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

### **Report<sup>1</sup>**

Committee on Legal Affairs and Human Rights

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

### *Summary*

The Committee on Legal Affairs and Human Rights concludes that in Syria and Iraq, Daesh has committed genocidal acts against the Yazidi, Christian and non-Sunni Muslim minorities with intent to destroy those groups, in whole or in part, as well as other crimes under international law.

Neither Syria nor Iraq is Party to the International Criminal Court (ICC), whose jurisdiction includes these crimes. The United Nations Security Council has been prevented from referring the situation in Syria to the ICC. The ICC Prosecutor has declined to open an investigation. There is at present no international judicial mechanism capable of trying Daesh. The primary responsibility for prosecuting crimes under international law rests, however, with national authorities.

Member and observer States of the Council of Europe and parliaments having observer or partner for democracy status with the Parliamentary Assembly should recognise the genocide committed by Daesh and take specific action to prevent and punish these and other crimes under international law. The United Nations should establish appropriate mechanisms for investigating serious crimes committed in Iraq, and consider establishing a special judicial mechanism for trying the perpetrators. The committee also proposes making practical recommendations to Syria and Iraq, the Independent International Commission of Inquiry on the Syrian Arab Republic and the ICC Prosecutor.

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1. Reference to committee: [Doc. 14167](#), Reference 4251 of 25 November 2016.



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## A. Draft resolution<sup>2</sup>

1. The Parliamentary Assembly recalls its [Resolution 2091 \(2016\)](#) on foreign fighters in Syria and Iraq. It reiterates its position that “individuals who act in the name of ... Daesh ... have perpetrated acts of genocide and other serious crimes punishable under international law. States should act on the presumption that Daesh commits genocide”, along with its calls on its member and observer States to “fulfil their positive obligations under the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide [1948 Genocide Convention] by taking all necessary measures to prevent genocide”.

2. Numerous national parliaments, including Council of Europe member States such as Austria, France, Lithuania and the United Kingdom, as well as those of Australia Canada and the United States of America, have also condemned Daesh’s actions as genocide, as have the European Parliament, the United States and Canadian governments and Pope Francis. These political positions reflect the expert assessments of authoritative international mechanisms including the United Nations Independent International Commission of Inquiry on the Syrian Arab Republic, the United Nations High Commissioner for Human Rights and the United Nations Special Rapporteur on Minority Issues.

3. There is conclusive evidence that Daesh has committed against members of the Yazidi, Christian and non-Sunni Muslim minorities genocidal acts including mass and individual killing, and serious bodily or mental harm, by way of torture, beatings and inhuman and degrading treatment and, in the case of the Yazidi and Christian groups, rape and sexual slavery and abuse. Furthermore, there is conclusive evidence that Daesh has:

3.1. subjected Yazidis to forced labour, including military service, and terrorist indoctrination including training children as suicide bombers, amounting to serious bodily and mental harm; deliberately inflicted conditions of life calculated to bring about the Yazidi group’s physical destruction, in part, by way of subjection to siege and to insanitary living conditions and inadequate nutrition without access to medical care; imposed measures intended to prevent births, by separating Yazidi women and men; and forcibly transferred children of the group to another group, with subsequent forced conversion and indoctrination of those children;

3.2. deployed members of Christian minorities as “human shields”, causing serious bodily or mental harm, and separated Christian children from their mothers, forcibly transferring them to another group.

4. These acts were committed by Daesh with intent to destroy, in whole or in part, the Yazidi, Christian and non-Sunni minority groups. In particular, Daesh made numerous declarations of doctrine and policy encompassing the destruction of Yazidi, Christian and non-Sunni Muslim minorities as groups and of intent to commit specific genocidal acts against them, before and during commission of these acts. These included descriptions of the Yazidi as “devil-worshipping pagans” and references to Christians as “slaves of the cross” whose women and sons would be enslaved. Daesh atrocities against all three groups were systematic and entirely consistent with these declarations. Daesh’s systematic destruction of Yazidi, Christian and non-Sunni Muslim places of worship is further evidence of its genocidal intent in committing the above-mentioned acts. Its theft of homes and property of Yazidis, Christians and non-Sunni Muslims also indicates a genocidal intent to disperse and weaken the cohesion of these groups, with a view to their destruction.

