Network for investigation and prosecution of genocide, crimes against humanity and war crimes

EUROJUST

CUMULATIVE PROSECUTION OF FOREIGN TERRORIST FIGHTERS FOR CORE INTERNATIONAL CRIMES AND TERRORISM-RELATED OFFENCES



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THE GENOCIDE NETWORK

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Cumulative prosecution of foreign terrorist fighters for core international crimes and terrorism-related offences

Contents 2

1. Executive summary 3
2. Background and methodology 4
3. Introduction 5
4. Foreign terrorist fighters – brief facts and figures 6
5. Foreign terrorist fighters from a counter-terrorism perspective 7
6. Prosecuting foreign terrorist fighters for war crimes 8
   - 6.1 Classification of the conflict and the parties to the conflict 8
     - 6.1.1 Intensity 8
     - 6.1.2 Organization 9
   - 6.2 Other examples of terrorist organizations qualifying as organized armed non-state groups 11
     - 6.2.1 The Liberation Tigers of Tamil Eelam – Sri Lanka 11
     - 6.2.2 Revolutionary Armed Forces of Colombia – Colombia 11
   - 6.3 War crimes committed by ISIS 12
7. Prosecuting foreign terrorist fighters for crimes against humanity 13
   - 7.1 Crimes against humanity committed by ISIS 14
8. Prosecuting foreign terrorist fighters for the crime of genocide 15
9. EU Member States jurisprudence of cumulative prosecution of ISIS foreign terrorist fighters or its members 16
   - 9.1 Germany 16
   - 9.2 The Netherlands 20
   - 9.3 Hungary 20
   - 9.4 France 21
   - 9.5 Sweden 22
   - 9.6 Finland 24
10. Gathering of information and evidence of crimes committed by foreign terrorist fighters and ISIS members 24
11. Conclusion 26
12. Annex 27

1. Executive summary

ISIS, which has been classified as a terrorist organisation, perpetrated horrific acts of violence in armed conflicts in Northern Iraq and Syria. The issue of investigating and prosecuting its members and foreign terrorist fighters returning to their countries of origin led most EU Member States to focus on preventing and punishing terrorism-related offences. However, ISIS should not only be considered as a terrorist organisation. ISIS has fulfilled criteria according to International Humanitarian Law as a party to a non-international armed conflict in Iraq and Syria acting as an organised non-state armed group. Therefore, its members and foreign terrorist fighters could be responsible for committing war crimes and other core international crimes.

Existing national jurisprudence of EU Member States and developing national practice demonstrate that it is possible to cumulatively prosecute and hold FTFs accountable for war crimes, crimes against humanity and the crime of genocide, in addition to terrorism-related offences. In some EU Member States, cumulative prosecution (terrorism and war crimes) could take place for the same facts. In others, cumulative prosecution could concern the same person, but for different facts.

After the fall of ISIS, more information and potential evidence became available. In order to hold perpetrators accountable for the acts committed, national authorities can cooperate with various stakeholders, ranging from national authorities of other states, UN bodies, civil society, open source information and social media platforms. In addition to international cooperation, judicial response to foreign terrorist fighters also requires comprehensive collaboration on national level. Focusing on both the terrorism aspect of ISIS's conduct and on core international crimes at national level requires cooperation and coordination on national level between practitioners working in counter terrorism units and war crimes units.

Prosecuting terrorism offences combined with acts of core international crimes ensures the full criminal responsibility of perpetrators, results in higher sentences and delivers more justice for victims. By recognising and naming these crimes for what they are, justice can hence be brought to the victims.

2. Background and methodology

The issue of the cumulative prosecution of foreign terrorist fighters for core international crimes and terrorism related offences was discussed during the 27th Genocide Network Meeting, held on 6-7 November 2019 in The Hague, Netherlands. The topic was addressed in the light of judicial response to returning fighters from Syria and Iraq. As per the Conclusions of that 27th Meeting[1], "*investigation and prosecution of all crimes, not only from a counter-terrorism perspective, committed by foreign fighters, members of ISIS and other terrorist groups during the armed conflict in Iraq and Syria are essential to ensure criminal responsibility of perpetrators and to deliver justice to victims*" (point 2). Reiterating the feeling expressed in point 5 of the Conclusions, the Network believes that "*cumulative prosecution of foreign terrorist fighters for terrorism-related offences, core international crimes and other crimes can ensure the full criminal responsibility of suspects, deliver higher sentences for the acts committed and lead to more justice for victims. This approach of cumulative prosecution is required, taking into account an increase in the number of foreign terrorist fighters who might return to EU countries"*. This report was compiled by the Genocide Network Secretariat to raise awareness on the possibilities for cumulative prosecution and to complement the excellent presentations and vibrant discussion during the meeting.

The United Nations (UN) Security Council Resolution 2178 defines foreign terrorist fighters (FTFs) as *"individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict"*[2]*.* This definition, largely accepted and recognised by practitioners, focuses principally on the counter-terrorism perspective. However, the objective of this report is to encompass a wider reality of FTFs linked with an armed conflict in Syria and Iraq, thus focusing on the international criminal law perspective. This report does not examine the appropriateness of this terminology in the broader debate on humanitarian assistance and concepts of international humanitarian law. Furthermore, the report and the presented national cases are not only relevant for prosecution of FTFs – nationals or residents of EU Member States – but are applicable to all members of ISIS and its affiliates, including nationals of Syria, Iraq and other countries that enter or are present in the EU as asylum seekers or visitors. Moreover, some cases presented in chapter 9 comprise only core international crimes, as the prosecuting State might not have criminalised the offence of membership in a terrorist organisation, or this fact was not existing or proven during the trial. Nevertheless, the report makes references to these cases as well due to their interesting legal or factual questions and potential applicability for prosecuting similar cases involving FTFs and other members of ISIS.

A wide array of sources was used in the making of this report. Along with open source information, academic literature on international criminal law and international humanitarian law, and institutional documents, the preparation of this report also relied on materials presented by participants during the 27th Genocide Network Meeting's open session, for which we renew our appreciation to stakeholders and presenters.

This report is meant solely for information purposes. Specifically regarding acts that are purported to have been committed by an individual or group thereof, the Genocide Network Secretariat would like to reaffirm that any person charged by national or international authorities is presumed innocent until proven guilty, and that those charges do not engage the Secretariat, or Eurojust's opinion.

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1 Conclusions of the 27th meeting of the Network for investigation and prosecution of genocide, crimes against humanity and war crimes, November 2019. Accessible on http://www.eurojust.europa.eu/doclibrary/genocide-network/genocidenetworkmeetings/Conclusions%20of%20the%2027th%20Meeting%20of%20the%20Genocide%20Network,%206-7%20November%202019/2019-11-Conclusions-27th-Genocide-Network-Meeting_EN.pdf

2 UN Security Council Resolution 2178 of 24 September 2014, Preamble

3. Introduction

This report will discuss opportunities for investigating and prosecuting foreign terrorist fighters and other members of terrorist organisations, such as ISIS, Jabhat al-Nusra and its affiliates, not only for terrorist offences but also for war crimes, crimes against humanity and the crime of genocide (core international crimes). It will also present existing jurisprudence and developing practice of national authorities.

ISIS[3], which has been classified as a terrorist organisation, has perpetrated horrific acts of violence in armed conflict in Northern Iraq and Syria. At its height, ISIS controlled over 100,000 km of land and 11 million residents therein.[4] In 2014, a US-led international coalition started airstrikes against ISIS targets in Iraq and Syria with the participation of over 30 countries.[5] In the following years, ISIS gradually lost control over the land. After the last territory held by ISIS in Syria was liberated in early 2019, the issue of prosecuting foreign terrorist fighters (FF) returning to their countries of origin became increasingly relevant for EU Member States.

