

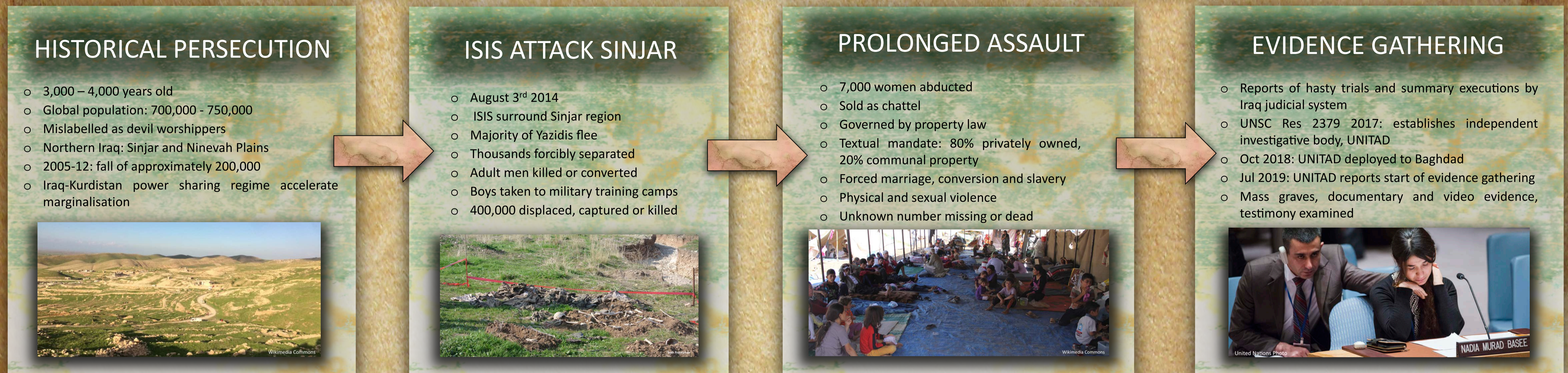
Legal Avenues and Obstacles for Prosecution of the Yazidi Genocide

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FACTUAL CIRCUMSTANCES



BUILDING AND BRINGING A CASE

JURISPRUDENCE

Question:
Does the Convention and its jurisprudence support a case for genocide?

- UNCG Article 2 protects against “acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”
- Prosecutor v Akayesu*: A religious group is one “whose members share the same religion, denomination or mode of worship”

Actus Reus

- Art. 2(a) Killing members of the group:
 - Mass killings of Yazidi men and boys
 - Mass killing of post-menopausal, older women
 - Killing of captured women whilst enslaved
- Art. 2(b) Causing serious bodily or mental harm to members of the group:
 - Torture of men and boys
 - Physical, sexual, psychological abuse of women
- Art. 2(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part:
 - Over 40,000 trapped on Mount Sinjar following siege in 50 degree heat, aid packages shot down
- Art. 2(d) Imposing measures intended to prevent births within the group:
 - Enslaved women were forced to take contraception, have abortions or birth children of their captors
 - Closed nature of Yazidi religion means surviving women face stigma, rejection and huge uncertainty regarding their reproductive futures
- Art. 2(e) Forcibly transferring children of the group to another group:
 - Boys transferred to military training camps
 - Girls sold into slavery

Mens Rea

- Art. 30(2) Rome Statute on general intent: a person “means to engage in the conduct” and “means to cause that consequence or is aware that it will occur in the ordinary course of events.”
- Art. 2 UNCG “intent to destroy”:
 - Prosecutor v Akayesu*: Special Intent is “required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged”
 - Distinguishes genocide from other international crimes
 - ISIS leaders on various occasions published statements denying Yazidis the right to exist in its caliphate
 - Prosecutor v Tadic*: personal gain do not exclude possibility of special intent
- Art. 2 “in whole or in part”:
 - Intent need not be to destroy group entirely
 - Prosecutor v Krstić*: portion of group targeted must be “significant enough to have an impact on the group as a whole”
 - Entire Yazidi population of Iraq affected
- Art. 2 “as such”:
 - The target is the group, rather than individual members of that group
 - Evidence that Yazidis faced greater persecution than Christians and other “People’s of the Book”

PROSECUTION

Question:
In what venue ought the case be prosecuted?