5. Neither Syria nor Iraq is Party to the International Criminal Court (ICC), whose material jurisdiction includes the crime of genocide, as well as other crimes under international law. The United Nations Security Council has been prevented by the vetoes of two of its permanent members from referring the situation in Syria to the ICC, and the ICC Prosecutor has declined to open an investigation in relation to offences that may have been committed by nationals of a State Party to the Rome Statute of the ICC. There is thus at present no international judicial mechanism actually capable of trying Daesh. In this connection, the Assembly recalls that the primary responsibility for the investigation and prosecution of crimes covered by the Rome Statute rests with national authorities, especially those of the States where those crimes have taken place.

6. On the basis of the foregoing, the Assembly calls 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:

6.1. formally recognise that Daesh has committed genocide, notably against the Yazidi people, Christian minorities and non-Sunni Muslim minorities;

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2. Draft resolution adopted unanimously by the committee on 5 September 2017.

6.2. take prompt and effective action in accordance with their obligation under the 1948 Genocide Convention to prevent and punish acts of genocide, as well as their general responsibility to act against crimes under international law, including by:

6.2.1. providing for universal jurisdiction over crimes covered by the Rome Statute of the ICC, where this is not already the case, and investigating and, where justified, prosecuting any suspected Daesh members who come within their jurisdiction or control;

6.2.2. prosecuting all offences committed within their jurisdiction relating to Daesh activities abroad, and in this connection, ratifying and fully implementing the 2005 Council of Europe Convention on the Prevention of Terrorism (CETS No. 196) and its 2015 Additional Protocol (CETS No. 217);

6.2.3. implementing the recommendations set out in Assembly [Resolution 2091 \(2016\)](#) on foreign fighters in Syria and Iraq;

6.2.4. contributing to the collection and preservation of evidence of Daesh's crimes, including by making voluntary contributions to the budget of the United Nations "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", in order that it may become fully operational without further delay;

6.2.5. not obstructing any possible future United Nations Security Council resolution that may contribute to the prosecution of Daesh members before an international, hybrid or national tribunal.

7. The Assembly calls on the United Nations to establish such mechanisms as may be necessary to inquire and assist, including by way of collection and preservation of evidence, in the investigation and prosecution of persons responsible for serious crimes committed in Iraq. It calls on the Iraqi authorities to cooperate with any such initiatives. It calls on the international community to be prepared to provide the necessary resources for any such mechanisms to become promptly operational. It further calls on the United Nations to consider establishing a special judicial mechanism for trying crimes committed by Daesh in Iraq, which could be based on existing international or hybrid models, or a system based in the Iraqi national courts with assistance from international experts as advisers rather than judges.

8. The Assembly also calls on:

8.1. Syria and Iraq to ratify the Rome Statute of the ICC;

8.2. the Independent International Commission of Inquiry on the Syrian Arab Republic to proceed with its report on genocide committed by Daesh against religious minorities other than the Yazidis;

8.3. the ICC Prosecutor to reconsider, in the light of subsequent submissions by concerned parties, her decision not to open a preliminary inquiry into crimes committed by Daesh.

## B. Explanatory memorandum by Mr Pieter Omtzigt, rapporteur

### 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 on Legal Affairs and Human Rights for report on 25 November 2016.

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>3</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.

4. In the course of the preparation of the report, the committee held a hearing with the participation of Ms Nadia Murad, a Yazidi survivor of Daesh and winner of the Assembly's 2016 Václav Havel Human Rights Prize; Mr Geoffrey Robertson QC, former President of the United Nations Special Court for Sierra Leone; and Ms Ewelina Ochab, legal researcher and PhD scholar at the University of Kent (United Kingdom). A questionnaire was also issued: I would like to thank the parliaments of the 22 member and observer States which replied.<sup>4</sup>

### 2. Origins and evolution of Daesh<sup>5</sup>

5. 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 United States air strike, 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 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.

6. 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 US\$400 million from the Central Bank of Iraq;<sup>6</sup> and at its peak, it controlled more than 80% of Syria's oil infrastructure, from which it earned around US\$500 million in 2015, contributing to total revenues of around US\$1 billion.<sup>7</sup> These economic resources allowed it to pay fighters generously, further attracting recruits. Since then, Daesh's situation has deteriorated significantly: by early July 2017, Iraqi forces had retaken all but

3. [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.

4. Austria, Azerbaijan, Canada, Cyprus, Denmark, Finland, France, Germany, Hungary, Ireland, Lithuania, Montenegro, the Netherlands, Norway, Poland, Romania, the Slovak Republic, Slovenia, Spain, Sweden, Switzerland, the United Kingdom.