So far, the issue of investigating and prosecuting foreign terrorist fighters has mainly been approached from a counter-terrorism perspective. However, various UN bodies, including the Office of the UN High Commissioner for Human Rights (OHCHR), the International, Impartial and Independent Mechanism in Syria (IIIM), the UN Investigative Team to Promote Accountability for Crimes Committed by Da'esh (UNITAD), as well as numerous NGOs, have reported credible allegations and produced evidence that ISIS and other terrorist organisations have committed war crimes, crimes against humanity and the crime of genocide.

According to international law and reiterated by the preamble of the Rome Statute of the ICC, "*the most serious crimes of concern to the international community as a whole must not go unpunished*" and "*their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.*" Therefore, it is the duty of every State to exercise criminal jurisdiction over those responsible for international crimes.[6]

Some EU Member States have already demonstrated that it is possible to cumulatively prosecute and bring to justice FTFs for both sets of criminal acts - core international crimes and terrorism-related offences. Prosecuting terrorism offences combined with acts of war crimes, crimes against humanity, genocide or other criminal acts brings numerous advantages and ensures the full criminal responsibility of perpetrators, delivers more justice for victims, and results in higher sentences. Additionally, the statute of limitations is not applicable to core international crimes and perpetrators could be held responsible for these crimes in future decades.

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3 The "Islamic State" entity has undergone several iterations: Al-Qaeda in Iraq (2003–2006), Islamic State in Iraq (2006–2010), Islamic State in Iraq and the Levant ("ISIL" or "ISIS" (the latter based on the Arabic term for the Levant, "*al-sham*")), and Islamic State. Islamic State is frequently given the pejorative name "*Da'esh*" (داعش), derived from its acronym in Arabic. (S.A. Gilmore, *United Nations Security Council Resolution 2379*, International Legal Materials, Volume 57, Issue 5) For ease of reference, paper will use the acronym "ISIS."

4 J. Cook, G. Vale (2018), From Daesh to 'Diaspora': Tracing the Women and Minors of Islamic State. *ICSR, King's College London*, p. 7

5 History.com editors. (2017). ISIS. Retrieved from https://www.history.com/topics/21st-century/isis; A. Rosen. (2014). The US-Led War On ISIS Now Has a Logo. Retrieved from https://www.businessinsider.com.au/the-us-led-war-on-isis-now-has-a-logo-2014-12

6 UN General Assembly, Rome Statute of the International Criminal Court, Preamble

4. Foreign terrorist fighters – brief facts and figures

This report will focus on foreign terrorist fighters, considering them as non-citizens of Iraq and Syria who willingly joined or supported ISIS. Nevertheless, the same application of law and possibilities for cumulative prosecution are relevant for any member of ISIS, irrespective of his or her nationality.

The UN Security Council (UNSC) only uses the term *foreign terrorist fighter*, addressing the issue of FTFs from a purely counter-terrorism perspective. The first reference to foreign terrorist fighters was made in UNSC Resolution 2170 in 2014 without defining the term. The Resolution called upon all UN Member States "to take national measures to suppress the flow of foreign terrorist fighters […] and bring [them] to justice". Later, UNSC Resolution 2178 defined the term as "individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict".[7]

The profile of Western European foreign terrorist fighters is diverse. They include Muslim Europeans of various ethnic backgrounds, and converts with no previous connection to Syria or Iraq. Though most reported foreign terrorist fighters are male, on average 17% of the jihadists travelling to the conflict zone were female.[8]

According to a study from July 2018 done by the International Centre for the Study of Radicalisation, 7,252 people from Eastern Europe and 5,904 from Western Europe were somehow affiliated with ISIS. This affiliation includes all foreign nationals who became associated with ISIS, including men, women and minors and those who were born into ISIS. The same study found that by June 2018, 1,765 had returned to Western Europe and 784 to Eastern Europe.[9] There are an estimated 2,000 foreign terrorist fighters still being detained by the SDF (Syrian Democratic Forces) in Syria.[10] According to SDF officials, hundreds of these are European citizens, above all from France, the United Kingdom, and Germany.[11] In Iraq, some 1,000 foreign terrorist fighters are reportedly being held in detention.[12] More foreign terrorist fighters are expected to return to their home countries, in which case they should be prosecuted by their national state.

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7 Ch. Paulussen, K. Pitcher. (2018). Prosecuting (Potential) Foreign terrorist fighters: Legislative and Practical Challenges, *ICCT – The Hague,* p. 5

8 S. Krahenmann, Geneva Academy of International Humanitarian Law and Human Rights. (2014). Foreign terrorist fighters under International Law. *Academy Briefing No. 7*, p. 10; Dutch National Public Prosecutor's Office, Van Feghel; Gender Dimensions of the Response to Returning Foreign Terrorist Fighters: Research perspectives, United Nations Security Council Counter-Terrorism Committee Executive Directorate, *CTED Trends Report*, February 2019, p. 6. Retrieved from https://www.un.org/sc/ctc/wp-content/uploads/2019/02/Feb_2019_CTED_Trends_Report.pdf

9 J. Cook, G. Vale. (2018). From Daesh to 'Diaspora': Tracing the Women and Minors of Islamic State. *ICSR, King's College London*, p. 13-15

10 R. Browne, J. Hansler. (2019). More than 2000 suspected ISIS foreign terrorist fighters held in Syria. Retrieved from https://www.clickondetroit.com/news/politics/more-than-2000-suspected-foreign-isis-fighters-held-in-syria; J. Schulz (2020), Will SDF-Affiliated Courts Try European Foreign terrorist fighters?, *Lawfare Institute*. Retrieved from https://www.lawfareblog.com/will-sdf-affiliated-courts-try-european-foreign-fighters

11 A. Dworkin. (2019). In legal limbo: EU returnees in the post-ISIS era, European Council on Foreign Affairs. Retrieved from https://www.ecfr.eu/article/commentary_in_legal_limbo_eu_returnees_in_the_post_isis_era; R. Coolsaet, T. Renard (2019), New figures on European nationals detained in Syria and Iraq, Research Note, *Egmont Royal Institute for International Relations*. Retrieved from http://www.egmontinstitute.be/new-figures-on-european-nationals-detained-in-syria-and-iraq/

12 T. Mehra, C. Paulussen. (2019), The Repatriation of Foreign terrorist fighters and their Families: Options, Obligations, Morality and Long-Term Thinking, *International Centre for Counter-Terrorism*. Retrieved from https://icct.nl/publication/the-repatriation-of-foreign-fighters-and-their-families-options-obligations-morality-and-long-term-thinking/; R. Jalabi (2019), Forgotten victims: The children of Islamic State. *A Reuters Special Report*. Retrieved from https://www.reuters.com/investigates/special-report/iraq-islamicstate-children/

5. Foreign terrorist fighters from a counter-terrorism perspective

The UN listed both ISIS and Jabhat al-Nusra as designated terrorist groups.[13] Currently, ISIS members who are returning to EU Member States are mostly being investigated and prosecuted for terrorism charges, such as membership of a terrorist organisation. Terrorist attacks committed in Europe in the past years led the EU Justice and Home Affairs Council to issue the Riga Statement, qualifying terrorism, radicalisation, recruitment and terrorist financing among the main threats to EU internal security. For example, some of the perpetrators at the Bataclan attack in Paris were foreign terrorist fighters trained in Syria.[14] As a response to the FTF phenomenon, the EU adopted the Directive on Combating Terrorism[15]. The objective of the Directive was to harmonise the criminalisation of FF-related offences across the EU. Other goals of the Directive included the facilitation of cross-border cooperation, the improvement of gathering and admissibility of evidence in terrorism cases.[16] The Directive was meant to be an update of the Framework Decision on Combating Terrorism[17] and an implementation of UNSC Resolution 2178 and the Additional Protocol to the Council of Europe Convention[18]. UNSC Resolution 2178 requires that States criminalise (attempted) travel, fundraising and the organisation (or other facilitation, including recruitment) of the travel of FTFs.[19] The focus of both the UNSC Resolution and the EU Directive lies on preventing terrorism and therefore places attention on preliminary and preparatory offences. The Directive on Combating Terrorism entered into force in March 2017 and criminalises, among others: receiving training for terrorism, travelling for the purpose of terrorism and terrorist financing.[20]

