

# The mechanisms of the European Union to pursue ISIS leaders for their grave violations of human rights in Iraq

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University of Zagreb

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THE MECHANISMS OF THE EUROPEAN UNION TO PURSUE ISIS LEADERS FOR  
GRAVE VIOLATIONS OF HUMAN RIGHTS IN IRAQ

Master Thesis

Zagreb, September 2020

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GRAVE VIOLATIONS OF HUMAN RIGHTS IN IRAQ

Master Thesis

Supervisor: Prof. Dr. Sc. Enes Kulenović

Student: Amer Abdulhusein Abbas Al-Fatlawi

Zagreb, September 2020

*I hereby declare that I have written my master thesis “The Mechanisms of the European Union to Pursue ISIS Leaders for Grave Violations of Human Rights in Iraq” that I submitted to my supervisor Enes Kulenović, Associate Professor, for evaluation, independently and that it is entirely in my authorship. I also declare that the paper in question has not been published or used to fulfil teaching obligations at this or any other institution of higher education and that I did not obtain ECTS credits based on it. Furthermore, I declare that I have respected the ethical rules of scientific and academic work, particularly Articles 16-19 of the Code of Ethics of the University of Zagreb.*

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Amer Abdulhussein Abbas Al-Fatlawi

To the victims of terrorism and extremism in Iraq, we will never forget you...

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## **Introduction**

The American occupation of Iraq in 2003 under the pretext of the existence of weapons of mass destruction left catastrophic effects on Iraq, the region and the world and the results of which are still to this day and will continue in the future. Al Qaeda took a foothold in Iraq through the Arab foreign fighters led by the Jordanian Abu Musab al-Zarqawi, which later committed atrocities against the civilians of the Iraqi people. The Iraqi parties formed the new government headed by Nuri al-Maliki, which was followed by demonstrations and sit-ins in the Sunni areas of western Iraq. By June 2014, ISIS took control of a third of the country. ISIS leader Abu Bakr al-Baghdadi declared the creation of an Islamic State in Mosul, Iraq's second largest city, and named himself a caliph and many of his fighters were foreigners. It instituted a reign of terror that included rape, abductions, executions, mass murder, pillaging, extortion, seizure of state resources, and smuggling. The rise of ISIS also led to foreign intervention a second time. In September 2014, the United States formed "The Global Coalition to Defeat ISIS," made up of 79 countries and institutions, including NATO, the European Union. The Obama administration re-deployed U.S. troops to retrain and advise the Iraqi Army; it also launched airstrikes that continued for more than three years until the Islamic State collapsed.

Between 2015 and 2017, Iraqi security forces, Kurdish Peshmerga forces and the PMF—backed by airpower provided by the U.S.-led coalition—gradually retook territory from ISIS. Tens of thousands of jihadis reportedly were killed and arrested many of them were foreign fighters. In December 2017, Prime Minister of Iraq Haider al-Abadi declared victory and the liberation of all the Iraqi territories, and the end of the caliphate state, but the victims left with the sorrows and the pain.

In order to achieve the truth and redress the victims, it is imperative that the perpetrators of the crimes who committed these atrocities be brought to justice in order to obtain their fair penalty to prevent this from happening in other parts of the world. Therefore, we present in this research ideas worthy of study for the mechanism for trialing the real perpetrators, especially foreign fighters for the atrocities they committed, especially after we saw that large numbers of them had escaped from the grip of justice, or that the sentences issued against them did not equate to the crimes that were committed, and that a number of others were subjected to poor detention conditions in Iraqi prisons or harsh sentences.

## Chapter 1: Foreign Fighters

### Who is the Foreign Fighter?

The phenomenon of individuals leaving their homes to travel to another country and participate in an armed conflict is not unique. However, the nature of today's foreign fighters has forced that bland definition to evolve. Modern conflicts like the Syrian civil war and Iraq have forced the international community to revisit the characteristics attributed to foreign fighters. For instance, the common denominator of travelling to participate in armed conflicts is far more ambiguous. The motivations of such individuals have evolved: foreign fighters today are intent on carrying out the agenda of a military or political group. The subtle nuance is membership in an organization aiming to carve out a state.<sup>1</sup> Years earlier, a group called the Lincoln Brigade was comprised of Americans who volunteered in the fight against the fascist regime of Spain's Francisco Franco. International law viewed them as volunteers<sup>2</sup> a term that did not distinguish between national and foreigner fighters. Civilians, combatants, soldiers, and military groups that took up arms to participate in that conflict were classified as volunteers. Another feature that distinguishes foreign fighters in the Syrian civil war and Iraq from those in earlier conflicts elsewhere is their organization capabilities. It was not until the recent wars in the Middle East that groups of foreign fighters sought to capture territory for the purpose of building a new state.

The term "foreign fighter" has many interpretations that lead to several questions: What defines an individual as a fighter? Is participation in combat the only characteristic of a fighter? Does travel to another country to be with a husband or to marry a jihadist make one a fighter (as some men and women have done in the Syrian civil war and Iraq)?<sup>3</sup> Once a fighter is identified, how do we define that fighter as foreign? How can we differentiate between someone who is a foreign fighter and one who is simply a national returning from a conflict zone?

These questions and considerations form the basis of much of today's discussion and argument and complicate the possibility determining conclusions. For example, a Syrian was given refuge in France in 2012, and lived in Paris for three years before becoming radicalized and travelling back to Syria to fight. Can he be called a foreign fighter? He may have been given refuge by France and enjoyed certain state benefits, but how long must one reside in a

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<sup>1</sup> Cephah Dahabreh, 2019

<sup>2</sup> Donnelly, Sanderson, & Fellman, 2017

<sup>3</sup> Baker, 2014

territory to be considered a foreigner—either in France or elsewhere? These questions and more dominate the landscape of determining nationality and residency.

Defining the “foreign” characteristic and the “fighter” characteristic of foreign fighters has proved to be problematic. Numerous scholars have stepped forward with definitions of each term. The most widely used definition was crafted by Sandra Krähenmann, a leading scholar in international law who conducts research on the impact of counterterrorism on human rights law and international humanitarian law. Her definition is this: *Individuals, driven mainly by ideology, religion, and/or kinship, who leave their country of origin or their country of habitual residence to join a party engaged in an armed conflict.*<sup>4</sup> This definition was adopted by the Geneva Academy of International Humanitarian Law and International Law<sup>5</sup>. Krähenmann’s definition points to “ideology” as the distinguishing common denominator when defining a person as a foreign fighter. When discussing the ideology behind many of ISIS’ and Al-Qaeda’s recruits, she incorporates in her definition any person who serves in any capacity in a party in an armed conflict. Authors Andrea de Guttry, Francesca Capone, and Christophe Paulussen take Krähenmann’s definition a step further, and explicitly include foreign fighters fighting on the side of a government<sup>6</sup>.

Based on the Syrian civil war and the subsequent rise of ISIS in Iraq , scholars who earlier supported Krähenmann’s definition now believe that excluding state-sponsored parties does not adequately address the more comprehensive understanding needed in the definition of foreign fighters in the twenty-first century.

In another example, scholars Jeffrey Colgan and Thomas Hegghammer developed an expanded definition that includes key points in a checklist. According to these authors, the following elements characterize a foreign fighter:

- They are not overtly state-sponsored.
- They operate in countries that are not their own.
- They use insurgent tactics to achieve their ends.
- Their principal objective is to overthrow a single government or occupier in a given territory.

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<sup>4</sup> Dahabreh, 2019

<sup>5</sup> Hegghammer & Colgan, 2011

<sup>6</sup> De Guttry, Capone, & Paulussen, 20016

- Their principal motivation is ideological rather than material reward<sup>7</sup>.

What separates today's foreign fighters from their predecessors is their intention to carry out the agenda of a military or political group. Before there was some form of organized capacity among such fighters, and international law viewed them as volunteers<sup>8</sup>, a that term made no distinction between national fighters and foreigner fighters. Thus civilians, combatants, soldiers, and military groups that took up arms to participate in a conflict were classified as volunteers.

In the last few years, however, this definition is being questioned, and with the Syrian civil war, the definition has been challenged even further. One distinction that is apparent among foreign fighters in the Syrian civil war, which distinguishes them from earlier conflicts elsewhere, is the chain of command among the fighters. It was not until the Syrian war that groups of foreign fighters sought to capture territory and build a state within it. In the past, foreign fighters operated primarily subordinate to leading factions in the conflict.

In 2014, the international community came together to make some decisions owing to the surge of individuals who were leaving a country to join in a conflict in the Middle East. The United Nations Security Council (UNSC) adopted Resolution 2178,<sup>9</sup> which condemned such individuals and empowered countries to impede those who seek to travel in order to join ISIS or other Al-Qaeda affiliates

### **Foreign Fighters from Europe**

The numbers of European foreign fighters travelling to Syria and Iraq to join ISIS are unprecedented. It is estimated that around 5,000 fighters from Western Europe have travelled to the region since the onset of the Syrian civil war in 2011. While there are significant numbers of foreign fighters departing from France (1,262-1,700), Germany (600-760) and the United Kingdom (600-800), smaller EU states also see many of their citizens leave for Syria. Belgium is said to have 440 to 470 of its own in the region, the Netherlands 220 to 250, Denmark 125 to 150 and Sweden 180 to 300. Austria is believed to have 150 to 300 foreign fighters in Syria and Iraq, a potential consequence of its sheer geography abutting the Balkans, an important conduit.<sup>10</sup>

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<sup>7</sup> Hegghammer & Colgan, 2011

<sup>8</sup> See ref. 2.

<sup>9</sup> Implementation of Security Council Resolution 2178 (2014) By State Affected by Foreign Terrorist Fighters, 2016

<sup>10</sup> The Foreign Fighters Phenomenon and Related Security Trends in the Middle East, 2016

Many foreign fighters return home disillusioned rather than committed to carrying out specific terror attacks on EU soil. That being said, there have been several attacks in Brussels and Paris in which attackers have shown operational connections to Iraq and Syria and the majority of terror plans since October 2013 have been carried out by ISIS sympathizers.

This mixed operational picture is also made murkier by the lack of a common socio-psychological profile for foreign fighters. A kaleidoscope of motivational factors and interplay between pull and push factors create unique profiles to explain why single individuals leave their home country. Social media serves as a direct peer-to-peer instrument for propaganda and recruitment. Many foreign fighters have a criminal background and low-income levels (except in UK); some come from dysfunctional families and have complex psychological issues, and many have limited future prospects. Some come from criminal gangs. However, some have advanced criminal or professional skill sets that can be used and exploited in conflict theatre. For example, Chechen recruits from Sweden have multiple trafficking and criminal connections throughout Europe reaching deep into the Islamic State in Iraq and the Levant (ISIL). Several territorial gang leaders in Denmark have joined the group, and some of its members become more dangerous when they return home<sup>11</sup>.

