



Déclassifié*
AS/Jur (2020) 03
4 February 2020
ajdoc03 2020

Committee on Legal Affairs and Human Rights

Addressing the issue of Daesh foreign fighters and their families returning from Syria and other countries to the member States of the Council of Europe

Introductory memorandum

Rapporteur: Mr Pieter OMTZIGT, the Netherlands, EPP/CD

1. Introduction

1. The motion underlying this report, which I tabled on 12 April 2019, was referred to the Committee on Legal Affairs and Human Rights for report on 25 June 2019. The Committee appointed me rapporteur on 1 October 2019.

2. As indicated in the motion, in March 2019, the Syrian Democratic Forces, an armed opposition group, declared that Daesh had been “defeated”. Over 5,000 of the ‘foreign fighters’ who had constituted part of Daesh are from European countries. Many of them are accompanied by women and children. It is estimated that over one-half of the foreign fighters have already returned to their countries of origin. The return of foreign fighters poses serious security risks for European societies.

3. In Resolution 2190 (2017) on ‘prosecuting and punishing the crimes against humanity or even possible genocide committed by Daesh’, the Assembly reiterated its view that Daesh had committed acts of genocide and other serious crimes under international law. It then called for prompt and effective action to ensure prosecution of such crimes, whether by national courts in the countries where the crimes were committed or in other countries by application of universal jurisdiction, or the International Criminal Court.

4. There has, however, been inadequate progress made since adoption of Resolution 2190 in October 2017, despite dramatic and, in many ways, alarming developments in the region. The present report will analyse the current situation and examine what progress has been made, with a view to making recommendations for a stronger national and international response that recognises the need to both fight impunity and minimise threats to security. There is a European interest in coordinating policies in this area. This is especially so within the Schengen zone, where terrorists and genocidal criminals have proven well able to exploit borderless travel policies to escape attention and plan attacks.

2. Developments since October 2017

5. According to the Global Coalition to Defeat Daesh, Daesh at its peak controlled 110,000 km² of territory in Syria and Iraq, home to a population of 7.7 million people, and attracted over 40,000 foreign fighters.

6. After a lengthy, destructive and bloody campaign undertaken in large part by the Syrian Democratic Forces (SDF), with support from United States forces in particular, Baghouz, the last Daesh stronghold in Syria, fell in March 2019. With that, the SDF declared the “total elimination of so-called caliphate and 100% territorial defeat of ISIS.” On 27 October 2019, US President Donald Trump announced that Abu Bakr al-Baghdadi, the leader of Daesh, had been killed the previous day during a US raid on his compound in north-west Syria, close to the border with Turkey.

* Document declassifié by the Committee on 28 January 2020.

7. This does not mean, however, that Daesh was eradicated once and for all. As early as June 2019, a US Defense Department report described Daesh as “resurging” in Syria, continuing to launch attacks, attempting to raise funds and seeking to recruit from amongst internally displaced persons (IDPs) especially in Hasakah province, which was under the control of the SDF. Daesh was also reported to be still active in Iraq, reorganising its leadership and organisational structure and attempting to establish safe havens, potentially with a renewed ability to wage war.¹ By late October, the US Department of Defense noted that Daesh cells in Syria had been “continuing to reconstitute networks and carry out frequent attacks on the SDF and local government officials” and been “growing its capability to support ‘hybrid military operations’ and to conduct them ‘when consistent counterterrorism pressure is absent’, with the ability to “assemble somewhat larger groups in isolated areas to attack and overrun pro-Syrian regime forces’ outposts, and to ambush convoys”. In Iraq, Daesh “continued to solidify and expand its command and control structure” but, whilst carrying out a number of primarily small-scale attacks, was “incapable of conducting large-scale attacks and maintains minimal forces in Coalition areas of operation.”² By November 2019, the Global Coalition against Daesh was declaring that “Daesh/ISIS’s enduring defeat [is] threatened.”³

