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via the Permanent Mission of the Republic of Iraq to the United Nations
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30 October, 2017

Subject: Recommendations for the Terms of Reference and Implementation of UN Security Council Resolution 2379 on Da’esh Accountability

Your Excellency,

We are writing to you to call on your leadership in ensuring successful implementation of UN Security Council Resolution 2379, initiating an Investigative Team for crimes committed by the so-called Islamic State in Iraq and the Levant (ISIL, hereinafter referred to as “Da’esh”).

Below, please find a list of recommendations which we hope will be reflected in the Terms of Reference for the Resolution, with the purpose of establishing a commitment to the highest standards of international law and guaranteeing inclusiveness and accountability, including through gender justice and a victim-centered approach.

The adoption of UN Security Council Resolution 2379 on September 21, 2017 marks an important milestone in the enormous task of holding members of Da’esh accountable for their commission of war crimes, crimes against humanity, and genocide. In this respect, we particularly emphasize the need to investigate and prosecute all forms of sexual and gender-based violence which can constitute acts of genocide as well.

We hope the Investigative Team will lay the groundwork for an inclusive and comprehensive justice process for all those affected by the conflict and atrocities committed.

We thank you for your consideration.

Sincerely,

Global Justice Center

Iraqi Al-Amal Association

Madre

Eyzidi Organization for Documentation

Iraqi Women Network

Yazda

Recommendations for the Terms of Reference of UN Security Council Resolution 2379 (2017) adopted on September 21, 2017

The following is a compilation of recommendations which we hope will be reflected in the Terms of Reference (hereinafter referred to as “ToR”). While we are aware that some recommendations will depend on the procedures and methods of work of the Investigative Team and its Special Adviser, we call on the Iraqi government to commit to these points and encourage their inclusion when approving the ToR. We also urge Iraqi courts, Iraqi police forces and all relevant authorities to accommodate these recommendations in their work and to ensure a fruitful collaboration with the Investigative Team.

We note that this is not an exhaustive list, yet we hope it provides guidance to ensure the Investigative Team and Iraq’s operations align with international humanitarian, human rights and criminal law and standards.

I. Operations

- Pursuant to paragraph 2 of the Resolution, the Investigative Team is to support domestic efforts to hold ISIL (Da’esh) accountable by collecting, preserving, and storing evidence in Iraq of acts that may amount to war crimes, crimes against humanity and genocide.

1. Develop Operational Guidelines: Prior to beginning its work, the Investigative Team should develop operational guidelines in line with international law and standards for collecting, preserving and storing evidence. The Rules of Procedure and Evidence of the International Criminal Court (ICC) can be used as guidance, as well as the definitions and elements of the crimes of genocide, war crimes and crimes against humanity in the ICC’s Rome Statute, which provides a baseline for a comprehensive and modern legal framework for international criminal justice. Efforts should also be made to ensure a comprehensive legal framework that encapsulates the broadest possible range of crimes in international and non-international armed conflict, as well as a complete framework for modes of liability, including those established in the UN Convention on the Prevention and Punishment of the Crime of Genocide to which Iraq is a party.

2. Applicable Legal Framework and Reform: In order to provide for effective implementation of Resolution 2379, the collection of evidence and information must be accompanied by efforts to ensure a comprehensive legal framework to prosecute war crimes, crimes against humanity and genocide. With the assistance of the Investigative Team, the Iraqi government should put in place enabling legislation for war crimes, crimes against humanity and genocide and present a concrete timetable for next steps. It is plainly insufficient to prosecute members of Da’esh solely for terrorism crimes - doing so denies victims justice and fails to reflect the full criminality of the crimes committed by the Da’esh group.

3. Efficiency of investigations: Investigating and prosecuting a single group of perpetrators not only creates significant operational challenges but also hinders an effective investigation strategy, e.g. in determining the threshold for evidence for different crimes and what do to with evidence

collected about crimes committed by non-Da'esh fighters. In this context, it should be noted that a majority of Da'esh fighters have also changed allegiances several times, further underscoring the need for complete investigations regardless of an individual's affiliation. Therefore, extending the Investigative Team's mandate to hold *all sides* accountable, including Iraqi, Kurdish and Coalition forces, should be a consideration for possible successor resolutions by the UN Security Council. When reporting back to the UN Security Council pursuant to paragraph 16 of Resolution 2379, the Special Adviser should also include concrete recommendations for revising or expanding the mandate to ensure utmost efficiency and with a view to preserving evidence for comprehensive accountability proceedings.