All of these personal circumstances matter when it comes to what European foreign fighters do within the fold of ISIS in Syria and Iraq. Their position within the network and their particular skill set matters greatly as to what they actually end up doing operationally in the field. There is a spectrum of both direct and indirect operational roles such as preachers, recruiters, facilitators, financiers and ordinary recruits without connections. Individual contact points and the ability to bring assets to the table greatly matter for the terrorist organization.

Individual financing schemes help assist the greater ISIL cause and enhance an individual's station within the group. These involve extensive fraud activities like using shell companies to evade fiscal constraints. Often, recruits bring cash with them or transfer small amounts to money-service providers in border towns along the Turkish-Syrian border.

Personal connections within *Daesh* matter greatly to reach an important status. This is the case of recruits with extremely specialized, high-demand skills like engineers, as well as IT and media specialists to handle the production of videos. The staging and technical expertise

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<sup>11</sup> Ibid.

seen in execution videos indicate that EU nationals are probably involved in the pre- and post-production work. Other profiles are highly sought after, as well, such as doctors or nurses who can serve in crucial administrative positions. These jobs are the most valued by ISIL recruiters after recruits willing to conduct martyrdom operations and other military missions. Often, EU nationals who speak the same language form specific contingents within *Daesh* to operate together.

Although most European foreign fighters are not drawn by financial benefits, most of them are paid almost twice as much as regular *Daesh* fighters. This can produce resentment over preferential treatment. The utility of the fighters without personal connections or particular skill set is usually to serve as cannon fodder, recruitment sergeants operating in Europe or propagandists. Many Europeans are sent on suicide missions or high-risk military operations. They are also used in specialized missions such as guarding Western hostages. There is an important gender distinction in that respect.

Young Western women marry male foreign fighters because local, clan and honor form barriers for marriage with locals. These women are often abused and vulnerable, reduced to raising the next generation of ISIL citizens. Older women play a mentoring role and focus on the recruitment of other women back in Europe. Depending on their abilities and language, European women are often found in clerical work, especially attending to social media. The types of social media platforms utilized is increasingly moving to peer-to-peer, encrypted apps, including SureSpot, Telegram, Kik and other platforms. Europeans foreign fighters are particularly exploited for their innovative capacity and their ability to think creatively to boost propaganda that will resonate in the West. They have also spread new technological innovations in the battlefield. For example, quadcopter drones are increasingly used as command-and-control systems.

Relatively few Europeans reach high-ranking military positions within *Daesh* though there are exceptions within specific "regions" of the Caliphate. Instead, Jordanians, Tunisians and Chechens have assumed these high-ranking positions, especially given the latter's military experience.

Europeans underage and children are used for propaganda effect in execution videos. Other Europeans are assigned specialized functions such as running the moral police roaming the territories under control to enforce religious behavior. There is also evidence that some

European foreign fighters are involved in significant plundering or financial schemes that require intimate knowledge of income sources in the West<sup>12</sup>.

Some European foreign fighters are involved in the logistics of travel and interaction between ISIL and the neighborhood. Part of this involves the creation of safe houses along the border and transfer into Syria from Turkey. Many break up their travel, avoiding direct routes and travelling through the Balkans and Greece into Turkey, and then onward to Syria. There is also significant evidence that some are involved in humanitarian work, playing dual roles as caregiver and fighter. Many humanitarian organizations distribute aid in ISIL-controlled areas and must negotiate access to these areas. The extent of their involvement and how much aid actually goes to *Daesh* is open for question.

It is unlikely many European recruits are climbing the inner echelons of decision-making within *Daesh* but they perform many individual and important functions for the organization, especially creating loopback mechanisms to supporters and infrastructure in the West. As such, there is constant travel and movement between Europe and ISIL. It is said that few have actually left or rebelled. Almost none are allowed to leave the organization of their own will, which means conditions are difficult inside *Daesh* in Syria and Iraq. Foreigners within *Daesh* have been regarded as prestigious and important for the terrorist organization in order to mobilize outsiders through propaganda. The most hardened and ideologically committed recruits from Europe are still fighting and dying with *Daesh* in the region. Many of them will never return. The real challenge ahead will materialize when European foreign fighters start going back home in large numbers, committed and ready to seek revenge. The broad variation in experience and skill sets makes this a formidable challenge.<sup>13</sup>

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<sup>12</sup> Ibid

<sup>13</sup> Ibid

## **Chapter 2 ISIS Violations of Human rights in Iraq**

Since June 2014, many thousands of persons belonging to minorities have been murdered, maimed or abducted, including unknown numbers of women and girls forced into marriage or sexual enslavement. ISIS forces and commanders have committed war crimes, crimes against humanity and the crime of genocide, including summary executions, killing, mutilation, rape, sexual violence, torture, cruel treatment, the use and recruitment of children, and outrages on personal dignity. Cultural and religious heritage dating back centuries has been destroyed, while property and possessions have been systematically looted.

### **Recruiting and using children in hostilities**

During its period of control in Iraq, ISIS recruited thousands of children, using them as suicide bombers and combatants, and for manufacturing and planting explosive devices. Children also acted as spies and scouts, transported military supplies and equipment, conducted patrols, manned checkpoints, videotaped attacks for propaganda purposes, and served in other support positions.<sup>14</sup> ISIS' own personnel records indicate that up to 41 percent of some of its Syrian units were under the age of 18.

Children interviewed by Human Rights Watch who said they were affiliated with ISIS identified several reasons for joining the group, including financial incentives, peer or family pressure, an escape from family problems, or a desire for social status. Based on Human Rights Watch research on the recruitment and use of child soldiers in more than a dozen armed conflicts around the world, these motivations are typical of children who join armed groups during armed conflict. Multi-country research by the United Nations University also has found that contrary to conventional wisdom, ideology is rarely the primary force motivating children's association with violent extremist groups.<sup>15</sup> None of the children interviewed for this report indicated that ISIS ideology played a role in their decision to join.

### **Cultural heritage destruction**

ISIS has pursued a programme of cultural heritage destruction that has taken the form of smashing artefacts in archaeological museums, iconoclastic breaking and bulldozing archaeological sites, dynamiting shrines, tombs and other holy sites of local communities, and burning libraries and archives. Prominent heritage sites include the Mosul Museum, and the archaeological sites of Ninewa, Nimrud and Ashur.<sup>16</sup> Satellite images have documented

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<sup>14</sup> Report of the Secretary-General on children and armed conflict in Iraq, 2015

<sup>15</sup> *Ibid.*, p. 17

<sup>16</sup> Harmanşah, 2015



thousands of illegal excavations in Syria and Iraq. During the field mission conducted for this report, team members received reports of cultural heritage sites and religious buildings used as training sites for ISIS fighters and weapons factories. These stories were corroborated at two different sites the field mission visited in the retaken town of Al Hamdaniya. The field mission also encountered PMU defacement of heritage sites retaken from ISIS. For example, a visit to the Mar Benham monastery revealed graffiti with PMU Babylon Brigade slogans and scribbling over ISIS graffiti, only adding to the existing defacement. Generally, sites have been looted before they are destroyed. Estimates of revenues ISIS has received from looting and sale of antiquities range from USD 4 million to USD 7 billion; this analysis is extremely limited due to three factors: (1) there is no reliable quantitative data on the antiquities trade from the region, not even considering illegal sales; (2) experts do not know what artefacts the looted sites actually contained; and (3) there are no established means of calculating revenue from these sales.<sup>17</sup> Revenue estimates aside, some archaeologists believe that at least USD 300 million worth of antiquities are now on the market as part of ISIS transactions.<sup>18</sup> ISIS ‘harvests the illegal artefacts and sells them to mafia networks in Turkey and Lebanon’, according to Iraq’s Deputy Minister of Culture.<sup>19</sup> ISIS revenues from the sale of looted antiquities has rapidly evolved from collecting a 20 per cent tax from diggers and dealers operating on their territory to running their own archaeological digs and selling heritage directly.<sup>20</sup> Turkish crime networks in the border towns of Gaziantep or Akcakale have close links to ISIS.<sup>21</sup> Galleries in Western Europe, however, also play a role in providing a space for buyers to purchase stolen works.<sup>22</sup> Pre-Islamic objects reportedly go primarily to European and North American markets, while Islamic art finds purchasers in the Gulf.<sup>23</sup> Antiquities experts believe that many of the looted items are likely being hidden for the time being, to be sold at a later date.<sup>24</sup> Laws around the world are weak and inconsistent, with customs enforcement only able to screen a fraction of what crosses international borders.<sup>25</sup> International cultural property protection policy is currently structured around two conventions: the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (including its First and Second Protocols), and the 1970 UNESCO

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<sup>17</sup> Rose-Greenland, 2016

<sup>18</sup> Yoon, 2015

<sup>19</sup> Interview with Iraqi Deputy Minister of Culture, 2016

<sup>20</sup> Yoon, 2015

<sup>21</sup> Ibid

<sup>22</sup> Interview with Columbia University Department of Art History and Archaeology , 2016

<sup>23</sup> Myers & Kulish, 2016

<sup>24</sup> Ibid

<sup>25</sup> Ibid

Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. This policy has been summarized as one of ‘protection and recovery’, reflecting 1950s and 1960s postcolonial concerns of countries that lost artefacts during colonial rule – a policy that has conspicuously failed in the Middle East and elsewhere.<sup>26</sup>

### **Cruel and arbitrary punishments**

After taking control over cities and villages, ISIS inflicted severe punishments upon the civilian population. In Tikrit, to name one example, ISIS fighters killed hundreds of people, targeting civilians accused of cooperating with, supporting or being relatives of police or Iraqi Security Forces (ISF) members. The properties of those suspected of supporting or cooperating with the central government were seized or destroyed. One of several pretexts for mass executions was the allegation of conspiring and attempting to rise against ISIS members.<sup>27</sup>

