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## Committee on Legal Affairs and Human Rights

# Prosecuting and punishing the crimes against humanity or even possible genocide committed by Daesh

## Introductory memorandum

Rapporteur: Mr Pieter OMTZIGT, the Netherlands, Group of the European People's Party

### 1. Introduction

1. The motion underlying this report was tabled on 11 October 2016. It recalled the crimes committed by Daesh, considered that they could be classified as at least war crimes and crimes against humanity, whilst remaining equivocal on whether or not they amounted to genocide, and mentioned the difficulties in bringing the matter before the International Criminal Court (ICC). It was referred to the Committee by the Bureau on 25 November.

2. Prior to this, I had tabled a motion that unequivocally supported the Assembly's previous assessment that the conduct in question could be considered genocide.<sup>1</sup> I intend to maintain that approach. The distinction is important: recognition of the crime of genocide entails positive obligations under international law, notably by requiring states parties to the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide (1948 Genocide Convention) to take action. The international community thus has a moral and legal duty to the victims of Daesh's atrocities to be clear and honest in its assessment of the situation and to be resolute in bringing the offenders to justice for the full extent of their crimes. This Assembly must not regress to a weaker position.

3. Beyond this difference, the two motions share a common goal: to find ways to overcome the obstacles to bringing members of Daesh to justice and to encourage the international community to take urgent and effective action on the matter. This remains the primary goal of my report.

### 2. Origins and evolution of Daesh<sup>2</sup>

4. The origins of Daesh lie in the Al-Qaeda in Iraq (AQI) group established by Abu Musab Al-Zarqawi in 2004, itself based on an earlier Iraqi jihadist group. In 2006, after Al-Zarqawi was killed in a US airstrike, AQI merged with other Iraqi jihadist groups and renamed itself Islamic State of Iraq (ISI). In 2011, ISI, now led by Abu Bakr al-Baghdadi, joined with the Al-Qaeda affiliate Jabhat Al-Nusra group fighting in Syria. In 2013, this alliance split, with a new group, Islamic State in Iraq and Syria (ISIS, otherwise known as Daesh), emerging the larger. Daesh initially prioritised the forcible creation of a 'state' over fighting the Syrian government, which led to clashes with other armed groups and Daesh's withdrawal to its strongholds in north-eastern Syria, where it consolidated its military and financial capacity. Significant territorial gains in Iraq in July 2014

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<sup>1</sup> PACE doc. 14098, motion for a resolution on the 'urgent need to stop genocide and ensure punishment of those complicit in genocide committed by Daesh', 22 June 2016, signed by Pieter Omtzigt and 27 others.

<sup>2</sup> Unless indicated otherwise, the description of the origins and evolution of Daesh set out in this section is taken from the report "Rule of Terror: Living under ISIS in Syria" of the Independent International Commission of Inquiry on the Syrian Arab Republic, United Nations, 14 November 2014.

greatly added to Daesh's resources and allowed its further expansion into eastern Syria, where the complex on-going conflict and power vacuum provided opportunities.

5. The rapid rise of Daesh meant that initially, the threat that it posed was badly underestimated by the international community. Its sudden, spectacular military successes attracted foreign financial and material support, including foreign fighters. Arms and material intended for moderate groups often found their way to extremists, including Daesh, further enhancing its capacities. This allowed Daesh to extend its territorial control, including seizure of economic resources: in June 2014, when overrunning Mosul, it stole perhaps as much as \$400 million from the Central Bank of Iraq;<sup>3</sup> and at its peak, it controlled more than 80% of Syria's oil infrastructure, from which it earned around \$500 million in 2015, contributing to total revenues of around \$1 billion.<sup>4</sup> These economic resources allowed it to pay fighters generously, further attracting recruits. By early 2016, however, it was reported that Daesh was running a budget deficit and had been forced to reduce payments to fighters and others.<sup>5</sup>

6. Daesh has a hierarchical structure with a central command. At its head, Al-Baghdadi holds absolute power, exercised through various bodies including a military council and a network of regional and local emirs and military commanders, enforcing strict discipline and full territorial control. Daesh's leadership structure is dominated by foreign fighters.<sup>6</sup> In the areas it controls, it operates a primitive administrative system with morality and general police, courts, and bodies to manage recruitment, tribal relations and education, as well as some basic services made possible by its financial resources. On 29 June 2014, Daesh declared a 'Caliphate' initially based on the areas it controlled in northern Iraq and eastern Syria, but with far wider geographical pretensions. This further motivated recruits to join the group.

