

POLICY BRIEF

#80, AUGUST 2022



Transitional Justice Approach to Foreign Terrorist Fighters: Challenges and Limits of Prosecuting Former ISIS Fighters

by Cholpon Orozbekova

EXECUTIVE SUMMARY

After the defeat of ISIS, thousands of ISIS fighters were captured by the Syrian Democratic Forces in northeast Syria and held in several prisons near Hasaka. More than three years have passed since the defeat of ISIS and Iraq had already charged and sentenced those fighters captured in its territory. However, still there is no consensus among states how to bring to justice the 11,000 ISIS fighters captured in northeast Syria. First, there is no official state authority in northeast Syria; thus, they have been held by a non-state actor. Second, ISIS fighters do not belong to one country; they represent more than 80 countries. Third, there is no universal solution for dealing with foreign terrorist fighters who travel to other countries and join terrorist groups. There are several options that have been considered and discussed by states, such as establishing an ad hoc tribunal, transferring them to Iraqi prisons, or repatriating them and prosecuting them in their home countries. Each option has its shortcomings and challenges. Transitional justice remains the only law-compliant solution for trying foreign fighters. However, many states are reluctant to allow for the return of their own citizens as they are considered a threat to national security.

Cholpon Orozbekova is a conflict analyst and terrorism expert based in Geneva, Switzerland. Cholpon lectures as a guest speaker at the Geneva Centre for Security Policy and is a Member of the European Expert Network on Terrorism. Currently, Cholpon is the director of the Bulan Institute for Peace Innovations, a research institute based in Geneva. She holds three MA degrees from public universities in Geneva. Her book «Foreign Fighters and International Peace» is to be published by Rowman in 2022.

© 2022 OSCE Academy in Bishkek. All rights reserved.

The views expressed and the conclusions reached in this brief are exclusively those of the author and are not necessarily shared or endorsed by the OSCE Academy in Bishkek and the Norwegian Institute of International Affairs.

Extracts of this Policy Brief may be quoted or reprinted without special permission for academic purposes provided that a standard source credit line is included. Academy Policy Briefs and submission guidelines are available on-line at <https://osce-academy.net/en/research/publication/policy-briefs/>

The OSCE Academy's Policy Briefs became possible with financial support from the Norwegian Ministry of Foreign Affairs via the Academy's Cooperation with the Norwegian Institute of International Affairs.

Introduction

From 2012 to 2017, around 40,000 people had travelled to Syria and Iraq to join jihadist groups, mainly ISIS.¹ They represent more than 80 countries across the globe. Approximately 5000 of these fighters came from European countries, and another 5000 travelled from Central Asian countries. This is the most extensive scale of jihadist mobilization in modern history as the Afghan-Soviet war mobilized only about 10,000 fighters from Arab countries.² UN experts and UN Member States assess that ‘between one half and two thirds of the more than 40,000 who joined the ‘caliphate’ are still alive,’³ and they may continue posing a significant threat to international peace.

While thousands of fighters were captured in the territory of Iraq and sentenced for their crimes by the Iraqi judicial system, the question of justice for foreign fighters who were captured in northeast Syria remains unresolved. Following the fall of ISIS in Syria in 2019, fighters fell into the custody of the Syrian Democratic Forces (SDF), which is a non-state actor. Currently, the SDF holds about 11,000 male fighters from over 60 countries in a range of facilities, the largest two being near the towns of Hasakah and Dashisha in northeast Syria. The United States is helping the SDF to run and secure its detention facilities to hold these male fighters.⁴ However,

makeshift prison buildings, converted from schools and hospitals, are not designed to be long-term jails for hardened fighters.

The current situation also presents an acute policy problem, as members of the terrorist groups are held in a territory without a state authority and no legitimate power to bring them to trial. Furthermore, established states have struggled to find an adequate approach to addressing captured fighters and their family members. While international mechanisms such as the UN Investigative Team to Promote Accountability for Crimes Committed by Da’esh/ISIL (UNITAD) and the International, Impartial and Independent Mechanism (IIIM) established have played significant roles in collecting, consolidating, and analyzing evidence that should be presented in courts and tribunals in the future,⁵ the international debate on finding an adequate solution to bringing ISIS fighters to justice continues to unfold. The UN and OSCE have taken leading roles in addressing the current situation with the ISIS fighters trapped in northeast Syria. The OSCE’s efforts have been focused on the human rights framework for dealing with former fighters and the publishing of important documents which outline commitments for participating States, as well as tasks for the Executive Structures in co-operation with other international organizations and stakeholders.⁶

¹ United Nations Security Council (UNSC) S/2020/53, ‘Review of Twenty-Fifth Report of the Analytical Support and Sanctions Monitoring Team Submitted pursuant to Resolution 2368’, 21 July 2021: https://www.security-councilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/S_2021_655_E.pdf (accessed 12 May 2022).

