

# WHEN TERRORISTS PERPETRATE GENOCIDE: Legal Obligations to Respond to Daesh's Genocide

Daesh is currently engaged in a campaign of terror in Iraq and Syria that has been marked by the commission of international crimes, including war crimes, crimes against humanity, and—the crime of crimes—genocide. Daesh's genocidal campaign against the Yazidi, which began in August 2014, continues to this day for the over 3,200 women and children still in captivity.<sup>1</sup>

The commission of genocide invokes non-derogable legal obligations on states and international entities to act to prevent, suppress and punish genocide. The international legal framework on genocide protects distinct values—the right of protected groups to exist and the right of all people to live in a world enriched by diversity and marked by tolerance. Daesh is not simply a terrorist group, they are also a genocidal organization—and the international community's response must treat them as such, whether through efforts to counter terrorism or violent extremism, or the responsibility to protect.

## **DAESH IS PERPETRATING ONGOING GENOCIDE**

Today, Daesh continues to perpetrate genocide, a crime of destroying national, ethnic, racial or religious groups, as distinct entities, along gendered lines.<sup>2</sup> Gender isn't ancillary to this genocidal campaign; it is a driving force in how it is being committed with women and girls methodically targeted by specific, ongoing crimes. Yazidi women and girls have been systematically kidnapped, bought, sold, used as sex slaves, repeatedly raped, forcibly converted, forcibly married, forcibly impregnated and forced to undergo abortions. Evidence indicates that Daesh is committing all of the five crimes listed in the Genocide Convention: (1) killing; (2) causing serious bodily or mental harm; (3) deliberately inflicting conditions to destroy the group; (4) preventing births within the group; and (5) transferring children (including girls under age eighteen) of the group to another group.<sup>3</sup>

Describing and treating these crimes solely as acts of terrorism, war crimes, crimes against humanity or even "ethnic cleansing," denies Yazidi women equal protection under the law, including the Genocide Convention.

## **LEGAL OBLIGATIONS TO RESPOND TO GENOCIDE**

Strategies to counter terrorism, and to prosecute and deny "safe havens" for terrorists, must be informed by the non-derogable obligations of states and international entities to take action in the face of genocide. The 1948 Genocide Convention and customary international law require that states and international entities prevent, suppress and punish genocide—obligations which are triggered when a serious risk of genocide is known or should be known.<sup>4</sup> With respect to Daesh's actions against the Yazidi—it is clear that genocide is occurring, far surpassing the requirement of a known "serious risk" of genocide. Accordingly, states and international entities are now required to take all measures reasonably within their means to fulfill their obligations to prevent and punish genocide.

### ***Obligations to Prevent & Suppress Genocide***

The Genocide Convention imposes obligations on all states to "prevent" genocide, individually and through collective action.<sup>5</sup> This obligation is customary international law and considered peremptory. While the Convention does not specify the exact content of these obligations, the International Court of Justice ("ICJ") has found that states need to employ "all means reasonably available to them, so as to prevent genocide so far as possible."<sup>6</sup> Failure to comply with this obligation creates civil liability for states and international entities.<sup>7</sup>

At a minimum, this duty requires the recognition of genocide. To date, Daesh's genocide against the Yazidi has been acknowledged by the European Parliament, the UN Commission of Inquiry of Syria, the governments of the United States and Iraq, and others.<sup>8</sup> However, the majority of states and international entities have yet to act. This is not unusual nor surprising; states' reluctance to say the word "genocide" in the midst of the Rwandan genocide was due to the fear that by doing so, they would have to comply with their obligations under the Genocide Convention.<sup>9</sup>

The ICJ has set forth factors which can guide what the

## “States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law.”

—Security Council Res. 1456

duty to prevent entails on a particular state or entity, including geographical distance and links between the state and those committing the genocide.<sup>10</sup> The mandate to comply with these obligations is broad and falls upon all Member States to the Convention that can “contribute to the restraining in **any degree** the commission of genocide”<sup>11</sup> regardless of their likelihood of success.<sup>12</sup> This means that those with more considerable connections to or abilities to influence the actors concerned in a genocide have heightened obligations to act. This includes permanent members of the Security Council, states where genocidal acts are taking place or those with a connection to the victims of the genocide.