Most notoriously, following the recapture of Tikrit, mass graves containing the bodies of hundreds of Iraqi army cadets were identified in the nearby Camp Speicher. In mid-June 2014, as Tikrit was overrun by ISIS, several thousand Iraq Air Force cadets fled the base as ISIS approached, abandoning their uniforms and walking towards Baghdad. Outside the camp, the cadets were rounded up by ISIS fighters. Sunni and Shi’a were reportedly separated from each other: the former were given the possibility to ‘repent’ for their loyalty to the Iraqi government, while the latter were summarily executed en masse.<sup>28</sup> Another pretext used by ISIS for punishment is the victim’s refusal to convert to Islam. In August 2014, following the battle for and the seizure of Sinjar and other surrounding cities in Ninewa governorate, witnesses reported ISIS’s attempts to forcibly convert hundreds of Yezidis, particularly targeted by ISIS as non-believers or heretics. Those who refused were executed.<sup>29</sup> Generally speaking, after consolidating control militarily, ISIS progressed towards establishing its own religious police, stricter punishments and a concerted educational system. With ISIS’s strengthened judicial system also comes an increase in more serious forms of punishment, known as hudud, which are reserved for the most egregious offences under Islamic law.<sup>30</sup> In Iraq, there have been dozens of reports of executions and other

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<sup>26</sup> Brodie, 2015

<sup>27</sup> Interview with Tikrit University professor, 2016

<sup>28</sup> The Rare Eyewitness Account of One of the Few Survivors of an Islamic State Massacre

<sup>29</sup> Report on the Protection of Civilians in Armed Conflict in Iraq , 2014

<sup>30</sup> Caris & Reynolds, 2014

extreme and unusual punishments meted out by these institutions, based on a broad spectrum of charges, from adultery to refusal to provide medical care for ISIS fighters.<sup>31</sup> ISIS regularly forces people to gather in public places to watch punishments imposed by these courts, including stonings and beheadings. Non-Muslims under ISIS control also contend with the jizya, a per capita religious tax levied on non-Muslim permanent residents under Islamic law. ISIS uses the jizya where possible to run a protection racket. Its evasion has led to serious consequences, such as abduction of female members of the family, detention or death. After the fall of Mosul to ISIS in 2014, for example, Christians who wanted to remain in the city were asked to pay the jizya or leave. Jizya has been collected across ISIS-controlled areas in northern Iraq. In Sinjar, those who were not abducted or killed, had the option to pay the jizya to stay.<sup>32</sup>

### **Sexual violence and slavery**

Women abducted by ISIS tell stories of abuse ranging from forced labour to physical assault, rape, torture, forced marriage and sexual slavery.<sup>33</sup> Women have faced sexual violence as a punishment and also as a reward to ISIS fighters. They have been exchanged by fighters as gifts, married by force with the purpose of rape,<sup>34</sup> and repeatedly raped. While to date the international focus has been predominantly on crimes committed against Yezidi women and girls, additional reports of sexual violence have emerged, extending to Christian and Shi'a women and girls in northern Iraq, and Sunni women who fled the violence in Anbar governorate.<sup>35</sup> Shi'a Turkmen kidnapped by ISIS from Tel Afar have also reportedly been subjected to sexual violence, including rape, before being brutally killed.<sup>36</sup> Additionally, as hundreds of thousands languish in IDP camps across the country for months, sexual violence inside the camps has remained widespread. In this case, it comes from within families.<sup>37</sup> But while victims and survivors urgently need physical and emotional support, only limited services have so far been made available by the Iraqi and Kurdish authorities, or by the international community. At the same time, the scale of the assault on the Yezidi minority has meant that community structures have struggled to cope with the needs of their members. Victims suffer a wide range of health issues, from severe post-traumatic stress to complicated

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<sup>31</sup> Report on the Protection of Civilians in Armed Conflict in Iraq , 2014

<sup>32</sup> These Sinjari were reportedly later killed by ISIS, Interview with Kurdish official in Duhok, 2016

<sup>33</sup> THESE YEZIDI GIRLS ESCAPED ISIS. NOW WHAT?, 2015

<sup>34</sup> Interview with IDPs, Duhok, 2016

<sup>35</sup> Interviews with Sunni and Christian IDPs and Iraqi Civil society leaders. Baghdad and Erbil, 2016

<sup>36</sup> Interview with Iraqi MP, Baghdad, 2016

<sup>37</sup> Interview with Iraqi civil society leader, 2016

gynaecological issues, disease and life-limiting disabilities; they are in strong need of psychotherapy and counselling.<sup>38</sup>

### **Abductions**

Since the fall of Mosul in June 2014, a large number of people have been abducted and deported while trying to escape or to hide, with young women and children being ISIS's preferred targets. Witnesses state that 'the elderly and disabled were abducted' by ISIS during the fall of Sinjar in August 2014; their whereabouts are unknown.<sup>39</sup> Most abducted young women and girls have become sex slaves for ISIS members or are sold for profit. Young boys are indoctrinated in Islamic schools, where they are brainwashed with ISIS propaganda. Of particular concern is the fate of Yezidi women. While estimates are crude, approximately 2,500 Yezidi women are still being held captive.

### **Ransom**

As a result of anti-ISIS coalition and Iraqi government efforts to diminish ISIS finances, ISIS has reportedly seen a loss of resources and incomes. Human trade now represents an alternative income stream.<sup>40</sup> Paying ransoms are now in all likelihood the only viable way to free these hostages. These are usually paid by the families. In some cases, the KRG claims it has also paid ransoms;<sup>41</sup> however, Yezidi leaders and Iraqi government officials emphatically deny these claims.

### **Mass grave sites**

As areas have been retaken from ISIS control, a number of mass graves have been identified in Ninewa, Diyala and Salahaddin governorates. Basic information is still being collected on the sites identified. Since the November 2015 liberation of Sinjar, NGOs, Kurdish authorities and other groups have uncovered at least 50 mass grave sites – most likely the Yezidi victims of ISIS – and have identified dozens more mass grave sites in the city and surrounding district of Sinjar.<sup>42</sup> Mass graves have been found in western Ninewa (including a mass grave of approximately 600 bodies from Badoush Prison and Al Jadaa), west of Mosul in the alEiadhia area, and in the Samarra area in Salahaddin. The KRG Ministry of Martyrs and Anfal is working to investigate with extremely limited resources. ISF uncovered the largest

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<sup>38</sup> Whyte, 2016

<sup>39</sup> Interview with Yazidi refugee, Washington DC, 2016

<sup>40</sup> Interview with Iraqi academic, Erbil, 2016

<sup>41</sup> Interview with senior Kurdish Official. Erbil, 2017

<sup>42</sup> Interview with Yazidi representatives. Duhok, 2017

single mass grave site to date at the Khasfa sinkhole, approximately 7 kilometres outside Mosul, reportedly containing an estimated 4,000 human remains.<sup>43</sup>

## **Genocide and Violence against Ethno-Religious Groups in Iraq**

### **Turkmen and Shabak**

The Turkmen are one of the largest ethnic groups in Iraq, making up around 500,000 people. They adhere to both Sunni and Shia Islam. The Shabak, predominantly adherents of Shia Islam, are estimated to be between 200,000 people. The Shabak have a complex ethnic history; though they have some unique cultural and linguistic remnants, they ethnically descend from Kurds, Arabs, and Turkmen, and are therefore difficult to distinguish as a distinct ethnic group. Both the Turkmen and Shabak communities have an extensive history of discrimination and violence prior to ISIS.

When ISIS advanced into Mosul and Tal Afar in June of 2014, they posed a threat to the religious communities living there. One of their primary targets were Shia Muslims and their religious sites. Shia properties, including Shia Shabak properties, were marked with the Arabic letter “R” referring to the derogatory term Rafidah (rejectors), used to describe Shia Muslims. Shia properties were confiscated and redistributed to ISIS fighters and local supporters. By August 2014, ISIS took control over Shabak and Turkmen villages in the Nineveh plains, resulting in mass displacement, abductions, killings, and forced conversions. After capturing Sinjar, Tal Afar became a transitory place to hold enslaved Yazidi women before trafficking them to other ISIS territory.

### **Assyrian, Chaldean and Syriac Christians**

Christians in Iraq are predominantly Chaldean or Assyrian, and many trace their roots to the Assyrian and Mesopotamian Empires. The Assyrians are not strangers to persecution and mass violence, and have previously been the targets of genocide by the Ottoman Empire during World War I.

After ISIS captured Mosul in June of 2014, Christians were given the option to either convert, pay taxes (jizya), leave, or be killed. ISIS marked Christian homes with the Arabic letter “N” to mean Nasrani, or Christian, which quickly became a global symbol of solidarity with persecuted Christians. A few months later, in August of 2014, ISIS took control of all Assyrian towns in the Nineveh Plains, resulting in a second wave of mass displacement.

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<sup>43</sup> Neuhof, 2017

## **Yazidis**

Yazidis are an ethnoreligious group, who practice a religion with elements from Christianity, Islam, Zoroastrianism, and Judaism .

On August 3rd, 2014, IS forces advanced into the Sinjar region, and without warning, the Peshmerga forces (the military forces of Iraqi Kurdistan) withdrew, leaving the Yazidi population unprotected and defenseless. ISIS brutally attacked and occupied Sinjar. Almost 200,000 Yazidis fled towards Mount Sinjar, but quickly became besieged by ISIS. Stranded in the heat, hundreds of Yazidis died from dehydration, malnutrition, and suicide. Eventually, American, Iraqi, French, Australian, and British forces were able to drop humanitarian aid, while the Syrian Kurdish Forces (YPG) opened a corridor between Mount Sinjar and Syria, allowing people to escape. Meanwhile, ISIS abducted women and girls to sell into sex slavery, forced young boys into ISIS training camps, and executed men and elderly women.

Since the attack in August, at least 5,000 Yazidis have been killed. Many mass graves have been identified, and more are yet to be found. According to the Yazidi Rescue Office in the Kurdistan Regional Government, ISIS kidnapped 6,417 Yazidis, of which 3,451 have since been rescued, and 2,966 remain missing. Almost 2,745 children have become orphans. Hundreds of thousands of Yazidis remain displaced, and the possibility of return has proven difficult amidst continuing security threats. In addition, ISIS destroyed Yazidi cultural sites in Bahzani, Bashiqa, and Sinjar.

### **Chapter Three: Humanitarian conditions for ISIS detainees in detentions**

#### **Humanitarian conditions for ISIS detainees in detentions**

Human Rights Watch has reported in a report dated on 2017 on extreme overcrowding and poor detention conditions in Iraq for many years, as well as rampant arbitrary and incommunicado detention for over a decade.<sup>44</sup> The addition of thousands of ISIS suspects in these already poor and overcrowded detention facilities is no doubt a recipe for compounding the stresses on the existing system; all the detention sites researchers visited showed severe overcrowding. In Nineveh, where the two main government prisons in and just outside Mosul have been damaged in the fighting, the conditions are most acute as detainees remain for a long time in what are supposed to be temporary detention facilities. Because both counterterrorism laws stipulate sentences of life or death in prison, the burden of ISIS convicts on the prison system will persist.