8. These reports on Daesh’s capabilities and activities must be seen against a background of dramatic change in the military environment in Syria. On 9 October, Turkey launched military operations against Kurdish People’s Protection Unit (YPG) positions in northern Syria. A withdrawal of US forces from the immediate vicinity of the Turkish incursion was soon followed by President Trump’s surprise announcement of a complete withdrawal from Syria. The meaning and implementation of President Trump’s announcement remain the subject of considerable uncertainty and confusion. What does seem clear is that the largely Kurdish SDF’s ability to conduct operations against Daesh has been severely impacted and the potential of US forces to support any such operations has been diminished. Former US positions have been rapidly occupied by Syrian and Russian forces. A US-Turkish agreement to prevent conflict between Turkish and Kurdish forces has been replaced by a Russo-Turkish agreement to establish a ‘safe zone’ along the Turkish-Syrian border, employ Russian and Syrian forces to push Kurdish forces back from the border and conduct joint Russian-Turkish border patrols.⁴

9. This fundamental change has huge significance for the fight against Daesh and the risk that it poses to regional and international security. The most recent Department of Defense report cites “concerns that the SDF would no longer be willing or able to continue operations against ISIS as its fighters focused attention on confronting the Turkish incursion... With SDF and Coalition operations against ISIS in Syria diminished, US military, intelligence, and diplomatic agencies warned that ISIS was likely to exploit the reduction in counterterrorism pressure to reconstitute its operations in Syria..., including its ability to conduct transnational attacks targeting the West.” Kurdish forces, described as having “consistently hedged their bets, never fully breaking with the Assad government”,⁵ are said to have struck deals with the Syrian regime in order to reduce their exposure to Turkish attacks.⁶ According to the US Department of Defense, “other forces that have moved into northeastern Syria are unlikely to prioritize fighting ISIS”, having different strategic priorities. That said, by late November it was reported that US forces, alongside the SDF, would resume “large scale operations” against Daesh.⁷

10. The US withdrawal also jeopardised the ability of the SDF to secure more than 30 make-shift prisons that hold 10,000 or so suspected Daesh fighters (including around 2,000 foreign fighters), and the camps in which live tens of thousands of their family members. Even prior to the Turkish incursion, the SDF had said that it could not indefinitely hold so many Daesh fighters in detention. Although the SDF has since said that it intends to maintain custody of the ISIS detention centres, it also admitted to having “significantly reduced security at the facilities due to the Turkish incursion”. Shortly after President’s Trump’s announcement, the SDF reported that almost 800 inhabitants of a camp holding Daesh fighters’ families had escaped after security was disrupted by Turkish artillery fire.⁸ Fortunately, by the end of October, “less than 200” Daesh fighters were said to have escaped. The US Department of Defense has also noted that “without counterterrorism pressure,

¹ “Operation Inherent Resolve: Lead Inspector Report to the United States Congress, April 1, 2019 – June 30, 2019”, US Department of Defense.

² “Operation Inherent Resolve: Lead Inspector Report to the United States Congress, July 1, 2019 –October 25, 2019”, US Department of Defense.

³ “Joint Communique by Ministers of the Global Coalition against Daesh”, 14 November 2019.

⁴ “Putin and Erdogan’s Deal for Syria Can’t Last”, Foreign Policy, 28 October 2019.

⁵ “The Syrian Withdrawal: Where Things Stand”, James Dobbins and Jeffrey Martini, the Rand Blog, 21 October 2019.

⁶ “Syria’s Kurds forget ‘costly deal’ with al-Assad as US pulls out”, Al Jazeera, 15 October 2019.

⁷ “U.S. Resumes Large-Scale Operations Against ISIS in Northern Syria”, New York Times, 25 November 2019.

⁸ “U.S. troops to withdraw from northern Syria as ISIS supporters escape amid alleged Turkish atrocities”, NBC News, 14 October 2019.

ISIS [...] will attempt to free ISIS members detained in SDF-run prisons and family members living in [IDP] camps.”

11. Looking outside the region, the US Department of Defense argues that Daesh “would likely also use the security vacuum in northeastern Syria to target the West because it will have more ‘time and space’ to plan attacks and provide support to its 19 global branches and networks.” US officials have also asserted that Daesh has “fellow travellers in Europe and elsewhere, and if more refugees are shipped to Europe because the Turks understandably don’t want them, they’re likely to have more”. Another US official was reported as saying that the harsh conditions in the SDF-run camps may have made them a fertile ground for recruiting “a new generation of terrorists, including women and young people who would have a lower profile on our radar.”⁹

3. The prospects for justice for the crimes committed by Daesh

12. As already noted, it is beyond question that Daesh and its supporters have been variously responsible for or complicit in a wide range of offences under national and international law, including terrorist offences, crimes against humanity such as slavery, imprisonment, rape, torture and murder, and genocide. The question is how and by whom those suspected of these crimes should be prosecuted. Assembly Resolution 2190 (2017) recalled that the primary responsibility for prosecuting Daesh suspects lies on the states in which the crimes were committed, in other words Iraq and Syria.

