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Prosecuting and punishing the crimes against humanity or even possible genocide committed by Daesh

Committee Opinion[1]
Committee on Political Affairs and Democracy
Rapporteur: Ms Thorhildur Sunna ÆVARSDÓTTIR, Iceland, Members not belonging to a Political Group

A. Conclusions of the committee

1. The Committee on Political Affairs and Democracy welcomes the report by the Committee on Legal Affairs and Human Rights on "Prosecuting and punishing the crimes against humanity or even possible genocide committed by Daesh", which is extremely clear and precise and proposes realistic solutions.

2. The Committee on Political Affairs and Democracy wishes to provide some factual information on the latest developments in the collection of evidence, both in Syria and in Iraq, in addition to that set out in the report by the main rapporteur, M. Pieter Omtzigt. It also stresses the need to consider the possibility for national courts to exercise their universal jurisdiction to prosecute all acts of genocide while making use of their anti-terrorist legislation to eliminate the threat posed by foreign terrorist fighters from Daesh returning to their country of origin.

B. Proposed amendments to the draft resolution

Amendment A (to the draft resolution)

In paragraph 6.2.1, after the words "not already the case, and", insert the following words:

", following the example set by Sweden and Germany,"

Amendment B (to the draft resolution)

After paragraph 6.2.2, insert the following paragraph:

"not focusing systematically and exclusively, with regard to the members of Daesh, on the application of national anti-terrorist legislation to the detriment of their universal jurisdiction when examining cases involving the crimes described in the Rome Statute of the ICC;"

1. Reference to committee: Doc 14167, Reference 4251 of 25 November 2016. Reporting committee: Committee on Legal Affairs and Human Rights. See Doc 14402. Opinion approved by the committee on 9 October 2017.

Amendment C (to the draft resolution)

In paragraph 6.2.3, after the word "Iraq", insert the following words:

> *", in particular not granting refugee status to fighters who may have committed acts of genocide and/or other serious crimes prohibited under international law and who seek international protection on returning to Europe, in accordance with the exclusion clauses provided for in Article 1F of the United Nations Convention of 28 July 1951 on the Status of Refugees;"*

Amendment D (to the draft resolution)

After paragraph 6.2.4, insert the following paragraph:

> *"supporting the United Nations Secretary-General in setting up the Investigative Team described in Resolution 2379 (2017) of the United Nations Security Council to support the Iraqi justice system in gathering evidence of war crimes, crimes against humanity and genocide committed by Daesh in Iraq;"*

Amendment E (to the draft resolution)

After paragraph 6.2.4, insert the following paragraph:

> *"insisting that the United Nations ordinary budget should, as soon as possible, contribute to the funding of the Mechanism and of the Investigative Team;"*

Amendment F (to the draft resolution)

In paragraph 7, replace the first three sentences with the following sentences:

> *"The Assembly calls on the Iraqi authorities to contribute to and co-operate with the work of the Investigative Team. It calls on the international community to provide the necessary resources for the Investigative Team to become promptly operational."*

C. Explanatory memorandum, by Ms Thorhildur Sunna Ævarsdóttir, rapporteur for opinion

1. The crime of genocide is a permanent stain on humanity's conscience. Those who have experienced the horror of genocide but survived are marked for life. Those who were not victims will always regret not having been able to prevent it. It is the most abject manifestation of what a major theorist of international public law of the 20th century called "the sore of humanity".[2] The expression speaks for itself: the crime of genocide abolishes the concepts of fellow creatures, of being part of a community of human beings and of shared humanity. The crime of genocide takes place when people are denied the right to exist. People are accused of only one crime – the crime of having been born – and are killed for that crime. It is no coincidence that Robert Antelme and Primo Levi, who both escaped from Nazi extermination camps, entitled their accounts of their experience in concentration camps *The Human Race*[3] and *If This Is a Man*,[4] respectively.

2. Like the rapporteur, Mr Pieter Omtzigt, I firmly believe that such a crime has been committed by Daesh, that this is an irrefutable fact and that the argument that this must be acknowledged by a court before any action can be taken is a mere excuse for not acknowledging the facts. I believe that the States Parties to the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide have failed to fulfil their positive obligations to take all necessary measures to prevent genocide or have done so only to a very small extent and imperfectly.

3. This is particularly unacceptable given that there were sufficient warnings. As far back as 2012, in his report on "The situation in Syria", the former Chairperson of the Committee on Political Affairs and Democracy, Mr Pietro Marcenaro, underlined the vulnerability of minorities in this country. In Resolution 1878 (2012), which was adopted at the initiative of our committee, the Assembly first and foremost condemned the abuses committed by the Syrian regime against its people. But at the same time, it sensed the danger. Paragraph 10 of the resolution reads as follows: "The Syrian population is a mosaic of ethnic, cultural and religious groups and this diversity, together with the territorial integrity of Syria, must be preserved …" If it needed to be preserved, it was because it was feared that it was under threat.

