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Determination of International Criminal Court jurisdiction over ISIS crimes against the Yazidi people in Iraq

Facts

The Yazidi people practice a unique ancient religion which combines elements of Zoroastrianism, from ancient Persia, and Mithraism, from Eastern Mediterranean cultures. They believe in a single deity, while placing a large amount of focus on an additional “fallen angel.” (For this reason, they have been called “devil worshipers” by other - mostly muslim - groups.) They have a religious caste system and many believe in reincarnation.

The Yazidi community considers itself to have already been victim of “72 previous genocides,” from the 16th century muslims, to the Ottomans, to Kurdish leaders, to Saddam Hussein's “Arabization” program.

The Yazidi's returned to Northern Iraq, primarily in the Nineveh and Sinjar provinces, following the reversal of the Arabization policies but have “suffered extensively since 2003,” quoting Joe Stork, as the uniqueness of their religion places them all of the surrounding canonical practices. Additionally, although most Yazidi's speak Kurdish, only some identify being ethnic Kurds. This has led to frequent tensions among the two Northern communities as well, as the Kurds attempt to convince the Yazidi's to adopt the Kurdish identity.

On June 10, 2014, the terrorist group known as the Islamic State (or ISIS/L), invaded the Nineveh Province and captured the city of Mosul, sending an estimated 130,000 Yazidi's into Kurdish controlled areas (mainly Dohok or Irbil). On August 6th 2014, the group would storm Sinjar and send another 40,000 onto nearby Mount Sinjar. (In total, 300,000 were displaced from the Sinjar province.) Those hiding in the mountains were subject to conditions of lack of food and water.

Since the ISIS victory on June 10th, reports of Yazidi deaths, averaging around 500 a week, were made by human rights groups and news agencies. Tens of thousands have are thought to have been captured in the past 16 months, with an estimated 3,000 remaining in captivity, according to the UN High Commissioner for Human Rights. (Although local leaders on the ground claim the number is much higher.) A database of 3,133 names and ages of Yazidi's who had been missing since the

August attack was provided to Human Rights Watch by a Yezidi group; as of March 2015 the group reported the number of Yezidi's in captivity reached 5,324. In March 2015 reports of total Yezidi murders also averaged around 5,000.

In addition to kidnappings and murders, escaped survivors report beatings, high rates of sexual violence and rape, forced marriage, enslavement and forced conversions while in ISIS custody. Consistent reports indicated an immediate division of women from men upon capture. Survivors report that these crimes have been committed upon girls as young as 6 years old. Those interviewed also state that, while most of the ISIS men they came in contact with were Iraqi, many were foreigners from countries feeding ISIS recruitment. (Officials estimate that over 20,000 foreign fighters are currently aiding ISIS.)

Numerous human rights groups, including Human rights watch, have referred to ISIS's crimes against the Yezidi sect as both widespread and systematic. "Widespread" has been deduced given the number of victims. Human Rights Watch reports the "systematic" nature of the crimes can be deduced from ISIS's public statements justifying the enslavement and abuse of captured women, as well as the organized sale of Yezidi women and girls.

In September, former ICC prosecutor Luis Moreno Occampo was approached by two Yezidi groups, the Free Yezidi Foundation and Yazda, in the U.S., with a report requesting that the crimes against the Yezidi's be tried at the ICC. The report claims that, although Iraq is not a party of the ICC, the Court will have jurisdiction over an estimated 5,000-7,500 foreign fighters within IS who come from ICC member states, including around 2,000 from France, Britain, Belgium, Germany and the Netherlands. The request has the support of the Kurdish Regional Government in Iraq. Occampo has since assisted in aiding the Yezidi groups effort and urging the Court to begin an inquiry into the case. The Court has begun such preliminary steps.

Issues

i. Legal Question:

Does the International Criminal Court have jurisdiction to bring charges against those responsible for the atrocities committed against the Yazidi community with regards to:

- a. ...the gravity of the crime in question
- b. ...the status of the accused, the geographical location, and the means of submission to the court

ii. Legal Provisions:

- a. The ICC only has jurisdiction over genocide, crimes against humanity and war crimes,

- i. as laid out in Article 5 of the Rome Statute;
 - ii. as defined in Articles 6, 7, and 8 of the Rome Statute.
- b. The court does not have universal jurisdiction and may only exercise in the event that (1) the accused is a national of a state party or a state otherwise accepting jurisdiction of the court; (2) the crime in question took place on the territory of a state party or a state otherwise accepting the jurisdiction of the Court; (3) the UN Security Council refers the situation to the Prosecutor, irrespective of the nationality of the accused or the location of the crime;
 - i. as laid out in Article 12 of the Rome Statute;
 - ii. as expanded upon in Articles 13, 14, and 15 of the Rome Statute.

Discussion

A. Do the crimes committed against the Yezidi people since June 10, 2015 qualify as genocide, crimes against humanity or war crimes?

Article 6 of the Rome Statute defines genocide to cover the scope of five distinct acts of violence against a people. Regarding the crimes against the Yezidi's, qualifications (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", and, (d) "Imposing measures intended to prevent births within the group" have all been met.