7. Tens of thousands of non-Syrian and non-Iraqi 'foreign fighters' have travelled to the region to join Daesh, although their number, and the flow of new recruits, has declined since the high-point of Daesh's military successes in 2015: from around 31,500 in mid-2014 to around 25,000 in early 2016;<sup>7</sup> by August 2016, it was reported that Daesh had only 15-20,000 fighters left in total.<sup>8</sup> The foreign fighters come from at least 86 countries: of Council of Europe member States, the largest numbers of foreign fighters came from France, Germany, Russia, Turkey and the United Kingdom; per head of population, significant numbers came also from Belgium, Bosnia and Herzegovina, Denmark, Sweden and 'the former Yugoslav Republic of Macedonia'. 3,700 come from just four European countries: the UK, Germany, Belgium and France.<sup>9</sup> It is said that 20-30% of foreign fighters from Western countries return home;<sup>10</sup> this proportion may increase as Daesh continues to lose territory and its capacities are further degraded.

### 3. Crimes committed by Daesh

8. As early as 2014, the specially constituted United Nations Independent International Commission of Inquiry on the Syrian Arab Republic (IICISAR) concluded that Daesh, as an armed group within the meaning of common Article 3 of the Geneva Conventions and customary international law, had committed a catalogue of war crimes and crimes against humanity. In its report, the IICISAR describes Daesh as a "cohesive and coordinated group" functioning under "responsible command" with a "hierarchical structure", able to "impose a policy on its members and ensure the coordinated implementation of decisions made by its leadership". "The commanders of [Daesh] have acted wilfully, perpetrating these war crimes and crimes against humanity with clear intent of attacking persons with awareness of their civilian or hors de combat status. They are individually criminally responsible for these crimes."<sup>11</sup>

9. International mechanisms have, quite properly, been cautious in determining whether Daesh has committed the specific crime of genocide. In August 2014, the Special Adviser of the UN Secretary-General on the Prevention of Genocide and the Special Adviser on the Responsibility to Protect were particularly circumspect, noting that "the reports we have received of acts committed by the "Islamic State" may also

<sup>3</sup> "ISIS Is the World's Richest Terror Group, But Spending Money Fast", NBC News, 20 March 2015.

<sup>4</sup> "ISIS Losses By the Numbers", Wilson Centre, 25 March 2016. Other reports suggest that the total annual Daesh revenue in 2015 was \$2 billion. See "Global Terrorism Index 2016", Institute for Economics and Peace.

<sup>5</sup> "ISIS faces budget crunch, cutting perks and trimming salaries", Associated Press, 16 February 2016.

<sup>6</sup> It should be noted that the ICC Prosecutor has a contradictory view on this point, which is relevant to the issue of whether or not she opens an investigation: see para. 20 below.

<sup>7</sup> "ISIS Losses By the Numbers", op. cit.

<sup>8</sup> "ISIS ranks dwindle to 15,000 amid 'retreat on all fronts', claims Pentagon", The Guardian, 11 August 2016.

<sup>9</sup> "Foreign Fighters: An Updated Assessment of the Flow of Foreign Fighters into Syria and Iraq", The Soufan Group, December 2015.

<sup>10</sup> Munich Security Report, 2016.