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2. Antoine Rougier, La théorie de l'intervention d'humanité, *Revue Générale de Droit International Public*, 1910, p. 472.
3. Robert Antelme, *L'espèce humaine*, éditions Gallimard, Paris, 1957.
4. Primo Levi, *Se questo è un uomo*, Einaudi, Turin, 1958.

4. Two years later, in August 2014, when Daesh had conquered Qaraqosh, a major Christian centre in Iraq, and had surrounded the region of Sinjar where a large number of Yezidis live, the Chairperson of our committee at that time, Ms Theodora Bakoyannis, called for more help for persecuted religious groups in Iraq.[5] On the occasion of a debate under urgent procedure, and on the basis of a report drawn up by Ms Bakoyannis, the Assembly adopted Resolution 2016 (2014) "Threats against humanity posed by the terrorist group known as "IS": violence against Christians and other religious or ethnic communities". Paragraph 2 of this resolution is very clear:

> *"[The Assembly] draws attention once again to the situation of Christian and other religious and ethnic communities in the Middle East in general, and in Iraq and Syria in particular. Due to recent developments in the region, in particular the attitude of the 'IS', the situation of such communities has evolved from alarming to desperate. In some places now under the control of the 'IS', those communities have already disappeared."*

5. In 2014, therefore, some religious and ethnic communities had disappeared from areas in Iraq and Syria. Genocide was at work. In his report on "The situation in Aleppo" (Doc. 14197), our colleague Jean-Claude Mignon summarised the situation after four years of war: "The Assembly rightly underlined that persecution of religious and ethnic communities had steadily transformed into a full-scale lethal onslaught."[6]

6. These warnings from the Assembly were not heeded. I would like to point to the responsibility that the United States, the United Kingdom and the coalition of the willing bear for the situation in Iraq today. Many mistakes were made during and following the invasion of Iraq that threatened security in the country and the entire region and contributed to the rise of Daesh. Here I would like to point to the failure to disarm and demobilise former soldiers in the Iraqi army, failure to secure weapons storage and the slow progress of State-building in the wake of the invasion in Iraq, an invasion which was in violation of international law. Could the members of the United Nations Security Council have overcome their divisions and imposed Secretary-General Annan's 2012 plan for Syria? Could the central Iraqi Government and the international coalition against Daesh have done more to protect the Christians of Qaraqosh and the Yezidis in the Sinjar region in August 2014? I do not intend to chronicle a foreseeable disaster or to speculate on "what might have happened if" or to assess the responsibilities or all concerned. Nevertheless, the cruel fact remains: we did not prevent the genocide carried out by Daesh.

7. Although States failed to comply with their obligation to prevent the genocide, most of those who have seen a number of their citizens set out to join Daesh, have tried to prevent them from leaving and done so in an increasingly effective manner. In so doing they have heeded the calls from the Assembly outlined in Resolution 2091 (2016) on foreign fighters in Syria and Iraq, to "do their utmost to prevent their own nationals from taking part in such acts [of genocide]".[7] That is meagre consolation, particularly given that the real reason for preventing their nationals from joining Daesh was, in most cases, to protect national security. The main fear was the threat that these terrorist fighters might pose when they returned to their country of origin.

8. Genocide has taken place. Although we did not prevent it, we still have a duty to try and bring to justice those who planned it and carried it out. Not only because the victims are entitled to compensation and to the official recognition of the crime of which they are the victims, as argued by Ms Amal Clooney, who has taken up the cause of the Yezidis, but also because we have a moral duty to punish a crime which destroys any idea of a human community, any idea of humanity. The aim is to punish a crime which not only concerns the victims but every one of us.

9. Ideally, the court envisioned in the 1948 Convention should be set up. But we have been waiting for this court for 70 years and I think we will still have to wait a long time. Although I would like to see the matter brought, even if only in part, before the International Criminal Court, because I believe it has real legitimacy, I doubt that it will happen. Finally, with regard to the establishment of an ad hoc court, I do not believe that there will be a sufficiently broad consensus, in the current international context, to set up a court along the lines of the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda or even the Special Tribunal for the Lebanon. Ms Carla del Ponte, former member of the United Nations Independent International Commission of Inquiry and former Chief Prosecutor of the ICTY, has revealed the bitter truth on this issue and pointed to the refusal of the Security Council to act on this matter.[8]

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5. Statement by Ms Bakoyannis, 19 August 2014.
6. Paragraph 13 of the report.
7. Paragraph 3 of the resolution.
8. Human Rights Council holds interactive dialogue with the Commission of Inquiry on Syria, Human Rights Council, 18 September 2017, www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22094&LangID=E.