In the majority of States, the most common offences among FTFs are participation in, or support of, the activities of a terrorist group. Some Member States have in addition criminalised other types of acts to prosecute FTFs: preparing for terrorist acts (e.g. making travel plans, booking tickets, visiting certain websites, etc.). Other offences applicable to FTF returnees in Member States include the following: travelling for the purpose of terrorism, recruitment for terrorism, accepting to be recruited to commit a terrorist act, providing and receiving training for terrorism, terrorist financing, (unlawful) participation in an armed conflict abroad, instructing/conspiring to commit a terrorist offence, providing material support to terrorism, money laundering and possessing articles for terrorist purposes.[21]

The fact that ISIS is referred to as a terrorist organisation by many, including the EU and the UN Security Council[22], does not prevent its consideration as a party to an armed conflict. Moreover, ISIS should not be considered only as a terrorist organisation but also as a party to a non-international armed conflict in Iraq and Syria as an organised non-state armed group. Consequently, parties to a non-international armed conflict are obliged to apply and adhere to International Humanitarian Law (IHL). Therefore, its members can be legally capable of committing a war crime[23] or other core international crimes.

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13 List established by the Security Council Sanctions Committee pursuant to Resolutions 1267 (1999) and 1989 (2011) concerning Al-Qaida and associated individuals and entities.
14 European Parliament. (2017). The European Union's Policies on Counter-Terrorism, *Study for the LIBE Committee*
15 Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA. Accessible on https://eur-lex.europa.eu/eli/dir/2017/541/oj
16 Ch. Paulussen, K. Pitcher. (2018), p. 9
17 Council Framework Decision of 13 June 2002 on combating terrorism. Accessible on http://data.europa.eu/eli/dec_framw/2002/475/oj
18 Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, Council of Europe Treaty Series - No. 217 (CETS 217), 22 October 2015. Accessible on https://rm.coe.int/168047c5ea
19 Ch. Paulussen, K. Pitcher. (2018), p. 5
20 *Ibid.* p. 10-13
21 *Ibid.* p. 14 -16
22 See, for example, UN Security Council Resolution 2170 (2014), §1.
23 S. Krahenmann, Geneva Academy of International Humanitarian Law and Human Rights. (2014), p. 24-25

6. Prosecuting foreign terrorist fighters for war crimes

This part of the report will address the issue of prosecuting FTFs for war crimes under IHL. IHL defines rules applicable for times of armed conflicts with the objective of protecting persons who are not or are no longer participating in the hostilities and to restrict the means and methods of warfare.

6.1 Classification of the conflict and the parties to the conflict

Firstly, the conflict needs to be classified as either an international (IAC) or a non-international armed conflict (NIAC). The classification of the conflict determines the applicable set of IHL rules and has an impact on the international criminal responsibility of the parties to the conflict, including on the responsibility of its members. The rules applying to NIAC are laid down in Article 3 Common to the four Geneva Conventions and in Additional Protocol II. In additional to the Geneva Conventions, customary IHL applies as well. For the specific conflict in Syria and in Iraq, only Common Article 3 and customary international law applies as these two countries are not parties to Additional Protocol II. Common Article 3 protects persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed "hors de combat" by sickness, wounds, detention or any other cause.

An IAC exists when one state uses armed force against another. The conflict in Iraq and Syria does not fall in this category as ISIS was not a state under international law or acting under the control of another state. The intervention of the coalition forces next to the Iraqi governmental forces did not internationalise the existing NIAC in Iraq.[24] Similarly determination can be established in relation to Syria, as the armed conflict against ISIS remains an NIAC in character.[25] Pursuant to the definition in the *Tadić* case, NIAC is a situation of regular and intense armed violence between the security forces of a state and one or more organised non-state armed groups or armed groups fighting each other.[26]

Parties to NIAC fall under the obligation to apply and adhere to IHL.[27] According to established case law by the International Criminal Tribunal for the Former Yugoslavia (ICTY), two criteria are relevant for establishing the existence of NIAC: (i) the intensity of the conflict and (ii) the organisation of the parties.[28] The Tribunal has proposed a list of indicative factors relevant in determining whether the required threshold of intensity and organisation has been met. Although not all terrorist groups can simultaneously qualify as a party to an armed conflict, ISIS and other conflicting parties, such as the "Free Syrian Army" and the "Jabhat al-Nusra" were all highly organised and therefore can be determined as non-state armed groups. Similar elements could also be attributed to Boko Haram in the context of an armed conflict in northeast Nigeria.

6.1.1 Intensity

Elements to be considered when making a distinction between NIAC and an internal disturbance include: the number, duration and intensity of individual confrontations; the type of weapons and other

24 V. Koutroulis. (2016). The Fight Against the Islamic State and Jus in Bello, *Leiden Journal of International Law, Volume 29, Issue 3.* Retrieved from https://www.cambridge.org/core/journals/leiden-journal-of-international-law/article/fight-against-the-islamic-state-and-jus-in-bello/7E83694E7FE9F65DF07DB4470CF3D4C2/core-reader

25 Geneva Academy. (2019). International armed conflicts in Syria. Retrieved from http://www.rulac.org/browse/conflicts/international-armed-conflict-in-syria#collapse1accord

26 ICTY, *Prosecutor v Tadić,* Judgment, Trial Chamber, Case No. IT-94-1-T, 7 May 1997, para. 561.

27 ICRC (2014), What is International Humanitarian Law? Retrieved from https://www.icrc.org/en/doc/assets/files/other/icrc-002-0703.pdf

28 V. Koutroulis. (2016). The Fight Against the Islamic State and Jus in Bello, *Cambridge University Press*, Volume 29, Issue 3, pp. 827-852. Accessible on https://doi.org/10.1017/S0922156516000339

military equipment used; the number and calibre of munitions fired: the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction and the number of civilians fleeing combat zones. Another indication is the attention of the UN Security Council and whether any resolutions on the matter have been passed.[29]

It is difficult to assess the exact time when the conflict with ISIS in the region changed from an internal disturbance to NIAC, but the required intensity had already been reached in 2014.[30] From January 2014, ISIS took control of large parts of the territory in Iraq and Syria, e.g. the cities of Mosul, Raqqa and Tikrit.[31] Up to November 2015, it has been counted that the U.S. and coalition partners targeted ISIS with 8,289 airstrikes, 5,432 of which in Iraq and 2,857 in Syria.[32] Another example that demonstrates the intensity of the conflict is the Iraqi operation to retake Mosul, which lasted more than nine months and, according to some reports, caused between 9,000 to 11,000 civilian casualties.[33] Such a massive and lengthy operation shows the presence of NIAC and not merely an internal riot. Moreover, in 2014, in Resolution 2169 the UN Security Council expressed grave concerns "*at the current security situation in Iraq as a result of a large-scale offensive carried out by terrorist groups, in particular the Islamic State in Iraq and the Levant (ISIL), and associated armed groups, involving a steep escalation of attacks, heavy human casualties including children, the displacement of more than one million Iraqi civilians, and the threats against all religious and ethnic groups[…]"*[34]

UNSC Resolution 2253 imposing sanctions on ISIS, adopted in 2015, furthermore supports the fact that ISIS was engaged in protracted violence,[35] as does the presence of heavy military weapons such as tanks, artillery and rockets in the arsenal of ISIS.[36] Therefore, from the intensity of specific confrontations, the international attention it received and the weapons ISIS used in its conflicts, it can be deduced that ISIS was engaged in protracted violence and not only in internal disturbances.

