

## INTERNATIONAL CRIMINAL LAW AND ISIS/DAESH

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There are three international crimes that are of specific relevance to the situation involving ISIS/Daesh. These are war crimes, crimes against humanity and genocide. All are also crimes under the law of England and Wales law pursuant to s51 of the International Criminal Court Act 2001. This covers all conduct occurring here, as well as that abroad, in the latter case when undertaken by British nationals, and British residents, including where people become residents after committing international crimes (ss67-68 (as amended by s70 of the Coroners and Justice Act 2009 (s67A)). This comment will cover war crimes and crimes against humanity briefly, but, although they are very important here, we will concentrate primarily on the most difficult issue, that of genocide.

### WAR CRIMES AND CRIMES AGAINST HUMANITY

With respect to war crimes, such offences require an armed conflict to exist. There is also a legal distinction between international and non-international armed conflicts (NIACs). This need not trouble us at this juncture, as the core of the International Humanitarian Law that applies to all armed conflicts is stated in Common Article 3 to the 1949 Geneva Conventions. This reads:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

There is more law applicable here, but in the interests of brevity, it suffices to comment that although this was drafted in 1949, it could have been written to cover ISIS/Daesh's actions.

The next set of international crimes that are relevant are crimes against humanity. These are defined in Article 7 of the Rome Statute of the International Criminal Court, (which have been enacted into UK law by the International Criminal Court Act 2001) as being:

any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender ...or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Again, although it was not done so, this provision could have been drafted with ISIS in mind. The issue is not really whether ISIS/Daesh members have committed such crimes, but what to do about them.

### **THE LAW OF GENOCIDE**

It is important to remember that whether or not the conduct of members of ISIS/Daesh amount to genocide, the question of whether or not they are guilty of the above international crimes (which are extremely serious in and of themselves) is entirely separate. Still, the most controversial issue is whether the conduct of ISIS/Daesh rises to the level of genocide, described by the International Criminal Tribunal for Rwanda [ICTR] as the 'crime of crimes' and which is often, all other things being equal, considered to be the most serious of crimes against international law.

Sociologically, the definition of genocide is often taken to cover all mass killings. The law here, however, is narrower. The legal definition of genocide is contained in Article 2 of the Genocide Convention of 1948, which reads as follows:

genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

By virtue of treaty and/or customary international law this is the definition that binds all States. Indeed, it is considered a foundational rule of international law. The International Court of

Justice [ICJ] has consistently held this to be the case since the early 1950s. Pursuant to Article 3 of the Convention, in addition to the genocidal conduct covered by Article 2, conspiracy, attempt, complicity, and direct public incitement to commit genocide are also required to be punished by the State upon which they occurred.

All other States may also exercise universal jurisdiction-jurisdiction based solely on the nature of the crime, without regard to where it occurred or who is alleged to have committed it. Israel did this in the *Eichmann* case and no State protested. There is a good case that the UK should follow suit, and legislate to extend its jurisdiction over crimes of genocide whenever an alleged perpetrator is present here, without a further requirement of residency. It would be lawful to do so.

### *The Nature of Genocide*

It is worth (re)emphasising that the crime of genocide does not cover all mass killings. There are other international crimes, especially crimes against humanity, which are broader, utterly condemnable, and also relevant in situations such as those involving ISIS/Daesh. The crime of genocide is characterised by its special intention, which is to destroy, in whole or in substantial part, a national, ethnic, racial or religious group. Such destruction has been determined by international courts (e.g. the *Krstić* case in the International Criminal Tribunal for the former Yugoslavia [ICTY] and the *Bosnian Genocide* case in the ICJ) to be essentially physical rather than cultural in nature. Even so, according to those cases, although conduct that targets cultural practices, artefacts, or buildings alone are not, in themselves, genocidal, these decisions also have noted that such conduct may be evidence of genocidal intent.

It ought to be noted that there is the possibility that a person may be responsible for the crime of genocide in the absence of an overall plan or policy to do so. Although the quintessential examples of genocide have occurred against this background (and such a background is often evidentially very important) an overall plan or policy is not a formal requirement for a conviction for genocide under general international law.

So, there is a distinction between determining (in the overall sense) that a Genocide has occurred and that an individual defendant is responsible for committing genocide (known as being, in the absence of an analogous English term, a *génocidaire*). It took many years of litigation (with a large number of convictions of defendants for genocide) before the ICTR decided to take judicial notice, in the 2006 *Karamera* case, of the fact that there was a Genocide in Rwanda in 1994 (although earlier cases had also accepted that there was such a plan and policy to do so). Before 2006 though, the prosecution had to prove a policy of Genocide in Rwanda in each case (which, it ought to be noted, the Prosecution were successful in doing).

## **LEGAL OBLIGATIONS OF STATES IN RELATION TO GENOCIDE**

It is often thought that by accepting that there is a Genocide (in the sense of there being a plan or policy to destroy, in whole or in substantial part, a group protected by the Convention definition) gives rise to large-scale obligations on parties to the Genocide Convention to

intervene, including militarily. Such concerns have led some States to be wary of determining that Genocides have occurred in situations where such a determination would be clearly warranted. However, as the ICJ made clear in the *Bosnian Genocide* case, the fact that a Genocide has occurred does not mean that all parties to the Genocide Convention have legal obligations to intervene actively.