In March 2017, Human Rights Watch researchers observed the poor conditions of the makeshift detention facilities where Iraqi authorities were detaining a segment of the ISIS suspects in Nineveh. Researchers observed authorities detaining approximately 1,200 ISIS suspects in overcrowded and filthy conditions in a set of abandoned homes and a local police station in the towns of Qayyarah, 60 kilometers south of Mosul, and Hammam al-Alil, 30 kilometers south of Mosul. The ISIS suspects were mostly men and boys held together, without charge and with limited access to medical care. Human Rights Watch visited one cell of roughly 4x6 meters that had been housing 114 detainees for four months. The detainees were not given regular access to the outdoors or to showers. They ate and used a single toilet inside the room. The windows were bricked up, and the temperature and stench in the room were overpowering. At least four had died in cases that, according to prison staff, were linked to the lack of proper medical care and hygiene standards.<sup>45</sup>

The evidence documented by Human Rights Watch strongly suggests that conditions at the Qayyarah and Hammam al-Alil facilities are hazardous, unfit to hold detainees for extended periods of time, and do not meet basic international standards. As a result, holding detainees there probably amounts to ill-treatment. The state of the facilities and severe understaffing pose severe risks to the prisoners, the prison administration, and the local community.

Detention conditions for ISIS suspects in the KRG have also raised concerns. Human Rights Watch researchers gained access to Erbil's reformatory holding women and children

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<sup>44</sup> Human Rights Watch reporting on Iraq at <https://www.hrw.org/middle-east/n-africa/iraq>.

<sup>45</sup> Iraq: Hundreds Detained in Degrading Conditions, 2017

suspected of ISIS affiliation in December 2016. They observed severe overcrowding, with the facility holding six times as many detainees as it was designed for, a lack of sufficient clothing and blankets, and an acute shortage of psychosocial support for a severely traumatized detainee population.<sup>46</sup> KRG authorities have not yet granted researchers access to adult male ISIS suspects in detention.

While the International Committee of the Red Cross has regular access to these facilities according to prison staff, some officials have blocked Human Rights Watch and other independent observers from maintaining regular access to the facilities and researchers were not allowed to conduct private interviews with the detainees.

While Human Rights Watch is unable to determine the extent to which Iraqi and KRG authorities are ill-treating or torturing ISIS suspects in detention because of lack of researchers' access to detainees, Human Rights Watch, as well as other groups, has in the past documented pervasive torture and other forms of ill-treatment in Iraqi detention facilities.<sup>47</sup>

Article 37(1) of the Iraqi Constitution stipulates that “all forms of psychological and physical torture and inhuman treatment are prohibited,” and that “any confession made under force, threat or torture shall not be relied on, and the victim shall have the right to seek compensation for material and moral damages incurred in accordance with the law.”<sup>48</sup> Iraq's criminal procedure code also prohibits torture and judges cannot rely on confessions extracted by torture.<sup>49</sup> However, it does not explicitly state that other evidence obtained by torture should be excluded.

Iraqi law does not provide details on how to investigate allegations of torture, but according to counterterrorism judges, when a defendant alleges they were tortured during interrogations, a judge should order a forensic examination to assess the claim and transfer the case to a higher court for review.<sup>50</sup> In addition, the General Amnesty Law grants detainees who claim they were convicted based on a confession extracted by torture the right to petition for a retrial.<sup>51</sup>

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<sup>46</sup> KRG: Children Allege Torture by Security Forces, 2017

<sup>47</sup> The New Iraq? Torture and ill-treatment of detainees in Iraqi custody, 2005

<sup>48</sup> Iraqi Constitution, art. 37

<sup>49</sup> KRG: Children Allege Torture by Security Forces, 2017

<sup>50</sup> Human Rights Watch interview with Judge Riadh Jafar and Judge Jabar Hussein. Baghdad, 2017

<sup>51</sup> General Amnesty Law, August 2016 (no.27/2016)



There are also concerns that ISIS suspects are facing torture and other forms of ill-treatment in the KRG. Human Rights Watch has documented allegations of torture by KRG forces holding ISIS suspects. Out of nineteen child ISIS suspects held by the KRG and interviewed by Human Rights Watch, seventeen said that Asayish forces tortured them in order to extract confessions.<sup>52</sup> KRG authorities have not granted researchers access to adult ISIS suspects yet.

Iraq's criminal procedure code, as amended by the KRG in 2010, prohibits enforced confessions.<sup>53</sup> However, an international aid worker with knowledge of counterterrorism cases said that while torture of ISIS suspects during interrogations was prevalent, they had not seen a single instance of a judge ordering a medical examination of a detainee who had alleged torture.<sup>54</sup> In addition, according to a KRG spokesperson, upon arrival at detention facilities, detainees are only checked for chronic and contagious diseases.<sup>55</sup> The spokesperson said in January 2017 that seven detainees had alleged ill-treatment while in detention, but later told Human Rights Watch that no charges had been brought against any officials.<sup>56</sup> The KRG's counterterrorism law states that judges must set aside forced confessions unless corroborated by other evidence.<sup>57</sup>

### **Judicial decisions for the detainees**

war crimes, crimes against humanity, and genocide are not crimes under Iraqi Penal Code No. 111 of 1969 therefore The Iraq's counterterrorism law (no. 13/2005) covers a wide variety of crimes including membership or support for a terrorist organization, as well as the specific crimes of possession or use of explosives, torture, maiming, kidnapping, unlawfully detaining, or killing while affiliated with a terrorist organization.<sup>58</sup> It does not however include rape, sexual slavery, and other serious crimes such as war crimes, crimes against humanity or genocide. Provision 4 of the law stipulates the death penalty for anyone who committed, incited, planned, financed, or assisted in a terrorist act. The same provision calls for a life prison sentence for anyone who covers up such an act or harbors those who

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<sup>52</sup> KRG: Children Allege Torture by Security Forces, 2017

<sup>53</sup> Global Justice Project: Iraq, "Criminal Procedure Code 23 of 1971, Kurdistan region of Iraq (as amended to 14 February 2010)"

<sup>54</sup> Human Rights Watch interview with an international aid worker who requested anonymity. Erbil, 2017

<sup>55</sup> Dr. Dindar Zebari, chairman of the KRG's High Committee to Evaluate International Organizations' Reports, email message to Human Rights Watch, 2017

<sup>56</sup> Dr. Dindar Zebari, chairman of the KRG's High Committee to Evaluate International Organizations' Reports, letter to Human Rights Watch, 2017

<sup>57</sup> Anti-terrorism Law in the Iraqi Kurdistan region, No. 3 of 2006.

<sup>58</sup> Iraqi Counterterrorism Law, No. 13 of 2005, arts. 2 and 3.

participated.<sup>59</sup> Chief Justice Zaidan stated that while the law only stipulates two penalties, life in prison or death, judicial discretion allows judges to hand down lower sentences. He did not specify what the lowest sentence could be.

Prosecution of ISIS suspects under counterterrorism laws is more expedient and faster than prosecutions in ordinary criminal courts on charges under the criminal law. But the counterterrorism law allows authorities to use specialized counterterrorism courts that in practice are limiting due process protections. Judges can speedily convict ISIS suspects on their mere admission of membership in ISIS, without the need to gather evidence of the full range of crimes committed. In addition, as three counterterrorism judges told Human Rights Watch, the cases rely heavily on confessions and written witness testimony of an ISIS suspect's affiliation, gathered by intelligence officers. Thus, the investigative judge has limited opportunity to question witnesses. Only in a handful of cases has the court called in witnesses to testify in ISIS related cases.

This approach is inadequate to the task of providing a real accounting of the crimes that ISIS committed – which Iraqis deserve – and fails the test of fairness and justice by equating the acts of individuals whose roles in ISIS may have been very different. By failing to investigate, document and prosecute the serious offenses under the criminal law that ISIS suspects committed, the approach currently being adopted fails to provide judicial documentation of these crimes and provide remedies for the victims of these crimes. The absence of victim participation in these prosecutions is detailed below. The approach also fails to allow the judiciary to prioritize the prosecution of those responsible for the most serious crimes under ISIS.

Under Iraqi law victims have the right, if they choose, to participate in all trials, to provide testimony and to submit questions to the investigative judge to pose to suspects about their motivations.<sup>60</sup> However, Iraq and the KRG authorities have been trying ISIS suspects in most cases solely based on confessions and written witness statements, primarily about their ISIS membership. They are taking no measures to inform victim communities about who is being

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<sup>59</sup> Art. 4 reads, "1. Any one who committed, as a main perpetrator or a participant, any of the terrorist acts stated in the second & third articles of this law, shall be sentenced to death. A person who incites, plans, finances, or assists terrorists to commit the crimes stated in this law shall face the same penalty as the main perpetrator; 2. Any one, who intentionally covers up any terrorist act or harbors a terrorist with the purpose of concealment, shall be sentenced to life imprisonment."

<sup>60</sup> Global Justice Project: Iraq, "Criminal Procedure Code 23 of 1971, Kurdistan region of Iraq (as amended to 14 February 2010)"

tried and when, or to solicit their participation in ongoing trials. As a result, according to victims whom researchers interviewed from diverse communities across Iraq, the ongoing trials seem to be doing little to convince victims that justice is being served.

Victims and witnesses normally do choose to have a role during Iraqi criminal trials in presenting their testimony of crimes committed.<sup>61</sup> They can also submit questions via their lawyer to the investigative judge, to put to the defendant. However, because the counterterrorism courts need only prove affiliation with ISIS to prosecute ISIS suspects under the counterterrorism law, they do not need victim testimonies to prove the culpability of ISIS suspects in any specific crimes under the criminal code, such as murder or rape. As a result, counterterrorism judges can forego gathering evidence from victims or witnesses. According to all five judges interviewed, judges are primarily relying on confessions as the basis for their prosecutions of ISIS suspects, as well as written testimony from friends or neighbours supporting claims of ISIS affiliation.<sup>62</sup>

One Nineveh judge told Human Rights Watch that while all hearings are open to the public, the court does not seek the testimony or participation of victims, and in fact would discourage it, saying it would put too great a burden on the system to maintain contact with victims.<sup>63</sup> In Baghdad, Chief Justice Zaidan and two counterterrorism judges said that once the situation in Nineveh stabilized and those displaced were able to return home, victims would be welcome to participate, particularly during the trial.<sup>64</sup> They did not address what participation would look like and what steps courts would take in order to solicit that participation.

This is highly problematic in both working out whether the suspected ISIS member committed a serious crime, but also in cases where convicted ISIS members are granted amnesties, making it possible that those who committed serious crimes may well be released as key victims or witnesses did not know about their prosecution.