5. Unless otherwise indicated, 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, A/HRC/27/CRP.3.

6. "ISIS Is the World's Richest Terror Group, But Spending Money Fast", NBC News, 20 March 2015.

a small area of central Mosul,<sup>8</sup> and its Syrian stronghold, Raqqa, was surrounded and under attack by US-backed Arab and Kurdish forces.<sup>9</sup> As its territorial losses have mounted, so have its revenues fallen: by one estimate, from US\$81 million per month in the second quarter of 2015 to US\$16 million in the second quarter of 2017.<sup>10</sup>

7. 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>11</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.

8. 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>12</sup> by August 2016, it was reported that Daesh had only 15 000 to 20 000 fighters left in total.<sup>13</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 Austria, Belgium, Bosnia and Herzegovina, Denmark, Sweden and "the former Yugoslav Republic of Macedonia". 3 700 come from just four European countries: the United Kingdom, Germany, Belgium and France.<sup>14</sup> It is said that 20-30% of foreign fighters from Western countries return home;<sup>15</sup> this proportion may increase as Daesh continues to lose territory and its capacities are further degraded. Some of the past returnees have been involved in the planning and execution of large-scale terroristic attacks: a number of terrorists involved in the November 2015 Paris attacks (130 civilian deaths) and the March 2016 Brussels attacks (32 deaths) had returned from fighting for Daesh in Syria, and the perpetrator of the 2017 Manchester suicide bombing (22 deaths) had engaged with Daesh in Libya and Syria.<sup>16</sup>

### 3. Crimes committed by Daesh

9. 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 co-ordinated group" functioning under "responsible command" with a "hierarchical structure", able to "impose a policy on its members and ensure the co-ordinated 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>17</sup> I see no reason to question this assessment, nor have I heard it being questioned by any serious commentator on the situation in Syria and Iraq.

10. 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 United Nations 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

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

8. "ISIS clings to last tiny urban patches of crumbling 'caliphate'", CBS News, 4 July 2017.

9. "Iraqi forces enter Mosul where ISIS declared caliphate", *The Guardian*, 29 June 2017.

10. "ISIS is in retreat and its sources of income are drying up", CNN, 29 June 2017.

11. 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 paragraph 33 below.

12. "ISIS Losses By the Numbers", op. cit.

13. "Isis ranks dwindle to 15 000 amid 'retreat on all fronts', claims Pentagon", *The Guardian*, 11 August 2016.

14. "Foreign Fighters: An Updated Assessment of the Flow of Foreign Fighters into Syria and Iraq", The Soufan Group, December 2015.

15. Munich Security Report, 2016.

16. "Paris attacks: Who were the attackers?", BBC News, 27 April 2016; "Who Are Mohamed Abrini And Osama Kraeim?", Sky News, 8 April 2017; "Everything we know about Manchester suicide bomber Salman Abedi", *The Telegraph*, 26 May 2017.

17. "Rule of Terror: Living under ISIS in Syria", Report of the IICISAR, 14 November 2014, paragraphs 74-78.

State' may also point to the risk of genocide".<sup>18</sup> In March 2015, the United Nations 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>19</sup>

11. 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. It also reported on patterns of religiously discriminatory attacks against Christian communities. 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>20</sup>

12. 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.<sup>21</sup> 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>22</sup> The IICISAR did not consider the atrocities committed against other religious minorities.

13. There is, however, some disagreement on the genocide issue. The disagreements fall under two heads. First, whether any determination of the issue must be left to an (international) judicial body. And second, whether the definition of genocide under international law is satisfied by the established facts concerning Daesh's acts in Syria and Iraq. A further controversy, falling under the second head, concerns the question of which ethnic and religious groups have been victims of genocidal acts committed by Daesh. I will address each of these issues in turn.

### **3.1. Whether determination of the genocide question must be left to a judicial body**

14. This objection has been expressed by some governments, including in countries whose parliaments have recognised the genocide and called on their governments to act. I sincerely hope that it does not reflect a reluctance to accept the legal consequences of a State's recognition of commission of genocide. This would be a betrayal of the essential principles underlying the 1948 Genocide Convention and an obstruction to achievement of its purpose. I would also disagree with those who may say that qualification of the actions of Daesh as genocide could be prejudicial to subsequent criminal proceedings. Political recognition by governments of Daesh's genocide does not prejudice criminal proceedings against individual suspects brought by independent prosecutors in independent courts, as individual guilt would still have to be established in each case.