II. Standards and Procedural Requirements

- Pursuant to paragraph 2, the Investigative Team is to collect, preserve and store evidence to the highest possible standards to ensure the broadest possible use before national courts, and complementing investigations being carried out by Iraqi authorities.
- Pursuant to paragraph 3, the Special Adviser will also work with survivors, in a manner consistent with relevant national laws, to ensure their interests in achieving justice are fully recognized.
- Pursuant to paragraph 5, evidence collected and stored by the Team in Iraq should be for eventual use in fair and independent criminal proceedings.
- Pursuant to paragraph 6, the Team should be impartial, independent, and credible and act consistent with the Charter of the United Nations and United Nations best practice, and relevant international law, including international human rights law.

1. Victim and Witness Protection: The Investigative Team should provide Iraqi courts with technical assistance to ensure victims and witnesses are protected in line with international standards, in particular with respect to informed consent and sharing information. Investigators, prosecutors and judges should pay specific attention to protecting victims and witnesses who fear reprisals for sharing information or stigmatization by their communities or families, including after the conclusion of a trial. Consideration should be given to the reality that thousands of girls and women still held in captivity face distinct risks of retaliation. The Iraqi government can play a pivotal role in ensuring adequate protection of institutions providing victim support and service providers offering legal, medical and psychosocial services to victims who come forward and ensure that these services are provided in a gender sensitive manner.

2. Confidentiality and Privacy: The Investigative Team should further provide Iraqi courts with technical assistance to safeguard respect for the confidentiality, privacy, interests and personal circumstances of victims, including information regarding age, sex, gender, health, as well as the nature of the crime. These measures are of particular importance in cases where the crime involved victims of sexual or gender-based violence or the crime was against LGBT individuals or children.

All efforts must be utilized to prevent re-traumatization of victims, and court measures should address any secondary traumatization, e.g. caused by testifying in court. Special attention should be paid and training should be provided to police and court staff on interacting, interviewing and questioning with victims traumatized by violence. Efforts must also be made to ensure that in the context of interactions with female victims, female staff should be available and all actors are provided with gender-sensitive training.

3. Investigative Strategy Must Address Sexual and Gender-Based Crimes & Crimes Against Children: The Investigative Team should provide guidance and conduct trainings for staff of Iraqi courts to ensure investigations and prosecutorial strategies pay particular attention to sexual and gender-based violence and crimes against children. The Investigative Team and Iraqi courts should integrate a gender perspective in all areas of their work and strategy, as well as an innovative approach to the investigation and prosecution of these crimes. In this respect we renew our call for a swift implementation of the Joint Communiqué between the United Nations and the Government of Iraq on the prevention and response to conflict-related sexual violence.

4. Right to a Fair Trial, Legal Counsel and Reparations: The Investigative Team should work together with Iraqi courts to guarantee basic fair trial principles and victims' rights to reparations – including redress, reparations for sexual and gender-based violence, and guarantees of non-recurrence – which should also be reinforced in the ToR. Further, we call on Iraqi courts to ensure fair trials with adequate legal representation and equality of arms on both sides, for victims as well as the accused, who have the right to legal defense at all stages of the proceedings. Legal counsel, including defense counsel, must be able to operate without interference and should not be subject to arbitrary arrests or harassment by authorities, armed groups or the community. Further, we would also welcome procedures that ensure that evidence is not obtained through the use of torture or other methods that constitute cruel, inhuman or degrading treatment and an explicit commitment to halt and prevent the extrajudicial killing of suspects.

III. Structure and Composition

- Pursuant to paragraphs 2 and 5, the Investigative Team shall be headed by a Special Adviser and the Team's ToR shall specify that Iraqi investigative judges, and other criminal experts, including experienced members of the prosecution services, will be appointed to the Team to work on an equal footing alongside international experts.