The KRG judges said that most hearings taking place in the Erbil counterterrorism chamber were open to the public and that all were welcome to attend, but that their courts did not take any steps to contact victims to solicit their testimony or participation during trials.<sup>65</sup>

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<sup>61</sup> Email message to Belkis Wille, September 15, 2017.

<sup>62</sup> Human Rights Watch interview with a judge who requested anonymity, Hamdaniya, 2017

<sup>63</sup> Ibid

<sup>64</sup> Human Rights Watch interview with Judge Riadh Jafar and Judge Jabar Hussein. Baghdad, 2017

<sup>65</sup> Human Rights Watch interview with Judge Fadhil Abbas and Judge Masoud al-Sinjari, Erbil, 2017

Without active victim participation, some communities may proceed to take justice into their own hands. In one possible example of this, in June 2017, Sunni tribal leaders alleged that Yezidi fighters captured and perhaps killed at least 52 civilians from eight families belonging to a Sunni tribe rumored to have participated in the roundup and abuse of Yezidi women, in complicity with ISIS, in August 2014.<sup>66</sup> Though the families were still missing at the time of drafting, the Yezidi community has rejected the allegations.<sup>67</sup> While Human Rights Watch was unable to determine the veracity of the claim, it highlights concerns that the exclusion of victims from judicial processes could fuel a desire for groups to take justice into their own hands.

In a positive development, in March 2017, Iraq passed a Witness Protection Law that increases protections for victims, witnesses, experts, and informants who provide information in criminal cases.<sup>68</sup> This can encourage victims to testify against ISIS suspects charged with serious offenses, but without an opportunity to testify, it will not be of much help.

### **Death Penalty**

Iraq has long had one of the highest rates of executions in the world, ranked number four after China, Iran, and Saudi Arabia.<sup>69</sup> Iraqi law permits the death penalty against adults for a range of crimes, including offenses under the counterterrorism law. In the Kurdish Region of Iraq, the KRG implemented a de facto moratorium on the death penalty in 2008, banning it “except in very few cases which were considered essential,” according to a KRG spokesperson, including for terror convicts.<sup>70</sup>

Under the Iraqi criminal procedure code article 224, all cases of defendants sentenced death automatically transfer to the High Federal Appeals Court in Baghdad for review of the verdict within 10 days.<sup>71</sup>

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<sup>66</sup> Video announcement from the media office of parliament representative Ali Almatioti official Facebook page, 2017

<sup>67</sup> Statement by Murad Ismael, executive director and a board member of Yazda posted on his official Facebook, 2017

<sup>68</sup> "قانون حماية الشهود والخبراء والمخبرين والمجنى عليهم", Parliament Iraqi, 2017

<sup>69</sup> The Death penalty in 2016: Facts and figures, 2017

<sup>70</sup> Capital Punishment in Kurdistan: Over 250 convicts on death row, 2017

<sup>71</sup> Global Justice Project: Iraq, "Criminal Procedure Code 23 of 1971, Kurdistan region of Iraq (as amended to 14 February 2010)"

Currently, Iraqi government authorities are conducting executions without publicizing any official numbers.<sup>72</sup> Human Rights Watch is aware of at least 92 executions of suspected ISIS members.<sup>73</sup> On August 2, the Higher Judicial Council issued a statement that the Nineveh counterterrorism court had handed down death sentences to four ISIS suspects, three of whom had been ISIS police and one responsible for recruiting fighters.<sup>74</sup> A judge at the court told Human Rights Watch on September 27 that they had already handed down around 200 death sentences.<sup>75</sup> The expedited nature of the trials in Nineveh's court, with the completion in six months of 5,500 investigative hearings of ISIS suspects now in the trial phase, raises concerns that there will be a large number of death sentences handed down despite serious due process shortcomings.

The Iraqi Penal Code prohibits the use of the death penalty against children.<sup>76</sup> In mid-September, Baghdad's Central Criminal Court authorities sentenced and reportedly executed a Russian man for membership in ISIS under the counterterrorism law.<sup>77</sup>

Human Rights Watch opposes capital punishment in all countries and under all circumstances. Capital punishment is unique in its cruelty and finality, and it is inevitably and universally plagued with arbitrariness, prejudice, and error. A majority of countries in the world have abolished the practice. In 2012, the United Nations General Assembly called on countries to establish a moratorium on the use of the death penalty, progressively restrict the practice, and reduce the offenses for which it might be imposed, all with the view toward its eventual abolition.<sup>78</sup>

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<sup>72</sup> Nasiri, 2017

<sup>73</sup> Iraq: Islamic State Executions in Tikrit, 2014

<sup>74</sup> Nineveh Criminal Court sentences four ISIS militants to death, 2017

<sup>75</sup> Human Rights Watch interview with a judge who requested anonymity, Tal Kayf, 2017

<sup>76</sup> The Latest: Iraq PM says Mosul abuses not systematic, 2017

<sup>77</sup> George & Abdul-Zahra, 2017

<sup>78</sup> Human Rights Watch, 2017

## **Chapter Four: Prosecution of returning foreign fighters in the European Union**

The new EU Counter-Terrorism strategy was adopted in December 2005. The EU legal framework produced a long-term strategy to combat the terrorism inside and outside of the EU and it contained four new pillars: Prevent, Protect, Pursue and Response.

### **1. Prevent**

Preventing is the most challenging pillar of the Counter-Terrorism Policy and it is important because it represents the main aim of all the intelligence agencies: to prevent the threat on the country. Since December 2005, when the EU adopted the four new pillars for combating terrorism, the Action Plan implemented more than 25 measures based only on the Prevention pillar. This contains seven approaches which are the key priorities of the EU foreign and domestic policy. The aim of the new measures and key approaches is to limit the radicalization of people by turning them into ISIS or Al-Qaeda terrorists (or any other group inspired by the terrorist ideology). It also aims to combat the causes of terrorism, radicalization and recruitment, and prevent the justification of terrorism as there is no excuse for terrorism. Much of the EU community, no matter what sort of belief they follow, refuse the fundamental ideology promoted by terrorists. The main aim of the intelligence communities is to combat the terrorist propaganda and the circumstances that lead people to get involved in terrorist acts.

The difficulties that arise when preventing terrorism are linked to determining the circle of people inside the Muslim society. The society is one of the important factors of radicalization and that is how terrorists are recruited inside and outside of the EU.

Moreover, combating terrorism is not the responsibility of some of the EU member states only. It is the responsibility of all the EU countries. They need to contribute to the combat of terrorism as it has been agreed by the EU Council. Some of the member states refuse or do not contribute enough to sharing information about their internal security with the EU Council. Such EU member states represent the main challenge for the Counter-Terrorism strategy as it focuses on the coordination level produced by the EU legal framework on both regional and local policies. This challenge requires a full engagement from the EU population, not only the governments.

On 15 January 2014, many EU member states developed counter radicalization strategy projects. It is important to mention that the Preventing strategy was criticized in regard to the

predictable level of violence<sup>79</sup>. In 2014, the EU Counter-Terrorism strategy was completely reviewed. The soft approach for preventing radicalization was not based on the Counter-Terrorism legislation. As a result, it was inefficient and inconclusive and it was a negative reflection of the community relations<sup>80</sup>. The former Director General of MI5, Baroness Elizabeth Manningham Buller, warned of a group of citizens turning into “vigilantism” due to fear induced by terrorism<sup>81</sup>. They found that implementing the prevent strategy created a suspicious atmosphere between the government and the Muslim community in the European Union<sup>82</sup>.

One of the recruitment methods used by terrorists is the internet and social media. They use it to turn people into terrorists who then operate in Europe or they transfer them to fighting areas such as Iraq and Syria. The EU Commission built a partnership with the internet service provider in Europe as all the ISP companies are private. It is necessary for the EU to build such a partnership with the private companies and share the information with the intelligence communities to prevent the recruitment through the social media<sup>83</sup>.

In December 2016, the main social media networks such as Facebook, Twitter, and Microsoft announced that they had developed technologies which allowed them to track extremist behavior. This announcement came after the EU Council criticized the social media in the USA for not making sufficient efforts to track down the terrorist recruitment videos. The new technologies were implemented in Europe at the start of 2017<sup>84</sup>.

## **2 .Protect**

Protecting the infrastructure and strengthening the defense strategy against terrorism is the main aim of the Protection pillar. Thus, the impact of terrorist attacks is reduced and the cooperation between the internal and external borders of the EU is improved.

The EU Action plan listed thirty measures that Counter-Terrorism needed to achieve. The key priority of the EU is to have an agreement to protect the infrastructure program introduced by the EU Council as well as improve and exchange passenger data including the identity, the

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<sup>79</sup> Secretary of state for Home department, “Prevent Strategy,” Command of her majesty, UK., 2011

<sup>80</sup> House of Commons, House of Lords Joint Committee on National Security Strategy (2012), First Review of the National Security Strategy 2010., 2012

<sup>81</sup> Holehouse, 2015

<sup>82</sup> BIGO, BONELLI, GUITTET, & RAGAZZI, 2014

<sup>83</sup> COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL, The EU Counter-Terrorism Policy: main achievements and future challenges, 2010

<sup>84</sup> Murgia, 2016

biometric information and the passport details of the passengers). It is also important to reinforce the efforts and develop methods to protect the soft targets at the international level, the EU member states must collaborate and exchange information about travelers through civil aviation and navy. They must also evaluate the existing legislation and implement the Action Plan measures. The Euro Border Agency (FRONTEX) provides risk management to protect the EU external borders. The EU introduced new civil aviation rules and changed many regulations including the maritime transport regulations<sup>85</sup>.

### **3 . Pursue**

The main objective of the Pursue pillar of the EU Counter-Terrorism strategy is the pursuit of terrorism around the world and across the EU borders including preventing travel planning, pursuing the terrorist communication, infiltrating terrorist support networks, blocking terrorist funding and bringing the terrorists to justice.

The EU Action Plan has more than 60 measures and the pursuit of eight of these measures is a priority for the Action Plan. These measures include strengthening the EU capabilities for counter terrorism, blocking terrorist financing and money laundry, blocking the access to weapons and explosives including homemade explosives, chemical, biological and radiological materials, reinforcing the law enforcement and changing the information between the EU member states and other countries outside of the EU.

In addition to that, the Action Plan includes measures regarding the evaluation of the current legislation and the ratification of international treaties as well as the facilitation of the cooperation between the police and the judicial professionals using Europol and Eurojust. All the measures used in the pursuit of terrorism are for enhancing, gathering, and simplifying the information exchange between the institutions of EU member states like Europol and Eurojust. These measures focused on training support and information exchange, including sensitive information. The Euro Evidence Warrant is very important for exchanging evidence between the EU members<sup>86</sup>.