15. There is a spiralling perversity to this objection. Without acceptance by governments that the case for Daesh's genocide is established to what one might call a *political* standard of proof, and a resulting acceptance that this entails legal obligations under the 1948 Genocide Convention to prevent and punish it, there is far less chance that the courts will ever be given the opportunity to determine the matter to the criminal standard of proof; and so governments will continue to reserve their position, and the courts will remain unable to act, and so on. In the meantime, the genocide will have continued and annihilation of the targeted population been accomplished. As the British politician Lord Alton said following the United Kingdom parliamentary debate, "Having no formal mechanism to refer evidence of genocide to the high court simply leads to government buck-passing and hand-wringing. They repeatedly say that determining whether a genocide is under way is a matter for the courts but then refuse to provide a trigger for a referral. Parliament ... needs to force the government's hand. Otherwise we might as well rip up the genocide convention as a

18. 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.

19. Report of the UNHCHR, 13 March 2015, A/HRC/28/18.

20. Report of the IICISAR, 13 August 2015, A/HRC/30/48.

21. The IICISAR was at the time composed of Mr Paulo Sérgio Pinheiro (Chairperson), a Brazilian legal scholar, Ms Karen Koning AbuZayd, an American diplomat, Mr Vitit Muntarbhorn, a Thai international law professor, and Ms Carla Del Ponte, former Swiss attorney-general and chief prosecutor of the international tribunals for the former Yugoslavia and for Rwanda.

22. "They came to destroy": ISIS Crimes Against the Yazidis", 15 June 2016, A/HRC/32/CRP.2.

worthless piece of paper”.<sup>23</sup> It is essential for governments, after careful, informed deliberation, to take this decision in order for the 1948 Genocide Convention to be effective. The Dutch Advisory Committee on Issues of Public International Law and the External Advisor on Public International Law have noted that “[t]he government is the most important representative of the state in international relations. So it is primarily the task of the government to ascertain whether genocide or crimes against humanity have been or are being committed in another state”.<sup>24</sup>

### **3.2. Whether the definition of genocide under international law is satisfied**

16. The atrocities perpetrated by Daesh fulfil the definition of genocide in Article II of the 1948 Genocide Convention. The *mens rea* (criminal state of mind) of genocide is an “intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such”; the *actus rei* (criminal acts) include killing, causing serious bodily or mental harm, deliberately inflicting conditions of life calculated to bring about the group’s physical destruction in whole or in part, imposing measures intended to prevent births and forcibly transferring children of the group to another group. Daesh’s atrocities, which include killings, torture, rape and other sexual violence (which may be considered as forms of serious bodily or mental harm<sup>25</sup>), enslavement, forced displacement, removing children from their families and many other crimes, correspond to many of the acts listed in Article II. These atrocities are being committed predominantly against religious groups, for example Christians, Yazidis, and other 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. It is true that Daesh also commits crimes against the population at large; there is, however, no evidence that this is done with the specific intent necessary to classify these other crimes as genocide.

17. It is noteworthy how many of the genocide risk factors set out in the “Analysis Framework” of the United Nations 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 ongoing 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.

### **3.3. Which ethnic and religious groups have been victims of Daesh genocide**

18. As noted above, the IICISAR’s detailed 2016 report concluded decisively that Daesh has committed genocide against the Yazidis. Other authoritative international actors have come to the same conclusion, including the UN High Commissioner for Human Rights<sup>26</sup> and the UN Special Rapporteur on minority issues,<sup>27</sup> as well as specialised non-governmental organisations (NGOs) such as Genocide Watch<sup>28</sup> and the United States Holocaust Memorial Museum.<sup>29</sup> The IICISAR report describes in detail the treatment of the Yazidis by Daesh, beginning with the armed attack on their homeland and the siege of Mount Sinjar, which inflicted upon them conditions of life calculated to bring about destruction of the group in whole or in part. The Yazidis were then separated according to age and gender, a measure intended to prevent births within the group, since Yazidi religious tradition requires both parents to be Yazidi for a child to be so. Women and pubescent girls were separated from their male relatives, and married women separated from unmarried women, meaning that pubescent girls were separated from their mothers. There was at least one mass killing

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23. “Why won’t the government recognise Daesh atrocities as genocide? I have a hunch”, *The Guardian*, 19 April 2016.

24. “Advies inzake mogelijkheden, betekenis en wenselijkheid van het gebruik door politici van de term genocide”, 21 March 2017.