1. Inclusion of Gender Expertise: The Investigative Team should ensure that it has broad based gender expertise at every level. This includes a senior level gender expert as well as experts in the areas of sexual and gender-based crimes and crimes against children. A gender expert should provide comprehensive technical assistance, integrate a gender perspective throughout the Team's work, and help ensure that charges for sexual and gender-based violence are included explicitly as crimes, in addition to charging these acts as other constitutive acts of other crimes, e.g. charging rape as torture and genocide. The gender expert should also have a mandate to advise the best approach for gender-sensitive reparations for rape and other forms of sexual violence. In order to bring Da'esh to justice

it is important for investigators, prosecutors and judges to understand the gender dynamics in Da'esh ideology, strategies and policies, which guide how Da'esh perpetrates their crimes and ensure that this guides all levels of investigation and prosecution efforts.

2. Equal Appointment of Women: When determining the selection process for the Special Adviser and appointment of members of the Investigative Team, due consideration should be given to the appointment of women. The selection process should put in place special measures applicable to the recruitment, promotion and placement of women. As Iraq is a member to the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), we also call on the Iraqi Government to implement the CEDAW Committee's General Recommendations (GR), particularly GR no. 30 on women in conflict prevention, conflict and post-conflict situations and GR no. 33 on women's access to justice. Further the preamble of Resolution 2379 also references resolutions 1325 (2000), 2106 (2013), 2242 (2015) on women, peace and security which call for the meaningful inclusion of women at all decision levels.

IV. Cooperation

- Pursuant to paragraph 3, the Special Adviser, while avoiding duplication of effort with other relevant United Nations bodies, will also promote throughout the world, accountability for acts that may amount to war crimes, crimes against humanity or genocide committed by ISIL (Da'esh), and work with survivors, in a manner consistent with relevant national laws, to ensure their interests in achieving accountability for ISIL (Da'esh) are fully recognized.

1. Civil Society Engagement: The ToR should provide a process for systematic engagement with civil society and outreach, particularly with community-based and women-led organizations. In order to avoid duplicating efforts and re-traumatizing victims who have already testified, the Investigative Team should engage with initiatives already in place to support victims, and actors that have been collecting evidence. The Investigative Team should work with and advise the Iraqi government on ensuring that civil society groups have a safe space to operate, that they are not placed under suspicion of having ties to Da'esh, and that Iraqi law is reformed to protect these service providers from harassment, intimidation and exploitation. A constructive and critical civil society dialogue is crucial in order to deliver effective justice for the victims, reduce misinformation, amplifying the impact of those pursuing accountability and rebuild community trust.

2. Community Outreach: It is also important to ensure a greater understanding and awareness of the work of the Investigative Team and trials across Iraq. Iraqi Courts should be equipped with sufficient funding to conduct community-based outreach with staff stationed throughout the country, using traditional and modern methods to answer questions from the public and respond to concerns raised by the public, using best practices developed by other international and hybrid tribunals, including the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia. In this respect, we also emphasize the important role of independent local media to promote and help understand the work of the Investigative Team and subsequent trials, as

well in facilitating outreach to the affected communities. Such measures should be encouraged and supported by the Investigative Team and the Government of Iraq.

3. Information Sharing with Third-Party Countries and Regional Stakeholders: The Investigative Team should adopt and provide guidance on methods for sharing information with Iraqi courts and authorities in third-party countries, with particular consideration for the respect of international human rights law and standards and the safety of witnesses and victims. The Team should act as a coordinator between other stakeholders in the region, such as Kurdish and other regional actors, to ensure their inclusion as well as efficient data collection, and engage with military actors, such as the Global Coalition Against Da'esh. Along with the Iraqi authorities, the Team should also ensure that evidence collected is not discarded or destroyed or used solely for counter-terrorism purposes.

CC: H.E. Ibrahim al-Jaafari, Minister of Foreign Affairs

H.E. Judge Faiq Zaidan, Chief of the High Judicial Council

H.E. Mohammed Hussein Bahr Aluloom, Permanent Representative of Iraq to the United Nations