10. I therefore think that there is no hope of a strictly international solution. The rapporteur was right to point out in his explanatory memorandum, and in his draft resolution, that primary responsibility for the investigation and prosecution of crimes covered by the Rome Statute rests with the national authorities, especially those of the States where those crimes have taken place, i.e. Syria and Iraq. I do not think anyone today has confidence in the Syrian system of justice and Bashar al-Assad is not likely to request the establishment of a special or hybrid tribunal. The situation is, however, different in Iraq.

11. This summer we noted Bagdad's increased focus on the gathering of evidence of the crimes committed by Daesh on its territory. In a letter dated 16 August 2017, Mr Ibrahim al-Jaafari, the Iraqi Minister for Foreign Affairs, asked the UN Secretary General that a body be set up to enquire into and prosecute the crimes against humanity committed by Daesh.[9] The resulting UN Security Council Resolution of 21 September 2017 asks the Secretary-General to establish an Investigative Team to "support domestic efforts to hold [Daesh] accountable by collecting, preserving, and storing evidence in Iraq of acts that may amount to war crimes, crimes against humanity and genocide …".[10] This is welcome support for Iraqi efforts to hold Daesh members responsible for their crimes in Iraq and I urge member States to assist the Investigative Team where possible, for example by providing legal assistance and donating to its budget. Perhaps this step forward will lead the Iraqi Government, in the long term, to consider the establishment of a special or hybrid tribunal, but we have not reached this point yet.

12. The most effective solution in the near future continues to be universal jurisdiction, at least in areas where it exists. I therefore think it is essential that those Council of Europe member States, observers and partners for democracy which have not yet done so, should provide for such a mechanism in their legislation, by incorporating in their laws the right to rule on crimes set out in the Statute of the ICC, enabling them to try any person who has taken part in such crimes and not only their own nationals. I therefore believe that paragraph 6.2.1 of the draft resolution is essential.

13. Irrespective of whether you believe that an ad hoc or hybrid tribunal will be set up in the medium or long term, or, like me, that the universal jurisdiction of national courts is currently the only real possibility for convicting Daesh members of the crime of genocide, it should be borne in mind that the fundamental difficulty for the courts will be that of proving that the crime was committed. Where the crime of genocide is concerned, a great deal of evidence is required for conviction and, as we know, it is an enormous challenge to preserve tangible elements of proof in a country where war is still going on.

14. That is why the United Nations Independent International Commission of Enquiry is so important. I have noted that Ms Carla del Ponte has strongly criticised the Commission and resigned from it. However, she has said her resignation is on account of the Security Council's failure to take action and the Commission's lack of powers in terms of criminal prosecution. She did not cast any doubt on the quality of evidence of crimes gathered by the Commission.[11]

15. It is therefore necessary that the International Impartial Independent Mechanism, set up by the UN General Assembly in December 2016, becomes fully operational. In this respect, I would like to add some further information to Mr Omtzigt's report. On 2 March 2017, the UN High Commissioner for Human Rights, under whose authority the Mechanism has been placed, said that the sums required for the Mechanism to come into operation had been estimated at between 4 and 6 million dollars, while one year's operation would cost some 13 million dollars[12]. According to the press, in July 2017 the Mechanism had received voluntary contributions amounting to 9 million dollars, mainly from the Netherlands, Germany and Finland.[13] In other words, the Mechanism has the funds required for this year which is good news as the sooner evidence is gathered, the more effective it will be.

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9. Iraq asks UN to collect evidence to prosecute ISIS crimes, 17/8/2017, Rûdaw, www.rudaw.net/english/middleeast/iraq/17082017.
Amal Clooney welcomes Iraq's moves to prosecute IS militants, 17 August 2017, *The New Arab,* https://www.alaraby.co.uk/english/news/2017/8/16/amal-clooney-welcomes-iraqs-moves-to-prosecute-is-militants.

10. United Nations Security Council Resolution 2379 (2017), www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2379(2017)&referer=/english/&Lang=E.

11. UN Syria investigator quits over concern about Russian obstruction, *The Guardian*, 7 August 2017, https://www.theguardian.com/world/2017/aug/07/we-are-powerless-un-syria-investigator-carla-del-ponte-quits-over-lack-of-political-backing.

12. 34th session of the Human Rights Council – Address by Zeid Ra'ad Al Hussein, UN High Commissioner for Human Rights, OHCHR | Side event on the International, Impartial and Independent Mechanism on international crimes committed in the Syrian Arab Republic.