6.1.2 Organisation

The other criterion of an existing NIAC is the sufficient organisation of the parties. Because Iraq and Syria are states, there is no need to question their organisation. However, to be party to a NIAC an organisation needs to be considered as an organised armed group, and consequently capable of implementing or adhering to the rule of the IHL. Certain conditions need to be fulfilled to meet the criterion of sufficient organisation.[37]

Jurisprudence of international criminal tribunals has developed indicative factors on the basis of which the 'organisation' criterion may be assessed. According to these criteria, the organisational complexity of a non-state armed group is indicated by the existence of a command structure and disciplinary rules and mechanisms within the armed group; the existence of headquarters; the ability to procure, transport and distribute arms; the group's ability to plan, co-ordinate and carry out military operations,

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29 J. Pejic. (2011). The protective scope of Common Article 3: more than meets the eye; *International Review of the Red Cross, Volume 93 Number 88,* p. 3-4
30 V. Koutroulis. (2016)
31 CNN. (2018). ISIS Fast Facts. Retrieved from https://edition.cnn.com/2014/08/08/world/isis-fast-facts/index.html
32 A. Fantz. (2015). Which Nations are Attacking ISIS?, *CNN*. Retrieved from http://edition.cnn.com/2015/12/02/world/war-on-isis-whos-doing-what/
33 Aljazeera. (2017). More than 9,000 killed in battle for Mosul*, AP*. Retrieved from https://www.aljazeera.com/news/2017/12/9000-killed-battle-mosul-ap-171220075620663.html
34 UN Security Council, *Resolution 2169 (2014)*, S/RES/2169 (2014), 30 July 2014.
35 UN Security Council, *Resolution 2253 (2015*), S/RES/2253 (2015), 17 December 2015.
36 Jeremy Bender, Jeremy Wilson and Armin Rosen, *These Are the Weapons Islamic State Fighters Are Using to Terrify the Middle East,* https://www.businessinsider.com/isis-military-equipment-arsenal-2016?international=true&r=US&IR=T
37 J. Pejic. (2011)

including troop movements and logistics; its ability to negotiate and conclude agreements such as ceasefire or peace accords; and so forth.[38]

There are many indications that ISIS fulfilled the above-mentioned requirements and can therefore be determined as an organised armed non-state group.[39] Since 2010, ISIS functioned under the responsible command of Abu Bakar Al-Baghdadi and had a hierarchical structure. While Al-Baghdadi as the "caliph" held absolute power within the organisation with his two deputies, a command and control system was established underneath him.[40] Various ministries were set up within ISIS such as the war ministry, the public relations ministry, the public security ministry, the media ministry and the oil ministry.[41] This demonstrates ISIS's perception of itself as a governing entity.[42] Additionally, ISIS exhibited various Sharia Committees and a da'wah office. While it was the task of the Sharia Committees to apply and enforce sharia law as well as to determine punishment for any infringements, the da'wah office had an outreach function and served to recruit members and to collect intelligence on ISIS opponents.[43]

At its peak in 2015, ISIS exercised control over a considerable amount of territory in Iraq as well as Syria and over a population of approximately 10 million.[44] The city of Raqqa in Syria was considered to be the de facto capital of ISIS.[45] In addition, ISIS was able to exhibit a judicial system, an army, a police force and extensive manpower due to recruitment.[46] It is estimated that 41,490 foreign terrorist fighters were fighting within ISIS ranks.[47] The organisation had extensive financial resources and due to territory, it was also capable of relying on natural resources for financing.[48]

Considering the above-mentioned elements, ISIS can be considered an organised armed non-state group that fulfilled criteria, such as an internal hierarchy with a command and control structure, disciplinary rules, the existence of headquarters and the possibility to carry out sustained military operations. Its non-compliance with IHL should not be treated as a matter of incapability, but rather a lack of willingness. Thereby, despite ISIS not having acted in accordance with IHL rules, it can be considered as a party to an armed conflict of non-international character with an application of relevant IHL rules.

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38 See: ICTY, *Prosecutor v. Fatmir Limaj et al*., Judgment, Trial Chamber II, Case No. IT-03-66-T, 30 November 2005, para. 90; *Prosecutor v. Ramush Haradinaj et al.,* Judgment, Trial Chamber I, Case No. IT-04-84-T, 3 April 2008, para. 60.
39 UNSC, Resolution 1540, S/RES/1540 (2004), 28 April 2004.
40 Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, *Rule of Terror: Living under ISIS in Syria, A/HRC/27/CRP.3*, 19 November 2014, para. 13.
41 H. Solomon. (2016). Islamic State and the Coming Global Confrontation, *Springer International Publishing*
42 *Ibid.*
43 A. Jawad Al-Tamimi. (2015). The Evolution in Islamic State Administration: The Documentary Evidence. Retrieved from http://www.aymennjawad.org/17687/the-evolution-in-islamic-state-administration
44 A. Levallois and others. (2017). The Financing of the 'Islamic State' in Syria and Iraq (ISIS): In-Depth Analysis. Retrieved from http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/603835/EXPO_IDA(2017)603835_EN.pdf
45 A. Barnard and H. Saad. (2017). Raqqa, ISIS "Capital," Is Captured, U.S.-Backed Forces Say, *The New York Times*. Retrieved from https://www.nytimes.com/2017/10/17/world/middleeast/isis-syria-raqqa.html
46 H. Solomon. (2016). Islamic State and the Coming Global Confrontation, *Springer International Publishing*
47 D. Byman. Understanding the Islamic State—A Review Essay, *International Security*, 40.4 (2016), 127–65 ; Global Terrorism Index 2019, p.16. Retrieved from https://reliefweb.int/sites/reliefweb.int/files/resources/GTI-2019web.pdf; J. Cook, G. Vale (2018), From Daesh to 'Diaspora': Tracing the Women and Minors of Islamic State. *ICSR, King's College London*, p. 19. Retrieved from https://icsr.info/wp-content/uploads/2018/07/Women-in-ISIS-report_20180719_web.pdf
48 A. Levallois and others. (2017)

6.2 Other examples of terrorist organisations qualifying as organised armed non-state groups

6.2.1 The Liberation Tigers of Tamil Eelam – Sri Lanka

The Sri Lankan Civil War from 1983-2009 can serve as an interesting example of another non-international armed conflict with participation of a terrorist organisation[49] being considered an organised armed non-state group with the obligation to comply with IHL.

The Liberation Tigers of Tamil Eelam (LTTE) fought the Sri Lankan Government for 25 years, with the intention of creating an independent Tamil state[50] in Sri Lanka. The organisation controlled and administered large areas in the north and eastern parts of Sri Lanka. Moreover, the LTTE were able to exhibit ground forces, their own navy and air force, and a special armed suicide group called the Black Tigers. For a non-state actor, the LTTE further had a very sophisticated chain of command, composed of a political as well as a military wing. The chain of command within the LTTE was clear and transparent. The civil wing of the LTTE provided the Tamil Eelam Panel Code and Civilian Code and an entire judicial system, ranging from district courts to a supreme court[51]. In addition, the LTTE imposed strict rules and punishments on their soldiers.[52] Consequently, the LTTE clearly put in place disciplinary measures and mechanisms. All these indications lead to the fact that the LTTE demonstrated the level of organisation required to be a party to NIAC.

In the 25-year Sri Lankan civil war, approximately 70,000 people were killed, while 300,000 were internally displaced by the armed violence. [53] Moreover, it is estimated that the conflict cost around US$ 200 billion.[54] These numbers serve as an indication that the Sri Lankan Civil War was marked by protracted armed violence, resulting in a high number of human casualties as well as material destruction. In addition, it has been estimated that in 2009 the Sri Lankan armed forces consisted of 200,000 fighters, while the armed forces of the LTTE comprised around 30,000.[55] These figures are evidence that the Sri Lankan government did not consider the conflict with the LTTE as a situation of internal disturbance or tension, such as riots or sporadic acts of violence. The LTTE hence was a party to a non-international armed conflict in Sri Lanka, under the obligation to adhere to IHL.

