



27 October 2014

Re: EU Genocide Network's strategy to combat impunity for genocide, crimes against humanity and war crimes within the European Union and its Member States

Dear Contact Point,

We write to you ahead of the 17th meeting of the EU Network of contact points in respect of persons responsible for the crime of genocide, crimes against humanity and war crimes ('EU Genocide Network') to welcome the draft 'Strategy of the EU Genocide Network to combat impunity for the crime of genocide, crimes against humanity and war crimes within the European Union and its Member States' ('the Strategy').

We commend the Network Secretariat and its Task Force for drafting the Strategy and are grateful that civil society was given the opportunity to provide comments on an earlier draft.

Notwithstanding a remaining concern with regards to the material scope of the Strategy which we explain below, we believe that the Strategy can play a vital role in advancing the fight against impunity of serious international crimes within the EU, including genocide, crimes against humanity, war crimes, torture and enforced disappearances.

Positive elements about the drafting process and contents of the strategy

The Strategy was drafted by the EU Genocide Network Coordinator and selected contact points following relevant Network conclusions at its 15th and 16th meetings to establish a "task force to explore and propose steps for increasing efficiency in combating impunity in the EU" and to raise "further awareness of the Network, its Members and its role in coordinating efforts to combat impunity across the EU." The Genocide Network Coordinator and the task force organised several rounds of consultations on different drafts of the Strategy with all contact points and included their input.

The Strategy gives a helpful overview of the experiences and good practices identified by a wide variety of practitioners and experts in the investigation and prosecution of serious international crimes, including contact points, immigration officials, mutual legal assistance officers and civil society.

Moreover, the Strategy reflects the legal and practical developments and advancements at EU and Member State levels over the past 12 years of the Network's existence. In particular, the Strategy recognises the important role of EU engagement – illustrated in particular through the

adoption of two Council Decisions, and the establishment of the EU Genocide Network Secretariat – in supporting and encouraging Member States to combat impunity.

The Strategy provides a clear framework for the way forward within the EU by identifying a set of concrete measures that the EU and Member States should take to further strengthen their commitment to the fight against impunity.

These measures and recommendations are not new ideas but rather reflect discussions and conclusions adopted by the Genocide Network over the past 10 years.

The importance of adopting and promoting the strategy

The proposed Strategy provides an overview of the important work done by contact points at the national level and of rich exchanges of experiences and best practices during meetings of the Network. It is crucially important for the Network to ensure that this work is known and available in a document for other actors at EU and Member State level. Spelling out specific measures that would strengthen the fight against impunity will also help national contact points and the EU Genocide Network to obtain the support they need from both national authorities and EU institutions.

The Strategy is ambitious and its effective implementation in practice will depend on active support from contact points and the Genocide Network Secretariat. Contact points should assist in implementing the Strategy by disseminating information on topics discussed by the Network to relevant authorities, presenting information on investigations and prosecutions of serious international crimes cases to decision makers and by engaging in two-way communication, acting as a point of communication for practitioners and relaying information back to the Network.

We therefore urge you to support the adoption and implementation of the Strategy.

Concern about the narrow focus of the Strategy

Including other serious international crimes in the Strategy

Notwithstanding our strong support for the Strategy, we would like to highlight our concern with regard to the fact that the Strategy is solely dealing with war crimes, crimes against humanity and genocide, defined as “core international crimes”.¹

This approach excludes other serious international crimes, such as torture and enforced disappearances as distinctive crimes. We believe this is unfortunate and creates an unnecessary and artificial distinction between serious international crimes for which an international obligation to investigate and prosecute exists.

Our organisations recognise that the EU Framework decision of 2002 establishing the EU Genocide Network only mentions its role in relation to war crimes, crimes against humanity and genocide. Yet, the clear objective of creating the Network is to strengthen the fight against impunity for grave violations of international law.

¹ The strategy highlights (in footnote 1) that this term will be used to include torture and enforced disappearance insofar as they constitute war crimes or crimes against humanity.