25. International Criminal Tribunal for Rwanda, Trial Chamber, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, judgment of 2 September 1998.

26. “Protecting minority rights to prevent or mitigate the impact of humanitarian crisis”, speech before the 9th Forum on Minority Issues, 24 November 2016.

27. Statement of the Special Rapporteur on minority issues on conclusion of her official visit to Iraq, 27 February to 7 March 2016.

28. “ISIS is committing genocide”, *The Washington Examiner*, 20 August 2015.

29. “‘Our Generation is Gone’: The Islamic State’s Targeting of Iraqi Minorities in Ninewa”, 2015.

of older women (over 60). Groups of women and girls were then forcibly transferred to mass holding sites, in severely crowded conditions with little to eat or drink and poor sanitary conditions; many, especially younger girls, became seriously ill, but received no medical treatment. Daesh fighters came to these sites to select, purchase and remove Yazidi women, whom they refer to as *sabaya* (slaves) and consider as chattels; these slave markets developed to include online auctions, and Yazidi women were often bought and sold repeatedly. Enslaved women were systematically subjected to rape, other forms of sexual violence and severe beatings. Survivors who escaped or were sold back to their families suffer severe psychological consequences of the extreme mental and physical trauma. Large numbers of men and pubescent boys were immediately killed, or forcibly converted to Islam, held captive and made to perform forced labour. Pre-pubescent boys were removed from their mothers at age seven (forcibly transferred to another group), then forcibly converted and forced to attend indoctrination and military training sessions, including as suicide bombers, causing them serious mental harm; the aim of the forcible conversion and indoctrination was to destroy their religious identity. The youngest children, although left with their mothers, were subjected to persistent brutality including beatings and insults amounting to serious bodily and mental harm.

19. Daesh propaganda, even prior to the attack on Sinjar, gave careful consideration to how the Yazidis – whom Daesh consider to be “devil-worshippers” – should be treated under Daesh’s interpretation of Islamic law. Daesh’s subsequent treatment of captured Yazidi, wherever it took place, was clearly consistent with this doctrine. Other non-Sunni ethnic and religious groups that fell victim to Daesh were not consistently subjected to the same treatment; this corresponds to the fact that Daesh doctrine and conduct distinguished Yazidis, as “pagans” (*mushrik*), from Jews and Christians, as “People of the Book” (*Ahl Al-Kitab*). The atrocities committed against the Yazidis were accompanied by systematic destruction of Yazidi shrines and temples, a phenomenon which both the International Criminal Tribunal for the former Yugoslavia and the International Court of Justice consider may serve evidentially to confirm an intent to destroy the group, as such.<sup>30</sup>

20. I fully subscribe to the findings of the IICISAR, which are extensively supported by numerous other sources and authoritative commentators. There can be no doubt that Daesh has committed and continues to commit genocide against the Yazidis.

21. It is also widely asserted, including in many parliamentary declarations, that Daesh has committed genocide against Christian minorities. The IICISAR has not yet reported on Daesh atrocities committed against other religious minorities. Other IICISAR reports do, however, provide some information. These note that although Daesh claims to consider Christians to be “People of the Book”, they still suffered forced displacement and deprivation of property; some 200 000 fled their homes in the Ninewa plains when confronted by the Daesh onslaught, following which Daesh destroyed historic Christian churches and cathedrals.<sup>31</sup> IICISAR reports also mention that in September and October 2013, Daesh attacked and destroyed churches of various Christian denominations in Ar-Raqqah governate;<sup>32</sup> and in February 2015, Daesh attacked Christian villages, targeting villagers on the basis of their religion.<sup>33</sup> Another source reports that in June 2014, Daesh attacked Aramean, Assyrian and Chaldean Christians in the province of Mosul, targeting them on the basis of their religion; confiscated all churches, homes and other property of Christians after marking it with the Arabic letter “N” (for “Nasrani”, i.e. Christian); and sold Christian and Yazidi women as slaves, even publishing a list of prices for them.<sup>34</sup> Another report sets out a strongly argued and evidentially detailed case for Daesh’s violations against Christians to amount to genocide, based on specific statements, policies and patterns of conduct that correspond to the requirements of the legal definition set out in the 1948 Genocide Convention.<sup>35</sup> This report describes separation of Christian children from their mothers, sexual slavery of Christian women, the “commonplace” murder of Christians (estimated at thousands across Syria) and hostage-taking. It refers to Daesh statements of intent to, for example, “conquer your Rome, break your crosses and enslave your women [and] sell your sons as slaves at the slave market”, and to “burn the slaves of the Cross”. According to the authors, “[t]he plain meaning of these statements, especially in context, is clear: The so-called Caliphate has slated Christians for destruction – now and in an apocalyptic battle to come”.

