more clearly understood legal frameworks addressing terrorism.

The conversation then turned to the International Court of Justice's (ICJ) decision in the 2007 Case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*. Participants agreed that while the judgment provided some useful parameters on duty to prevent genocide (e.g. the "serious risk" threshold to trigger the obligation and the "all possible measures framework"), the judgment also left many questions unanswered.

“While some governments felt a strong moral obligation to act when faced with genocide, they did not understand the legal obligation to prevent.”

Some issues that participants felt needed development are:

- ▶ **Who** is the holder of the duty to prevent? While the ICJ seemed to indicate that it was anyone with a “capacity to influence” the genocidal actors, participants felt that this was not sufficiently clear in terms of calling for governments to comply with their obligations.
- ▶ **How** does the duty to prevent extend to the inchoate crimes of genocide (conspiracy, incitement, attempt, complicity), which do not require the actual commission of genocide?
- ▶ **What** sort of acts fulfill the duty to prevent and suppress, and what is the role of genocide recognition in discharging this duty?
- ▶ **How** do obligations to prevent and suppress genocide evolve as genocide is ongoing?

There was acknowledgement that determining whether genocide is occurring must be more nuanced than “counting the bodies.” Specifically, participants discussed how because the crime of genocide is inherently gendered, the evaluation of the indicia of genocidal acts must have a gender lens—failure in this regard risks maintaining a blind-spot on actual conduct that amounts to genocide. As a result, participants felt that

more must be done to facilitate an understanding of the non-killing crimes of genocide, including how gender roles within groups and communities may inform and influence how genocide is committed.

Overall, participants felt strongly that the duty to prevent and suppress is an essential component of international law concerning genocide and should be better understood and more effectively deployed—particularly with regard to the Genocide Convention. At the same time participants made clear that genocide should not be elevated to a special status but instead needs to be brought down to an “everyday level” to ensure accountability and enforcement.

Recommendations

- Develop further legal clarity on the parameters and content of the duty to prevent and suppress genocide, as well as the consequences for states and international organizations for failing to discharge those obligations, including through advisory opinions from the ICJ;
- Work with governmental and military actors to develop their capacity and understanding of legal obligations to prevent and punish genocide and their importance to international peace and security;
- Foster increased understanding of the gender dimensions of genocidal intent and genocidal acts in order to ensure more effective responses to the risk and commission of genocide;
- Demystify the notion that genocide occupies the top of a hierarchy of international crimes, while simultaneously reinforcing the importance of the distinct values protected by its prohibition.

B. DUTY TO PUNISH GENOCIDE

This discussion investigated the modern contours of the obligation to punish genocide. Specific questions touched on the value of prosecuting genocide as such, the relationship of the duty to prevent and the duty to punish, and the practical requirements in fulfilling the duty to punish, particularly in light of the counterterrorism agenda.

Participants agreed that while there is no hierarchy embedded in the core international crimes, there is special value in prosecuting genocide as such. In particular, participants discussed inherent values in: keeping crimes separate and observing the specific harms done by separate crimes; calling a thing by its name; not being complicit in erasure; honoring the experience of victims; establishing justice in a transitional society; bearing historical witness; recognizing gender harms; and upholding global principles of diversity and tolerance. There was an understanding that failure to ensure accountability for genocide when it happens is harmful to the entire community of victims and may further entrench longstanding discrimination against a community (which genocide is often predicated upon).

Participants explored the dynamics of how to ensure accountability for genocidal acts perpetrated by a group that is also responsible for international terrorism. The conversations grappled with the tensions between the urgencies of security and the slower gears of justice for international crimes. Specific issues included prosecutors' preference to pursue the easiest theories towards conviction (often being provision of material support to a terrorist organization) and the sense that genocide is outside the capacity and expertise of many domestic justice professionals (whereas terrorism cases are much more familiar). Participants recognized the tendency of prosecutors to prefer certainties and to be apprehensive at the prospect of acquittals and bad precedent. In this vein, the group contemplated prosecutorial tools from other areas of criminal law that may be used to empower and enable genocide prosecutions at the national level. These included the use of evidentiary presumptions at trial, development of state witnesses to provide information on other perpetrators, and establishing organizational intent.

There was acknowledgement that when prosecutors prioritize counter-terrorism over genocide it results in neglect for the specific gendered harms that occur in the commission of genocide. Thus, participants discussed how to ensure that sexual and gender-based acts are incorporated into the investigation, evidence collecting and documentation stages of prosecution. It was emphasized that this should include obtaining evidence from witnesses other than direct victims.

One thread that participants frequently revisited was the idea that investigation, documentation and prosecution must be strategic in the long-term. To this end, participants reached consensus that any forthcoming justice measures should include investigation and prosecution for the inchoate crimes of genocide (conspiracy, incitement, attempt, complicity).