3.1. Prosecution by the authorities in Iraq and Syria

13. Iraq has been prosecuting Daesh suspects for some time but the procedure lacks basic procedural safeguards and results in indiscriminate, often disproportionate sentences. In December 2017, Human Rights Watch (HRW) found “serious legal shortcomings that undermine the efforts to bring ISIS suspects to justice”, with “no national strategy to ensure the credible prosecution of those responsible for the most serious crimes”; “authorities appear to be prosecuting all ISIS suspects in their custody under counterterrorism laws, primarily for ISIS membership, and not focusing on specific actions or crimes that may have been committed.” 7,374 people had been charged with ISIS membership since 2014, with 92 sentenced to death and executed – including one death sentence passed against an ISIS cook. At the time HRW reported that Iraq held at least 20,000 ISIS suspects in detention, often in overcrowded and sometimes in inhuman conditions, with children detained alongside adults.¹⁰

14. There have been some localised improvements since then. In March 2019, HRW reported that in Nineveh province in northern Iraq, judges were “requiring a higher evidentiary standard to detain and prosecute suspects, minimizing the court’s reliance on confessions alone, erroneous wanted lists, and unsubstantiated allegations”: failings that HRW had criticised in its earlier report.¹¹ Elsewhere, serious concerns remained: in April 2019, Agnes Callamard, UN Special Rapporteur on extrajudicial, summary or arbitrary executions, called on the Iraqi authorities to “take appropriate steps to prosecute the crimes perpetrated against the Iraqi people, including alleged genocide, crimes against humanity and war crimes” and to “respect fair trial guarantees, ensure victim participation and uphold the right to truth.” Her statement followed the conviction and sentencing to death of four senior Daesh figures for membership of Daesh, despite evidence (including from the defendants themselves) of their complicity in even more serious crimes.¹² Anti-government demonstrations in Baghdad and southern Iraq, which have led to over 400 deaths since October 2019, have further complicated the situation in the country.¹³

15. There are many foreign fighters amongst the detainees in Iraq, including nationals of European states. In February 2019, it was reported that 13 French nationals had been captured by the SDF in Syria and transferred to the authorities in Iraq, where they would be prosecuted. The 13 were part of a group of 500 transferred Daesh fighters whom the SDF was expected to transfer to Iraq.¹⁴ In June 2019, it was reported that 11 French nationals had been sentenced to death by hanging for simple Daesh membership.¹⁵ The trial judge stated that “the penalty is the death sentence, whether they fought or not.” Observers suggested that France was in effect ‘outsourcing’ the judicial process to Iraq, despite the trials being unfair and the punishment disproportionate.¹⁶ It has been claimed that “the death sentences of jihadists were handed down

⁹ “ISIS Fighters Are Gaining Strength After Trump’s Syria Pullout, U.S. Spies Say”, Time, 19 November 2019.

¹⁰ “Flawed Justice: Accountability for ISIS Crimes in Iraq”, 5 December 2017.

¹¹ “Iraq: Key Courts Improve ISIS Trial Procedures”, 13 March 2019.

¹² “Iraq: UN expert says prosecution of ISIL leadership must be fair and thorough”, 4 April 2019.

¹³ “Pro-Iran militia supporters converge on Baghdad protests”, The Guardian, 5 December 2019.

¹⁴ “Iraq to prosecute 13 French Isis fighters captured in Syria”, Financial Times, 25 February 2019.

¹⁵ “Ce que l’on sait des onze djihadistes français condamnés à mort en Irak”, La Chaîne Info, 3 June 2019.

¹⁶ “France Hands ISIS Suspects to Iraq, Which Sentences Them to Hang”, New York Times, 29 May 2019.

on the basis of allegations of facts that were not clearly stated, discussed or proven, following trials that were usually expeditious and did not respect a number of the defendants' fundamental rights. These procedures are therefore contrary to all the international instruments ratified by France and Iraq.¹⁷ The convictions may be appealed, but this process is likely to take years.¹⁸

16. The prospects for prosecution of Daesh members in Syria are even more complicated. This is primarily due to the multiplicity of actors – Syrian, SDF/ Kurdish, other Syrian opposition groups, Russian, Turkish, and US/ coalition military forces – all of whom play some role in controlling territory.