It may well be the case that if a State were to shelter a fugitive charged with genocide in an international tribunal this would violate a State's obligation under Article 1 of the Genocide Convention to prevent and punish Genocide (as the ICJ determined with respect to Serbia's inaction with respect to Ratko Mladić in the *Bosnian Genocide* case), but absent a very special relationship between a State and those (other than its own officials, or those it controls, for which the State has responsibility) that are committing genocide, there is no legal obligation on other States to take direct physical action.

This also relates to the issue of the Responsibility to Protect (R2P), where intervention is recommended when international crimes (not only genocide, and the focus on genocide is not always helpful, as other international crimes, especially crimes against humanity, may, depending on the circumstances, be as serious) are occurring. This doctrine, which has received considerable international attention, especially in the United Nations, nonetheless is not one that has entered positive international law. Whilst the failure of the UN Security Council (SC) to take action in a number of situations where international crimes have been committed may not cover the SC in glory, there is no legal duty for it to do so.

Furthermore, for the SC to invoke its coercive powers under Chapter VII of the UN Charter (which can involve referring the matter to the International Criminal Court, setting up an *ad hoc* tribunal like the ICTY or ICTR, or even mandating military intervention), what is required is that the Council declare that there is a threat to international peace and security under Article 39 of the UN Charter. The existence of a Genocide is not necessary for this, and, the ISIS/Daesh situation clearly amounts to such a threat to international peace and security, as was confirmed by the SC in Resolution 2253 of December 2015, a determination that was clearly within the SC's authority to make.

## **ISIS/DAESH AND GENOCIDE**

On the 17 March 2016, US Secretary of State John Kerry made clear his views, which were that

Daesh is responsible for genocide against groups in areas under its control, including Yezidis, Christians, and Shia Muslims. Daesh is genocidal by self-proclamation, by ideology, and by actions – in what it says, what it believes, and what it does. Daesh is also responsible for crimes against humanity and ethnic cleansing directed at these same groups and in some cases also against Sunni Muslims, Kurds, and other minorities.

There is very good evidence for such a view. In relation to conduct undertaken by ISIS/Daesh members against members of the Yezidi community, there is a truly strong case that it fulfils the definition of Genocide in the 1948 Convention, and it has been determined by a number of European bodies to have done so as a matter of policy. There have been killings of members of the Yezidi community that clearly fulfil the criterion of being a religious group covered by the Genocide Convention. Furthermore, any evidence of a 'convert or die' imperative mentioned as

being an ISIS/Daesh policy by Lord Alton (HL Hansard 3 February 2016, column 1860) would be very strong evidence of genocidal intent on the part of those who espoused it.

Indeed ISIS/Daesh may be condemned from its own publications on point. Amongst other places, in issue 4 of Dabiq, ISIS/Daesh's mouthpiece, we find the following statement:

[u]pon conquering the region of Sinjar in Wilāyat Nīnawā, the Islamic State faced a population of Yazidis, a pagan minority existent for ages in regions of Iraq and Shām. Their continual existence to this day is a matter that Muslims should question as they will be asked about it on Judgment Day, considering that Allah had revealed Wilāyat as-Sayf over 1400 years ago.

Although it continues to say that if Yazidis convert, mercy is to be shown to them, this is very strong evidence of the policy Lord Alton has spoken of. If I were to be asked (with all due caveats) to quantify the likelihood that Genocide has been committed against the Yazidis, I would appraise it as being between 80-90%.

ISIS/Daesh's actions with respect to other religious groups, though, may not be such clear cases of Genocide. They are almost certainly, at least, war crimes and crimes against humanity-and prosecutable as such. However, their actions against, for example Christians, might not be, as a policy, Genocidal, although much would depend on the facts, and it is likely, on balance, that they are. This would also not exclude the fact that individuals have acted with genocidal intent (and thus be *génocidaires*) even if a Genocidal policy was not proved. It ought to be said of course, that any person accused of genocide is, as with any defendant in a criminal proceeding, entitled to the presumption of innocence.

There are many examples of conduct in the 20<sup>th</sup> century that have been claimed to be Genocidal. The two most unambiguous were the Holocaust (in response to which the term genocide was coined by Raphaël Lemkin in 1944), and the Rwandan Genocide of 1994. There are controversies about other examples. For example in Cambodia, many of the actions of the Khmer Rouge may not fit under the legal definition of Genocide (although were undoubtedly crimes against humanity) and debates about whether the Ottoman treatment of Armenians during World War I amounted to a Genocide remain bitterly contested by Turkey.

To summarise, in the specific situation of ISIS/Daesh, a Genocide against the Yazidis is almost definitely occurring, and is probably happening in relation to other groups, although this is less certain. The Security Council is acting within its powers when it deals with this ISIS/Daesh, and it would be entitled to do more were it minded to do so. It is not necessary that a Genocide be declared for further action to be taken. Such action could include referral of the situation to the International Criminal Court, but much will depend on whether or not there is the political will to do so.

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(Opinions are my own and do not necessarily reflect the views of the University of Birmingham)