² Scholars have given differing numbers ranging from 6,000 to 20,000. For example, David Malet argues that more than 6,000 arrived between 1987 and 1993, which in his view would be more than twice the number that came to fight the Soviets. Bergen suggests that the number of Arab volunteers may have reached 200,000. Q.v., P. Bergen, ‘After the War in Iraq: What Will the Foreign Fighters Do?’ in B. Fishman, ed., *Bombers, Bank Accounts & Bleedout, Combating Terrorism Center at West Point* (West Point: West Point Academy, 2008): 99. However, Muhammad Hafez argues that not all Arab volunteers can be considered to be fighters as they served in Pakistani cities as humanitarian aid workers, cooks, drivers, accountants, teachers, doctors, engineers, and religious preachers. Q.v., M. Hafez, ‘Jihad after Iraq: Lessons from the Arab Afghans,’ *Studies in Conflict & Terrorism*, v. 32, is. 2 (2009): 73–94 (DOI: 10.1080/10576100802639600).

³ Review of Twenty-Fifth Report of the Analytical Support and Sanctions Monitoring Team Submitted pursuant to Resolution 2368, *ibid*

⁴ J. Arraf, ‘Visiting Imprisoned ISIS Fighters,’ *National Public Radio (NPR)*, 08 December 2019: <https://www.npr.org/2019/12/08/786039731/visiting-imprisoned-isis-fighters.?t=1649601833376> (accessed 25 May 2022).

⁵ International, Impartial and Independent Mechanism (IIIM) of the United Nations Secretary General (UNSG) A/71/755, ‘Implementation of the resolution establishing the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011: Report of the Secretary General,’ 19 January 2017: <https://digitallibrary.un.org/record/857709?ln=en> (accessed 26 April 2022).

⁶ The following ministerial documents reflect the joint priorities of the 57 OSCE member states in addressing the major challenges posed by FTFs: MC.DOC/1/16 on ‘Strengthening OSCE Efforts to Prevent and Counter Terrorism’; MC.DEC/6/16 on ‘Enhancing the Use of Advance Passenger Information’; MC.DOC/4/15 on ‘Preventing and Countering VERLT’; MC.DOC/5/14 on ‘The OSCE’s Role in Countering the Phenomenon of Foreign Terrorist

The issue of dealing with returning foreign fighters is complex for two reasons. The first reason is that the world has never witnessed the mobilization of foreign fighters at this scale. They had never seen women and children traveling to conflict zones to join terrorist groups. The second complication stems from the fact that the fighters trapped in the territory of northeast Syria, are held in an area which is currently being administered by a non-state actor. States do not consider the Syrian Democratic Forces (SDF) to be a legitimate negotiating actor; thus, other options have been considered for inter-State interaction, such as creating an ad hoc tribunal, transferring all captured foreign fighters to Iraqi prisons, and repatriation and prosecution in home countries.

Policy Challenge: Limits and Shortcomings of the Options Considered

One possible solution in addressing ISIS fighters is to bring them to justice in the territory where they committed their crimes. Many countries thus believe they should be brought to justice in the Middle East, and several European countries have considered transferring their citizens held by the Kurdish forces to Iraqi prisons for trial in Iraq. Seven European countries took this position and began working on a framework for implementation beginning in June 2019. European officials held several talks with the Iraqi government to reach a deal to try European fighters. Iraq in turn was also interested in the deal and requested millions of dollars in financial compensation for

the maintenance and trials of the European fighters. According to media reports, Baghdad asked European countries, including Belgium, the UK, and France, to pay two million euros for each foreign combatant tried on its territory.⁷

However, the main issue in terms of follow through was not the financial details of that negotiations but deficits in the judicial system of Iraq. Since 2018, about 10,000 ISIS fighters captured in the territory of Iraq have been tried in Iraqi courts. In 2018, as highlighted by Amnesty International, there was a sharp spike in the number of death sentences imposed in Iraq. 'In Iraq, the number quadrupled from at least 65 in 2017 to at least 271 last year.'⁸ This rise in death sentences is presumably connected with the trials of ISIS fighters. Many deficits are present in the Iraqi judicial system, leading to it being labelled by human rights defenders as 'Guantánamo East' for its inability to guarantee fair trials.⁹ UN experts monitored over 600 trial hearings against ISIS suspects in Iraq, including 44 hearings against children. The courts did not distinguish between those who were commanders and responsible for violent crimes and those who took on smaller roles, such as cooking; most defendants were charged for their ISIS affiliation and many received death sentences.¹⁰ UNAMI experts noted that trials focused excessively on confessions, which may have been acquired through the practice of torture, the occurrence of which has been widely documented in Iraq.¹¹ UNAMI pointed to such torture, as well as the limited access to legal representation, as violations of international obligations regarding the right to a fair trial.