6.2.2 Revolutionary Armed Forces of Colombia – Colombia

The Revolutionary Armed Forces of Colombia (Fuerzas Armadas Revolucionarias de Colombia – FARC) is another example of a designated terrorist organisation[56] that was a party to a non-international armed conflict as a belligerent.

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49 The Council of the European Union (EU) decided on 29 May 2006 to include the LTTE (Liberation Tigers of Tamil Eelam) on the EU list for the application of specific measures to combat terrorism. See: Declaration by the Presidency on behalf of the European Union concerning listing of the LTTE as a terrorist organisation, Brussels, 31 May 2006, http://europa.eu/rapid/press-release_PESC-06-78_en.htm

50 J. Richards, An Institutional History of the Liberation Tigers of Tamil Eelam (LTTE), *CCDP Working Paper*, p. 12. Retrieved from https://repository.graduateinstitute.ch/record/292651/files/CCDP-Working-Paper-10-LTTE-1.pdf

51 Ibid, p. 45

52 Ibid, p. 18

53 Reuters, *FACTBOX: Five Facts about Sri Lanka's 25-Year-Old Civil War,* 7 September 2008), https://www.reuters.com/article/us-srilanka-violence-factbox/factbox-five-facts-about-sri-lankas-25-year-old-civil-war-idUSSP13029220080907

54 The New Indian Express. (2016). Sri Lanka's Internal War Cost US$ 200 Billion, http://www.newindianexpress.com/world/2016/dec/13/sri-lankas-internal-war-cost-us-200-billion-1548433.html

55 Ministry of Defence Democratic Socialist Republic of Sri Lanka. (2011). Humanitarian Operation Factual Analysis , http://slembassyusa.org/wp-content/uploads/2011/08/Sri-Lankan-Humanitarian-Operation-Factual-Analysis.pdf

56 Put on the EU terrorist list on 17 June 2002, see: The Council of the European Union, *Council Decision of 17 June 2002 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2002/334/EC*, https://eur-lex.europa.eu/legal-

From 1948 to 1958 Colombia experienced a civil war called *La Violencia* between the Colombian Conservative Party and the Colombian Liberal Party. The conflict gave birth to several guerrilla groups, including the FARC, taking advantage of the country's unstable and violent political environment.[57] The group was founded in 1964 with the aim of overthrowing the government and installing a Marxist regime. For decades the group fought the government as a party to a non-international armed conflict.[58] Historically, the FARC has been the most persistent guerrilla group and at one point controlled more than one third of the country's territory.[59] It financed its war against the government by engaging in kidnapping, extortion and by participating in coca growing and drug trafficking.[60] It exhibited a strong institutional structure and organisational culture.[61] The group had a great network consisting of logistical experts in areas such as bombing, transportation, kidnapping, arms trafficking, food storage, etc. The FARC further managed militia groups in the cities.[62] The FARC had extensive military and civil administration.[63] In 2007, an estimated 18,000 persons were fighting within FARC's ranks.[64] Since then, the size shrank to approximately 8,000 guerrillas.[65] Furthermore, the FARC had the capacity to negotiate peace agreements, including the conclusion of the peace accord in 2016 between the Government of Colombia and the FARC, bringing an end to this armed conflict.[66] These criteria define the FARC as being an organised armed non-state group.

6.3 War crimes committed by ISIS

The Reports of the Independent International Commission of Inquiry on the Syrian Arab Republic (UN CoI Syria)[67] stated that ISIS had endangered and directed acts of violence against the civilian population in areas controlled by them, and persons not taking part in hostilities. Accordingly, they committed the war crimes of murder, execution without due process, mutilation, enforced disappearance, torture, cruel

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content/en/TXT/?uri=celex:32002D0460 [accessed 15 July 2019]. The FARC was suspended from the list on 27 September 2016. This decision followed the official signing on 26 September 2016 of the Colombia peace agreement between the Colombian government and the FARC, see: The Council of the EU, Council Regulation (EU) 2016/1710 of 27 September 2016 amending Regulation (EC) No 2580/2001 *on specific restrictive measures directed against certain persons and entities with a view to combating terrorism*, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016R1710. See also: U.S. Department of State, Bureau of Counterterrorism and Countering Violent Extremism, *Designated foreign terrorist organizations,* Date designated: 10/8/1997, Revolutionary Armed Forces of Colombia (FARC), https://www.state.gov/foreign-terrorist-organizations/, [accessed 15 July 2019].

57 Saab, Bilal Y., and Alexandra W. Taylor, *Criminality and armed groups: A comparative study of FARC and paramilitary groups in Colombia*, Studies in Conflict & Terrorism 32.6, 2009, p. 455-475; Eccarius-Kelly, Vera, *Surreptitious Lifelines: A Structural Analysis of the FARC and the PKK,* Terrorism and Political Violence 24.2, 2012, p. 235-258.

58 *Columbia: Peace Deal with FARC ends 60 years of conflict* in Annyssa Belall, *The War Report: armed conflicts in 2016*, March 2017.

59 *Columbia: Peace Deal with FARC ends 60 years of conflict* in Annyssa Belall, *The War Report: armed conflicts in 2016*, March 2017.

60 InSight Crime, *FARC*, 3 March 2017, https://www.insightcrime.org/colombia-organized-crime-news/farc-profile/

61 *Columbia: Peace Deal with FARC ends 60 years of conflict* in Annyssa Belall, *The War Report: armed conflicts in 2016*, March 2017.

62 European Strategic Intelligence and Security Centre, *Colombia: an overview of the Farc's military structure*, 1 December 2010, http://www.esisc.org/publications/briefings/colombia-an-overview-of-the-farcs-military-structure

63 Canada: Immigration and Refugee Board of Canada, *Colombia: Revolutionary Armed Forces of Colombia (Fuerzas Armadas Revolucionarias de Colombia, FARC), including information on criminal activities, such as drug trafficking and kidnapping; state response to criminal activity (2009 - February 2011)*, 5 April 2011, COL103709.E, https://www.refworld.org/docid/4dbfcc952.html

64 Garry Leech, *Colombia: Interview with FARC Commander Raul Reyes,* Columbia Journal, 12 July 2007, https://reliefweb.int/report/colombia/colombia-interview-farc-commander-raul-reyes

65 InSight Crime, *FARC*, 3 March 2017, https://www.insightcrime.org/colombia-organized-crime-news/farc-profile/

66 UN Security Council, *Letter dated 14 December 2016 from the Secretary-General addressed to the President of the Security Council,* S/2016/1063, 15 December 2016.

67 *Independent International Commission of Inquiry on the Syrian Arab Republic*, reports accessible on https://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/Documentation.aspx; Second report of the Special Adviser and Head of the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh/Islamic State in Iraq and the Levant, March 2019, paragraph 13. Accessible on https://www.unitad.un.org/sites/www.unitad.un.org/files/general/17.05.2019_0.pdf

treatment, hostage-taking, rape and sexual violence, forced pregnancy, the use and recruitment of children in hostilities and attacking protected objects, forcibly displacing civilians, outrages upon personal dignity as well as other serious violations of IHL.[68] ISIS violated its obligations towards civilians and persons hors de combat which amounted to war crimes by beheading, shooting and stoning men, women, children and captured soldiers. They mutilated their bodies and carried out amputations and lashings in public spaces. Prisoners of ISIS had to survive beatings, whipping, electrocution, and suspension from walls or ceilings. Moreover, ISIS was engaged in abductions, and women and girls suffered from sexual slavery[69], gang raping, executions for unapproved contact with the opposite sex and stoning for adultery. According to the UN CoI Syria, the commanders of ISIS had wilfully perpetrated these war crimes with the indisputable intent of attacking persons while they were aware of their status as civilians or persons no longer participating in hostilities.[70] Yazidis were especially targeted by horrific abuse by ISIS due to their community's religious identity.