13. Crimes in Syria: "The more time goes by, the more the evidence fades" ("Plus le temps passe, plus les preuves s'évanouissent"), 4 July 2017, *Le Temps*, https://www.letemps.ch/monde/2017/07/04/crimes-syrie-plus-temps-passe-plus-preuves-sevanouissent.

16. On the other hand, I agree with the High Commissioner for Human Rights that it is regrettable that the United Nations refused to finance this Mechanism out of their ordinary budget and that they preferred to call for voluntary contributions given the uncertainty that will cause the Mechanism year in year out. I believe that the legal, symbolic and memorial importance of this Mechanism justifies making it a part of the UN budget in order to allow forecasting and a sustainable work environment. Our Assembly should strongly recommend this, and the same goes for the Investigative Team.

17. Citizen's initiatives could also play a critical role in the gathering of evidence of genocide. NGOs that wish to contribute to the effective punishment of crimes against humanity and genocide can do so by collecting evidence in a professional manner with the help of the *Handbook on Civil Society Documentation of Serious Human Rights Violations*.[14]

18. Irrespective of the quality of the evidence gathered by the international commission, the Mechanism for Syria and, perhaps in the very near future, the Mechanism for Iraq, we should be prepared for the sentencing of members of Daesh on grounds of genocide to take a long time, even if such convictions are made on the basis of the universal jurisdiction of national courts. It was 15 years after the Rwandan genocide that a Rwandan national was first found guilty of genocide by the Canadian courts[15] and 20 years before the French courts convicted a Rwandan national on grounds of genocide.[16]

19. This time lag and the difficulty in proving the crime of genocide give me cause to fear that national courts may be more inclined to convict members of Daesh on the basis of their anti-terrorist laws than on the basis of their universal jurisdiction in matters concerning genocide. The rapporteur's explanatory memorandum also suggests this: paragraph 41 gives examples of numerous investigations and convictions of persons returning to a country, often their home country, after fighting for Daesh, but all on charges of terrorism.

20. The reason for this is obvious: the national courts want to ensure that terrorist fighters do not present a security risk. They therefore use their most effective legal tools to detain them, in other words anti-terrorist laws. It is easier to prove that someone belongs or has belonged to a terrorist group than to prove that they took part in genocide.

21. I believe this approach is understandable and pragmatic given the current threat of terrorism hanging over us, although I would like to stress the importance of observing proper legal safeguards and guaranteeing a fair trial, standards which are sometimes pushed aside in the eagerness to secure a conviction. It is also paramount that the use of this effective legal tool, prosecution for terrorist offences, is not used to the detriment of any endeavours to charge terrorist fighters with genocide or crimes against humanity. These two objectives, curbing the terrorist threat and punishing the perpetrators of genocide, must be pursued either in parallel or consecutively but failure to exercise the right and obligation to convict for crimes of genocide cannot become the norm.

22. As highlighted in a recent report by Human Rights Watch, Germany and Sweden have become the first countries in which individuals have been tried and convicted of war crimes or crimes against humanity in Syria. The countries have done this on the basis of universal jurisdiction and have been able to build on previous experience with trials of this nature[17]. This is extremely important for victims of genocide and for all of us as a society and I would like to commend the countries' justice systems for their success.

23. We all know that, as with all ordinary offences, there is a time limitation on terrorist offences. That is not the case where crimes against humanity or genocide are concerned, precisely because they are considered in a different category. We owe it to ourselves, as much as to the victims, not to give up efforts to prosecute the perpetrators.

24. Finally, with regard to foreign terrorist fighters who have taken part in acts of genocide, it goes without saying that they should not be entitled to any form of international protection when they return to Europe, as stated in paragraph 4 of Resolution 2091 (2016), and explicitly stated in the United Nations Convention of 28 July 1951 on the Status of Refugees. I think it would be a good idea to reiterate this in the draft resolution presented by the Committee on Legal Affairs and Human Rights.

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14. The Public International Law and Policy Group https://www.vu.nl/nl/Images/PILPG_Handbook_on_Civil_Society_Documentation_of_Serious_Human_Rights_Violations_Sept_2016_tcm289-785328.pdf.
15. Quebec Superior Court, R. v/ Munyaneza, 2009 QCCS 2201, 22 May 2009.
16. Paris Assize Court, 14 March 2014, the case of Pascal Senyamuhara Safari alias Pascal Simbikwanga.
17. "These are the Crimes we are Fleeing", report by the Human Rights Watch, October 2017, https://www.hrw.org/report/2017/10/03/these-are-crimes-we-are-fleeing/justice-syria-swedish-and-german-courts.