Among European countries, France has the largest number of ISIS fighters. In total, it is

⁷ O. Schneider, 'Iraq Wants 2 million Euros for Each Foreign Fighter Tried on its Territory', *Brussels Times*, 01 October 2019: <https://www.brusselstimes.com/all-news/belgium-all-news/71090/iraq-wants-2-million-euros-for-each-foreign-fighter-tried-on-its-territory/> (accessed 17 April 2022).

⁸ Amnesty International United Kingdom, 'Global Executions Fell by Nearly One Third Last Year – New Report,' press release, 10 April 2019: <https://www.amnesty.org.uk/press-releases/global-executions-fell-nearly-third-last-year-new-report> (accessed 02 May 2022).

⁹ P. Cebrán, 'They Left to Join ISIS. Now Europe is Leaving Their Citizens to Die in Iraq,' *Foreign Policy*, 15 September 2019: <https://foreignpolicy.com/2019/09/15/they-left-to-join-isis-now-europe-is-leaving-their-citizens-to-die-in-iraq/> (accessed 01 June 2022).

¹⁰ Office of the United Nations High Commissioner for Human Rights (OHCHR), 'Iraq: UN Report on ISIL Trials Recognizes Efforts and Raises Concerns,' press release, 20 January 2020, <https://reliefweb.int/report/iraq/iraq-un-report-isil-trials-recognizes-efforts-and-raises-concerns-enarku> (accessed 30 April 2022).

¹¹ Human Rights Watch (HRW), 'Iraq: Change Approach to Foreign Women, Children in ISIS-Linked Trial,' press release, 21 June 2018: <https://www.hrw.org/news/2018/06/21/iraq-change-approach-foreign-women-children-isis-linked-trials> (accessed 27 April 2022).

estimated that about 2,000 French nationals travelled to Syria and Iraq.¹² France was very interested in transferring French fighters to Iraqi prisons and managed to transfer eleven French fighters captured in Syria to Iraq, all of whom were sentenced to death by hanging.¹³ The French government and President Emmanuel Macron faced criticism for this, as France is staunchly opposed to the death penalty.¹⁴ One of the critics, Agnes Callamard, the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, expressed her concern by stating, 'There are serious allegations that the sentences were handed down following unfair trials, with the accused having no adequate legal representation or effective consular assistance.'¹⁵ She called on the French government to repatriate all French fighters sentenced in Iraq for trial at home. The French Foreign Ministry responded saying, 'Adult French nationals, men and women, having joined (ISIS) to fight in (Iraq and Syria) [...] should be tried nearest to where they committed their crimes.'¹⁶ However, France later softened its position and did not continue negotiating with the Iraqi government on the issue. As the only state which can currently be considered as a local host country is Iraq, the pitfalls of its judicial system which hinder fair trials must be considered as a serious problem.

Another alternative proposed to deal with former fighters is to establish an ad hoc tribunal. This idea gained momentum in Europe when several European states initiated expert meetings and ministerial discussions to pave the way for the formation of such a special tribunal. On 3 June 2019, Sweden hosted a meeting of senior experts at an official level,

with participants from eleven EU countries, including Sweden, Germany, France, the UK, and the Netherlands, and representatives of the EU and the UN. The Ministry of Home Affairs of Sweden regarded this as an important step in finding the right measure to ensure justice regarding foreign fighters, 'Establishing a tribunal or some other legal mechanism is no simple matter, and the path to a possible process would take time and would require cooperation between many parties. This was the case for previous tribunals and would naturally be the same in this case, too. But because something is hard is no reason for failing to investigate the possibilities,' said Minister for Home Affairs Mikael Damberg.¹⁷

The establishment of an ad hoc tribunal might be an adequate solution to address the situation in light of the unwillingness of states to repatriate their citizens. However, it is an initiative that would cease repatriation to home countries and remove states' shared responsibility for international peace. As Impunity Watch underlines, 'The proposal for an ISIS-only tribunal represents an effort by European states to outsource their responsibility for dangerous or highly vulnerable individuals to a region recovering from decades of conflict with plenty of its own challenges to address.'¹⁸ The main problem is that establishing an ad hoc tribunal is a long and laborious process. It demands not only unity among states, but also significant financial resources. As Fionnuala Ní Aoláin stressed in an interview, there is no clarity among states on whether they are prepared to spend such resources, 'Perhaps a permanent ad-hoc tribunal, which would address the

¹² Counter-Extremism Project, 'France: Extremism & Counter-Extremism,' Report, 19 June 2019: https://www.counterextremism.com/sites/default/files/country_pdf/FR-01062020.pdf (accessed 19 June 2022)

¹³ H.J. Mai, 'Why European Countries Are Reluctant to Repatriate Citizens Who Are ISIS Fighters,' *NPR*, 10 December 2019: <https://www.npr.org/2019/12/10/783369673/europe-remains-reluctant-to-repatriate-its-isis-fighters-here-s-why> (accessed 11 April 2022).