<sup>11</sup> "Rule of Terror: Living under ISIS in Syria", Report of the IICISAR, 14 November 2014, paras 74-78.

point to the risk of genocide".<sup>12</sup> In March 2015, the UN High Commissioner for Human Rights stated in slightly more definite terms that "it is reasonable to conclude, in the light of the information gathered overall, that some of those incidents [of attacks by Daesh against religious and ethnic groups] may constitute genocide." In particular, "information pointed to the intent of ISIL to destroy the Yazidi as a group when perpetrating those acts and to the existence of a manifest pattern of attacks against that community, whose identity is based on its religious beliefs. If confirmed, such conduct may amount to genocide".<sup>13</sup>

10. The IICISAR's assessment has likewise evolved over time, as evidence mounted of the nature and extent of Daesh's atrocities. In August 2015, it noted Daesh's religious motivation when targeting the Yazidi community, which it regards as pagan and infidel, with particularly egregious violations committed against women and girls.<sup>14</sup> It also reported on patterns of religiously discriminatory attacks against Christian communities.<sup>15</sup> Nevertheless, despite reiterating its conclusion that Daesh had committed war crimes and crimes against humanity, the IICISAR did not at this stage qualify its actions as genocide.<sup>16</sup>

11. The June 2016 report of the IICISAR sought specifically to determine whether Daesh had committed the crime of genocide against the Yazidi community in Iraq. Taking into account the accumulated evidence available at that time, the IICISAR was now able to make an unequivocal finding: "ISIS has committed, and continues to commit, the crime of genocide, as well as multiple crimes against humanity and war crimes, against the Yazidis. [...] ISIS seeks to destroy the Yazidis in multiple ways, as envisaged by the drafters of the 1948 Genocide Convention."<sup>17</sup> The IICISAR did not consider the atrocities committed against other religious minorities.

12. The atrocities perpetrated by Daesh fulfil the *mens rea* and *actus reus* set out in the definition of genocide in Article II of the 1948 Genocide Convention. Daesh's atrocities, which include killings, torture, rape, sexual violence, enslavement, forced displacement, and many other crimes, correspond to many of the acts listed in Article II. They are being committed predominately against religious groups, for example Christians, Yazidis, and other religious minorities, and are committed with specific intent to destroy the groups in whole or in part. Daesh targets religious minorities in Syria and Iraq as it wants to establish a purely Islamic state and so abolish religious pluralism in the region.

13. It is noteworthy how many of the genocide risk factors set out in the 'Analysis Framework' of the UN Special Adviser on the Prevention of Genocide apply to the circumstances surrounding Daesh's actions – for example: the presence of illegal arms and armed elements; the motivation of Daesh's leading actors; its motivation to target a group and separate it from the rest of the population; its use of exclusionary ideology and construction of identities in terms of 'us' and 'them'; its depiction of a targeted group as unworthy or inferior so as to justify action against it; a permissive environment created by on-going armed conflict that could facilitate access to weapons and commission of genocide; evidence of Daesh's intent to destroy in whole or in part a particular group; the nature of the atrocities committed, including the systematic rape of women which may be intended to transmit a new ethnic identity to the child or to cause humiliation and terror in order to fragment the group; and the targeted elimination of community leaders and/or men and/or women of a particular age group (the 'future generation' or a military-age group). Such circumstances enhance the confidence with which Daesh's conduct may be qualified as genocide.

#### 4. The position of national and international actors on the genocide issue

14. As the evidence has mounted and the position of independent monitoring mechanisms has evolved, a growing number of important national and international actors have also concluded that Daesh has committed genocide. The Parliamentary Assembly was one of the first, in January 2016, when it found that Daesh had "perpetrated acts of genocide and other serious crimes punishable under international law" and called on states to "fulfil their positive obligations under the [1948 Genocide Convention] by taking all necessary measures to prevent genocide".<sup>18</sup> The European Parliament adopted a similar resolution the

<sup>12</sup> Statement by Adama Dieng, Special Adviser of the Secretary-General on the Prevention of Genocide, and Jennifer Welsh, Special Adviser of the Secretary-General on the Responsibility to Protect, on the situation in Iraq, 12 August 2014.