### **4. Response**

The objective of the Response pillar is to improve the capability, coordination, and response to minimize the consequences of a terrorist attack. In 2001, the EU developed the “EU Community Civil Protection Mechanism” (CCPM) and today this represents one of the best

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<sup>85</sup> The EU Counter-Terrorism Policy: main achievements and future challenges.

<sup>86</sup> Ibid



efforts of the EU response<sup>87</sup>. CCPM continually reinforced that there should be a fast response in case of any disasters, not only in the case of a terrorist attack. There should be a similar response in terms of other disasters such as earthquakes, forest fires and floods. Each EU member should respond to the crisis within their own country and look after their citizens living abroad as well. Another task of the Response pillar is to link the political response and the emergency management, to make sure the elements are integrated to a high degree and the conformity takes place horizontally and vertically<sup>88</sup>.

Despite the great developments of the EU Counter-Terrorism Strategy since 2001, a significant challenge remains. The strategy has not reached its full potential yet<sup>89</sup>. One of the main developments in the EU Counter-Terrorism Strategy was establishing the European Arrest Warrant in 2002 which became operational in 2007<sup>90</sup>. This was set up to help the extradition procedure of suspected terrorists between the EU members.

### **Criticism of the EU Counter-Terrorism Strategy**

The major problem of the EU Counter-Terrorism Strategy was the cooperation between the EU members. Some of the members were unwilling to share intelligence information with the other members through EAW and Europol. Some of these countries still prefer to share information based on bilateral agreements outside of the EU member states. The cooperation problem between the EU members affects Europol as well, as they do not have the power to arrest any suspects. They are only responsible for exchanging intelligence information between the EU countries<sup>91</sup>. The restriction of Europol is reflected in the EU institutions and its influence is limited. In 2014, the “Focal Point Travelers Scheme”<sup>92</sup> was established by Europol to collect and analyze the information regarding the terrorists travelling abroad to join the fight. However, only 14 countries of the 28 EU member states responded on the day of the Paris attack and registered their own people on the scheme. Another problem of Europol was that it collaborated only with the police (national or federal) and it did not involve the intelligence agencies. This caused problems in terms of accessing specific information about certain terrorists. To solve this issue, in 2016 Europol launched the “European Counter-Terrorism Centre”<sup>93</sup> (ECTC) which represents the main

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<sup>87</sup> Civil Protection

<sup>88</sup> The European Union Strategy for Combating Radicalisation and Recruitment to Terrorism, 2005

<sup>89</sup> Gohel, 2016

<sup>90</sup> Ibid.

<sup>91</sup> Ibid.

<sup>92</sup> Improving information and Intelligence exchange in the area of counter-Terrorism across the EU, 2015

<sup>93</sup> European Counter Terrorism Centre, 2016

hub for intelligence information for combating terrorism inside the EU. The success of the ECTC needs time to be evaluated. The European Union Counter-Terrorism Strategy was criticized due to the slow bureaucratic process and for the fact that it became active only after the terrorist attacks. This happened because a large number of EU member states refused to participate or provide the EU legal institutions with enough information to combat terrorism.

### **1. Prosecution of returning foreign fighters**

During the last years, an increasing number of court cases have been opened in the EU in which returning Foreign Fighters are convicted. They were prosecuted for offenses such as travelling to a conflict zone, being involved in a terrorist group, and receiving training for the purpose of committing or preparing a terrorist attack<sup>94</sup>. Taking into consideration that until 2013, the act of joining a terrorist organization was not in itself considered as a crime in the criminal codes of the MS<sup>95</sup>, the recent situation shows an increasing development in the prosecution of returning foreign fighters. However, the practical implementation of the criminal law measures has revealed challenges and negative consequences that might explain why the number of court cases against returning foreign fighters is still very low compared to the relative high number of returnees<sup>96</sup>.

#### **a. Challenges faced by the prosecutors**

A possible premise for prosecuting a potential foreign terrorist fighter is the committing of a criminal offense. Therefore, it is necessary for the prosecutors to provide evidence of this commitment. Due to the fragile situation in Syria and Iraq, establishing a legal cooperation with local law enforcement authorities and undertaking criminal investigations abroad to collect evidence or arrest suspects can be complicated. Indeed, it poses a serious challenge for the foreign prosecutors<sup>97</sup>. Although the emerging role of social media and Internet publications of pertinent materials such as photos or video of suspected individuals enables new opportunities, the gathering of Internet based evidence is likewise challenging when the providers are located abroad<sup>98</sup>. However, if proving the commitment of a criminal act is impossible or very difficult, prosecutors often choose a prosecutorial approach. In this case, it is sufficient to prove “the criminal acts of recruitment, incitement or glorification of

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<sup>94</sup> Reed, de Roy van Zuijdewijn, & Bakker, 2015

<sup>95</sup> Ibid.

<sup>96</sup> van Ginkel, 2016

<sup>97</sup> Ibid.

<sup>98</sup> Ibid.

terrorist acts, financing of terrorism, membership of a terrorist organization, and preparatory or supportive activities for terrorist acts”<sup>99</sup>. Hence, this strategy largely avoids the need for collecting evidence abroad and thus offers a higher chance of success for the prosecution of returnees. Yet, it is important to consider the choice of the criminal qualification as it directly influences the court judgement.

#### **b. Consequences of the prosecution**

The prosecution of a Foreign Fighters is mainly used as a measure to discourage potential Foreign Fighters from leaving their home countries for Syria or Iraq. In contrast, the deterrent effect of this measure might have unintended impacts: Family members and friends might be discouraged to inform the local authorities about the departure or return of a potential foreign fighter from Syria. This will significantly reduce the security authorities’ capabilities to gather information and consequently limit the chances to detect returnees to their home countries. In the worst-case scenario, they might continue their engagement in terrorist activities<sup>100</sup>; Foreign fighters might be deterred from returning to their home countries due to the prosecution and consequently stay in Syria or Iraq or move to another country. While this result may be considered as positive from a European perspective in the short term, it will provoke an ongoing destabilization in Syria and Iraq and might even lead to a spillover effect on a wider region in the long term<sup>101</sup>.

## **2. Prison and probation**

The purpose of prisons is to “confine offenders in secure and humane conditions”<sup>102</sup> and thereby also includes the “retribution, rehabilitation and protection of society”<sup>103</sup>. However, after it was known that some of the major perpetrators of terrorist attacks in Europe had passed through the criminal justice system, suspicions were strengthened that prisons may be used as a “breeding ground for radicalized violent extremists”<sup>104</sup>. To counter the risk of radicalization in prisons and during probation, it is crucial to identify and address the challenges and unintended consequences of the current prison and probation system.

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<sup>99</sup> Ibid.

<sup>100</sup> Reed, de Roy van Zuijdewijn, & Bakker, 2015

<sup>101</sup> Ibid.

<sup>102</sup> Draft Council of Europe Handbook for Prison and Probation Services regarding Radicalisation and Violent Extremism, 2016

<sup>103</sup> Ibid.

<sup>104</sup> Ibid.

#### a. Challenges

Understanding the process of radicalization and identifying radicalized individuals are one of the key factors and at the same time one of the main challenges to counter radicalization of offenders in prison and on probation. This is due to the fact that there is no consistent profile for violent extremists regarding their personal, political and ideological motivation. However, distinctive characteristics of violent extremist offenders compared to other offenders do exist and need to be taken into account as they will influence the process of radicalization in prison and reintegration into society during probation. In order to prevent radicalization, it is therefore necessary to undertake individualized risk assessments and to specialize intervention programs. Consequently, it is also important to provide adequate resources and qualified prison and probation staff members to ensure the successful implementation of the individual procedures.

#### b. Impacts

Even though a correlation between overcrowded prisons and increased radicalization in prisons has not yet been proved, it seems obvious that a “hostile and overcrowded environment”<sup>105</sup> will facilitate the recruitment and radicalization process of frustrated individuals that suffer from inhumane treatment in prisons. Given this possible risk of radicalization, prisons thus should give positive incentives to avoid overcrowding, by providing for example more time for prison visits or out-of-cell activities<sup>106</sup>. On the other hand, an expansion of these prescriptions might increase the risk that extremist activities are continued or even intensified through contacts outside prison<sup>107</sup>. Furthermore, concern has also been expressed over the negative effects of regular transfers of prisoners. According to the CPT, “successive transfers could under certain circumstances amount to inhuman and degrading treatment”<sup>108</sup> that “can have very harmful effects on [the prisoner's] psychological and physical well-being”<sup>109</sup>.

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<sup>105</sup> Ibid.

<sup>106</sup> Ibid.

<sup>107</sup> Ibid.

<sup>108</sup> Ibid.

<sup>109</sup> Ibid.

### 3. Other administrative measures

Criminal law measures are widely used in most of the countries as they have the advantage of separating the Foreign Fighters from the rest of the society. However, this is not the only solution. Indeed, as observed, many countries are using administrative measures as alternatives or supplements to criminal prosecutions<sup>110</sup>. A distinction could thus be made between two periods: the first wave of returning Foreign Fighters (before 2014) did not generally face legal measures, but only administrative measures. Since the end of 2014, Member States rather choose criminal prosecutions when they can. Among administrative measures we can distinguish: revoking nationality, travel restriction (including house arrest, confiscation of travel documents, electronic tracking bracelet), the suspension of social allowance, the loss of the ability to hold public office, to vote and be elected in public elections. This section focuses on the most common procedures dealing with the problem of the Foreign Fighters: revoking nationality and travel restriction.

#### a. Revoking nationality

Some countries revoke nationality for dual nationals if “serious prejudicial” activities have been proven (for example in France or in the Netherlands)<sup>111</sup>. Revoking nationality could be a solution for the Foreign Fighters phenomenon. Indeed, the withdrawal of nationality prevents them from re-entering the country. Thus, two positive aspects on the challenge regarding Foreign Fighters can be demonstrated.

**Firstly**, this lack of passport might limit chances of seeing a returning Foreign Fighters involved in terrorist plotting in its home country because he would not be allowed to come back<sup>112</sup>.