17. Syrian President Bashar al-Assad has stated that “Every terrorist in the areas controlled by the Syrian state will be subjected to Syrian law, and Syrian law is clear concerning terrorism. We have courts specialized in terrorism and they will be prosecuted.”¹⁹ It has been noted that “Syrian criminal justice is not known for its guarantees of due process, but rather its pre-trial torture and post-trial mass executions after trials lasting several minutes... Justice in the Syrian system, without due process and the protection of the rights of the accused, is not the type of accountability that would be palatable to the international community.”²⁰ More specifically, prosecution of terrorist offences in Syria is said to suffer from a lack of legal certainty in the applicable laws, disproportionate sentencing, a lack of procedural guarantees such as effective legal representation, public trials and appeals processes, and a lack of judicial independence.²¹

18. The fact that the great majority of Daesh detainees in Syria are in SDF captivity does not simplify the situation. Although still controlling extensive territory, the SDF does not qualify as a state entity and is not subject to legal obligations that would ensure fair trial guarantees. According to a June 2019 report on trials of Daesh suspects in Rojava in Kurdish-controlled Syria, the ‘people’s courts’ consist of a bench of three judges applying elements of Syrian law; there are defence lawyers and an appeals process, torture has been prohibited and the death penalty abolished. It was even reported that the SDF no longer transferred Daesh suspects to Iraq, since people previously transferred had been executed there.²² Other reports have noted, however, that “There are major concerns about due process, with suspects denied the right to a lawyer and to appeal their sentences”²³ and “there are few details about how justice is being carried out and what safeguards, if any, have been put in place to ensure accused fighters get a fair hearing.”²⁴ In July 2019, it was reported that over 7,000 Syrian Daesh suspects had been tried and sentenced by these courts, with another 6,000 awaiting trial.²⁵

19. Turkey is known to have detained a number of Daesh suspects since its military incursion into northern Syria (see further below). There is little information on whether other forces present in Syria detain significant number of Daesh suspects and if they do, what are their intentions towards such persons. Should forces under the authority of any Council of Europe member State detain Daesh suspects in Syria, this may bring such persons within the extraterritorial jurisdiction of the State concerned. If so, that State would be obliged under Article 1 of the European Convention on Human Rights to secure that person’s Convention rights and freedoms, including the right to liberty and security under Article 5, the right to a fair trial under Article 6, the right to an effective remedy against alleged human rights violations committed by the State in question under Article 13, and the prohibition on refoulement under Article 3 (i.e. return or transfer to a situation in which there is a real risk of the individual being subjected to serious ill-treatment or the death penalty).

20. Given that, for various reasons, the authorities – whether de facto or de jure – in Syria and Iraq cannot generally be relied upon at present to deliver justice according to international standards, the question of alternatives arises. Two possibilities suggest themselves: for foreign fighters, repatriation to their countries of nationality, to be tried before the domestic courts; and more generally, some form of international or hybrid tribunal.

¹⁷ “Jihadists in the East: the case of French citizens facing the death penalty in Iraq”, Ensemble Contre la Peine de Mort.

¹⁸ “Inside the Iraqi courts sentencing foreign Isis fighters to death”, The Guardian, 2 June 2019.

¹⁹ “Bachar el-Assad: ‘Terrorists are terrorists. French or not, they must abide by Syrian law’”, Paris Match, 28 November 2019. For further details of the legal situation in Syria, see “Bringing (Foreign) Terrorist Fighters to Justice in a Post-ISIS Landscape Part I: Prosecution by Iraqi and Syrian Courts”, International Centre for Counter-Terrorism, 22 December 2017.

²⁰ “Northeastern Syria: Complex Criminal Law in a Complicated Battlespace”, Just Security, 28 October 2019.

²¹ “Enforcing human rights in counter-terrorism laws in Syria”, Syrian Legal Forum.

²² “‘Revenge Is For The Weak’: Kurdish Courts In Northeastern Syria Take On ISIS Cases”, National Public Radio, 3 June 2019.

²³ “Difficult Justice Questions”, Human Rights Watch, 6 November 2017.

²⁴ “Accused Syrian IS Fighters Starting to Face Justice”, Voice of America, 6 August 2019.

²⁵ “Bringing ISIS to Justice: Towards an International Tribunal in North East Syria”, Rojava Information Centre, 5 July 2019.