¹⁴ 'Syrian Kurds transfer 12 orphans from jihadist families to France for repatriation,' *France 24*, 10 June 2019: <https://www.france24.com/en/20190610-france-orphans-jihadist-families-syria-kurds-transfer> (accessed 15 April 2022).

¹⁵ 'UN expert to France: Bring home citizens facing hanging in Iraq,' *Aljazeera*, 13 August 2019: <https://www.aljazeera.com/news/2019/08/expert-france-bring-home-citizens-facing-hanging-iraq-190813012621682.html> (accessed 14 May 2022).

¹⁶ UN expert to France: Bring home citizens facing hanging in Iraq, *ibid*.

¹⁷ Sweden Ministry of Justice, 'Sweden Hosted Expert Meeting on Tribunal,' press release, 03 June 2019: <https://www.government.se/press-releases/2019/06/sweden-hosted-expert-meeting-on-tribunal/> (accessed 30 May 2022).

¹⁸ Impunity Watch, 'ISIS-Only Tribunal: Selective, Politicised Justice Will Do More Harm Than Good,' policy brief, 01 November 2019: https://www.impunitywatch.nl/docs/PolicyBrief_Iraq_ISIS_Tribunal_2019_eng.pdf (accessed 02 April 2022).

concerns in the region and could be done fairly and equitably, is the only solution, but that would require states to be prepared to spend a great deal of money to produce that outcome and it's not clear that they're willing to do that.¹⁹

Previous international ad hoc tribunals such as those in Nuremberg and Tokyo were created to address crimes of an international character committed by individuals, later to be known as war crimes, crimes against humanity, and genocide. Other major tribunals in history were established in post-conflict situations to bring justice for victims, such as The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), which were created in response to atrocities committed during the conflict in the former Yugoslavia and the mass killings in Rwanda respectively. Both were created by the UN Security Council.

A tribunal to try ISIS fighters may similarly also be established by the UN Security Council. However, considering the lack of unity among states on the initiative and the fact that the UN has never discussed the question, it may prove difficult to bring the issue to the Security Council. Moreover, the proposal by Sweden to establish an international tribunal was met with criticism by civil society groups. Seven Syrian and European rights and law groups, including the Open Society Justice Initiative, expressed their reservations about the proposal to establish an international tribunal exclusively focusing on ISIS's crimes.²⁰ They urged caution in the initiative and reflection on past experiences in Iraq, the broader region, and the world. Civil society experts warned that the effort would encounter numerous challenging questions, including the tribunal's jurisdiction, the scope of prosecutions, the extent of international and domestic elements, structure and financing, and oversight.

A Law-Compliant Solution: Repatriation and Transitional Justice

States have considered several methods of dealing with ISIS fighters, and the majority have been proven to be inefficient and/or prone to shortcomings. The only law-compliant and appropriate solution is repatriation and the bringing ISIS fighters to justice in their home countries. The UN and OSCE have played a leading role in norm building and the provision of guidelines to Member States in terms of fostering repatriation efforts and ensuring accountability. The UN Security Council adopted several important resolutions (2178 [2014]), 2396 [2917]) that played a critical role in norm building, preparing legal a basis, enhancing community engagement, and encouraging states to comply with their international obligations. States have a responsibility under these UNSC resolutions to repatriate and prosecute their citizens who were ISIS fighters as the resolutions affirm that states should ensure that any person who participated in financing, planning, preparation, and perpetuation of terrorist acts need to be brought to justice. UN experts and international lawyers conducted important legal analyses and concluded that the urgent return and repatriation of foreign fighters and their families from conflict zones is the only response compliant with international law.²¹

This having been said, OSCE member states are facing several serious challenges in bringing former ISIS fighters to justice at home. The main challenge is the lack of evidence for their crimes committed under ISIS. While Kazakhstan was able to convict dozens of ISIS fighters on the basis of video and social media materials as evidence of those fighters' crimes,²² Ireland's court indicated that it had insufficient evidence to enable convictions on charges of financing terrorism or being a soldier in the

¹⁹ Fionnuala Ní Aoláin, interview.