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30. *Prosecutor v. Krstic*, ICTY Appeals Judgment, 19 April 2014; *Bosnia and Herzegovina v. Serbia and Montenegro*, Application of the Convention on the Prevention and Punishment of the Crime of Genocide, International Court of Justice judgment, 16 February 2006.

31. A/HRC/28/18, paragraphs 21-22.

32. A/HRC/27/CRP.3, paragraphs 25-26.

33. A/HRC/30/48, paragraphs 120-122.

34. “De Arabische lente en de genocide op Arameeërs”, July 2017, Federation of Arameans in the Netherlands.

35. “Genocide against Christians in the Middle East”, 9 March 2016, Knights of Columbus/In Defense of Christians.

22. It is claimed by some that Daesh tolerates Christians in the same way that they were tolerated under the “Pact of Umar” that regulated their status in Muslim caliphates between the 9th and 19th centuries. This assertion has been strongly refuted, essentially on the grounds that whilst Christians are required to pay a so-called *jizya* tax, it does not correspond in practice to the earlier, historical model: it is set at an extortionately high rate, those who pay it are nevertheless subject to killing, ill-treatment, deprivation of liberty and deployment as human shields, and they are unable to practice their religion, in part due to destruction of churches and kidnapping of priests.<sup>36</sup> Christians are faced with an appalling choice: pay the *jizya*, convert to Islam, leave or be killed. The brutal reality is that Daesh considers Christians as infidels, liable to be killed; its *jizya* has been described as “a ploy from which ISIS could keep the Christians there to take advantage of them and abuse them” and a “Caliphate publicity stunt”.<sup>37</sup> One widely reported estimate suggests that around one third of Iraq’s 2014 population of 200 000 to 250 000 Christians have fled the country, with many of those remaining internally displaced, and perhaps as many as half of Syria’s 2011 population of around 2 million Christians have left, again with high levels of internal displacement.<sup>38</sup> It should be recalled that Daesh also has a presence in Egypt, where it has been systematically attacking churches and driving Coptic Christian communities from their homes.<sup>39</sup>

23. The nature and scope of the atrocities committed against Christians by Daesh, the consequences of those atrocities on the Christian communities of especially Iraq and Syria as groups and Daesh’s numerous declarations of doctrinally motivated intent are all extremely well documented and strongly suggestive of deliberate genocide.

24. The IICISAR has also provided specific information in its general reports on Daesh crimes committed against non-Sunni Muslims, including Shi’a, whom Daesh considers to be apostates or heretics; many commentators and some of the parliamentary declarations consider also these acts to amount to genocide. Virtually all of the tens of thousands of Turkmen and Shabaks living in villages around Mosul fled in the face of Daesh’s 2014 capture of the city. Many, including children, were nevertheless captured, ordered to “repent” of their “heretical” views, tortured and killed, and their mosques and properties were pillaged.<sup>40</sup> During these attacks, Daesh tortured and killed more than a thousand Shi’a whom they had deliberately separated from Iraqi soldiers they had captured. In August 2015, a Daesh bomb killed at least 76 people in a majority Shi’a district of Baghdad.<sup>41</sup> In July 2016, Daesh again attacked a Shi’a district of Baghdad, killing more than 300.<sup>42</sup> Later the same month, Daesh attacked the Mausoleum of Sayed Mohamed bin Ali al-Hadi, a Shi’ite holy place in central Iraq, killing at least 40 people.<sup>43</sup> In April 2017, a Daesh suicide bomber attacked buses carrying mainly Shi’a villagers during an agreed exchange from rebel-held areas, killing 126 people, of whom 80 were children.<sup>44</sup>

25. The nature and scope of the atrocities committed against non-Sunni Muslims by Daesh, the consequences of those atrocities on these communities, especially in Iraq and Syria, as groups and Daesh’s numerous declarations of doctrinally motivated intent are all well documented and strongly suggestive of deliberate genocide.

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

26. 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

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36. See, for example, “Falling for ISIS Propaganda about Christians”, *The American Interest*, 21 July 2016, and “Genocide against Christians in the Middle East”.