<sup>13</sup> Report of the UNHCHR, 13 March 2015, A/HRC/28/18, paras 16-17.

<sup>14</sup> Report of the IICISAR, 13 August 2015, A/HRC/30/48, paras 110-117.

<sup>15</sup> Ibid, paras 120-122.

<sup>16</sup> Ibid, paras 172-173.

<sup>17</sup> "They came to destroy": ISIS Crimes Against the Yazidis", 15 June 2016, A/HRC/32/CRP.2, paras 201-202.

<sup>18</sup> PACE Resolution 2091 (2016) on foreign fighters in Syria and Iraq, paras 2 and 21.2. In October 2016, the Assembly reiterated its position, calling on member States "to fulfil their positive obligations under international law to prevent the

following month, stating that Daesh was committing genocide against Christians and Yazidis, and urging the UN Security Council to refer the matter to the ICC.<sup>19</sup>

15. Similar positions have been adopted in several Council of Europe member States. The United Kingdom House of Commons, for example, on 20 April 2016, by a unanimous vote of 278 members, stated its belief that “Christians, Yazidis, and other ethnic and religious minorities in Iraq and Syria are suffering genocide at the hands of Daesh” and called on the UK government “to make an immediate referral to the UN Security Council with a view to conferring jurisdiction upon the ICC so that perpetrators can be brought to justice”. On 8 December 2016, the French National Assembly considered that the violence and crimes committed by Daesh against Christian, Yazidi and other minority populations met the criteria of the definition of genocide, called on the French government to recognise this genocide officially and invited the government to seize the UN Security Council of the matter, in order that it give the ICC competence to prosecute these crimes.

16. Countries outside Europe have likewise taken position. On 14 March 2016, the US House of Representatives, by a unanimous vote of 393 members, passed a resolution recognising the atrocities committed against Christians, Yazidis, and other ethnic and religious minorities in Iraq and Syria as genocide. On 17 March 2016, the US Secretary of State, in a carefully considered, closely argued speech, stated that “Daesh is responsible for genocide against groups in areas under its control, including Yazidis, 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 kills Christians because they are Christians; Yazidis because they are Yazidis; Shia because they are Shia.” The Secretary of State went on to note that he was “neither judge, nor prosecutor, nor jury with respect to the allegations of genocide, crimes against humanity, and ethnic cleansing by specific persons. Ultimately, the full facts must be brought to light by an independent investigation and through formal legal determination made by a competent court or tribunal. But the United States will strongly support efforts to collect, document, preserve, and analyze the evidence of atrocities, and we will do all we can to see that the perpetrators are held accountable.”<sup>20</sup> The Canadian government confirmed its recognition of Daesh genocide of the Yazidis on 16 June 2016, and on October 2016, the Canadian House of Commons unanimously passed a motion to the same effect.

## 5. The legal situation concerning prosecution of Daesh members

17. As noted above, there is no doubt that Daesh has committed a catalogue of war crimes and crimes against humanity in Iraq and Syria, and an increasingly widespread acceptance that it has also committed genocide. Such actions fall within the jurisdiction of the ICC, as defined by articles 5, 6, 7 and 8 of the Rome Statute. Under article 28, Daesh military commanders would appear to be responsible for the crimes of those under their command, given Daesh’s hierarchical structure and strict internal discipline (see paragraphs 6 and 8 above). The defence of ‘superior orders’ under article 33 is unlikely to be available to military subordinates, on account at the very least of the manifest unlawfulness of the orders given.<sup>21</sup>

18. Under article 12 of the Rome Statute, the ICC can only exercise jurisdiction where the alleged offence occurred on the territory of, or was committed by a national of a state party to the Rome Statute, or a state that has declared its acceptance of the jurisdiction of the ICC with respect to the crime in question. Otherwise, the ICC has jurisdiction if the UN Security Council refers “the situation in which one or more such crimes appears to have been committed” to the ICC Prosecutor, under article 13 – as was done, for example, in the cases of Sudan and Libya.

