

Advice on the legal classification of the actions of Daesh/ISIS

Lord Morrow MLA has asked, on behalf of himself and other MLAs, for advice on whether the violence currently being perpetrated against Christians and other minority religious groups (notably Yazidis and members of certain Islamic communities) by Daesh/ISIS in territory controlled by them in Syria and Iraq constitutes genocide within the meaning of the December 9 1948 UN Convention on the Prevention and Punishment of the Crime of Genocide, ‘the Genocide Convention’¹.

If behaviour can be properly classified as genocide then a range of international law consequences ensue. The first of these consequences is the activation of the twofold undertaking by contracting parties contained in Article 1 of the Genocide Convention to prevent and to punish genocide. Article 1 reads as follows:

“The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.”

This use of ‘undertake’ in Article 1 is important, as the International Court of Justice emphasised in its 2007 *Bosnian Genocide* decision, “[Undertaking] is not merely hortatory or purposive. The undertaking is unqualified ... and it is not to be read merely as an introduction to later express references [in the Convention] to legislation, prosecution and extradition.”²

It is important to recall that other discrete provisions of the Convention do not merely specify or particularise the obligations in Article 1: “*Article 1 does*

¹ The Genocide Convention came into force on January 12 1951 see <https://treaties.un.org/doc/Publication/UNTS/Volume%2078/volume-78-I-1021-English.pdf>

² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro))* February 26 2007 ICJ Reports (2007) p. 111 § 162

impose distinct obligations over and above those imposed by other Articles of the Convention.”³

I do not dilate here on extent (territorial or substantive) of the obligations on contracting parties created by Article 1 of the Genocide Convention save to observe that it seems clear that a necessary component of the twofold undertaking is thorough and candid investigation⁴ and analysis of circumstances capable of falling within the definition of genocide in Article 2 of the Genocide Convention together with a truthful account of the product of that investigation and analysis.

In other contexts, much academic and other ink has been spilled on a right to truth in international law⁵; it seems to me that actual or potential victims of genocide have a right to truthful acknowledgement of their circumstances and that governments are under a corresponding duty to make such acknowledgements.

By Article 2 of the Genocide Convention, 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; and (e) Forcibly transferring children of the group to another group.”

³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro) February 26 2007 ICJ Reports (2007) p. 113 § 165*

⁴ The logic of the requirements first identified by the European Court of Human Rights in *McCann and others v the United Kingdom*, 27 September 1995, Series A no. 324 seems inescapable here.

⁵ For a very recent example see Olga Chernisova [Right to the truth in the case-law of the European Court of Human Rights](#) in Early, Austin, Ovey, Chernisova (eds) *The Right to Life under Article 2 of the European Convention on Human Rights* (Oisterwijk, 2016) pp. 145-160

It may be noted that the definition in Article 2 is identical to that in Article 6 of the Rome Statute of the International Criminal Court (even to using the now rather dated form 'ethnical' rather than the (now) more usual 'ethnic').

In addition to proof of the commission of acts falling within Article 2 (a) to (e), there are two forms of intention that must be established in order to bring conduct within the scope of Article 2.

Firstly, it must be established that the acts falling within Article 2 (a) to (e) are done intentionally, i.e. it is not enough that, for example, a Christian pastor was killed there must have been an intention to kill him.

Secondly, that this killing has been carried out with the intention to destroy the protected group in whole or in part⁶, so that the Christian pastor was killed intentionally *and* with the further intention that this would contribute towards the destruction in whole or in part of a particular Christian community.

Naturally, I am not asked about the prosecution of any private citizens or public officials for the crime of genocide. In any such prosecution the criminal standard of proof applies. Before the International Court of Justice (which does not exercise criminal jurisdiction) the existence of genocide "requires proof at a high level of certainty appropriate to the seriousness of the allegation"⁷.