37. See, for example, “Christians’ Life in ISIS-Controlled Iraq: A Daily Dance With Death”, *National Catholic Register*, 6 April 2017, and “Genocide against Christians in the Middle East”; also “Convert, pay tax, or die, Islamic State warns Christians”, Reuters, 18 July 2014.

38. “Understanding recent movements of Christians from Syria and Iraq to other countries across the Middle East and Europe”, Open Doors International/ Served/ Middle East Concern, June 2017.

39. See, for example, “Egypt’s Christians Flee ISIS Violence”, Human Rights Watch, 13 March 2017.

40. “Iraq: ISIS Abducting, Killing, Expelling Minorities”, Human Rights Watch, 19 July 2014.

41. “Islamic State claims huge truck bomb attack in Baghdad’s Sadr City”, Reuters, 13 August 2015.

42. “The ISIS campaign against Iraq’s Shia Muslims is not politics. It’s genocide”, *The Guardian*, 5 January 2017.

43. “Iraq says Balad suicide blast is Isis attempt to stir up sectarian war”, *The Guardian*, 8 July 2016.

44. “It’s Time To Acknowledge Shi’ite Genocide”, *Huffington Post*, 18 April 2017.

measures to prevent genocide”.<sup>45</sup> The European Parliament adopted a similar resolution the following month, stating that Daesh was committing genocide against Christians, Yazidis and other religious minorities, and urging the United Nations Security Council to refer the matter to the ICC.<sup>46</sup>

27. Similar positions have been adopted in several Council of Europe member States. As early as 15 December 2015, the Seimas of the Republic of Lithuania stated that “atrocities against Christians and representatives of other religious minorities which are targeted in the Middle East, particularly in Iraq and Syria, and North Africa solely on religious grounds can be considered as genocide”. The United Kingdom House of Commons, 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 United Kingdom 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. Also in 2016, the Hungarian Parliament declared that Daesh’s atrocities “shall be considered to be acts of genocide, crimes against humanity and war crimes”. On 7 June 2017, the Austrian National Council endorsed the European Parliament resolution, whilst also calling for a formal declaration by the UN Security Council that ISIS atrocities against Christians and other religious and ethnic minorities are acts of genocide, and for prosecution of these crimes before the ICC.

28. Countries outside Europe have likewise taken position. On 14 March 2016, the United States 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 15 March 2016, the United States Senate declared that the atrocities perpetrated by Daesh against Christians, Yazidis, and other religious and ethnic minorities in Iraq and Syria constitute war crimes, crimes against humanity, and 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>47</sup> The current United States administration has maintained that position, Secretary of State Tillerson stating that “ISIS is clearly responsible for genocide against Yazidis, Christians, and Shia Muslims in areas it controlled”.<sup>48</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. On 2 May 2016, the Australian House of Representatives recognised Daesh’s “ongoing genocidal conduct ... against indigenous minorities in Iraq, including the Assyrian [Christian] people”.<sup>49</sup> Pope Francis has also asserted that “a form of genocide” is taking place against Christians in the Middle East.<sup>50</sup>

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45. [Resolution 2091 \(2016\)](#) on foreign fighters in Syria and Iraq, paragraphs 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 ongoing genocide in Syria and Iraq”: see [Resolution 2134 \(2016\)](#) “Co-operation with the International Criminal Court: towards a concrete and expanded commitment”, paragraph 8.

46. European Parliament resolution of 4 February 2016 on the systematic mass murder of religious minorities by the so-called “ISIS/Daesh”, paragraph 2.

47. During discussion of the situation in the Middle East at the 7419th 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.

48. Preface to the International Religious Freedom Report 2016, US Department of State.

49. “Australia Recognises Crimes Committed By ISIS Against Assyrians As Genocide”, Assyrian International News Agency, 2 May 2016.

50. Address of the Holy Father to the Second World Meeting of Popular Movements, 9 July 2015.

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

29. 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 7 and 9 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>51</sup>

30. 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.

31. 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 8 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 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.

32. 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.

33. 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>52</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".

34. 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.

35. 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.

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

52. This wording recalls Article 39 of the United Nations Charter, which states that "[t]he 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.

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 the Office’s stated policy on sexual and gender-based crime.

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

36. 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 the Rome Statute or has accepted the ICC’s jurisdiction.

37. 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>53</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 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 13 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. In August 2017, IICISAR member Ms Carla Del Ponte resigned in protest at the UN Security Council’s failure to act on the inquiry’s findings and recommendations, arguing that its work was “not backed by any political will”.<sup>54</sup>

38. 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.