7. Prosecuting foreign terrorist fighters for crimes against humanity

Crimes against humanity (CAH), according to the definition in Article 7 of the Rome Statute, are acts committed as part of a widespread or systematic attack that is perpetrated against a civilian population.[71]

When considering victims of CAH, namely the "civilian population", it is not necessary for the population as a whole to be targeted, but that the attack was not only targeting a limited or randomly selected group of people.[72] The presence of military personnel and persons hors de combat[73] does not change the civilian character of the population.[74]

'*Widespread or systematic attack directed against […]*' means that the prohibited act must have been perpetrated pursuant to or in furtherance of a governmental or organisational policy.[75] The policy may be implemented by a state-like organisation or by any organisation capable of committing widespread or systematic attacks against a civilian population.[76] '*Widespread'* refers to the number of victims and requires the attack to be of a large scale, thus, the multiple commissions of acts.[77] In order to be '*systematic*', an attack has to be organised and has to follow a regular pattern, hence, should not be

68 UN Human Rights Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, A/HRC/25/65*, 14 February 2014, p.1. Accessible on https://undocs.org/A/HRC/25/65

69 The prosecution at national level of sexual and gender-based violence (SGBV) committed by the Islamic State in Iraq and the Levant (ISIL), *Genocide Network Secretariat*, July 2017, p. 24. Retrieved from http://www.eurojust.europa.eu/doclibrary/genocide-network/KnowledgeSharing/The%20prosecution%20at%20national%20level%20of%20sexual%20and%20gender-based%20violence%20committed%20ISIL%20(July%202017)/2017-07_Prosecution-at-national-level-of-sexual-and-gender-based-violence_EN.pdf

70 UN Human Rights Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic: Rule of Terror: Living under ISIS in Syria, A/HRC/27/CRP.3*, 19 November 2014. Accessible on https://reliefweb.int/sites/reliefweb.int/files/resources/HRC_CRP_ISIS_14Nov2014.pdf

71 *Rome Statute*, Article 7. Elements of Crimes, Article 7.

72 ICC, *Prosecutor v. Jean-Pier Bemba Gombo,* Decision on Confirmation of Charges, Pre-Trial Chamber II, Case No. ICC-01/05-01/08, 2009, para. 77.

73 Wounded, disabled, etc. military personnel

74 ICTY, *Prosecutor v. Tadic*, Trial Chamber, Case No. IT-94-1-T, 1997 para. 638.

75 ICC, *Elements of Crimes*, 2002. Article 7. Introduction. 3.

76 Guilfoyle, p. 247,248.

77 Prosecutor v. Dragoljub Kunarac et al. (ICTY Trial Chamber), 2001, IT-96-23-T& IT-96-23/1-T; *Tadic TC*, IT-94-1-T. para. 648.

randomly perpetrated.[78] The case law of the ICC now expresses that no formal policy is needed. Instead it is sufficient if the attack is '*planned, directed or organised*'.[79]

In order to determine if a particular group qualifies as an organisation with the capability of committing widespread or systematic attacks, one has to take into account and consider:[80]
"(i) whether the group is under a responsible command, or has an established hierarchy; (ii) whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population; (iii) whether the group exercises control over part of the territory of a State;(iv) whether the group has criminal activities against the civilian population as a primary purpose; (v) whether the group articulates, explicitly or implicitly, an intention to attack a civilian population;(vi) whether the group is part of a larger group, which fulfils some or all of the abovementioned criteria."[81]

These criteria assist the ICC in its assessment on a case-by-case basis, though it is not necessary for them all to be met.[82] However, the attack can either be widespread or systematic. These two criteria constitute alternative requirements. The fulfilment of either one is sufficient to exclude sporadic, random and isolated acts.[83]

Next, the perpetrator of the underlying crime has to commit the prohibited act '*as part of the […] attack and with knowledge of the attack*'. In order to fall under this scope, it is not necessary for the perpetrator himself to have committed a widespread or systematic attack, though he has to have knowledge of the factual circumstances of a widespread or systematic attack occurring, as well as knowledge that his act forms part of this attack against a civilian population.[84]

7.1 Crimes against humanity committed by ISIS

ISIS is responsible for extreme and gruesome acts of violence perpetrated against the civilian population on the territory of Iraq and Syria such as murder, enforced disappearance, mutilation and torture of civilians. Particularly, ethnic and religious minorities such as the Christian and Kurdish population suffered under the reign of ISIS.[85] The Report of the Independent International Commission of Inquiry on the Syrian Arab Republic (UN CoI Syria) from 2014 classified the attacks by ISIS against the civilian population as being widespread and systematic. These acts were part of an attack on the civilian population under the control of ISIS in Aleppo, Ar Raqqah, Dayr Az-Zawr and Al-Hasakah, and in enforcement of an organisational policy they amounted to crimes against humanity.[86] Furthermore, these crimes were perpetrated pursuant to and in furtherance of the organisation's policy – their war against the infidels – and in continuance of the establishment of a global Islamic caliphate.[87]

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78 *Kunarac*, IT-96-23-T& IT-96-23/1-T, para. 429; *Tadic*, IT-94-1-T. para. 648.
79 *Bamba*, ICC-01/05-01/08. para. 81.
80 Corrigendum of the Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (ICC Pre-Trial Chamber II), 2010, ICC-01/09-19-CORR. para. 93. Accessible on https://www.refworld.org/cases,ICC,4bc2fe372.html
81 Ibid.
82 Guilfoyle. p. 248.
83 Guilfoyle. p. 246.
84 Guilfoyle. p 249.
85 See Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, *Rule of Terror: Living under ISIS in Syria, A/HRC/27/CRP.3*, 19 November 2014.
86 UN Human Rights Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, A/HRC/27/60*, 13 August 2014. para. Summary, 38, 74.
87 Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, *Rule of Terror: Living under ISIS in Syria, A/HRC/27/CRP.3*, 19 November 2014, para. 77. Accessible on https://reliefweb.int/sites/reliefweb.int/files/resources/HRC_CRP_ISIS_14Nov2014.pdf

To be considered an 'organisation' and, therefore, capable of committing widespread or systematic attacks, a group has to show a certain degree of organisational complexity.[88] By applying the above criteria one has to conclude that ISIS is an organisation definitely capable of committing crimes against humanity.

UN CoI Syria reports described violence perpetrated by ISIS members against the female population. Since this conduct was undertaken as part of a widespread and systematic attack by ISIS, it amounted to crimes against humanity of murder, torture, enslavement, rape, sexual slavery, forced pregnancy and sexual violence.[89] Furthermore, specific reports dealt with the crimes ISIS perpetrated against the Yazidis in particular.[90] It recorded that ISIS attacks on Yazidis in ISIS-controlled territory in Syria and Iraq in a widespread manner constituted crimes against humanity of murder and extermination since they were killing Yazidi men, women and children. Moreover, the sexual enslavement and beating of the women and girls of the Yazidi community and the forcing of Yazidi men and boys into labour were categorised as crimes against humanity of sexual slavery, rape, sexual violence, enslavement, torture, other inhuman acts and severe deprivation of liberty. Additionally, since these crimes were perpetrated on discriminatory grounds based on religion, the Commission concluded that ISIS further fulfilled the facts of the crime against humanity of persecution.[91]

8. Prosecuting foreign terrorist fighters for the crime of genocide

The crime of genocide is defined by Article 6 of the Rome Statute as:

'any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group, or (e) Forcibly transferring children of the group to another group.'