**Secondly**, revoking nationality would have a dissuasive effect on prospective Foreign Fighters as they would not be able to travel freely<sup>113</sup>. In addition, revoking nationality for Foreign Fighters already back to the national territory would, in some cases, allow the State to expel them to their country of second nationality. Even if such procedures seem to give a short-term solution to the Foreign Fighters phenomenon, it has no positive effects on the long term and can in fact in some cases cause human rights infringements. However, the deprivation of nationality causes real human rights’ infringements when it is applied to

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<sup>110</sup> VIDINO, 2014)

<sup>111</sup> Foreign fighters: a New Challenge for the EU Counterterrorism Strategy, 2016

<sup>112</sup> Reed, de Roy van Zuijdewijn, & Bakker, 2015

<sup>113</sup> Ibid.

individuals with only one nationality. Indeed, the most basic political and civil rights are related to the citizenship. Being stateless means “to lose all rights others that those generally recognized as basic human rights”<sup>114</sup>. Various international texts express the right to nationality and call States to refrain depriving individuals from it. The most well-known example is the Universal Declaration of Human Rights, adopted on 10 December 1948. Article 15 specifies on the one hand that “Everyone has the right to a nationality”, and on the other hand that “No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality”<sup>115</sup>. Indeed, this UN General Assembly Resolution is not a convention and has no legal authority per se. But the Convention on the Reduction of Statelessness, signed in 1961, is a binding international treaty and, today, a major source of international law on citizenship and rights of stateless people. It states that one cannot lose nationality until one has not acquired nationality of another State (article 7)<sup>116</sup>. It also specifies exceptions according which an individual can lose its nationality: fraud, disloyalty or prejudicial conduct toward the State where he holds his nationality (article 8)<sup>117</sup>. Thus, revoking nationality when it results in creating stateless people is against international law and breaks basic human rights. Furthermore, even when it is applied to dual nationals, revoking citizenship also have negative effects on the problem of returning Foreign Fighters.

Moreover, revoking citizenship also leads to negative effects when apply to dual-nationals Foreign Fighters<sup>118</sup>. **Firstly**, if the nationality is revoked when they return, it makes it more difficult for the returnees to reintegrate peacefully into society<sup>119</sup>. Some returning Foreign Fighters are not violent and wish to deradicalize or disengage. But if their nationality is revoked, the State can legally expel them to their second nationality country, even if they may have no real link with this nation<sup>120</sup>. This could be used only if they do not risk “torture or to inhuman or degrading treatment or punishment” (European Convention of Human Rights, Article 2) in their country.

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<sup>114</sup> JAYARAMAN, 2016

<sup>115</sup> Universal Declaration of Human Rights, 1948

<sup>116</sup> Convention on the Reduction of Statelessness, United Nations, 1961. Until now, 55 states have ratified the Convention among which Denmark, France, Germany, the Netherlands and the UK, 1961

<sup>117</sup> Ibid.

<sup>118</sup> Reed, de Roy van Zuijdewijn, & Bakker, 2015

<sup>119</sup> Ibid.

<sup>120</sup> BOUTIN, 2016

**Secondly**, if the nationality is revoked during fighting, it is a signal that there is no way back. Individuals might prefer or be obliged to stay in the conflict zone or leave for another nonwestern country that they can enter or that they will enter illegally.<sup>121</sup> They will move into illegality and it will make it harder to monitor and detect them. Nevertheless, they can stay in touch with potential returnees in their home country, support terrorist activity or become involved in terrorist plots in other states.

**Thirdly**, it creates an unequal treatment between citizens of a country<sup>122</sup>. Deprivation of nationality contributes to increase the perceived discrimination in the home society, which is a factor of radicalization and can be an obstacle for Foreign Fighters' deradicalization. Indeed, deprivation of nationality for dual nationals only is perceived as the creation of “second-class citizens”<sup>123</sup> resulting in an increase of animosity against the State<sup>124</sup>.

**Finally**, revoking nationality will not prevent from radicalisation<sup>125</sup>. This procedure simply “shifts the problem and possible threat to another location”<sup>126</sup>. It is a way to export the risk to another State, without solving the real deep-seated problem. Alternatives to revocation of citizenship could be travel restrictions.

#### **b. Travel restrictions and house arrest**

Another widely used administrative measure is the restriction of travelling. When nationals and EU citizens are suspected of interest in jihadist activity, instead of being imprisoned, they could be placed under house arrest and have their travel documents (identity card, passport, and visa) withheld<sup>127</sup>. House arrest is, by definition, the obligation to stay home a number of hours per day combined with the obligation to frequently make a report to a police station.<sup>128</sup> These measures could be controlled by the use of an electronic tracking bracelet. Foreigners can be subject to expulsion, residence permit withdrawal, entry ban or prohibition to leave the country for security reasons<sup>129</sup>.

These different forms of travel restrictions could have positive effects on the Foreign Fighters phenomenon in the short term. Indeed, those individuals do not have the right to

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<sup>121</sup> Reed, de Roy van Zuijdewijn, & Bakker, 2015

<sup>122</sup> BOUTIN, 2016

<sup>123</sup> Ibid.

<sup>124</sup> Reed, de Roy van Zuijdewijn, & Bakker, 2015

<sup>125</sup> JAYARAMAN, 2016

<sup>126</sup> Reed, de Roy van Zuijdewijn, & Bakker, 2015

<sup>127</sup> Foreign fighters: a New Challenge for the EU Counterterrorism Strategy, 2016

<sup>128</sup> BOUTIN, 2016

<sup>129</sup> Foreign fighters: a New Challenge for the EU Counterterrorism Strategy, 2016

leave their homes, cities, or countries, depending on the judge's choice. Their travel documents can be confiscated, and their movements can be controlled by electronic tracking bracelet. Thus, their chance to go back to Syria and Iraq are very limited, as are their attempts to organize attacks in their home countries.

However, it cannot completely avoid them to commit attacks on the national territory or to recruit people, especially through the Internet and social Medias. If an individual want to commit an attack, he can simply ignore his house arrest or travel restriction. Furthermore, such practices increase the risk of marginalization of returnees who want to disengage or deradicalize. Confiscation of travel documents and house arrest are in fact very stigmatizing measures because without an identity card or a passport, it is very difficult to find a job. For instance, in France when travel documents of an individual are withdrawn, he/she receives in exchange a paper explaining the reason of the confiscation, highlighting at the same time the terrorist past of the person. As a consequence, the potential employer will likely be very reluctant to hire this person<sup>130</sup>. Moreover, measures like house arrest can have a significant impact on the right to “private and family life”, which is yet guaranteed by article 8 of the European Convention on Human Rights<sup>131</sup>. It is clearly hard to have a job, to pursue studies or to care for children when the individual has to stay home or to report regularly to a police station<sup>132</sup>.

To conclude, administrative measures like revoking nationality, travel ban, or house arrest seems to have limited effects on the Foreign Fighters phenomenon, especially in the long term. Those who are in a disengagement or a deradicalization process will still come back to their country and those who want to commit an attack on the national territory will not be deterred by these measures. Thus, it seems to be more an announcement effect used by the politicians to show to the public opinion that they are acting against the Foreign Fighters phenomenon. For instance, revocation of citizenship is rarely applied, which shows that this measure is firstly symbolic.<sup>133</sup> However, those measures create “significant restrictions to basic liberties”<sup>134</sup>, especially regarding freedom of movement and right to private and family life.

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<sup>130</sup> THOMSON, 2016

<sup>131</sup> European Convention for the Protectio of Human Rights and Fundamental , 1950

<sup>132</sup> BOUTIN, 2016

<sup>133</sup> Ibid.

<sup>134</sup> Ibid.



## **Chapter 5 Extraordinary Procedures for Prosecution**

### **Extraordinary Judicial Procedures in Contemporary History**

International courts have existed since the inception of the modern international system for the purpose of settling disputes between states and, in some cases, between other international actors. However, it was the Nuremberg trials after the Second World War that mainly resulted in the establishment of special courts that dealt with criminal cases against individuals in relation to the basic international crimes, that is, genocide, war crimes and crimes against humanity.

The first international criminal tribunals were established after the Tokyo and Nuremberg trials in the 1990s in response to atrocities committed during the conflict in the former Yugoslavia and the mass killings in Rwanda. The Security Council established both the International Tribunal for the Former Yugoslavia (ICTY) and the equivalent International Tribunal for Rwanda (ICTR).

Since then, special courts have also begun to be established to pursue crimes committed at the national and international levels. Examples of such hybrid courts can be found in Kosovo, Bosnia and Herzegovina, East Timor, Sierra Leone, Cambodia, and Lebanon.

### **International Criminal Tribunal for the Former Yugoslavia (ICTY)**

The ICTY was born out of the difficult events that followed the collapse of the fragile Yugoslavian state in early 1993. At the time, Yugoslavia was home to many ethnic groups, including Serbians, Bosnians, Croats, Slovenes, and others. When the ethnic and religious groups in the country began to declare their independence, the state retaliated in effort to stunt secession demands. This resulted in grave crimes committed in violation of the Geneva Conventions, during the ensuing war between the government and secessionists, more than 100,000 people were killed and approximately 4 million were displaced<sup>135</sup>.

In May 1993, the UNSC passed Resolution 827 establishing the International Tribunal for the Violations of International Humanitarian Law that occurred in Bosnia and Herzegovina. The court had jurisdiction over “Genocide, Crimes against Humanity, Violations of the Laws or Customs of War, and Grave Breaches of the Geneva Conventions.”<sup>136</sup> The court successfully

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<sup>135</sup> Transitional Justice in the Former Yugoslavia, 2009

<sup>136</sup> UN Security Council, Resolution S/RES/827, 1993

sentenced 90 of 161 indicted individuals, and as a result of the work of this court, no fugitives remain outstanding<sup>137</sup>.

The ICTY came under criticism for numerous shortcomings. Some scholars noted that despite being established in 1993, the court did not stop mass killings or the genocide that took place in Srebrenica in 1995.<sup>138</sup> Other criticisms stem from an inability to persuade the local audience that the court was needed in order to serve justice.

### **International Criminal Tribunal for Rwanda (ICTR)**

A year after the ICTY was founded, the ICTR was established following horrendous events that took place in Rwanda. Ethnic tensions between the Hutu and Tutsi tribes exploded into genocide, with almost one million Tutsi murdered by Hutu in three months.<sup>139</sup> The systematic campaign began with a call to exterminate Tutsis, bringing out Hutu tribesmen brandishing knives, machetes, spears, and clubs spiked with nails, who began to commit genocide.<sup>140</sup>

The international community repeatedly expressed outrage at the events unfolding in Rwanda, and as a result, the UNSC invoked Chapter VII of the UN Charter and passed Resolution 955 on November 8, 1994, establishing the ICTR.<sup>141</sup> The tribunal was established for the purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in Rwanda, and for rendering justice against Rwandan citizens responsible for genocide and other such violations committed in the territory and neighboring States, between 1 January 1994 and 31 December 1994.

