

SAMPLE PARLIAMENTARY QUESTIONS TO THE GOVERNMENT ON TAKING ACTION TO PROSECUTE FOREIGN FIGHTERS (E.G. RETURNEES FROM IRAQ AND SYRIA) FOR INTERNATIONAL CRIMES

Background/Rationale:

While the existence of foreign fighters, defined as “individuals, driven mainly by ideology, religion and/or kinship, who leave their country of origin or habitual residence to join a party engaged in an armed conflict”, is not a new phenomenon, it has recently represented a growing threat in many countries. It has been reported that since 2011, more than 40,000 people from approximately 110 countries travelled to join the Islamic State in Iraq and the Levant (ISIL, also known as ISIS/Daesh) and other associated extremist groups in Syria and Iraq—in addition to the local Syrians and Iraqis who became fighters. In the last two years, it has been reported that at least 5,600¹ individuals have left these groups to either return to their countries of origin or move to other countries.

To address the phenomenon appropriately, the engagement of national parliaments in providing an adequate response is of paramount importance. Parliamentarians from 54 countries came together at the *Milan Forum for Parliamentary Action in Preventing Violent Extremism and Mass Atrocities* (27-28 November 2017) of Parliamentarians for Global Action (PGA) to adopt the [Milan Plan of Action](#), an ambitious outcome document that commits parliamentarians to future action and sets a roadmap on addressing the drivers and root causes of violent extremism and mass atrocities; halting the flow of conventional arms and weapons of mass destruction to violent extremists; ending impunity for violent extremists and perpetrators of mass atrocities and ensuring justice for the victims; preventing violent repression that may bring about the perpetration of atrocity-crimes; and protecting civil society space, democratic participation and the rights of minorities and vulnerable groups.

Participants, including high-level politicians from critical countries affected by violent extremism and armed conflict, affirmed that universally accepted human rights should not be violated in the name of counter-terrorism measures, which so far have not proven to be successful in addressing and reducing the phenomenon of violent extremism that underpins terrorist attacks and the perpetration of atrocity-crimes, namely war crimes, crimes against humanity and, at times, even genocide. The lack of proportionate law-enforcement and security responses and adequate criminal and reparative justice as well as inadequate rehabilitation, re-education and reintegration measures serve to increase the likelihood of occurrence of new crimes and are conducive to radicalisation that leads to violent extremism.

All states have a *duty to prosecute or extradite* suspects of international crimes, while ensuring that all suspected perpetrators are afforded due process guarantees and investigated in an impartial and fair way. To this end, States need to ensure that all legislative measures and policies comply with universally accepted human rights and the Rule of Law, in particular the right to a fair trial and that correct qualifications of the most serious crimes of international concern are applied.

In this respect, while terrorism constitutes one of the most visible and perceived manifestations of violent extremist groups, the nature of the mass atrocities perpetrated by ISIL must be adequately addressed, namely: (1) genocide, (2) crimes against humanity, (3) war crimes, including the destruction of cultural heritage sites, and (4) the crime of aggression. Effective prosecutions of these crimes are facilitated by the application of general principles of international criminal law (i.e., non-applicability of statutes of limitations and of the defense of superior-order, command responsibility or responsibility of the superior, irrelevance of official capacity, prohibition of amnesties and other impunity measures, obligation to prosecute and extradite or surrender to the International Criminal Court). These general principles of law, also known as the “Nuremberg principles”, do not apply to crimes under national law, including terrorism.

The UN 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) is particularly relevant, as it affirms an obligation by all States to prevent and eradicate any

¹ A study by the Soufan Center and the Global Strategy Network has tracked 5,600 fighters who have returned to their home countries: *The Washington Post* (Tim Meko, 22 Feb. 2018), *Now that the Islamic State has fallen in Iraq and Syria, where are all its fighters going?* - https://www.washingtonpost.com/graphics/2018/world/isis-returning-fighters/?utm_term=.1a032acc9233.

genocidal policy. This means that all States that are Parties to the Genocide Convention must take active steps to prevent, detect, investigate, prosecute and adjudicate the crime of genocide. Several entities and institutions have recognised that ISIL has committed the crime of genocide against ethnic and religious minorities, including the Yazidis, Christians, Shia and others. Such institutions include the UN High Commissioner for Human Rights and the UN Independent International Commission of Inquiry on the Syrian Arab Republic, several national parliaments (e.g. Australia, Austria, Canada, France, Hungary, Italy, Lithuania, UK, US), governments (Canada, the Netherlands, US), the European Parliament and the Parliamentary Assembly of the Council of Europe.² Action to give effect to the obligations contained in the Genocide Convention is urgently needed.