19. Neither Iraq nor Syria is party to the Rome Statute and neither has accepted the ICC’s jurisdiction. The ICC therefore does not have territorial jurisdiction over all relevant crimes committed in those countries. As noted in paragraph 7 above, however, many foreign fighters, including thousands from Council of Europe member States and other States parties to the Rome Statute, have joined Daesh and many will, at some level, have been involved in committing offences under international law. This potentially brings such

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ongoing genocide in Syria and Iraq”: see [Resolution 2134 \(2016\)](#) on co-operation with the International Criminal Court: towards a concrete and expanded commitment, para. 8.

<sup>19</sup> European Parliament resolution of 4 February 2016 on the systematic mass murder of religious minorities by the so-called ‘ISIS/Daesh’, para. 2.

<sup>20</sup> During discussion of the situation in the Middle East at the 7419<sup>th</sup> Meeting of the Security Council on 27 March 2015, Austria, Iraq and New Zealand qualified Daesh’s actions as genocide; Bulgaria, the Russian Federation, Slovenia and Switzerland appeared to agree.

<sup>21</sup> ILC, ‘Report of the International Law Commission on the Work of Its 48<sup>th</sup> Session’ (6 May-26 July 1996) UN Doc A/51/10, 90.

persons within the personal jurisdiction of the ICC, even though the crimes they have committed did not take place on the territory of a state within its jurisdiction.

20. Under article 53 of the Rome Statute, the ICC Prosecutor shall, having evaluated the information made available to her, initiate an investigation unless she determines that there is no reasonable basis to proceed, considering whether the information available provides a reasonable basis to believe that a crime within the jurisdiction of the ICC has been or is being committed. This decision may at any time be reconsidered on the basis of new facts or information.

21. On 8 April 2015, the Prosecutor issued a 'Statement on the alleged crimes committed by ISIS'. This noted that "the atrocities allegedly committed by ISIS undoubtedly constitute serious crimes of concern to the international community and threaten the peace, security and well-being of the region, and the world."<sup>22</sup> She recalled that whilst the ICC does not have territorial jurisdiction over these crimes, it may nevertheless exercise personal jurisdiction over alleged perpetrators who are nationals of a State Party. Although thousands of foreign fighters had joined Daesh, some of whom may have been involved in the commission of crimes under international law, it was primarily led by nationals of Iraq and Syria, and so the prospects of investigating and prosecuting those most responsible within the leadership appeared limited. She thus concluded that "the jurisdictional basis for opening a preliminary examination into this situation is too narrow at this stage."

22. The Prosecutor's Statement then noted that decisions of States not party to the Rome Statute (i.e. Iraq and Syria) to accept the ICC's jurisdiction or of the Security Council to confer jurisdiction on it are wholly independent of the ICC itself. She also emphasised that the primary responsibility for the investigation and prosecution of perpetrators of mass crimes rests, in the first instance, with national authorities, adding that the Office of the Prosecutor remained committed to working with relevant States to support domestic investigations and prosecutions. The Office also remained open to receiving additional information on the positions occupied by State Party nationals within Daesh, which could justify future reconsideration of her decision.

23. On 17 December 2015, the Global Justice Centre wrote to the Prosecutor in support of submissions of further detailed information on foreign fighters and their roles in Daesh made by the Yazda organisation and the Free Yazidi Foundation, intended to meet the requirements for opening a preliminary examination into genocide and other crimes committed against the Yazidis by nationals of states parties to the Rome Statute. This letter recalled the policy of the Office of the Prosecutor as set out in its 2015 Report on Preliminary Examination Activities, which stated that the Office would "expand its general prosecutorial strategy to encompass mid- or high-level perpetrators, or even particularly notorious low-level perpetrators, with a view to building cases up to reach those most responsible for the most serious crimes. The Office may also consider prosecuting lower-level perpetrators where their conduct has been particularly grave and has acquired extensive notoriety." It also referred to the significance that the Prosecutor should give to crimes involving sexual violence, gender violence or violence against children, in accordance with article 54 of the Rome Statute and Office's stated policy on sexual and gender-based crime.

