

PROSECUTE; DON'T PERPETRATE

*Ending impunity for sexual
violence in armed conflict*

REPORT FOR THE
COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN

Introduction

This report aims to inform the Committee about issues regarding the Australian government's implementation of CEDAW and subsequent recommendations. It is written from the perspective of the *prosecute; don't perpetrate* campaign which aims to end impunity for conflict related sexual violence. The report will cover three of the Committee's *List of issues and questions in relation to the eighth periodic report of Australia*. Those issues are: Women, Peace and Security; access to justice; and trafficking. In so doing the report will also touch on access to health especially for women living in rural settings.

The report is based largely on two requirements identified in General Recommendation 30. Firstly, the requirement for states parties to regulate non-State actors who perpetrate "gross violations of human rights or serious violations of humanitarian law"¹ that entail individual criminal responsibility. Secondly, the Committee's recommendation that states parties "ensure redress for the acts of private individuals or entities, as part of their due diligence obligation"² to ensure the protection of women's rights in conflict-affected areas.³

Women, Peace and Security

Australia's National Action Plan on Women, Peace and Security predates *General Recommendation 30 on women in conflict prevention, conflict and post-conflict situations*. Based on OECD data, Australia is a global leader in providing ODA to peace and justice sector in fragile and conflict affected countries.⁴ However, there are some specific areas of activity where the Australian Government needs to stand up against violence against women and act to meet their rhetoric.

The number and diversity of foreign fighters in the conflict with Da'esh in Syria and Iraq poses a unique opportunity to help end impunity for conflict related sexual violence. The international community has agreed Da'esh have perpetrated sexual violence as war crimes, crimes against humanity and genocide. Between one and two hundred Australians have travelled to Syria and Iraq to fight with extremist groups like Da'esh. Australia has ratified the each of the Geneva Conventions, the Rome Statute and the Genocide Convention. Under the Rome Statute, Australia is obliged to investigate and prosecute such perpetrators in their national legal system.

¹ General Recommendation 30, paragraph 16

² General Recommendation 30, paragraph 17, section (a)

³ General Recommendation 30, paragraph 3

⁴ <http://www.oecd.org/dac/gender-development/financingunsecuritycouncilresolution1325aidinsupportofgenderequalityandwomensrightsinfofragilecontexts.htm>

Both houses of the Australian Parliament have called for the investigation and prosecution of these crimes.⁵ The Foreign Minister, Minister for Home Affairs, and the former Attorney General all agreed Australia would investigate and where appropriate prosecute Australians who allegedly perpetrated these crimes. However, no effort is being made to overcome the practical barriers to investigations of this kind and no human or financial resources have been allocated to do so.

Although Australia has quite thorough legislation on war crimes, crimes against humanity and genocide, the last time a war crimes prosecution was brought to an Australian court was 1951. The Australian Federal Police, who would be the relevant investigative authority no longer have a dedicated unit for such investigations and there is little understanding even of the evidentiary requirements for such a prosecution. It is unlikely the special evidentiary requirements of international courts have been established for Australian systems. As such, all the agencies that would be needed to support such investigations and prosecutions are unfamiliar with the processes required. It would be very valuable for relevant government agency(ies) to sponsor a multi-agency workshop to identify and overcome practical and policy barriers to investigating and prosecuting Australian foreign fighters who perpetrated sexual violence as war crimes, crimes against humanity and genocide while fighting with terrorist organisations such as Da'esh in Syria and Iraq.

Access to justice

As part of Australia's humanitarian visa program, between 2015 and 2017, the Australian Government settled over 12,000 refugees from the conflict in Syria and Iraq.⁶ The government prioritised refugees who were most vulnerable, including 400 Yazidis. We know that Da'esh "sought to destroy the Yazidis through killings; sexual slavery, enslavement, torture... the imposition of measures to prevent Yazidi children from being born, including forced conversion of adults, the separation of Yazidi men and women, and mental trauma."⁷

The Yazidi community has expressed deep gratitude to the Australian Government for giving them asylum and offering them the chance for a new and better life. Social and health services needed for their rehabilitation are extremely stretched, and often limited in the rural and semi-rural communities in which they have been settled. It is important that these refugees, many of whom experienced heinous sexual and gender-based violence receive the proper psychosocial services for their rehabilitation and recovery.

The Yazidi community has asked for two things from the Australian Government: recognition that they experienced genocide and justice for what they experienced. The federal parliament passed a motion recognising the genocide, including the use of sexual violence.⁸ But many of these refugees want their stories heard; they want to give evidence against their perpetrators.