To promote an effective and independent justice system and ensuring accountability, the United Nations (UN) Security Council adopted unanimously Resolution 2379 (2017) on 21 September 2017, requesting the UN Secretary General to establish an Investigative Team to collect, preserve and prepare the evidence of the crimes committed by ISIL in Iraq for future prosecutions. In the Resolution, the Council also encouraged Member States, and regional and intergovernmental organizations, to provide appropriate legal assistance and capacity-building to the Government of Iraq to strengthen its courts and judicial system, and called on all other States to cooperate with the team, including through mutual arrangements on legal assistance.

It needs to be emphasized that the International Criminal Court (ICC) currently does not have jurisdiction to try all international crimes committed in Iraq, given that it lacks territorial jurisdiction over these crimes. Currently, there is no other international or regional tribunal that could proceed with prosecutions. Furthermore, Iraqi courts may not be equipped to prosecute ISIL members for international crimes as its penal law does not incorporate such crimes in the domestic legal order.³ Therefore, to ensure accountability for atrocity-crimes and guarantee justice for victims in compliance with fair trial rights, it would be of particular importance for Iraq to accede to the Rome Statute of the ICC and to file with the Registrar of the ICC a declaration under Article 12(3) of the Rome Statute, giving the ICC jurisdiction over the international crimes committed over the past years on the territory of Iraq. Alternatively, the Government of Iraq could work with the UN Security Council on an international or regional ad hoc tribunal to prosecute crimes committed in Iraq (and/or beyond).

Against this background, we would like to ask the following questions:

1. **Has the Government taken adequate legislative measures to prevent and punish international crimes, namely genocide, crimes against humanity and war crimes that have been committed by ISIL and other extremist groups?**
2. **A) Which actions has the Government taken to ensure domestic prosecutions of its nationals who joined violent extremist groups such as ISIL? How many (former) ISIL fighters do we have in our country (as returnees, as asylum seekers or otherwise) and how many are prosecuted? What is the prosecution strategy?**
B) In case of such nationals being arrested in another country, where they might be subjected to unfair trial or the death penalty, has the Government undertaken active steps to request extradition in order to ensure that the accused are brought to justice in accordance with internationally-accepted standards applicable to a fair trial?

² See, for all, the sources and authorities cited in: *Parliamentary Assembly of the Council of Europe (PACE), Doc. 14402: Report of the Committee on Legal Affairs and Human Rights, Prosecuting and punishing the crimes against humanity or even possible genocide committed by Daesh, Rapporteur: Mr Pieter Omtzigt*, 22 September 2017 (available at <http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-en.asp?FileID=24014&lang=en>). This pivotal report brought about the adoption of *PACE, Resolution 2190 (2017), Prosecuting and punishing the crimes against humanity or even possible genocide committed by Daesh*, 12 October 2017 (available at <http://assembly.coe.int/nw/xml/XRef/Xref-XHTML-EN.asp?fileid=24219&lang=en>).

³ The special law through which Iraq instituted the proceedings for international crimes against Saddam Hussein and other members of his regime does not have any general application and represented an *ad hoc* effort to promote accountability. The Iraqi High Tribunal's proceedings have been criticized as "unfair" and a failure of justice (see, for all, Jennifer Trahan, *A Critical Guide to the Iraqi High Tribunal's Anfal Judgement: Genocide Against the Kurds*, 30 Michigan Journal of International Law 2 (2009) (<https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1122&context=mjil>), and Michael P. Scharf, *Lessons from the Saddam Trial*, 39 Case W. Res. J. Int'l L. 1 (2007) (<https://scholarlycommons.law.case.edu/jil/vol39/iss1/1>)).

3. Has the Government made efforts to call on Iraq to accede to the Rome Statute of the ICC and to accept its jurisdiction under Art. 12(3) of the Rome Statute over the period during which ISIL and other violent extremist groups allegedly committed international crimes?
4. A) Has the Government given effect to the UN Security Council Resolution 2379 (2017) and taken action to provide appropriate legal assistance and capacity-building to the Government of Iraq to strengthen its courts and judicial system?
B) Does the Government support initiative of The Netherlands in the UN Security Council to set up an international mechanism for prosecution and adjudication of ISIL crimes in Iraq?