## **6. Overcoming the legal obstacles to prosecuting Daesh members**

24. There are three obvious solutions to overcome the obstacles to exercise by the ICC of its jurisdiction over the crimes committed by Daesh: one, Syria and/ or Iraq accept the ICC's jurisdiction; two, the UN Security Council refers the situation to the ICC Prosecutor; and three, the Prosecutor decides to investigate crimes committed by nationals of a state that is a party to or has accepted the ICC's jurisdiction.

25. The first of these is unrealistic. The second is also unlikely, as such a referral would arguably relate to the entire 'situation' in which the crimes were committed. Since serious allegations have been made concerning the actions of certain permanent members of the Security Council or their allies,<sup>23</sup> they may be reluctant to empower the ICC to open an investigation that could examine not only the crimes of Daesh, but also possible offences committed by other actors in the course of the wider conflict. This means that one or more of the permanent members could be motivated to exercise their veto over any decision to refer the

<sup>22</sup> This wording recalls Article 39 of the United Nations Charter, which states that "the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." It could thus be read as suggesting a duty on the part of the Security Council to refer the situation to the ICC Prosecutor.

<sup>23</sup> As, for example, at the 7777<sup>th</sup> meeting of the Security Council on 25 September 2016.

situation to the ICC. On 22 May 2014, a draft Security Council resolution to refer the situation in Syria to the ICC was vetoed by Russia and China, despite all thirteen other members – including Council of Europe member states France, Lithuania, Luxembourg and the United Kingdom – voting in favour. No subsequent attempt has been made to refer the situation in Syria and/ or Iraq to the ICC and the international community's efforts now aim at other solutions to enable prosecution of the perpetrators of atrocities in Syria.

26. The third possible solution to allow prosecution before the ICC, although only partial in that it would be limited to alleged perpetrators who are nationals of a state under the ICC's jurisdiction, nevertheless offers several important advantages. An investigation by the Prosecutor would help to secure evidence, including the testimony of witnesses, to the standard necessary for presentation in court, including domestic courts. Even if no prosecution of any kind was ever subsequently brought, this evidence would be available as a reliable historical record of events. Should the prosecutor decide to bring charges, this would mark the beginnings of justice for the victims, make possible conviction and punishment of offenders and increase the political pressure on the Security Council to refer the situation to the ICC.

27. An alternative route to justice could be the establishment of an ad hoc tribunal. Since February 2015, the IICISAR, having noted the lack of consensus amongst Security Council members on the question of referral to the ICC, has been recommending that it consider referring the situation to an ad hoc tribunal,<sup>24</sup> the March 2016 resolution of the US House of Representatives also called for the "establishment and operation of appropriate tribunals". Various possibilities exist. 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 Rwanda in 1996. 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.

28. As the ICC Prosecutor has noted, however, the primary responsibility for investigating and prosecuting war crimes, crimes against humanity and genocide rests with domestic authorities, and the ICC intervenes when states fail to act. According to Amnesty International, the great majority of UN member States have legislated to provide for universal jurisdiction over at least one of these crimes, although this does not necessarily mean that they can effectively act to enforce international criminal law, due to obstacles within the legislation.<sup>25</sup> The IICISAR observed as early as February 2015 that many States have been willing to investigate and prosecute their own nationals, and that some had shown a willingness to exercise universal jurisdiction also over foreign nationals; it urged the international community to use the principle of universal jurisdiction to investigate and prosecute alleged perpetrators.<sup>26</sup> More recently, the UN General Assembly has welcomed States' efforts to investigate and prosecute crimes committed in Syria, urged other states to do the same and encouraged information sharing between States.<sup>27</sup>