3.2. Prosecution by the authorities in countries of nationality

21. European countries have, on the whole, been reluctant to repatriate their nationals. In May 2019, the French foreign minister, for example, said that French people who have fought in the Daesh caliphate must be tried in the place where they committed their crimes.²⁶ One of the French nationals who had previously been transferred from SDF to Iraqi detention has even claimed that France organised his transfer, with French officials directly involved in it.²⁷ In September 2019, the Dutch justice minister said that he had declined US assistance to repatriate ten women Daesh suspects and their children as their return could result in “direct risks to the national security of the Netherlands”.²⁸ Even if a state is for good reasons unwilling to repatriate its own nationals who fought for Daesh, it will still have to prepare itself for trials, since many Daesh members have already returned by themselves and more may do so in future.

22. Some States have deprived of citizenship their nationals who travelled to join Daesh, thus preventing them from returning. The UK, for example, is thought to have revoked the citizenship of at least 100 individuals for joining terrorist groups abroad, although the real number is suspected to be higher.²⁹ I refer to Assembly Resolution 2263 (2019) on ‘withdrawing nationality as a measure to combat terrorism: a human-rights compatible approach?’, which noted that depriving foreign fighters of citizenship “may lead to the ‘exporting of risks’, as those persons may move to or remain in terrorist conflict zones outside Europe”, “may expose local populations to violations of international human rights and humanitarian law”, “goes against the principle of international co-operation in combating terrorism” and “undermines the State’s ability to fulfil its obligation to investigate and prosecute terrorist offences.” Nevertheless, deprivation of citizenship is possible under international law, even if only under constrained circumstances. I will examine this situation in greater detail, as well as the practice of Council of Europe member States in relation to Daesh suspects and members. At the same time, there are undeniable political consequences for governments that repatriate their nationals, as domestic populations first and foremost see the potential security threats involved, whether immediately, for those returnees who cannot be detained and prosecuted, or in future, once any prison sentences have been served. I will explore this dilemma in more detail in my report, as it is important for European countries to adopt a balanced, co-ordinated approach.

23. There have nevertheless been a number of repatriations of European nationals from Syria and Iraq. These have, however, consisted mainly of children. Following a court case brought by the grandparents of two girls stranded in Syria, in May 2019 the German government declared its readiness to find and repatriate the orphans of German Daesh supporters.³⁰ Those repatriated to date have included twelve French, two Dutch and five Belgian orphans from SDF-controlled north-eastern Syria in June 2019; four German orphans in August 2019;³¹ two Austrian orphans in October 2019;³² and a Danish orphan, three British orphans, and three German children (along with their mother, herself a Daesh suspect)³³ in November 2019.³⁴

24. It is no coincidence that most of these children are orphans: according to Human Rights Watch, Western European countries fear that “if they bring home children of living parents, their own courts might compel them to repatriate their mothers.”³⁵ European states would indeed have to respect the right to family life (Article 8 of the Convention) of repatriated children. This does not mean that national authorities would have to admit even parents who were suspected Daesh members to be reunited with their repatriated children. The right to family life is not absolute but can be denied in the wider interests of, for example, national security or the prevention of crime – both of which could be relevant in this case. States are also obliged to respect the ‘best interests of the child’. Again, however, this does not necessarily imply family reunification; the question would be whether it is in the best interests of the child to be reunited with a parent who may have committed genocide or crimes against humanity, or wilfully exposed their children to a dangerous and degrading situation. These issues, and member States’ national practices, will have to be explored in detail, whether in my report or in a separate

²⁶ “Les procès des djihadistes français soulignent les failles du système judiciaire irakien”, *Le Monde*, 4 June 2019.

²⁷ “Irak : un djihadiste français condamné à mort accuse la France”, *Le Point*, 1 August 2019.

²⁸ “Dutch minister refuses US offer to help repatriate ISIS women and their children in Syria”, *Kurdistan 24*, 13 September 2019.

²⁹ “Turkey warns it will send Islamic State members back to UK even if citizenship revoked”, *The Telegraph*, 4 November 2019.

³⁰ “Berlin ready to fetch ‘IS’ German children after court case”, *Deutsche Welle*, 31 May 2019.

³¹ “Le casse-tête du rapatriement des enfants de djihadistes en Europe”, *France 24*, 20 August 2019.