Article 6 specifies the necessity of a *mens reas* for genocide that requires the "intent to destroy, in whole or in part" the group, in this case a religious group, in question. (Their distinct religion qualifies them as a group in accordance with this article.) Such intent has been established by ISIS's own statements that it intends to wipe the Yezidi religion of the face of the earth. The use of statements to confirm intent has been established through the jurisprudence of the ICTR.

Regarding the necessary conditions of the crimes met, the "floor" for the scale of murder to qualify as genocide was set at 8,000 by the ICTY. Given that reports of murders averaged around 5,000 as of March 2015, with an additional 5,000 (+) Yezidi's in captivity; given the reports of conditions in captivity; and taking into account the sustained momentum of ISIS forces, it is not an unreasonable deduction that another 3,000 have been killed in the past 7 months.

Regarding part (b) of Article 6, large scale survivor reports of kidnappings, rape and beatings confirm such a crime. Part (c) can be deduced by the conditions of the 40,000 Yezidi's that were trapped, without food or water in Mount Sinjar for an extended period of time, due to the direct actions of ISIS; as well as the continued forced migration and kidnappings of the Yezidi people.

Although more difficult to prove, the ICTR and ICTY have set sufficient precedents of rape as a weapon of war that, if so desired, the prosecutor could make the case that part (d) has also been met in these circumstances. The rape and assault of what Human Rights Watch has estimated to be tens of thousands of women and girls, leaves a significant portion of the population at risk of rejection by their community in accordance to cultural norms. More specifically, women having been exposed to such conditions by multiple men may be prohibited from, denied, or in fear of future childbirth, whether due to cultural practice or injuries sustained from the crimes. Although these women have been accepted back, one may still make the case for the intention, given the cultural prevalence of such practices

Article 7 of the Rome Statute defines crimes against humanity to be those outlined that take place as part of part of “a widespread or systematic attack directed against any civilian population, with knowledge of the attack”. The crimes outlined in Article 7 that apply to the Yezidi case are: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (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; (h) Persecution against any identifiable group on religious grounds; (i) Enforced disappearance of persons.

Each of these crimes have been attested to by multiple survivor and witness accounts as having happened to them or as having happened to multiple individuals in their vicinity. These crimes have been confirmed by multiple human rights groups (including medical groups), as well as Yezidi groups who have had the ability to keep more detailed records.

B. Does the ICC have the right to exercise “personal jurisdiction” over the fighters of member states, despite their potential to be able to try such cases themselves? If so, should they do so?

Article 12, paragraph 2, subsection (b) of the Rome Statute specifies the ICC’s jurisdiction over cases where “the State of which the person accused of the crime is a national.” Referred to as “personal jurisdiction,” this route would give the court access to an estimated 5,000 - 7,000 accused participants from member states.

This section of the Rome Statute has never before been utilized and the court is hesitant to do so, primarily for political reasons. Enforcing this method of jurisdiction on member states that have the ability to try these cases themselves presents the potential consequence of future states withdrawing or declining to enter the jurisdiction of the ICC for fear of loss of control over the prosecution of their nationals.

This is not, however, a legal question. The ICC has been set up to try cases in which the alternately responsible judicial arms of states are “*unwilling* or unable.” By

not prosecuting these criminals on their own, and by not being spurred to do so as the Court begins its investigation, these states are demonstrating their unwillingness to try their own nationals for these high crimes. The political concerns of the ICC are irrelevant.

What is more, the long-term, larger scale of the political repercussions may be of more benefit to these member states than to not try the case. Recruitments to ISIS from foreign countries, notably Europe, have entered a second phase of increase. The prosecution, or, more realistically, established threat of future prosecution, of the returning and active fighters is likely to have a significant impact on any future recruits from ICC member states.

Conclusion

The Yezidi case is important, not only for the recovery and hope of the Yezidi people, but also for the ICC itself. Taking on this case against the wishes of some of its member states will establish the Court as a legally motivated, rather than a politically motivated body as some have claimed. In addition, this case has the potential to ebb the flow of foreign fighters to ISIS, something national governments have been attempting, and failing to accomplish, for over a year now.

Beyond the threat of punishment, trying foreign fighters in this manner also counteracts several of the ISIS narratives that intelligence has found to be most successful for recruitment. These include the fact that the fate of “masculine, militant” fighters, will be seen as being under the control of the very western norms, specifically - the rule of law, that the group has portrayed itself as having undermined or otherwise dominated. Additionally, the idea that the apocalypse is imminent, something researchers have held as key for the final decision of individuals to join the group, will be challenged by the instituting of long term consequences for the fighters actions. Finally, the ISIS initiative in general will be reframed *as a criminal enterprise*, rather than a crusade of virtue.

All of this is, however, secondary to the underlying fact that, in accordance with the Rome Statute and the mandate of the ICC, this case *is* within their jurisdiction given both the overwhelming qualifications of the crimes against the Yezidi sect as genocide and crimes against humanity, as well as their legal ability to enforce personal jurisdiction over fighters of member states. Should member states be shamed by their own unwillingness to prosecute these crimes, the option always remains for the Security Council to send its own request for prosecution. Either way, it is the legal responsibility of the ICC to the Yezidi sect and the international human community to pursue this case.