

# BOFAXE

## GERMANY AND THE YAZIDIS – GOING BACK ON A PROMISE? (PART 1)

### Why International Law Obligates Germany to Stop Deportations of Yazidis to Iraq

— When Josefine Paul, the asylum minister of the state of North Rhine Westphalia (NRW), announced that NRW would provisionally suspend all deportations of Yazidi women and children to Iraq, this decision came as a relief to those members of the Kurdish-speaking ethnoreligious minority group from the Sinjar region in northwestern Iraq that are currently seeking protection in Germany. Already back in October, a group of Yazidi asylum seekers had been on hunger strike outside the German Agency for Refugees and Asylum (BAMF) in Berlin to protest against their looming expulsion to Iraq. In early January, the government of the state of Thuringia followed NRW's lead and also halted all deportations of Yazidi women and children to Iraq. However, these measures of NRW and Thuringia are only preliminary, do not include Yazidi men, and, of course, do not apply to Yazidis in other federal states. This post will evaluate the situation of Yazidis in Iraq and, against this backdrop, discuss why, despite a prevailing general anti-immigration sentiment, the principle of non-refoulement prohibits Germany from further deporting Yazidis to their country of origin, Iraq.

#### The Principle of Non-Refoulement

The principle of non-refoulement is one of the most fundamental regulations in modern refugee law and, vis-à-vis Germany, can be deduced from numerous human rights treaties, *inter alia* Article 3 of the European Convention on Human Rights, as well as Article 6 and 7 of the International Covenant on Civil and Political Rights. Nonetheless, it is most clearly articulated in Article 33 of the 1951 Refugee Convention (GRC), which lays down that no state “shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” With regard to the scope of the principle, it must be added that the states of the European Union apply it not only to refugees within the meaning of Article 1 GRC, but also to other asylum seekers (see here, para 31). The principle finds further clarification in Article 3 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which stipulates that in order to determine whether there are grounds for which the person in question might be persecuted “the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”

#### Yazidis in Iraq – “Unacceptable” Conditions?

Against this backdrop it is crucial to shed light on the current circumstances that Yazidis face after returning to Iraq in order to assert whether non-refoulement actually prohibits Germany from deporting them to their country of origin. The Yazidis, as alleged “heretical devil worshippers”, have been the target of hatred for centuries. Yazidis themselves count seventy-two large-scale persecutions against the group up until 2014 and when Daesh conquered large parts of Iraq, this century old hatred, once again, resulted in atrocities against the Yazidi population. Daesh abducted and killed thousands of Yazidis, forced boys to become child soldiers, sold women and girls into sexual slavery, and displaced large parts of the more than 550,000 Yazidis who previously resided in northern Iraq. These acts have been formally acknowledged as genocide by not only Germany, but also the UK and the US. Now, almost 10 years later, Daesh has largely been defeated and Yazidis are no longer systematically persecuted in Iraq. But does that mean that the principle of non-refoulement no longer applies?

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## GERMANY AND THE YAZIDIS – GOING BACK ON A PROMISE? (PART 2)

### Why International Law Obligates Germany to Stop Deportations of Yazidis to Iraq

While the wording of Art. 33 GRC seems to suggest a narrow understanding of non-refoulement which would require an ongoing persecution resulting from one of the characteristics enumerated in the norm, the Human Rights Committee (HRC) and the European Court of Human Rights (ECtHR) have applied the principle in a much broader way, basically prohibiting expulsion whenever there are substantial grounds for asserting that the returnee would be at risk of “irreparable harm” upon return on account of serious breaches of human rights obligations. For instance, in their General Comment No. 31 the HRC argued that non-refoulement would also prohibit expulsion in those cases where there is a risk of a violation of the right to life (GC No. 31, para. 12), and in its decision in MSS v. Belgium and Greece the ECtHR concluded that the prospect of facing degrading living conditions after being deported can trigger the prohibition of refoulement (para. 367). These considerations can be applied to the conditions that the Yazidis would currently face in Iraq. Before being defeated, Daesh pursued a strategy of scorched earth in the Sinjar region, systematically and deliberately destructing the environment by poisoning dwells and destroying farmland and basic infrastructure. Just like Saddam Hussein and US-led invasion troops did before, they left behind land mines and IEDs (improvised explosive devices), making Iraq the most mine-polluted country in the world. There are still ongoing military disputes in the Sinjar region, leaving the traditional home of the Yazidis in a “complex political power play” between Iraqi security forces, Kurdish groups, and Turkish, Iranian-backed and Yazidi militias. And on top of that, ongoing Turkish air raids on northern Iraq contribute to an already fragile security situation that until this day drives Yazidis to flee their homes to IDP camps, in which, according to the UN High Commissioner for Refugees, a dignified standard of living is not warranted.

Besides these immediate dangers to their life and physical health, there is of course also the psychological toll that returning to the place of the genocide would put on the Yazidis, many of whom are already heavily traumatized. They would now be forced to return to a country where they not only continue to be harassed and discriminated by Muslim extremists, but where already 81 mass graves of Yazidis have been discovered, while almost 3,000 members of the religious group remain missing. In addition to that there is a lack of criminal prosecution of former Daesh fighters in Iraq, which arguably puts the state in violation of Articles I and VI of the Genocide Convention and might force returning Yazidis to be confronted with their perpetrators or their perpetrators’ assistants. What is more, only last March the German federal government declared that deportations of Yazidis to Iraq would constitute an “unacceptable state of affairs” (“Unzumutbarkeit”) and thereby arguably created a situation of trust, since it is not apparent which changes in Iraq might have led to a cease of this unacceptability.

#### Germany’s Federal Government: Unwilling but Not Unable

With regard to the state of Germany’s domestic politics, the apparent unwillingness to grant extensive protection to Yazidis cannot be explained by legal but rather by political considerations. Due to a growing anti-immigrant sentiment and rising poll numbers for the extreme right party AfD, many leading politicians appear willing to demonstrate a tough stance when it comes to questions of migration – especially with upcoming elections in east Germany later this year. Most notably, chancellor Olaf Scholz used a Spiegel interview to announce that Germany must “finally undertake large-scale deportations” (“endlich im großen Stil abschieben”) and is apparently eager to fulfill this promise, for instance by striking a secret migration deal with Iraq which might also be responsible for the increasing number of expulsions to that country. In this political climate, human rights considerations seem to be, at best, only of secondary importance. However, there are also different voices within the governing coalition. Especially Green parliamentarians such as Anton Hofreiter and Max Lucks have been pressuring Germany’s minister of the interior, Nancy Faeser, to issue a general ban on all deportations of Yazidis to Iraq.

And indeed, the above-mentioned assertions could and should convince Nancy Faeser (in cooperation with the conference of the ministers of the interior) to enact a national deportation ban of Yazidis based on § 60a Section 1 and § 23 Section 1 of the German Aufenthaltsgesetz which enables the ministers of the interior to permanently halt deportations of a certain group for humanitarian reasons. In the long term, the Bundestag could then decide how to provide the Yazidis with a more secure residence status (as suggested by several MPs). In this way, Germany would not only fulfill its obligations under international human rights law, but also live up to its special responsibility springing from it being the home of the largest Yazidi diaspora community in the world.