³² “Syrian Kurds repatriate Islamic State orphans to Austria”, *The New Arab*, 3 October 2019.

³³ “Germany takes back ‘Islamic State’ mother and her three children from Syria”, *Deutsche Welle*, 23 November 2019.

³⁴ Information from the Twitter account of Dr Abdulkarim Omar (@abdulkarimomar1), Co-chair of the Foreign Relations Commission in North Syria.

³⁵ “ISIS Suspects Transfers to Iraq Replete with Risks”, 1 November 2019.

report that I understand may be prepared by the Committee on Social Affairs, Health and Sustainable Development.

25. Both before and since its military incursion into northern Syria, Turkey has detained a number of Daesh suspects. In total, it is said now to hold up to 1,300 foreign fighters in detention.³⁶ In early November 2019, it began calling for the repatriation of European nationals from Syria, criticising those countries that had refused to repatriate their nationals or revoked their citizenship and stating that “We are not a hotel for IS members from any country”.³⁷ Shortly thereafter, Turkey called on Germany, for example, to take back 20 German Daesh members, four of whom had been captured in Syria, with the other 16 already in Turkish detention.³⁸ Soon afterwards, a total of nine persons were returned to Germany. These included a woman who was detained on arrival on suspicion of being a member of a terrorist organisation in a foreign country; and a man who was also detained, although not, reportedly, on terrorism-related charges, along with his family, who were not detained. German Chancellor Angela Merkel has said that suspected Islamists returned by Turkey would be assessed on arrival in federal counter-terrorism centres.³⁹ I will seek to obtain more exhaustive information on the return or deportation of Daesh members to Council of Europe member States, and on how they are treated by the domestic authorities following their arrival.

26. Information on prosecutions of Daesh suspects returning from Syria or Iraq is also limited, or at least dispersed. A German woman suspected of travelling to Iraq to join Daesh was charged in Munich with various offences, including war crimes,⁴⁰ another was sentenced to five years’ imprisonment for joining Daesh,⁴¹ and an Italian man was returned and charged with participation in a terrorist organisation, for example.⁴² Dozens more German nationals have been brought before the domestic courts following voluntary returns.⁴³ There are said to be 95 German Daesh suspects detained in Turkey, Syria or Iraq; German police have opened investigations into 33 of these, with 26 arrest warrants issued – these cases could presumably be prosecuted, should the individuals concerned be repatriated. Those returning to France are said to be generally charged with ‘AMT’ (*association de malfaiteurs en relation avec une entreprise terroriste*, association of wrongdoers in relation to a terrorist enterprise), which since 2016 has been treated as a felony that can be punished by up to 10 years’ imprisonment; such cases are tried before the special Assize Court.⁴⁴ I will seek to obtain more exhaustive information on prosecution of Daesh suspects in their countries of nationality.

3.3. *Prosecution by a hybrid or international tribunal*

27. My earlier report on ‘prosecuting and punishing the crimes against humanity or even possible genocide committed by Daesh’⁴⁵ examined alternatives to prosecution by purely national authorities in either the region or in foreign fighters’ countries of nationality.

28. The most obvious alternative is prosecution before the International Criminal Court (ICC). There are three legal avenues towards achieving this: first, Syria and/ or Iraq accepts the ICC’s jurisdiction, which in 2017 I considered to be unrealistic, and which still seems unrealistic today; second, the UN Security Council refers the situation to the ICC Prosecutor, which I considered unlikely in 2017 and consider even more unlikely today, given the greatly expanded military presence of Russia, which has a Security Council veto; and third, the ICC Prosecutor decides to investigate crimes committed by a national of a State that is subject to the ICC’s jurisdiction, which the Prosecutor had declined to do – a position which has not since changed, so far as I am aware.

29. Given the ICC’s paralysis, an alternative would be an ad hoc international tribunal or some form of ‘hybrid’ (national/ international) tribunal. In 2017, I noted that “The UN Security Council has adopted resolutions establishing ad hoc international criminal tribunals twice in the past, for the former Yugoslavia in 1993 and for

³⁶ “Turkey to begin repatriating ‘Islamic State’ militants within days”, Deutsche Welle, 8 November 2019.

³⁷ US President Trump has said that “We have thousands of ISIS fighters that we want Europe to take, and let’s see if they’ll take them. If they don’t take them, we’ll probably have to release them to Europe” (“Trump warns U.S. allies to take back captured ISIS fighters”, NBC News, 3 August 2019). Whilst the exact meaning of this statement is unclear, it does not yet seem to have led to any concrete consequences.