The investigation and prosecution of torture and enforced disappearances often raise challenges similar to war crimes, crimes against humanity and genocide. Several EU member states are handling all these crimes together in practice and information and best practices have been shared at EU Genocide Network meetings about cases involving these crimes over the years.

It is important to underscore that, in some cases, torture or enforced disappearance may also present an alternative basis for charging decisions where evidence of crimes against humanity or war crimes is insufficient, making these legal characterizations an important tool in the fight against impunity.² Prosecutions for torture are regularly included in statistics of ‘international crimes cases’ successfully prosecuted by EU Member States.³

We therefore recommend that the Strategy clearly state as its objective to strengthen the fight against impunity for serious international crimes, including genocide, crimes against humanity, war crimes, torture and enforced disappearance; and that the Strategy make clear what the current mandate of the EU Genocide Network is, while highlighting its current practice is to combat impunity also for other serious international crimes in line with other global efforts to fight impunity.⁴

Changing the term “Core international crimes”

We recognise that the term ‘core international crimes’ is sometimes used to refer to those crimes currently under the ICC’s jurisdiction.⁵ But the word “core” suggests a hierarchy between war crimes, crimes against humanity and genocide on the one hand and other serious international crimes on the other, which is neither necessary nor correct, in some instances. As mentioned above, there are serious international crimes which EU member states have a treaty obligation to investigate and prosecute.

We therefore propose that the Strategy, rather than using the term ‘core international crimes’, refer to ‘serious international crimes’ throughout the Strategy, explaining that this term is used to refer to a non-exhaustive list of the most serious crimes under international law arising from international treaty obligations, customary international law or because their prohibition amount to a peremptory norm (*jus cogens*).⁶ As highlighted above, war crimes, crimes against

² It is important to note, however, that torture and enforced disappearance are distinct international crimes, and not “included offences”; see further for instance the Dutch District Court’s decision in the case of *Public Prosecutor v Mpambara*, in which it found that there was no sufficient link between the defendant’s acts and the Rwandan armed conflict in order to prove his guilt for war crimes; the Court instead convicted the defendant for complicity in torture (the Court of Appeal disagreed on the District Court’s interpretation of the ‘nexus requirement’, and found the defendant guilty of torture and war crimes, see <http://www.internationalcrimesdatabase.org/Case/1218/Mpambara/>).

³ See EU Genocide Network Secretariat, *Criminal Responsibility of Corporations and Business Persons for Serious International Crimes*, Background Paper for 15th Meeting, p. 4; Open Society Justice Initiative, *Case Digest: Update on Domestic Accountability for International Crimes*, 2013; Maximo Langer, ‘The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes’, 105 *American Journal of International Law* (2011) 1; J. Rikhof, “Fewer Places to Hide? The impact of domestic war crimes prosecutions on international law”, Conference Paper 2008, available at: www.isrcl.org/Papers/2008/Rikhof.pdf; Human Rights Watch, *Universal Jurisdiction in Europe: The State of the Art*, 2006.

⁴ See UN Commission on Human Rights, “Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher, E/CN.4/2005/102.Add.1, 8 February 2005, p.6.

⁵ See also for a debate on the term of ‘core international crimes’ Terje Einarsen, *The Concept of Universal Crimes in International Law*, 2010, Section 4.4, pp. 150-167, available at: http://www.fichl.org/fileadmin/fichl/documents/FICHL_14_Web.pdf

⁶ See ICJ, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, 20 July 2012, ICJ Reports 2012, para.99 (“In the Court’s opinion, the prohibition of torture is part of customary international law, and it has become a peremptory norm (*jus cogens*)”).

humanity, genocide, torture, and enforced disappearance should be given as specific examples of the non-exhaustive list of crimes with which the Strategy deals. The Strategy should then be renamed to *'EU Genocide Network Strategy on the fight against impunity serious international crimes.'*

We look forward to collaborating with the Secretariat and contact points on the implementation of the Strategy in the future.