International Criminal Court

- Crimes within ICC jurisdiction:
 - Rome Statute Art. 5: genocide, war crimes, crimes against humanity, the crime of aggression
- Principle of Complementarity:
 - Rome Statute Art. 17: Prior to moving forward with a case the court must consider national efforts, ability and willingness to investigate and prosecute
 - Iraq and Syria’s overburdened and under resourced judicial system arguably incapable of dealing with the magnitude of Yazidi genocide
- Jurisdiction:
 - Neither Iraq nor Syria party to the Rome Statute
 - Art 12(3): Either nation could accede limited jurisdiction to ICC but have shown no intent to do so
- UNSC Referral:
 - Rome Statute Art. 13: The Court may exercise its jurisdiction based on a referral from the UNSC (acting under Chapter VII of the UN Charter)
 - UNSC permanent members have a veto right
 - China and Russia have already vetoed a resolution to refer Syria to the ICC
- Prosecutor Initiated Investigation:
 - Rome Statute Art. 15(1): ICC Prosecutor may initiate investigation on their own discretion into crimes within Court jurisdiction
 - Iraq and Syria not within jurisdiction
 - 2015: NGOs Yazda and Free Yazidi Foundation submit petition to Prosecutor to open investigation on basis of thousands of ISIS members from ICC state parties
 - Prosecutorial policy is to focus on perpetrators “Who bear the greatest responsibility” and ISIS leadership is largely comprised of Iraqi and Syrian nationals
 - Such a move could lead to arguments that European offenders are held to account while Iraqi and Syrian nationals receive impunity

International Criminal Tribunal

- Establishment:
 - ICTY and ICTY established by UNSC
 - UNSC interpreted UN Charter Chapter VII to incorporate this power on the basis of restoring peace and justice
 - Legitimacy questioned in *Prosecutor v Tadic* but UNSC implicit authority affirmed by Appeals Chamber
 - ISIS situation meets the various criteria set out by the UNSC for tribunal creation
 - ISIS crimes deployed by UNSC in various resolutions
- Jurisdiction:
 - ICTY Statute Arts. 1-5: Tribunal may prosecute:
 - Grave breaches of Geneva Conventions of 1949
 - Violations of the laws or customs of war
 - Genocide
 - Crimes against humanity
 - Jurisdiction over natural persons “not organisations, political parties, army units, administrative entities or other legal subjects.”
 - Iraqi and Syrian regimes may legitimately fear being implicated by such a tribunal
 - Both nations may request government and military personnel immunity be written into statute
- Practicalities:
 - Advantages:
 - Proximity to witnesses and evidence
 - As UN members Iraq and Syria required to cooperate
 - Access to high ranking ISIS members
 - Obstacles:
 - Russia and China veto power
 - Cost: international public support necessary
 - Time: Although UNITAD gathering evidence, Iraq is still summarily trying innumerable perpetrators. Thus, effect of tribunal may be limited
 - Size, scope and range of crimes committed by ISIS unlike the limited nature of the ICTR and ICTY
 - Location: Syria still at war, Iraq unstable and basing in Kurdistan may destabilise Iraqi-Kurdish relations

CONCLUSIONS

AVENUES

- All material elements of genocide as defined by the UNCG satisfied by the Yazidi experience
- ISIS documentation of crimes via publications and social media provide ample evidence of mental elements; both general and special intent
- Unique nature of ISIS membership could open new opportunity for development of ICC if state parties agree to centralise such prosecutions
- Ad hoc international criminal tribunal could provide this historically persecuted minority with some redress in their home territory

OBSTACLES

- Although commendable, UNITAD may simply be too late to gather vital physical evidence, testimonies from survivors trying to forget and suspects who may already have been executed
- Lack of jurisdiction poses first and biggest hurdle to international intervention
- Beyond law, the geopolitical climate renders possibility of UNSC involvement unlikely
- Lack of public support for international intervention in Iraq and the costs involved makes inaction “politically cost free”

ABBREVIATIONS
ICC International Criminal Court
ICTR International Criminal Tribunal for Rwanda
ICTY International Criminal Tribunal for the former Yugoslavia
ISIS Islamic State of Iraq and Syria/ Islamic State of Iraq and the Levant/ Da'esh
Rome Statute UN General Assembly, *Rome Statute of the International Criminal Court* (last amended 2010)
UN Charter United Nations, Charter of the United Nations, 24 October 1945
UNCG UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948
UNITAD United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh/Islamic State in Iraq and the Levant
UNSC United Nations Security Council

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