29. Whether the crimes of Daesh will be prosecuted before national or international courts, the gathering of evidence remains an essential task: the Special Adviser on the Prevention of Genocide, for example, has called for "all evidence of criminal activity to be properly documented and secured for future consideration by a court of justice".<sup>28</sup> The IICISAR has played a particularly important role in this respect, amongst other things by compiling lists of alleged perpetrators. The IICISAR, as well as the ICC Prosecutor, has indicated willingness to share evidence with national authorities. On 21 December 2016, the UN General Assembly decided to establish an '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'.<sup>29</sup> The new Mechanism will cooperate closely with the IICISAR "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

<sup>24</sup> A/HRC/28/69, para. 146(b), A/HRC/32/CRP.2, para. 207(a) and A/HRC/34/CRP.3, para. 120(c).

<sup>25</sup> "Universal Jurisdiction: A preliminary survey of legislation around the world – 2012 update", IOR 53/019/2012.

<sup>26</sup> A/HRC/28/69, paras 102-107 and 145(a).

<sup>27</sup> UNGA Resolution 71/248, para. 3.

<sup>28</sup> Statement by Adama Dieng, Special Adviser of the Secretary-General on the Prevention of Genocide, on the situation in and around Mosul (Iraq), 1 November 2016.

<sup>29</sup> The establishment of the new Mechanism followed the 'Bringing Daesh to Justice' campaign launch event, hosted by the foreign ministers of the UK, Belgium and Iraq during the 71<sup>st</sup> UN General Assembly meeting on 19 September 2016, which called for evidence to be gathered and preserved.

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.”<sup>30</sup> It should be noted, however, that its mandate extends only to Syria, in relation to acts committed since 2011 not only by Daesh but by all parties to the conflict, and does not include Iraq. A similar mechanism should be established for the Daesh atrocities committed in Iraq. Furthermore, individual states can also contribute to the gathering of evidence, for example by responding to the IICISAR’s recommendation that States provide expertise, on request, to assist in the preservation and documentation of mass grave sites.<sup>31</sup>

## 7. Conclusions

30. Daesh has committed some of the most appalling crimes the world has seen in recent years, unquestionably amounting to offences under international law. It has not been possible to bring the perpetrators to justice in Syria or Iraq, the countries where these crimes took place. It has not been possible to bring cases before the ICC, because neither Syria nor Iraq has accepted its jurisdiction, the UN Security Council has failed to refer the situation and the ICC Prosecutor has decided not to investigate alleged perpetrators from states within the ICC’s jurisdiction. Whilst some countries have made laudable efforts to investigate and prosecute Daesh’s crimes through exercise of universal jurisdiction, these are far from enough to do justice to the victims or to manifest the international community’s condemnation. Daesh continues to act with shameful impunity, and the response of the international community as a whole remains woefully inadequate.

31. General political recognition of the commission of genocide by Daesh would help to achieve this, by turning a vicious circle into a virtuous one. The courts are at present unable to make a definitive finding on the issue because of lack of jurisdiction or evidence, but with no such finding, many states are failing to act on their positive obligations under the 1948 Genocide Convention. Recognition of the genocide by states followed by concerted action pursuant to their obligations could provide the ICC in particular with the opportunity and means to bring Daesh to justice. Of course, genocide is a perhaps uniquely serious allegation and one that should not be made lightly, but there is now more than enough evidence to justify its use in a political sense, as shown by the positions of a growing number of national and international bodies. It is also the case that general political qualification of the actions of Daesh as genocide, whilst having legal consequences for the international community, in no way prejudices criminal proceedings against Daesh – although it may be essential if they are ever to be brought to trial.

32. In the meantime, the international community must ensure that the evidence necessary for eventual prosecution of Daesh members, whether before domestic or international courts, is collected and preserved to the necessary standards of admissibility. Just as Nazi war criminals are still being prosecuted for their heinous crimes today, so should justice never rest until the criminals of Daesh, both principal and complicitous actors, are brought to account and punished their crimes.

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<sup>30</sup> UNGA Resolution 71/248, para. 4.

<sup>31</sup> A/HRC/32/CRP.2, para. 211(c).