Therefore, the crime of genocide entails: [92]

- The killing of one or more persons;
- Because of their affiliation to a specific national, ethnical, racial or religious group.

In addition, international criminal law requires that the alleged perpetrator intends to destroy, in whole or in part, the targeted group, as such.

The investigation of the crimes perpetrated against the Yazidi community could potentially lead to the identification of the intent by ISIS to destroy in whole or in part the Yazidi community as a group[93].

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88 Corrigendum of the Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (ICC Pre-Trial Chamber II), 2010, ICC-01/09-19-CORR. para. 93. Accessible on https://www.refworld.org/cases,ICC,4bc2fe372.html

89 Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, *Rule of Terror: Living under ISIS in Syria, A/HRC/27/CRP.3*, 19 November 2014, para. 53- 57. Accessible on https://reliefweb.int/sites/reliefweb.int/files/resources/HRC_CRP_ISIS_14Nov2014.pdf

90 UN Human Rights Council, *"They Came to Destroy": ISIS Crimes Against the Yazidis, A/HRC/32/CRP.2*, 15 June 2016.

91 UN Human Rights Council, *"They Came to Destroy": ISIS Crimes Against the Yazidis, A/HRC/32/CRP.2*. para. 168.

92 *Rome Statute,* Article 6.; *Elements of Crimes*, Article 6.

93 Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, *Rule of Terror: Living under ISIS in Syria, A/HRC/27/CRP.3*, 19 November 2014, para. 57. Accessible on https://reliefweb.int/sites/reliefweb.int/files/resources/HRC_CRP_ISIS_14Nov2014.pdf; Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, *"They came to destroy": ISIS Crimes Against the Yazidi*s, June 2016. Accessible on https://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A_HRC_32_CRP.2_en.pdf; UN

9. EU Member States jurisprudence of the cumulative prosecution of ISIS foreign terrorist fighters or its members

All EU Member States have ratified the Rome Statute of the ICC and the majority have the necessary implementing legislation to enable them to exercise jurisdiction over war crimes, crimes against humanity and the crime of genocide. In the prosecution of returning foreign terrorist fighters for war crimes or other core international crimes, States can apply the principle of nationality rather than the principle of universal jurisdiction.[94] However, the principle of universal jurisdiction could be applicable for Syrian and Iraqi nationals or ISIS members of other nationalities who have fled the conflict and are present in the territory of Member States. Furthermore, national law of some countries allow that one act can be prosecuted both as a terrorist crime and as a core international crime, provided that all relevant facts of the act are not exhaustively judged under one set of legislation.[95] Some countries differentiate between the crimes and allow for the cumulative prosecution of terrorism-related offences, crimes against humanity and the crime of genocide, but not of war crimes.[96]

The following section will present cases of final judicial decisions or ongoing cases before the domestic courts that demonstrate opportunities for the cumulative prosecution of FTFs for both sets of criminal acts - core international crimes and terrorism-related offences. Some cases featured comprise only core international crimes and not terrorism-related offences, as the prosecuting State might not have criminalised the offence of membership in a terrorist organisation or this fact was not existing or proven during the trial. Nevertheless, these war crimes cases illustrate interesting legal or factual questions raised that could be applicable for prosecuting similar cases involving FTFs and other members of ISIS.

9.1 Germany

- *German national convicted as a member of a terrorist organisation and for the war crime of outrage upon personal dignity*

Frankfurt Higher Regional Court, 8 November 2016, reference 5-2 StE 10/16 - 9 - 2/16
Facts – A German jihadist recorded with a phone a video of himself cutting body parts (ears and nose) and damaging the body of a dead Syrian soldier from the opposite side in Aleppo, amounting to outrages upon personal dignity. He also kicked and fired bullets into the heads of dead soldiers.
Legal procedure and *crimes* – conviction for membership in a terrorist organisation (ISIS) and the commission of the war crime of outrage upon personal dignity.
Sentence – 8.5 years' imprisonment[97]

Commission of Inquiry on Syria: ISIS is committing genocide against the Yazidis, *United Nations Human Rights Office of the High Commissioner Press Release*. Retrieved from https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20113

94 S. Krahenmann, Geneva Academy of International Humanitarian Law and Human Rights (2014). Foreign terrorist fighters under International Law. *Academy Briefing No. 7*, p. 52

95 H. Cuyckens, C. Paulussen, The Prosecution of Foreign terrorist fighters in Western Europe: The Difficult Relationship between Counter-Terrorism and International Humanitarian Law, Journal of Conflict & Security Law; *T.M.C. Asser Institute for International & European Law*, Asser Research Paper Series 2019-04, p.19. Accessible on https://ssrn.com/abstract=3471908

96 For instance, in Belgium, it is not possible to prosecute simultaneously acts committed by FTFs on the basis of counter-terrorism legislation and on the basis of a classification of war crime. The Belgian Criminal Code determines that the provisions relating to terrorist offences cannot be applied to the activities of the parties to an international or non-international armed conflict. However, it is legally possible to prosecute acts simultaneously as terrorism and crimes against humanity and/or the crime of genocide.

97 Genocide Network, Eurojust (2018). Prosecuting war crimes of outrage upon personal dignity based on evidence from open sources, p. 8. Retrieved from http://www.eurojust.europa.eu/doclibrary/genocide-network/KnowledgeSharing/Prosecuting%20war%20crimes%20of%20outrage%20upon%20personal%20dignity%20base

- *German national convicted for posing with the body parts of a dead soldier, amounting to the war crime of inhumane and degrading treatment*

Federal Court of Justice, 27 July 2017, reference BGH 3 StR 57/17
Facts – While in Syria after joining armed jihad, a German national posed in 3 photographs with the severed heads of enemy combatants impaled on metal rods, which were uploaded to Facebook.
Legal procedure and *crimes* – Appeal decision of the Federal Court of Justice on points of law. The perpetrator was charged with war crimes for the demeaning and degrading treatment of dead persons, under the *Volkerstrafgesetzbuch* (VStGB) penalising core international crimes and applicable regardless of the place of offence or the nationality of the offender (universal jurisdiction). The Court's ruling made a distinction between NIAC and IAC and analysed the intensity and organisation criteria to determine if a group can be considered as an armed group. Additionally, the judgment clarified the inhumane treatment of a dead person as a war crime.
Sentence – 2 years' imprisonment[98] for a war crime of outrage upon personal dignity

- *German national, ISIS spouse, convicted for the offence of terrorism and the war crime of pillaging*

Higher Regional Court of Stuttgart, 5 July 2019, reference 5-2 StE 11/18
Facts – A German woman joined ISIS in Syria and married an ISIS fighter at the end of 2013. In March 2014, she and her husband moved into and lived in a house seized by ISIS after its lawful owners had fled the area. In addition, the accused and her husband were given household appliances pillaged by ISIS. In June/July the accused and her husband allegedly moved into another apartment in Raqqa, which had also been seized by ISIS after its lawful owners had fled or had been displaced by ISIS. Additionally, she identified herself with the goals and rules of ISIS and acted on behalf of the terrorist organisation in various ways (e.g. she received weapons and weapons training, supervised ISIS websites and praised the methods and the way of life within ISIS)[99].
Legal procedure and *crimes* – convicted for membership in a terrorist organisation (ISIS) pursuant to the national penal code, for the war crime of pillaging pursuant to the German *Völkerstrafgesetzbuch* (VStGB) and for violating weapons laws
Sentence – 5 years' imprisonment[100]