The discussion carried a theme throughout concerning how to improve the current justice paradigm, where varying notions of justice (incarceration, accountability and securitization) are at odds. There was a frank conversation concerning

the securitization of justice, in particular the idea that killing a perpetrator of atrocity crimes is in and of itself viewed as “justice.” Participants noted that convictions for genocide will never occur if the priority continues to be killing the accused, especially where the genocidal actors are also terrorist actors. Accordingly, participants agreed on the need to engage in broader accountability exchanges that involve not only legal experts, but judges and military personnel as well. The conversation further highlighted the need to work more with military actors to demonstrate the overlapping interests of justice and military priorities.

With all things considered and challenges investigated, the sentiment at the end of the discussion was that while there was work to be done, deliberate evidence gathering, investigations, and prosecutorial strategies can close impunity gaps to ensure full justice for genocide.

Recommendations

- Develop long-term strategies for the integration of gender into the indicia of genocidal acts and into the investigation and case development stages of accountability proceedings at all levels;
- Develop legal tools from other areas of criminal law to aid in the prosecution of genocide, including the development of presumptions and modes to establish genocidal intent;
- Foster increased cooperation of justice actors, including through international networks of prosecutors and judges, to share best practices, strategies and information on accountability for genocide;
- Build the technical capacity of a range of actors, including military, law enforcement, prosecutors and judges to document, investigate, prosecute and engage with criminal laws and procedures on genocide;
- Foster discussions with a diverse group of stakeholders, including the military, around the increasing securitization of justice, and develop strategies for criminal accountability that also adhere to security concerns.

“An ongoing theme throughout the discussion was the highly gendered nature of the Yazidi genocide and its implications.”

C. GLOBAL COUNTER-TERRORISM EFFORTS

This conversation began with a presentation on major UN counterterrorism efforts, including activities of the Counter-Terrorism Committee Executive Directorate (CTED), and areas of potential intersection with genocide prevention and accountability. As an independent body with a specific mandate, CTED’s work covers implementing Security Council resolutions regarding threats of terrorism to international peace and security, and conducting assessments and analysis of the counterterrorism capacities of UN Member States. Due to strong buy-in from Member States, the counterterrorism framework has developed sophisticated mechanisms utilizing international cooperation to respond to terrorism and to hold terrorists accountable. Such mechanisms include technical assistance to improve domestic legislation on terrorism, as well as assessments and analysis of national capacities to address terrorism.

Participants then discussed recent treaties concerning international crimes and the Genocide Convention. The conversation addressed how modern treaties on terrorism and organized crime provide a better model for grappling with the realities of today’s world than the Genocide Convention, which was written before many of the current models of international cooperation were established. Participants felt that in implementing obligations to prevent and punish genocide, there may be value in learning from and adapting some of the effective methods of response developed under the global counter-terrorism framework.

Participants further engaged in a discussion on the inter-linkages between human rights and counter-terrorism. Participants agreed that human rights should guide and inform how counter-terrorism efforts are deployed, but warned against the conflation of that agenda and frameworks with those on atrocity crimes and genocide.

Recommendations

- Strengthen the integration of human rights laws and norms into counter-terrorism efforts at all levels;
- Foster increased understanding of the implications counter-terrorism efforts have on women and girls in order to develop strategies to ensure that they meaningfully include gender concerns, including in accountability and reparations processes;
- Explore strategic avenues to utilize the modern mechanisms of counter-terrorism, including at the United Nations and its modalities of international cooperation, to inform response and accountability strategies for atrocity crimes committed by terrorists;
- Develop strategies and arguments that clearly demonstrate the importance and need to prioritize response to atrocity crimes, including genocide, in mechanisms dealing with international peace and security.

D. THE YAZIDI GENOCIDE: PUTTING GENOCIDE PREVENTION, SUPPRESSION AND PUNISHMENT TO THE TEST

The day's final conversation addressed ISIS's ongoing genocide of the Yazidis as a frame for discussing the duties to prevent, suppress and punish the crimes of genocide. Specific questions concerned whether states have failed their obligations to prevent genocide and what the duty to punish requires in this situation, specifically with respect to the UN Security Council and Member States.

Participants discussed some of the distinct aspects of the Yazidi genocide since its start in August 2014 with ISIS's attack on Sinjar. This included: the clear evidence that all five genocide crimes have been committed; the ongoing nature of the genocide, which is characterized by the perpetration of the four non-killing crimes of genocide primarily against women and children; the highly gendered way in which the genocide is being committed; and ISIS's clearly expressed intent to destroy the Yazidi community.

With respect to the duty to prevent, the group recognized that despite the fact that over 3,000 Yazidi

women and children remain in ISIS captivity, the international community has generally failed to take concerted global action to end the genocide as it is occurring today. Participants discussed a "duty to rescue" the victims who remain in captivity and how this could inform ongoing military efforts against ISIS. This led to a back-and-forth concerning the viability of an "ending-the-war-ends-the-crimes" approach to preventing ongoing genocide.