²⁰ Open Society Justice Initiative, 'NGOs Challenge Sweden's Proposal for an ISIS-Only War Crimes Tribunal,' Press release, 03 June 2019: <https://www.justiceinitiative.org/newsroom/ngos-challenge-swedens-proposal-for-an-isis-only-war-crimes-tribunal> (accessed 27 April 2022).

²¹ OHCHR, 'Extra-territorial jurisdiction of States over children and their guardians in camps, prisons, or elsewhere in the northern Syrian Arab Republic, United Nations Human Rights Special Procedures,' Legal Analyses, 10 February 2020: <https://www.ohchr.org/sites/default/files/Documents/Issues/Executions/UNSRsPublicJurisdictionAnalysis2020.pdf> (accessed 12 March 2022).

²² 'V Kazakhstane osudili 14 boevikov IGIL. Kto oni i kak popali v Siriyu? [В Казахстане осудили 14 боевиков ИГИЛ. Кто они и как попали в Сирию?]' *informburo.kz*, 11 December 2019: <https://informburo.kz/stati/v-kazakhstan-oseudili-14-boevikov-igil-kto-oni-i-kak-popali-v-siriyu.html> (accessed 10 March 2022).

ranks of ISIS. After Irish woman Lisa Smith was repatriated from Syria and immediately arrested, the court ruled that there was no evidence that she sent the 800 EUR she had sent abroad knowing or intending that it would be used for the benefit of ISIS.²³ While it may be challenging to find evidence against specific individuals, there are international mechanisms established to gather and document the crimes of ISIS, namely IIIM and UNITAD. Both mechanisms have collected a wealth of documents, videos and photos that can serve as evidence in national courts.

Alongside the evidence-finding issue, the OSCE member states have also encountered other concerns. First, countries consider male fighters as a threat to national security based upon the fear that they may commit further terrorist attacks at home and/or recruit other people to join terrorist groups. Second, diplomats have highlighted the lack of legitimate actor in northeast Syria to negotiate with. Many EU countries do not feel comfortable negotiating with the Syrian Democratic Forces and have emphasized the absence of diplomatic or consular services in the region. Third, there is currently no comprehensive rehabilitation exit program for inmates. Prisons cannot guarantee that perpetrators will go through positive change and disengage from violence. Rather, in most cases, prisons create favourable conditions for the spread of violent ideas and gaining of followers.

Despite the existing challenges, the return of ISIS fighters to their home countries is the best way to ensure that justice is met and to maintain control over the processes of interrogating and prosecuting them. Since there is neither a state authority in northeast Syria nor the prospect of establishing a new inter-

national tribunal as the International Criminal Court has neither the clear mandate nor the capacity to prosecute such a huge number of foreign terrorist fighters who represent more than 60 countries, the obligation of bringing ISIS fighters to justice falls to States of origin.²⁴ States have a shared responsibility for international peace under Chapter VII of the UN Charter, which is binding on all UN member states. Thus, all States 'should assume their responsibility for suspects who fall under their jurisdiction.'²⁵

Moreover, OSCE member states also have obligations in compliance with OSCE commitments, especially the organization's long-standing commitment to the promotion and protection of human rights as a strategic focus of OSCE counter-terrorism activities.²⁶ Before the Covid pandemic, the OSCE was actively engaged in addressing the threats posed by such terrorism activities and advocated for a human rights-based approach to the issue. The most important document developed by the OSCE is its Guidelines for Addressing the Threats and Challenges of FTFs (Foreign Terrorist Fighters) within a Human Rights Framework.²⁷ This is a comprehensive document that provides legal analyses, policy recommendations for human rights compliant approaches, and best practices. Due to the pandemic, the OSCE has slowed down its efforts in addressing the issue of returning fighters. The UN has, meanwhile, been working on the issue intensively and has recently launched the Global Framework on UN Support to Repatriate and Rehabilitate Third Nationals from Syria and Iraq. The OSCE should join the UN efforts and start meaningful consultations among Member states. Although some OSCE states have taken a firm position against repatriation, there are considerable positive examples of several countries which

²³ 'No evidence that Lisa Smith joined or funded Isis, court is told,' *The Irish Times*, 22 March 2022: <https://www.irishtimes.com/news/crime-and-law/courts/criminal-court/no-evidence-that-lisa-smith-joined-or-funded-isis-court-is-told-1.4833452> (accessed 30 June 2022).

²⁴ D.E. Stigall, 'Repatriating Foreign Fighters from Syria: International Law and Political Will,' *Just Security*, 18 March 2020: <https://www.justsecurity.org/69244/repatriating-foreign-fighters-from-syria-international-law-and-political-will-part-1/> (accessed 25 April 2022).