³⁸ “Turkey demands Germany take back 20 captured ‘Islamic State’ members”, Deutsche Welle, 4 November 2019.

³⁹ “Germany detains ‘Islamic State’ returnee deported from Turkey”, Deutsche Welle, 15 November 2019.

⁴⁰ “German IS member on trial for war crimes in Munich”, Deutsche Welle, 9 April 2019.

⁴¹ “German woman sentenced to 5 years for joining Islamic State”, Associated Press, 5 July 2019.

⁴² “Beyond good and evil: Why Europe should bring ISIS foreign fighters home”, European Council on Foreign Relations, 25 October 2019.

⁴³ “Germany: Don’t panic over ‘Islamic State’ returnees’ arrival”, Deutsche Welle, 14 November 2019.

⁴⁴ “French foreign fighters: The engagement of administrative and criminal justice in France”, Sharon Weill, *International Review of the Red Cross* (2018), 100 (1-2-3), 211-236

⁴⁵ PACE doc. 14402, 22 September 2017.

Rwanda in 1994. There have also been various special courts based on agreements between the national authorities of the State in which relevant offences were committed and the United Nations, such as the Special Court for Sierra Leone, established in 2002, and the Special Tribunal for Lebanon, established in 2007. Another model might be the special “hybrid” judicial mechanisms within the domestic legal system, such as the Special Panels for Serious Crimes in East Timor, established in 2000, the Extraordinary Chambers in the Courts of Cambodia, established in 2001, or the War Crimes Chamber of the State Court of Bosnia-Herzegovina, established in 2004, in which international judges sit alongside national ones.” One could also mention in this context the Kosovo Specialist Chambers (part of the Kosovo judicial system, but located in the Hague), established in 2015.

30. My report will explore the extent to which these alternative options may now be viable and which might perhaps be implemented, should there be the necessary international political will. I will in particular seek to engage with the ICC, with a view to elucidating its current stance on the matter.

3.4. *‘Ne bis in idem’ (the right not to be tried or punished twice for the same offence)*

31. Assembly Resolution 2190 recalled that “the primary responsibility for the investigation and prosecution of crimes covered by the Rome Statute [of the ICC] rests with national authorities, especially those of the States where those crimes have taken place”. It also called on Council of Europe member and observer States and States whose parliaments enjoy observer or partner for democracy status with the Parliamentary Assembly, where applicable, to “take prompt and effective action in accordance with their obligation under the 1948 Genocide Convention to prevent and punish acts of genocide, and their general responsibility to act against crimes under international law”, whilst “not prioritising, systematically and exclusively, with regard to the members of Daesh, 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”.

32. As noted above, treatment of Daesh suspects by different national criminal justice systems varies considerably. Very few people either in Syria and Iraq, or in European countries, have been prosecuted for crimes under international law committed by Daesh. Albeit for perhaps different reasons depending on the country concerned, most suspects are charged only with simple Daesh membership. There is a question as to whether individuals may be tried again in future for more serious offences, should policy change or evidence become available. I will consider whether there are legal barriers to this, in particular whether the *ne bis in idem* rule (the right not to be tried or sentenced twice for the same offence) applies, and if so to what extent.

3.5. *Evidential issues*

33. Assembly Resolution 2190 recognised the significance of evidential issues to the prospects for prosecution of Daesh suspects, notably prosecution before an international tribunal outside the region or prosecution of foreign fighters in their countries of origin. Problems such as the preservation of material evidence, for example documentation and burial sites, the recording of witness testimony and the availability of witnesses to give evidence outside the region must be addressed as a matter of urgency. Without sufficient, specific evidence, the chances of justice being done for the extremely serious crimes that have been committed will be drastically reduced.

34. Two international bodies have been established to investigate violations of international human rights and humanitarian law in Syria: the ‘Independent International Commission of Inquiry on the Syrian Arab Republic’, created by the United Nations Human Rights Council (HRC) in August 2011; and the ‘International, Impartial and Independent Mechanism to assist in the investigation and prosecution of persons responsible for the most serious crimes under International Law committed in the Syrian Arab Republic since March 2011’, created by the UN General Assembly in December 2016. The Commission’s mandate, as expressed in HRC Resolution 21/26,⁴⁶ is “to conduct an international, transparent, independent and prompt investigation into abuses and violations of international law, with a view to hold to account those responsible for violations and abuses, including those that may amount to crimes against humanity and war crimes”. The Mechanism’s mandate is “to collect, consolidate, preserve and analyse evidence of violations of international humanitarian law and human rights violations and abuses and to prepare files in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards, in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes, in accordance with international law.” No equivalent bodies exist in relation to Iraq.