In addition to the general duties, the Genocide Convention itself gives all states—even those who are not injured by genocide—two avenues for action in the face of genocide: the UN Security Council<sup>13</sup> and the ICJ.<sup>14</sup> For example, the ICJ was used by Bosnia in 1993, where the court issued an injunction to stop Serbia from perpetrating genocide, including rape.<sup>15</sup> The UN Charter provides for the Security Council to enforce ICJ orders.<sup>16</sup>

### **Duty to Punish Genocide**

In addition to the obligation to prevent genocide, states and international entities have obligations to punish genocide. Not only is the act of genocide itself punishable, but so too are acts of conspiracy, complicity, inciting genocide, and attempts to commit the crime.<sup>17</sup> Regardless of status or position, all actors engaged in the commission of genocide—whether heads of state, public officials and non-state actors—can be prosecuted.<sup>18</sup>

The punishment of genocide is not only something to be undertaken once genocide is completed and/or years after the acts have taken place. Rather, the duty to punish runs concurrently with the duty to prevent, and may have a deterrent effect on the commission of further crimes. In fact, it has been found that impunity for mass atrocity crimes has not only been a driver of conflict, but that it has created an enabling environment for the commission of such crimes: “[t]he general lack of and mismanagement of investigations and prosecutions, and lack of accountability for perpetrators, send a strong signal to those considering taking up arms, whether in

support of or against [Daesh], that there are few costs for committing atrocities against minority communities.”<sup>19</sup> Furthermore, not only does impunity encourage the commission of such crimes, but evidence indicates that atrocity crimes, including rape and sexual violence, are being used as recruiting tools by Daesh.<sup>20</sup> Consequently, the commission of atrocity crimes with impunity by individuals at all levels of Daesh enables, sustains and strengthens the organization,<sup>21</sup> rendering the duty to punish all the more important.

As an international crime, there are multiple venues where genocide can be prosecuted: an international tribunal such as the International Criminal Court (ICC) or ad-hoc/hybrid tribunal; domestic prosecutions in Iraq and Syria; and domestic prosecutions in third-party states under universal jurisdiction. Considering the various political and jurisdictional limits of the various venues for prosecution, it is essential that all possible measures are attempted to begin the accountability process—whether that be a referral from the Security Council to the ICC, the opening of a *proprio motu* preliminary examination into foreign terrorist fighters by the ICC prosecutor, the creation of an ad-hoc or hybrid tribunal to deal with the situation, or prosecutions in domestic courts.

Prosecuting genocide **as genocide** is essential. As the ICC Appeals Chamber made clear in the Bashir case, evidence of genocidal intent need only be one of all possible reasons for the crimes,<sup>22</sup> in order to support the inclusion of charges of genocide at the arrest/indictment level. Furthermore, due to the special intent requirements of the crime of genocide, prosecutions of underlying acts as war crimes and crimes against humanity do not capture the full criminality of the act. Irrespective of the outcome of any legal process, addressing Daesh’s crimes of genocide as such, reinforces the very values—diversity and tolerance—Daesh is seeking to destroy.

### **WHEN TERRORISTS PERPETRATE GENOCIDE**

Today, while it is clear that Daesh, a terrorist, non-state actor is perpetrating genocide, it may be equally unclear how obligations under international law to prevent and punish genocide apply. The Genocide Convention was clearly written with state perpetrators of genocide in

mind, or at least perpetrators whose actions could be imputed to a state actor. However, a plain reading of the Genocide Convention also makes clear that all states have duties to prevent and punish genocide regardless of whomever commits it. Therefore, a genocidal actor such as Daesh cannot be exempt from the framework of international law on genocide merely because their actions cannot be imputed to any state.

Accordingly, states must progressively interpret their obligations to prevent, suppress and punish genocide when it comes to the commission of genocide by non-state actors. Counter-terrorism efforts against Daesh must take into account obligations to prevent and suppress genocide, including proactive efforts to rescue those still under Daesh captivity. Furthermore, prosecutions of Daesh fighters cannot be limited to crimes of terrorism, or even war crimes and crimes against humanity. Rather, where evidence supports it, prosecutions must, at a minimum, include investigations into whether the fighter is implicated in the genocide. To exempt

actions against Daesh from these obligations under the cloud of counter-terrorism is entirely antithetical to the values and norms that underlie international prohibitions on genocide.