39. 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>55</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 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. I understand that the Iraqi authorities are somewhat reluctant to agree to a “special court” or a “hybrid” judicial mechanism. Consideration could therefore be given to variants on these models, such as extraordinary chambers within Iraqi courts, composed of Iraqi judges, but assisted by international experts.

53. As, for example, at the 7777th meeting of the Security Council on 25 September 2016.

54. “Syria investigator Del Ponte quits, blaming U.N. Security Council”, Reuters, 6 August 2017.

55. A/HRC/28/69, paragraph 146.b, A/HRC/32/CRP.2, paragraph 207.a and A/HRC/34/CRP.3, paragraph 120.c.

40. 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>56</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>57</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>58</sup>

41. Most countries that replied to the questionnaire allow for exercise of universal jurisdiction over offences under international law, most clearly in the cases of Austria, Canada, Cyprus, Denmark, Finland, France, Germany, Ireland, Lithuania, the Netherlands, the Slovak Republic, Slovenia, Sweden, Switzerland and the United Kingdom. Many countries' replies made clear their policy of applying criminal law measures to returnees from Syria and Iraq: Austria, France, Germany, Spain, Sweden, Switzerland and the United Kingdom all drew particular attention to their readiness to investigate and, where justified, prosecute returnees. In France, for example, the Anti-Terrorism Unit is working on 122 procedures: 170 persons are under investigation, of whom 105 were remanded in custody. The Netherlands has prosecuted 15 returnees, three of whom were convicted; Norway has prosecuted eight, with five convicted; and information provided in the United Kingdom's reply suggests that eight returnees have been convicted for terrorist offences. Norway also indicated that it was considering initiating criminal investigations against persons who had not yet returned, in order that international arrest warrants could be issued. Several replies, in particular those of Denmark, Finland, France and the United Kingdom, described at some length the serious potential long-term security threat posed by returnees. United Kingdom law allows for deprivation of citizenship; it has been reported that over 150 suspected jihadists and criminals have been deprived of their citizenship and banned from returning to the United Kingdom, amid fears of an influx of Daesh members resulting from its military defeat.<sup>59</sup> Denmark has introduced a ban on travelling to certain affected areas; other countries allow for seizure of suspects' passports (France, in the case of minors, Germany and the United Kingdom).

42. A number of States also underlined the need for deradicalisation and reintegration measures, notably Austria, Canada, Denmark, Finland, Ireland, Slovenia and Sweden, the latter stressing the importance of such measures given the difficulties in obtaining evidence against and securing convictions of returnees. Re-education measures for the children of returning Daesh members, who may be too young to be considered criminally liable for their previous situation but may have been subject to violent extremist indoctrination, is particularly important.

43. 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>60</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. I have therefore proposed that the Committee ask the Bureau to invite a representative of IICISAR to address the Assembly during the debate on this report.

44. 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>61</sup> The new mechanism will co-operate 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 independent criminal proceedings, in accordance with international law standards, in national, regional or international courts or tribunals that have or may in the

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

57. A/HRC/28/69, paragraphs 102-107 and 145.a.

58. UNGA Resolution 71/248, paragraph 3.

59. "UK 'has stripped 150 jihadists and criminals of citizenship'", *The Guardian*, 30 July 2017.

60. 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.

61. The establishment of the new Mechanism followed the "Bringing Daesh to Justice" campaign launch event, hosted by the foreign ministers of the United Kingdom, Belgium and Iraq during the 71st UN General Assembly meeting on 19 September 2016, which called for evidence to be gathered and preserved.

future have jurisdiction over these crimes, in accordance with international law".<sup>62</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. Furthermore, although Ms Catherine Marchi-Uhel, a French former judge, was appointed head of the mechanism in July, it has still not become fully operational, as it has not yet received the voluntary contributions necessary to finance its activities.

45. 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>63</sup>

## 7. Conclusions

46. 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 States 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.

47. 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 by paving the way for proper judicial investigations, in no way prejudices criminal proceedings against Daesh – although it may be essential if they are ever to be brought to trial.

48. 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.

49. The Parliamentary Assembly must stand by its condemnation of Daesh's crimes, including its commission of genocide, and make specific recommendations to member and observer States and other relevant international actors with a view to prosecuting and punishing the perpetrators, as proposed in the draft resolution.

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62. UNGA Resolution 71/248, paragraph 4.

63. A/HRC/32/CRP.2, paragraph 211.c.