⁴⁶ This is the most recent, general description of the mandate; other HRC resolutions have given similar or specific, supplementary mandates.

35. I will examine the progress made by the two UN bodies, as well as any evidence gathering undertaken by state or non-state actors.

4. Interim conclusions and next steps

36. The need for justice for the crimes committed by Daesh is now greater than ever. In Syria and Iraq, following the defeat of the so-called 'caliphate', tens of thousands of suspected Daesh fighters, including foreign fighters, are now detained, and an even greater number of their family members are residing in camps. The Daesh suspects cannot lawfully be detained indefinitely. Sooner or later, they must be either tried or released. If they are to be tried, this should be in accordance with international fair trial standards. If they are released, they must not be allowed to present a renewed danger either in Syria or Iraq, or, for the foreign fighters, in their countries of nationality. What was to a large extent a hypothetical problem in 2017 has become very real, and thus very urgent, today.

37. In Resolution 2190 (2017), the Assembly called on Council of Europe member and observer States and States whose parliaments enjoy partner for democracy status with the Assembly to "take prompt and effective action in accordance with their obligation under the 1948 Genocide Convention to prevent and punish acts of genocide, and their general responsibility to act against crimes under international law". Unfortunately, there has been very little progress in this regard.

38. Of course, countries cannot easily prosecute persons who are outside their jurisdiction. There may, however, be good reasons why European States should repatriate their nationals – to ensure that they are prosecuted according to international standards; to ensure that they are not exposed to a real risk of torture or the death penalty; to relieve the burden on the Iraqi and Turkish authorities, and on the SDF; and to avail themselves of the potential intelligence these individuals could provide on Daesh, its past international terrorist activities and its global network. At the same time, European governments must recognise the legitimate security concerns of their citizens and ensure that repatriation of Daesh suspects does not endanger society as a whole.

39. One of the main purposes of my report, therefore, will be to explore this morally, legally and politically complicated situation, identify the difficult dilemmas that it raises, and propose a framework within which States can respond in a principled, realistic and coordinated way. The Committee has already authorised a hearing with experts and a questionnaire to national parliaments. A draft questionnaire appears in appendix to this introductory memorandum.

Appendix

Questionnaire to be sent to national parliaments (via the European Centre for Parliamentary Research and Documentation, ECPRD)

Context

The present questionnaire forms part of the preparation of a report by Mr Pieter Omtzigt (the Netherlands, EPP/CD) on 'addressing the issue of Daesh foreign fighters and their families returning from Syria and other countries to the member States of the Council of Europe' for the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe.

The questionnaire was approved by the Committee at its meeting on ... January 2020, when Mr Omtzigt presented his introductory memorandum. For information, you will find a copy of the introductory memorandum in appendix.

This report follows on from an Mr Omtzigt's earlier report on 'prosecuting and punishing the crimes against humanity or even possible genocide committed by Daesh', which led to Assembly Resolution 2190 (2017).

Mr Omtzigt intends to present his report to the Committee for adoption in September 2020.

Questions

1. Do your authorities have a policy on deprivation of citizenship from terrorists, in particular Daesh (a.k.a. ISIS or ISIL) members and suspects?
 - If possible, please indicate how has this policy been applied in practice, to how many people and with what results.
2. Do your authorities have a policy on repatriation of nationals who are known or suspected to have been Daesh members?
3. How many Daesh members or suspects have returned to your country?
 - If possible, please indicate how did these returns take place. For example, were they undertaken independently by the persons concerned, did they involve assisted repatriation, or did they result from involuntary deportation?
4. How are returning Daesh members or suspects treated on arrival and following their return?
 - Are any special measures in place to ensure the avoidance of threats to national security?
 - Are returning Daesh members subjected to any deradicalization process?
 - Is there differential treatment depending on the age of the person involved?
5. Have any returning Daesh members or suspects been prosecuted for criminal offences?
 - If so, for which offences?
 - What was the outcome of the prosecution?