

BOFAXE

Germany's Commitment to International Justice

ON THE GROUNDBREAKING FIRST TRIAL ADDRESSING GENOCIDE AGAINST THE YAZIDIS (II)

— The case of Taha Al J. marks a vital step towards international justice. It is a rare case of the exercise of universal jurisdiction and marks the first trial of its kind to address clearly and specifically crimes against the Yazidi minority which included genocidal acts and crimes against humanity. Lastly, Taha Al J.'s case proceedings could increase pressure on other states to follow similar leads in the future.

Challenges for domestic and international jurisdictions

While several trials involving ISIS are underway in Iraq and Iraqi Kurdistan, they mostly deal with charges under anti-terrorism legislations and none of them addresses genocidal acts against the Yazidis. To address genocidal acts, Iraqi courts would require more extensive investigations and documentations. On all cases involving ISIS persons, Iraqi judges prefer to implement the Iraqi Anti-Terrorism Law No. (13) for the years 2005 to criminalize membership in a terrorist organisation and ensure state sovereignty. For example, the infamous case of Ashwaq Haj Hassan marked the first case in Iraq in which a Yazidi victim personally confronted her ISIS attacker, Mohammed Sahab, an Iraqi national. He was found guilty of participating in a terrorist organization and in the rape and abduction of Yazidi women. Similarly, last year, an Iraqi court addressed terrorism charges to seven ISIS French citizens. In both cases, the accused were found guilty of terrorism charges against the state. None of the cases, however, referred to the atrocities against the Yazidis as acts of genocide.

Furthermore, collaboration efforts regarding ISIS cases between the Iraqi central government and the Kurdish Regional Government (KRG) remain unorganized and often complicated by politics. Given that some of the offenses occurred on the disputed areas between the Iraqi government and the KRG, while other offenses occurred on areas controlled by one of the respective governments, such a collaboration would be vital. Although the KRG has been collecting documentations against ISIS for years and has established a special investigative committee on genocide, they have limited access to ISIS perpetrators, who remain in the custody of Iraqi security services. On the other hand, Iraq's central government has established the Iraqi Investigative Independent Team (IIIT) based on the request of the UN Secretary-General in the UN-Security Council Resolution No. 2379 to support efforts to hold ISIS accountable, in which the KRG has no say given the requirement of the respective resolution reaffirming Iraq's sovereignty and territorial integrity.

Moreover, it has been challenging to secure adequate evidence and reliable testimonies from Yazidi victims despite the fact that many of them know their tormentors' names. Survivors would undoubtedly take comfort in seeing ISIS persons prosecuted, but the fear of retaliation against them or their family members, the traumatization to narrate their stories again, and fearing stigmatizations and shame from their community hinder the attesting process. The high mobility of ISIS fighters in the region poses another challenge. Fighters either went back to their country of origin, were killed in battles or traveled to third countries making it difficult to establish adequate evidence.

Regarding potential ICC prosecution, most ISIS genocidal acts against the Yazidis and crimes against humanity took place in Iraq and Syria. The ICC has no jurisdiction over neither of them because neither Iraq nor Syria have ratified the ICC Statute. The ICC could, however, exercise jurisdiction over these crimes, if the UN-Security Council referred the cases to them. The latter submitted a draft in 2014 which was supported by 13 members to investigate war crimes during the conflict in Syria. However, Russia and China vetoed the draft. As a result, the referral efforts to the ICC were blocked.

Given these impasses on the regional and international levels, could other states follow the German example and prosecute ISIS members for crimes committed against the Yazidis? This depends on the respective implementation of universal crimes into the national legal order of the state in question. Similar to Germany, Austria has shown that it is proactively willing to exercise universal jurisdiction over international crimes, including torture, genocide, crimes against humanity and war crimes. One of the most high-profile Austrian cases in this regard was the case of the Syrian, Brigadier General Khalid Halabi, who was granted asylum in Austria and was later identified by one of his victims in May 2018 in a refugee camp in Vienna. As a result, the Austrian authorities opened an investigation in his case. For other states, this might not as easily be possible. France, for example, applies universal jurisdiction only under specific circumstances. Although having conformed its criminal code to the Rome Statute in 2010, France can exercise universal jurisdiction merely if the suspect is present on French soil and when the crime is also punishable under the jurisdiction of the state on whose territory it occurred. Such specificity is deemed to hinder the mandate of universal jurisdiction over transnational crimes.

Overall, German courts have dominated international headlines this year over their commitment and tenacity for justice and skillfully handling the interface between universal jurisdiction and crimes against international law. Recent examples are the cases of the former Syrian Intelligence Officer whose trial started on April 23, 2020 to systematically address torture in Syria, the case of Omaima A., a German-Tunisian woman who is accused of crimes against humanity in Syria and Iraq and went on trial in Hamburg on May 4, 2020. These trials at German courts, although marking six years after ISIS began persecuting minority groups and eleven years since the start of the Syrian conflict, show the whole world that the accountability to prosecute perpetrators extraterritorially and prevent impunity can after all prevail, even if takes one domestic court at a time.

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