## CONCLUSION

States and international entities are today faced with an ongoing genocide. Over 3,200 Yazidi women and children remain in Daesh's captivity and continue to be regularly subject to genocidal acts. Acts to avert this genocide in 2014 may have saved lives, but they have failed to successfully suppress the genocide and prevent the commission of further genocidal acts. As a result, the international community must ensure that all efforts to counter Daesh, including counter-terrorism efforts, incorporate and are in line with their legal obligations to prevent, suppress and punish genocide. To do anything less fails the Yazidi and renders states and international entities accountable under international law.

## ENDNOTES

1. Int'l Commission of Inquiry on the Syrian Arab Republic, "They came to destroy": *ISIS Crimes Against the Yazidis*, ¶ 6 (15 June 2016).
2. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 278 U.N.T.S. 1951, art. II.
3. Syria COI, "They came to destroy," *supra* note 1; Global Justice Center, *Letter and Annex in Support of Filing OTP-CR-397/15*, 17 Dec. 2015.
4. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide Case* (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), Judgment, International Court of Justice, Feb. 26, 2007, ¶ 430.
5. Genocide Convention, *supra* note 2, at arts. 1, 8.
6. ICJ 2007 Genocide Decision, *supra* note 3, at ¶ 430.
7. See *Order of the Court Indicating Provisional Measures*, 8 Apr. 1993; *Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)*, Preliminary Objections, International Court of Justice; see also Draft Articles on the Responsibility of States for Internationally Wrongful Acts, art. 1 and the Draft Articles on the Responsibility of International Organizations for Internationally Wrongful Acts, art. 1.
8. Syria COI, "They came to destroy," *supra* note 1, at ¶ 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; U.S. Holocaust Mem'l Museum, at 20-21 (2015).
9. See HAZEL CAMERON, *BRITAIN'S HIDDEN ROLE IN THE RWANDAN GENOCIDE: THE CAT'S PAW* 105 (2013).
10. ICJ 2007 Genocide Decision, *supra* note 3, at ¶ 430.
11. ICJ 2007 Genocide Decision, *supra* note 3, at ¶ 461

12. ICJ 2007 Genocide Decision, *supra* note 3, at ¶¶ 430, 461.
13. Genocide Convention, *supra* note 2, art. 8. The United States used this avenue with respect to the genocide in Sudan, see William A. Schabas, *Convention on the Prevention and Punishment of the Crime of Genocide*, <http://legal.un.org/avl/ha/cppcg/cppcg.html>.
14. Genocide Convention, *supra* note 2, art. 9.
15. ICJ 1993 Genocide Decision, *supra* note 7.
16. Charter of the United Nations and the Statute of the International Court of Justice (1945), art. 94(2).
17. Genocide Convention, *supra* note 2, art. 3.
18. Genocide Convention, *supra* note 2, arts. 1, 4-6; Rome Statute of the International Criminal Court, art. 27.
19. United States Holocaust Memorial Museum, 'Our Generation is Gone': *The Islamic State's Targeting of Iraqi Minorities in Ninewa*, p. 28 (Nov. 2015).
20. Rukmini Callimachi, *ISIS Enshrines a Theology of Rape*, N.Y. TIMES (Aug. 13, 2015), [http://www.nytimes.com/2015/08/14/world/middleeast/isis-enshrines-a-theology-of-rape.html?\\_r=0](http://www.nytimes.com/2015/08/14/world/middleeast/isis-enshrines-a-theology-of-rape.html?_r=0); U.S. Holocaust Mem'l Museum at 10.
21. United States Holocaust Memorial Museum, 'Our Generation is Gone': *The Islamic State's Targeting of Iraqi Minorities in Ninewa*, p. 10 (Nov. 2015).
22. *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, Judgment on the appeal of the Prosecutor against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir" (Feb. 3, 2010), <https://www.icc-cpi.int/iccdocs/doc/doc817795.pdf>.