It must be emphasised that although the etymology of genocide tends to emphasise the deliberate taking of life, it is possible to commit genocide without killing. A body of laws or a pattern of administrative practice that had as its purpose the destruction of a particular religious or ethnic community would undoubtedly constitute genocide, being captured by

⁶ See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro))* February 26 2007 ICJ Reports (2007) p. 121 § 186-7

⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro))* February 26 2007 ICJ Reports (2007) p. 130 § 210

Article 2 (c). Given the purpose of the *Nürnberger Gesetze* their existence and application well before 1939 certainly constitute genocide quite apart from any death or physical ill-treatment.⁸

In this advice I do not pause to debate the existence of many acts committed by Daesh/Isis which fall within Article 2 (a) to (e) of the Genocide Convention, nor do I query the presence of the necessary intention to commit those acts. The acts are notorious and lamentable.

In this advice I discuss whether the intention to destroy Christian and other religious and ethnic groups is proved at a high level of certainty appropriate to the seriousness of the allegations.

There are two preliminary matters that should be noted: that A is intentionally killed or ill-treated because she is a Christian or a member of the Yazidi community does not in itself cause the killing or ill-treatment to be regarded as an act of genocide; a theologically or ethnically inspired killing is not in itself an act of genocide unless it is accompanied by the intention to destroy the relevant group in whole or in part⁹.

Secondly, treatment falling within Article 2 (a) to (e) that is carried out in order to drive out a particular protected group from specific territory (often referred to as 'ethnic cleansing') is not, in itself, genocide¹⁰.

What matters is the presence or absence of acts listed in Article 2 (a) to (e) committed intentionally, together with the intent to destroy the relevant group in whole or in part. It is clear, however, that ethnic cleansing may occur in parallel with acts falling within Article 2 (a) to (e) and "may be

⁸ See Cornelia Essner *Die Nürnberger Gesetze oder die Verwaltung des Rassenwahns 1933-1945* (Paderborn, 2002) pp. 76-108

⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro))* February 26 2007 ICJ Reports (2007) p. 121 § 187

¹⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro))* February 26 2007 ICJ Reports (2007) p. 122-3 § 190. The ICJ noted, in particular, the rejection of a drafting proposal that would have included within the definition of genocide "measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment".

significant as indicative of the presence of a specific intent (*dolus specialis*) inspiring those acts.”¹¹

A coda to the second of these two preliminary matters is that while violence applied for the purpose of simply expelling a protected group from a specific area of territory is not in itself genocide, violence applied to a group of persons for the purpose of ‘converting’ that group from religious allegiance A to religious allegiance B (thus causing the complete or partial destruction of a group holding religious allegiance A) is inherently genocidal.

Applying the foregoing conditions and turning, then, to the question of whether the well-known acts of Daesh/ISIS in Iraq and Syria against Christians, certain Islamic sects, and Yazidis constitute genocide within the meaning of the Genocide Convention, I have no hesitation in saying that the violence perpetrated against these protected groups does constitute genocide.

It will be understood that I do not have access to direct evidence of what has occurred in Iraq and Syria nor does my office have resources to collate and assess a great mass of indirect evidence. I will, of course, be happy to consider any evidence that is properly placed before me.

From the open source material available to me I conclude that there is compelling evidence not only of intentional killing and ill-treatment of members of protected groups but that there is also compelling evidence that this killing and ill-treatment is carried out for the purpose of destroying communities of Yazidis, Christians, and members of certain Islamic groups.

This conclusion is driven not merely by inference from the external acts of Daesh/ISIS against these communities but also from the announced intentions of Daesh/ISIS itself. From these announced intentions it is clear (and here I agree with US Secretary of State Kerry) that Daesh’s “entire

¹¹ Ibid.

worldview is based on eliminating those who do not subscribe to its perverse ideology".¹²

The most modest commitment to the prevention and punishment of genocide (and, as I have said, I do not address the consequences domestically or internationally of the actions of Daesh/ISIS being properly regarded as genocide) must begin with the obligation to examine candidly and thoroughly what has occurred and to classify it correctly.



John F Larkin QC

Attorney General for Northern Ireland

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¹² US Secretary of State John Kerry on March 17 2016
<http://www.state.gov/secretary/remarks/2016/03/254782.htm>