²⁵ A. Correa, *A Transitional Justice Approach for Foreign Fighters*, *International Center for Transitional Justice, Research Report*, December 2021: https://www.ictj.org/sites/default/files/2022-03/ICTJ_Report_Foreign-Fighters_EN_0.pdf (accessed 12 June 2022).

²⁶ OSCE Office for Democratic Institutions and Human Rights (ODIHR), 'Guidelines for Addressing the Threats and Challenges of "Foreign Terrorist Fighters" within a Human Rights Framework', Report, 12 September 2018: https://www.osce.org/files/f/documents/4/7/393503_2.pdf (accessed 06 March 2022).

²⁷ OSCE, Guidelines for Addressing the Threats and Challenges of "Foreign Terrorist Fighters", *ibid*

have repatriated their citizens from Syria and Iraq.²⁸

While EU countries ‘mostly conflated the return of foreign fighters and their families with the security threat they are considered to pose,’²⁹ and subsequently adopted severe administrative counterterrorism measures, there are some positive cases of transitional justice in Europe. Transitional justice approaches to former fighters might be the most efficient and rational way of bringing ISIS fighters to justice. As the International Center for Transitional Justice argues, a transitional justice approach to foreign fighters would be aimed at addressing the legacies of serious human rights violations committed in contexts in which significant numbers of people travelled to another state to engage in violent conflict. Such an approach is based on the common responsibility of States to meet the obligations derived from international human rights law and international humanitarian law to the best of their capacities.³⁰ In this case, transitional justice also means ensuring justice for victims and justice for crimes regardless of where they were committed.

In Europe, Germany has created an important precedent by bringing ISIS fighters to court for crimes committed in the Middle East. Germany convicted several fighters and their wives for their involvement in the genocide against the Yazidi community in Iraq.³¹ A 29-year-old German man and his wife were charged with crimes against humanity and genocide for the death of a Yazidi girl in Iraq. The German fighter was sentenced to life in prison and his wife was sentenced to 10 years in prison. The court ordered them to pay 50,000 EUR, as compensation to the girl’s mother, who was a co-plain-

tiff in the case and was living in Germany under the witness protection program.³² This is the first genocide conviction of an ISIS fighter in relation to their systemic persecution of the Yazidi. ISIS killed thousands of Yazidi men, and kidnapped, raped, and forced thousands of Yazidi women and girls into slavery. As Amal Clooney stated, this is the historic moment that the Yazidis have been waiting for.³³ This court verdict presents a very important and clear message to other countries as, though the crime was committed in Iraq, the trial was held on the principle of universal jurisdiction which requires that such crimes be prosecuted wherever they can be whenever they occur.

A handful of successful court trials are not enough in the light of the war crimes and crimes against humanity committed by ISIS fighters. Every state should comply with their shared responsibility for international peace and take real measures to bring ISIS fighters to justice for their war crimes, genocide, and crimes against humanity. The OSCE should launch comprehensive diplomatic initiatives among member states to accelerate international efforts to bring the thousands of fighters held in makeshift prisons by a non-state actor to justice. If states continue ignoring this need, there is a high risk that ISIS will attempt to free them once again. Such fighters thus pose a real threat to international security which needs to be addressed by the OSCE member states working together to accept their shared responsibilities for international peace.

²⁸ For example, Kazakhstan repatriated 722 Kazakh nationals from Syria and Iraq, including 43 male fighters. Kazakhstan arrested all male fighters immediately and charged them with terrorism. All 43 men were convicted and faced charges of involvement in terrorist activities, recruitment, promoting terrorism, and committing other serious crimes. Kosovo and Uzbekistan repatriated only women and children from Syria and Iraq, while European countries have repatriated small numbers of the same. Tajikistan, Russia and Kyrgyzstan repatriated children from Iraqi prisons.

²⁹ C. Rigotti and J.Z. Barboza, ‘Unfolding the Case of Returnees: How the European Union and its Member States Addressing the Return of Foreign Fighters and Their Families,’ *International Review of the Red Cross*, no. 916-917, February 2022: <https://international-review.icrc.org/articles/unfolding-the-case-of-returnees-eu-and-member-states-return-of-foreign-fighters-916> (accessed 05 May 2022).

³⁰ Correa 2021: 10.

³¹ ‘German court finds former ‘IS’ member guilty of genocide,’ *Deutsche Welle*, 30 November 2021: <https://www.dw.com/en/german-court-finds-former-is-member-guilty-of-genocide/a-59976226> (accessed 18 April 2022).

³² ‘ISIS Fighter Convicted in Death of Enslaved 5-Year-Old Girl,’ *The New York Times*, 30 November 2021: <https://www.nytimes.com/2021/11/30/world/europe/isis-trial-yazidi-germany.html> (accessed 29 April 2022).