Concerning the duty to punish, participants discussed ongoing efforts to ensure accountability, and in particular evidence-gathering and documentation. Participants felt that investigations spearheaded by NGOs and other actors since 2014 have laudably called international attention to the issue, but underscored that more coordination and information sharing was needed. Participants expressed concerns over methods of evidence-gathering, such as improper training, incomplete documenting and the re-traumatization of victims. The conversation touched on the need to uniformly and centrally gather evidence from witnesses other than direct victims. It was mentioned that the smuggler network primarily responsible for rescuing Yazidi girls is a rich source of communications, data and intelligence that has developed in the absence of a global response. It was further noted that there is an urgent need to adopt and follow protocols on how captured fighters should be debriefed and how evidence is gathered and preserved by military actors for future justice proceedings. There was consensus that it is important to treat areas being liberated from ISIS control not only as battlefields, but also as areas where genocide occurred for investigation purposes. Participants stated that an enduring challenge in achieving justice for the Yazidi genocide is decentralized global action.

The conversation featured a debate on the UN-based and Genocide Convention-based theories of obligations to act. Participants grappled with the question of what obligations the UN Security Council Member States have with respect to referring genocide to the International Criminal Court. Some participants argued that since government representatives do not lose their state-based legal obligations to take all possible measures when they sit on the Security

Council, those on the Council may have duties not to veto resolutions referring genocide to justice. Other participants maintained that the UN Charter determines the obligations and rights of states on the Security Council, but that an argument could be made that there is an obligation to act to maintain peace and security, which in turn could impose a duty not to veto.

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An ongoing theme throughout the discussion was the highly gendered nature of the Yazidi genocide and its implications. This included—drawing on earlier discussions on the duty to prevent and punish—the need to better understand the relationship between gender and genocide. For example, participants discussed whether those who participated in the buying and selling of Yazidi women could be deemed to have genocidal intent and how this intent could be imputed through theories of liability. Participants also discussed how the highly gendered nature of the genocide may be hindering its recognition. On this subject it was agreed that the discourse needs to move away from an emphasis on biological destruction (with respect to the specific intent of genocide). Further along this line, it was acknowledged that laws on genocide were written at a time when women’s roles were very different than today, when women’s value was viewed as a sum of their reproductive parts.

There was also a discussion about connecting the Yazidi genocide to other acts of persecution and discrimination by ISIS, most notably against other minority populations. Several participants raised the

fact that there is strong evidence for genocide against certain Shia populations, but that there have been no concerted documentation efforts on this to date.

Participants noted that advocates should not only focus on action by traditional Western powers, but on other countries that may be able to provide leadership to see action on this issue.

Ultimately the conversation unearthed challenges presented by the current lack of global political will. Yet, it also highlighted multiple opportunities, including continuing development of strategies, possible venues for prosecutions and refocusing advocacy approaches, in order to end and achieve accountability for the Yazidi genocide.

Recommendations

- Develop advocacy strategies on actions to be taken by states, coalition actors and regional/international organizations, including the UN Security Council, to suppress the ongoing genocide of the Yazidis. Such actions should take into account the duty to rescue Yazidis currently in ISIS captivity;
- Increase cooperation and information sharing between those engaged in documentation and case-building efforts, as well as capacity building for groups involved in evidence collection and documentation;
- Expand documentation and evidence-gathering to non-victim testimony, including military actors, captured fighters, and smuggler networks;
- Include an awareness of the gender aspects of ISIS’s genocide when gathering evidence, investigating, prosecuting and otherwise pursuing cases for criminal justice;
- Increase investigation and analysis of other potential acts of genocide committed by ISIS, including against Shia populations;
- Explore avenues to hold state actors and the international community accountable for their failure to prevent or suppress the genocide, including through the ICJ.

III. Conclusion

The Brain Trust confirmed the importance of laws on genocide and, perhaps more significantly, the special values that it protects: plurality, diversity and tolerance. In today's world of increasing nationalism, suppression and prejudice, it is more important than ever to uphold these values. However, the ongoing genocide against the Yazidis demonstrates there is a real gap between the strength of the legal obligations to prevent, suppress and punish genocide and compliance with them.

As the participants in the Brain Trust identified, this gap can be attributed to a variety of factors, including the tendency to place genocide at the top of a perceived hierarchy of international crimes, the failure to recognize the inherently gendered nature of genocide crimes, the ambiguity of the provisions of the Genocide Convention and the fact that the mechanisms of the Convention are not rooted in modern practices of international law and cooperation. The Brain Trust and the recommendations included herein make clear that none of these are fatal flaws. Rather, strategic approaches that further clarify the content of genocide obligations, demystify the difficulties of ensuring accountability for genocide and tap into modern avenues of international cooperation can help translate these important legal protections into practice.

The Global Justice Center will seek to use its capacity to implement these recommendations and continue this discussion. We welcome feedback and suggestions.

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