The Australian Government (probably the Australian Federal Police) should work in consultation with civil society to develop and implement a culturally and psychologically appropriate system for gathering legal testimony of Yazidis who were witnesses and victims of the genocide, including sexual and gender-based violence. These testimonies may be used for investigations and prosecutions in Australian courts but need to be suitable for sharing with international processes and mechanisms

⁵ <https://prosecutedontperpetrate.com/2018/03/08/australian-parliament-recognises-sexual-violence-against-yazidis-as-constituent-of-genocide/>

⁶ <https://www.dss.gov.au/settlement-services-programs-policy/syrian-iraqi-humanitarian-crisis>

⁷ http://www.ohchr.org/Documents/HRBodies/HRCouncil/ColSyria/A_HRC_32_CRP.2_en.pdf

⁸ <https://prosecutedontperpetrate.com/2018/03/08/australian-parliament-recognises-sexual-violence-against-yazidis-as-constituent-of-genocide/>

such as that established by the United Nations for crimes perpetrated by Da'esh in Iraq. While it is unlikely any of the Yazidis now in Australia were assaulted by Australian foreign fighters, such a project would still support some form of redress for the sexual and gender-based violence experienced by Yazidi women and girls.

Trafficking

Da'esh had an entire infrastructure established for the kidnap, transfer, sale and enslavement of sex slaves. No attempt was made by Australians in operational or training roles in the fight against Da'esh to locate or free any of these slaves.⁹ If the military had fully operationalised the Women, Peace and Security agenda, this would have been a key operational concern. So too, it should have been considered by the heads of the relevant government departments and the National Security Committee of cabinet who work on the conceptual development of Australia's contributions to crisis overseas.

The UN Security Council passed resolution 2331 in 2016, condemning human trafficking in the strongest possible terms, reminding member states that "that trafficking in persons undermines the rule of law and contributes to other forms of transnational organized crime, which can exacerbate conflict and foster insecurity and instability and undermine development."¹⁰ It goes on to encourage "Member States to ensure that existing national strategic frameworks and national action plans against trafficking in persons...and... national counterterrorism strategies are complementary and mutually reinforcing." As such, Australia's next National Action Plan on Women, Peace and Security needs to incorporate issues of trafficking in areas of armed conflict.

Australia's current human trafficking and slavery laws comprise the Criminal Code Amendment (Slavery and sexual servitude) Act 1999 and the Criminal Code Amendment (Trafficking in Persons Offences) Act 2005. They are contained in Divisions 270 and 271 of the Commonwealth Criminal Code Act 1995. Slavery and sexual servitude can also be war crimes and crimes against humanity. The legislation outlaws slavery and slavery-like practices, including forced marriage, servitude (including sexual servitude), forced labour, and deceptive recruiting for labour or services. The slavery offences in Division 270 have universal jurisdiction. The slavery-like practices in Division 270 have extended geographical jurisdiction.

As such, the kidnap, transfer, sale and enslavement of women by Da'esh in Syria and Iraq is illegal and judiciable under Australia's current legislative framework. But no attempt has been made to investigate or prosecute. Indeed, investigative journalists gathered testimony from Yazidi women who identified a specific Australian man, Khaled Sharrouf, as the person who purchased them from a slave market in Raqqa, held them captive and physically and sexually abused them. Rather than make any attempt to investigate and prosecute Sharrouf for these crimes, or for the war crimes, crimes against humanity and genocide which his acts also constitute, the Australian government merely revoked his citizenship, removing any prospect that his victims would be able to see justice.¹¹

Australia is in the process of developing a modern slavery act. The final report of the parliamentary inquiry into establishing a modern slavery¹² called on the government to appoint an Independent Anti-

⁹ <https://theconversation.com/war-crime-deliberations-in-iraq-and-syria-must-be-mindful-of-violence-against-women-66972>

¹⁰ UNSCR 2331 (2016), operative paragraph 1

¹¹ <https://www.lowyinstitute.org/the-interpreter/what-chance-sharrouf-victims-justice>

¹² https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/ModernSlavery/Final_report

Slavery Commissioner. Any new legislation needs to account for the relationship between human trafficking and peace and security and the negotiation of the governance arrangements, including the new commissioner needs to connect the issues of modern slavery to the Women, Peace and Security agenda.

Recommendations

Given the information contained in this report, it is hoped the Committee will recommend the Australian Government:

1. Allocate the human and financial resources needed to successfully investigate and prosecute nationals who have perpetrated sexual violence as war crimes, crimes against humanity and genocide while fighting with extremist organisations like Da'esh in Syria and Iraq.
2. Implement a special project, in partnership with civil society and trauma treatment providers, to collect legal testimony from witnesses and victims of sexual and gender-based violence that constituted genocide against the Yazidis who now reside in Australia.
3. Include the provisions of Security Council Resolution 2331 in any new legislation and governance architecture on modern slavery.
4. Fully integrate General Recommendation 30 in the new National Action Plan on Women, Peace and Security.
5. Fully integrate issues of human trafficking, and any new legislation and governance arrangements on modern slavery, into the new National Action Plan on Women, Peace and Security.

Attachments

Prosecute; don't perpetrate submission to the UN Special Rapporteur on Violence Against Women.

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