³³ ‘Yazidi genocide: IS member found guilty in German landmark trial,’ *British Broadcasting Company*, 30 November 2021: <https://www.bbc.com/news/world-europe-59474616> (accessed 11 June 2022).

Recommendations to the OSCE and its Member States:

- The OSCE should resume its activities and join the UN's initiatives to accelerate international efforts to address the current situation with ISIS fighters held in northeast Syria. There is an urgent need for more dialogue between OSCE countries toward finding an adequate solution to manage the current crisis with ISIS fighters.
- OSCE member states should assume their shared responsibility for international peace, start building dialogue, and take concrete actions toward a comprehensive diplomatic and international effort to bring ISIS fighters to justice.
- The OSCE should support the UN's Global Framework on UN Support to Repatriate and Rehabilitate Third Nationals from Syria and Iraq. The OSCE can take a leading role in launching interstate consultations and negotiate with countries and invite them to use the possibilities within the Global Framework to respond to the current crisis with ISIS fighters.
- OSCE states need to request full assistance under the Global Framework in order to receive all necessary assistance in the repatriation and prosecution of their citizens who joined ISIS and are now held by the SDF, including financial assistance from the Multi-Partner Trust Fund. The latter has been established by the UN to enable rapid, coherent and coordinated repatriation, prosecution and rehabilitation.
- The OSCE should allocate financial and human resources to assess all policies, with critical emphasis on transitional justice to ensure justice for victims. Fighters who committed serious crimes should be tried under the principle of universal jurisdiction, which means that war crimes, genocide and crimes against humanity should be prosecuted whenever they occur, regardless of location. Thus, every state should comply with their shared responsibility for international peace and take real measures to bring such fighters to justice.

References

- 'German court finds former 'IS' member guilty of genocide,' Deutsche Welle, 30 November 2021: <https://www.dw.com/en/german-court-finds-former-is-member-guilty-of-genocide/a-59976226> (accessed 18 April 2022).
- 'ISIS Fighter Convicted in Death of Enslaved 5-Year-Old Girl,' *The New York Times*, 30 November 2021: <https://www.nytimes.com/2021/11/30/world/europe/isis-trial-yazidi-germany.html> (accessed 29 April 2022).
- 'No evidence that Lisa Smith joined or funded Isis, court is told,' *The Irish Times*, 22 March 2022: <https://www.irishtimes.com/news/crime-and-law/courts/criminal-court/no-evidence-that-lisa-smith-joined-or-funded-isis-court-is-told-1.4833452> (accessed 30 June 2022).
- 'Syrian Kurds transfer 12 orphans from jihadist families to France for repatriation,' *France 24*, 10 June 2019: <https://www.france24.com/en/20190610-france-orphans-jihadist-families-syria-kurds-transfer> (accessed 15 April 2022).
- 'UN expert to France: Bring home citizens facing hanging in Iraq,' *Aljazeera*, 13 August 2019: <https://www.aljazeera.com/news/2019/08/expert-france-bring-home-citizens-facing-hanging-iraq-190813012621682.html> (accessed 14 May 2022).
- 'V Kazakhstane osudili 14 boevikov IGIL. Kto oni i kak popali v Siriyu? [В Казахстане осудили 14 боевиков ИГИЛ. Кто они и как попали в Сирию?]' *informburo.kz*, 11 December 2019: <https://informburo.kz/stati/v-kazahstane-osudili-14-boevikov-igil-kto-oni-i-kak-popali-v-siriyu.html> (accessed 10 March 2022).
- 'Yazidi genocide: IS member found guilty in German landmark trial,' *British Broadcasting Company*, 30 November 2021: <https://www.bbc.com/news/world-europe-59474616> (accessed 11 June 2022).
- Amnesty International United Kingdom, 'Global Executions Fell by Nearly One Third Last Year – New Report,' press release, 10 April 2019: <https://www.amnesty.org.uk/press-releases/global-executions-fell-nearly-third-last-year-new-report> (accessed 02 May 2022)
- Arraf J., 'Visiting Imprisoned ISIS Fighters,' *National Public Radio (NPR)*, 08 December 2019: <https://www.npr.org/2019/12/08/786039731/visiting-imprisoned-isis-fighters.?t=1649601833376> (accessed 25 May 2022).
- Cebrán P., 'They Left to Join ISIS. Now Europe is Leaving Their Citizens to Die in Iraq,' *Foreign Policy*, 15 September 2019: <https://foreignpolicy.com/2019/09/15/they-left-to-join-isis-now-europe-is-leaving-their-citizens-to-die-in-iraq/> (accessed 01 June 2022).
- Correa A., *A Transitional Justice Approach for Foreign Fighters*, *International Center for Transitional Justice, Research Report*, December 2021: https://www.ictj.org/sites/default/files/2022-03/ICTJ_Report_Foreign-Fighters_EN_0.pdf (accessed 12 June 2022).
- Counter-Extremism Project, 'France: Extremism & Counter-Extremism,' Report, 19 June 2019: https://www.counterextremism.com/sites/default/files/country_pdf/FR-01062020.pdf (accessed 19 June 2022).
- Human Rights Watch (HRW), 'Iraq: Change Approach to Foreign Women, Children in ISIS-Linked Trial,' press release, 21 June 2018: <https://www.hrw.org/news/2018/06/21/iraq-change-approach-foreign-women-children-isis-linked-trials> (accessed 27 April 2022).
- Impunity Watch, 'ISIS-Only Tribunal: Selective, Politicised Justice Will Do More Harm Than Good,' policy brief, 01 November 2019: https://www.impunitywatch.nl/docs/PolicyBrief_Iraq_ISIS_Tribunal_2019_eng.pdf (accessed 02 April 2022).
- International, Impartial and Independent Mechanism (IIIM) of the United Nations Secretary General (UNSG) A/71/755, 'Implementation of the resolution establishing the International, Impartial and Independent

Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011: Report of the Secretary General,' 19 January 2017: <https://digitallibrary.un.org/record/857709?ln=en> (accessed 26 April 2022).

Mai H.J., 'Why European Countries Are Reluctant to Repatriate Citizens Who Are ISIS Fighters,' *NPR*, 10 December 2019: <https://www.npr.org/2019/12/10/783369673/europe-remains-reluctant-to-repatriate-its-isis-fighters-here-s-why> (accessed 11 April 2022).

Office of the United Nations High Commissioner for Human Rights (OHCHR), 'Iraq: UN Report on ISIL Trials Recognizes Efforts and Raises Concerns,' press release, 20 January 2020, <https://reliefweb.int/report/iraq/iraq-un-report-isil-trials-recognizes-efforts-and-raises-concerns-enarku>, (accessed 30 April 2022).

OHCHR, 'Extra-territorial jurisdiction of States over children and their guardians in camps, prisons, or elsewhere in the northern Syrian Arab Republic, United Nations Human Rights Special Procedures,' Legal Analyses, 10 February 2020: <https://www.ohchr.org/sites/default/files/Documents/Issues/Executions/UNSRsPublicJurisdictionAnalysis2020.pdf> (accessed 12 March 2022).

Open Society Justice Initiative, 'NGOs Challenge Sweden's Proposal for an ISIS-Only War Crimes Tribunal,' Press release, 03 June 2019: <https://www.justiceinitiative.org/newsroom/ngos-challenge-swedens-proposal-for-an-isis-only-war-crimes-tribunal> (accessed 27 April 2022).

OSCE Office for Democratic Institutions and Human Rights (ODIHR), 'Guidelines for Addressing the Threats and Challenges of "Foreign Terrorist Fighters" within a Human Rights Framework', Report, 12 September 2018: https://www.osce.org/files/f/documents/4/7/393503_2.pdf (accessed 06 March 2022).

Rigotti C. and J.Z. Barboza, 'Unfolding the

Case of Returnees: How the European Union and its Member States Addressing the Return of Foreign Fighters and Their Families,' *International Review of the Red Cross*, no. 916-917, February 2022: <https://international-review.icrc.org/articles/unfolding-the-case-of-returnees-eu-and-member-states-return-of-foreign-fighters-916> (accessed 05 May 2022).

Schneider O., 'Iraq Wants 2 million Euros for Each Foreign Fighter Tried on its Territory,' *Brussels Times*, 01 October 2019: <https://www.brusselstimes.com/all-news/belgium-all-news/71090/iraq-wants-2-million-euros-for-each-foreign-fighter-tried-on-its-territory/> (accessed 17 April 2022).

Stigall D.E., 'Repatriating Foreign Fighters from Syria: International Law and Political Will,' *Just Security*, 18 March 2020: <https://www.justsecurity.org/69244/repatriating-foreign-fighters-from-syria-international-law-and-political-will-part-1/> (accessed 25 April 2022).

Sweden Ministry of Justice, 'Sweden Hosted Expert Meeting on Tribunal,' press release, 03 June 2019: <https://www.government.se/press-releases/2019/06/sweden-hosted-expert-meeting-on-tribunal/> (accessed 30 May 2022).

United Nations Security Council (UNSC) S/2020/53, 'Review of Twenty-Fifth Report of the Analytical Support and Sanctions Monitoring Team Submitted pursuant to Resolution 2368', 21 July 2021: https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/S_2021_655_E.pdf (accessed 12 May 2022).