This tribunal produced 62 indictments among 93 individuals, including high ranking military and government personnel, politicians, businessmen, religious figures, those belonging to militias, and individuals responsible for the incitement of genocide through media.<sup>142</sup> Another interesting success was that this court was the first of its kind to prosecute using the word “genocide” as defined in the 1948 in the Geneva Convention, and defining rape as a crime utilized in the commission of genocide.<sup>143</sup>

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<sup>137</sup> UN International Residual Mechanism for Criminal Tribunals

<sup>138</sup> Milanovic, 2016

<sup>139</sup> Black Earth Rising: The Rwandan genocide and its aftermath, 2018

<sup>140</sup> Power, 2013

<sup>141</sup> UN Security Council, Resolution S/RES/955, 1994

<sup>142</sup> United Nations International Residual Mechanism for Criminal Tribunals (IRMCT), The ICTR in Brief

<sup>143</sup> UN IRMCT

### **Special Tribunal for Lebanon**

The Special Tribunal for Lebanon (STL) set a precedent when it was established following the assassination of the Lebanon's Prime Minister Rafik Hariri. The tribunal—the first to cover terrorism as a crime—was charged with finding those responsible for the attack.<sup>144</sup>

The STL's decision regarding acts of terrorism was highly controversial. For one, this was the first time an international court was established that had jurisdiction over acts of terrorism and the act of spreading terrorism.<sup>145</sup> The STL was given jurisdiction over the acts of terrorism because the crime was already present in the Lebanese Code.

The STL developed the first clear definition of international law what constituted an act of terrorism. The STL found that acts of terrorism have three elements: (i) perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson), or threatening such an act; (ii) intent to spread fear among the population (which generally entails the creation of public danger), or directly or indirectly coercing a national or international authority to take or refrain from taking some action; and (iii) when an act has a transnational element.<sup>146</sup>

What assisted the STL tribunal was the investigative mechanism of the United Nations International Independent Investigation Commission (UNIIC), which was pivotal for prosecutors in the court.<sup>147</sup> It provided research assistance and knowledge that often became the foundation for holding individuals accountable for the crimes that fell under the jurisdiction of the STL. The court issued its verdict on August 18, 2020 in The Hague, establishing the murder charge against a Lebanese Hezbollah operative as the perpetrator of the assassination of former Lebanese Prime Minister Rafik Hariri in Beirut.

### **An international tribunal to Iraq**

An alternative option that some European countries have looked at is to establish an international tribunal in the region to try at least some ISIS fighters. The Swedish interior minister convened a meeting of European officials in June 2019 to promote the idea. Setting up a tribunal is an attractive idea in some ways and would fit with Europe's traditional support for international justice. But it would raise questions about the scope of jurisdiction, would take a long time, and would probably only be able to prosecute a small fraction of the

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<sup>144</sup> Statute of the Special Tribunal for Lebanon, Resolution S/RES/1757, 2007

<sup>145</sup> Scharf, 2011

<sup>146</sup> Scharf, 2011

<sup>147</sup> Tolbert, 2014

ISIS detainees in Syria and Iraq. Traditionally, international courts have prosecuted those most responsible for serious crimes – not large numbers of low-level foot soldiers.

Since all EU member states are party to the International Criminal Court, it would have jurisdiction over international crimes committed by their citizens. However, this would only extend to those who could be charged with genocide, crimes against humanity, or war crimes – not membership of a terrorist group. **For these reasons, officials have discussed setting up a new tribunal, probably in the form of a ‘hybrid’ international-national court establish in association with Iraq.**

**The formation of an international national tribunal in conjunction with Iraq is a logical solution to this erroneous approach that is currently being implemented, but this tribunal must be issued in accordance with a decision of the UN Security Council under Chapter VII of the Charter.**

#### **The main reasons for forming an international tribunal to Iraq**

There are several local Iraqi legal and administrative reasons in addition to the reasons mentioned in Chapter Three and Four that make it necessary to prosecute ISIS fighters accused of committing human rights violations in Iraq before a special international court instead of trying them in Iraqi courts or courts of countries of their nationality, and the most important of these reasons are the following:

- 1- The Iraqi constitution prohibits extradition of criminals according to Article 21, and based on Iraq's obligations, being a founding member of the United Nations, it is obligated to implement UN Security Council resolution to establish an international tribunal for Iraq.
- 2- Iraq's non-accession to the 1984 Convention against Torture in spite of The constitutional text prohibiting torture in the current Iraqi constitution of 2005 requires the Iraqi legislator to take the necessary legal measures to activate this text, and among these measures is support for Iraq's respect for the above convention against torture and the amendment of the legal text What permits torture, or at least allows it to take place or to impunity for the perpetrator, which thus leads to a crack in the sense of criminal justice and its application.
- 3- Iraq's non-accession to the Rome Convention of 1998: This convention is the establishment of the International Criminal Court despite the great importance it represents as a mechanism adopted by international law in order to incriminate and

punish crimes of the most serious and the focus of the international community as a whole, and these crimes (crime Genocide, crimes against humanity, war crimes and the crime of aggression), all in order to reduce the impunity of criminals.

- 4- The Iraqi Penal Code No. 111 of 1969 in force did not explicitly stipulate the adoption of the basic principles (the seven) that the International Law Commission extracted in 1950 from judgments issued by the Nuremberg Tribunal, pursuant to United Nations General Assembly Resolution No. 177/1 of 1947, which requested According to the law committee.

**First** - The principle of recognizing individual criminal responsibility at the international level.

**Second** - The principle of the supremacy of the international criminal rule over national law.

**Third** - the principle of the responsibility of the head of state and senior government officials for international crimes.

**Fourth** - the principle of the supremacy of conscience over the duty to obey the orders of superiors.

**Fifth** - the principle of a fair trial.

**Sixth** - The principle of assigning and defining international crimes.

**Seventh** - the principle of criminalizing participation in committing international crimes.

- 5- The Iraqi Penal Code No. 111 of 1969 in force did not include a text stating that there is no legal immunity or judicial immunity for persons when committing crimes under international law, whether that is through the issuance of pardon decisions, the intervention of the executive authorities, the statute of limitations, or the restriction of jurisdiction .
- 6- The Iraqi Penal Code 111 of 1969 contains numerous texts punishing the death penalty.
- 7- Trials are not conducted in accordance with the amended Iraqi Penal Code of 1969, which requires the issuance of judgments in a series of investigative and judicial

procedures, followed by the appeal of these judgments, and the rulings are subject to cassation in the Court of Cassation. Rather, what is currently being done is that these defendants are subject to a special law on combating terrorism (called Terrorism Law 4, which was drafted according to special circumstances, and the accused are convicted with mere testimony from a secret informant) and thousands were sentenced according to this mechanism.<sup>7</sup> The difficult conditions of prisons and detention centers in Iraq, as we explained in the third chapter of our research.

- 8- In addition to the inability and impartiality of the Iraqi judiciary sufficient to conduct trials, as we explained earlier in the third chapter, from this research, the trial of the leaders and thinkers of the organization requires a great deal of culture and knowledge of Islamic sciences and the rulings of the Qur'an in order to refute the allegations of the accused and this requires choosing judges with an Islamic background or on Full knowledge of Islamic jurisprudence and that will contribute to exposing their allegations and refute their arguments, thus limiting the spread of extremist ideas of the elements of the organization among the youth and preventing court sessions from being propaganda for the extremist organization.
- 9- The approach currently followed in the Iraqi judicial system has failed to provide judicial documentation of these crimes, which will lead to obliterating the facts and losing evidence that proves the grave crimes against humanity committed by ISIS in Iraq.
- 10- The failure of the current approach to allow the judiciary to give priority to prosecuting those responsible for the most serious crimes committed by ISIS and not separating ISIS leaders from the ordinary fighters, sympathizers, or forced to join this group.

## **Conclusion**

The formation of the International Tribunal for Iraq to prosecute ISIS fighters for committing grave violations of human rights in Iraq is an important step in achieving justice and redress for tens of thousands of victims who were prey to the brutality of these terrorist groups who took advantage of the absence of international cooperation and coordination to carry out their barbaric acts of murder, torture, genocide, rape and recruitment.

Without the joint international effort through the international coalition to fight ISIS, Iraq would not have been liberated and the caliphate state ended. Therefore, international cooperation in prosecuting the organization's leaders from foreign fighters and thinkers who committed these crimes is an urgent necessity to avoid impunity for those who take advantage of the absence of coordination and cooperation and the different national laws of the countries who follow them. The best example of this is what is happening in Europe now.

The grave crimes committed by ISIS fighters in Iraq revealed the criminal and brutal face of these gangs, which can be repeated at any time or place if the opportunity arises to do so.

From this standpoint, the international community, and through the United Nations and the authority of the Security Council, must issue a decision under Chapter VII to form an international tribunal to trial ISIS fighters, and this court must do everything to achieve justice and hold criminals accountable, document all crimes committed by members of the organization and publish them in books And volumes, in various languages, for future generations to see.

## **Recommendations**

- 1- The formation of an international national tribunal in conjunction with Iraq is a logical solution to this erroneous approach that is currently being implemented, but this tribunal must be issued in accordance with a decision of the UN Security Council under Chapter VII of the Charter.
- 2- The trial of ISIS leaders and thinkers requires choosing judges of Islamic origins or that the judges have a broad knowledge of jurisprudence, culture, Islamic sciences, rulings of the Qur'an and Islamic law in order to refute the allegations of the defendants, expose their claims and refute their arguments, in order to limit the spread of extremist ideas of the elements of the organization among the youth in various countries of the world And it is forbidden for the court sessions to be free propaganda

for the extremist organization .This court should adopt a new approach instead of the current one, whereby the priority is to prosecute ISIS leaders and thinkers about the ordinary fighters, sympathetic, or forced to join this group.

- 3- This court must follow a scientific approach in judicial documentation that provides judicial documentation of these crimes and preserves the facts and evidence proving the grave crimes against humanity committed by ISIS in Iraq in different languages for future generations.
- 4- All countries of the world, especially those that have foreign fighters, must assist the international court in freely accessing the required information, investigations and handing over the accused in order to reach the desired truth and achieve justice.
- 5- Pressuring the Iraqi government to take care of prisons and detention centers and to provide adequate humane treatment to the detainees and allow their families to visit them, as well as to allow international and humanitarian organizations to monitor prisons.
- 6- Pressure to stop the work of the death penalty government in Iraq.
- 7- Find urgent solutions for children and women, family members of foreign fighters who are detained in difficult humanitarian conditions in Iraqi detention centers.



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