- *German national, ISIS spouse, convicted for the war crime of pillaging*

Higher Regional Court of Dusseldorf, 4 December 2019, reference III-2 StS 2/19

d%20on%20evidence%20from%20open%20sources%20(February%202018)/2018-02_Prosecuting-war-crimes-based-on-evidence-from-open-sources_EN.pdf
98 Federal Court of Justice (Germany), 27 July 2017, reference 3 StR 57/17, translated. Retrieved from http://www.eurojust.europa.eu/doclibrary/genocide-network/GNnationaljurisprudence/Case%20number%20StR%2057-17%20-%20Federal%20Court%20of%20Justice,%20Germany%20(July%202017)/2017-07_DE-Federal-Court-of-Justice_EN.pdf
99 Der Generalbundesanwalt, *Pressemitteilung,* 16.01.2019. Retrieved from https://www.generalbundesanwalt.de/SharedDocs/Pressemitteilungen/DE/2019/Pressemitteilung-vom-16-01-2019.html; Asharq Al-Awsat. (2019). German Woman Charged over Years in ISIS-controlled Territory. https://aawsat.com/english/home/article/1548461/german-woman-charged-over-years-isis-controlled-territory
100 AP (2019). German woman sentenced to 5 years for joining Islamic State. Retrieved from https://federalnewsnetwork.com/world-news/2019/07/german-woman-sentenced-to-5-years-for-joining-islamic-state/

Facts – A German woman travelled to Syria in 2014 and married an ISIS fighter there. In 2015, she and her family willingly moved into a house that had been seized by ISIS after the lawful owners had fled from the fighters or had been displaced by ISIS.[101]
Legal procedure and *crimes* – convicted for membership in a terrorist organisation and for the war crime of pillaging.
Sentence – 3 years and nine months' imprisonment[102].

Federal Court of Justice, 15 May 2019, reference BGH AK 22/19
Ruling – in the Dusseldorf case above, the Federal Court of Justice was required to determine as punishable acts of membership in a terrorist organisation, in particular the meaning of participation, and its cumulative application with the war crime of pillaging.[103]

- *German ISIS spouse indicted for the war crime of pillaging*

Federal Court of Justice, 4 April 2019, reference BGH AK 12/19
Ruling on pretrial detention

Facts – At the end of 2013, a German woman travelled to Syria and in 2014 married an ISIS fighter there. She moved into three different properties that had been seized by ISIS, together with furniture and household appliances, after the lawful owners had fled or had been killed. In addition, she had supported ISIS as a member and held at least three Yazidi women against their will as slaves.
Legal reasoning – According to the Court, the appropriation must be done without the consent of the owner and as part of the armed conflict. The victim needs to be a member of the enemy party. In a situation such as the internal conflict in Iraq and Syria, where various armed groups are participating in the conflict, a person with an opposing aim to the perpetrator (e.g. a different ideology) already counts as a member of the enemy party. The Court also ruled grounds for the cumulative prosecution for membership in a terrorist organisation, the war crime of pillage and severe trafficking in human beings and deprivation of liberty.[104]

- *Syrian national indicted for mistreating civilians and participating in the execution of persons hors de combat*

Ongoing case before the Higher Regional Court of Stuttgart, reference 5-3 StE 6/19
Facts – The defendant, a Syrian national, allegedly joined ISIS in 2014 and took part in the mistreatment of at least three persons no longer participating in hostilities. He also mistreated a pickup driver together with other ISIS members by hitting him many times on the head with his weapon. Furthermore, he allegedly took part in the execution of a prisoner of war, and showcased the corpse in a square in the village[105].

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101 Der Generalbundesanwalt, *Pressemitteilung, 17.04.2019.* Retrieved from https://www.generalbundesanwalt.de/SharedDocs/Pressemitteilungen/DE/2019/Pressemitteilung2-vom-17-04-2019.html
102 Press release from Justiz NRW, retrieved from https://www.justiz.nrw/JM/Presse/presse_weitere/PresseOLGs/archiv/2019_02_Archiv/04_12_2019_2/index.php
103 Federal Court of Justice (Germany), 15 May 2019, reference BGH AK 22/19, retrieved from: http://www.eurojust.europa.eu/doclibrary/genocide-network/GNnationaljurisprudence/Case%20number%20AK22-19%20-%20Federal%20Court%20of%20Justice,%20Germany%20(May%202019)/Anonymised-DE-case-AK22-19.pdf
104 Federal Court of Justice (Germany), 4 April 2019, reference BGH AK 12/19, retrieved from https://www.hrr-strafrecht.de/hrr/2/19/ak-12-19.php
105 Der Generalbundesanwalt, *Pressemitteilung, 19.06.2019.* Retrieved from https://www.generalbundesanwalt.de/SharedDocs/Pressemitteilungen/DE/2019/Pressemitteilung-vom-19-06-2019.html

Legal procedure and *crimes* – indicted in June 2019 on charges of membership in a terrorist organisation, two specific war crimes (the killing of a protected person under IHL and the inhumane and degrading treatment of a protected person under IHL), violating weapons law and grievous bodily harm.

- *German citizen prosecuted for the slavery and murder of a Yazidi child*

Ongoing case[106] before the Higher Regional Court of Munich, reference 8 St 9/18
Facts – A 28- year old German woman allegedly travelled to Iraq in 2014 and started participating in IS by patrolling the territory in Mosul and Fallujah. She was responsible for policing the region and for supervising the acceptability of women's clothing and behaviour according to ISIS' rules of conduct. For purposes of intimidation she received a Kalashnikov rifle. The defendant and her husband, who was a member of ISIS as well, bought a 5-year old Yazidi girl in 2015 from a group of prisoners of war and held her in slavery in their household. When the 5-year old became sick, she wet her bed, for which the defendant's husband punished her by chaining her up outside in the heat and let her die of thirst in agony. The defendant did nothing to save the child, but let her die instead, an act constitutive of the war crime of killing a protected person.[107]
Legal procedure and *crimes* – indicted in December 2018 and prosecuted for membership in a terrorist organisation and for the war crime of killing a protected person under IHL and for violating weapons laws.

- *Iraqi citizen prosecuted for the murder of a Yazidi child as a crime of genocide*

Ongoing case before the Higher Regional Court of Frankfurt am Main, reference 5-3 StE 1/20-4-1/20
Facts – The husband of the German citizen from the above-mentioned case, an Iraqi national, allegedly punished a Yazidi child they had bought by chaining her up outside in the heat and letting her die of thirst in agony, leading to her death[108].
Legal procedure and *crimes* – charged on February 14, 2020 with the crime of genocide, a crime against humanity, a war crime against persons and human trafficking for the purpose of exploitation.[109] The trial started on 24 April 2020.[110]

- *German ISIS spouse convicted for enlisting child soldiers due to handing over her child to an ISIS training camp*

Federal Court of Justice, 17 October 2019, reference AK 56/19
Facts – A German citizen travelled to Syria with her three children in 2015. In Syria, she joined ISIS, married an ISIS member and performed various tasks for the organisation. In 2016, she repeatedly handed over her then seven-year-old son to an ISIS training camp for child soldiers in Raqqa, for him to

106 Justiz Bayern, Press release. Retrieved from https://www.justiz.bayern.de/gerichte-und-behoerden/oberlandesgerichte/muenchen/presse/2020/11.php
107 Der Generalbundesanwalt, *Pressemitteilung,* 28.12.2018. Retrieved from https://www.generalbundesanwalt.de/SharedDocs/Pressemitteilungen/DE/2018/Pressemitteilung-vom-28-12-2018.html?nn=478298
108 DW (October 2019). Germany charges Iraqi man with genocide for killing Yazidi child: https://www.dw.com/en/germany-charges-iraqi-man-with-genocide-for-killing-yazidi-child/a-50800811
109 Der Generalbundesanwalt, *Pressemitteilung,* 21.01.2020. Retrieved from https://www.generalbundesanwalt.de/SharedDocs/Pressemitteilungen/DE/aktuelle/Pressemitteilung-vom-21-02-2020.html
110 https://www.bbc.com/news/world-europe-52409406

learn how to handle weapons. On 7 December 2018, one of her sons was killed when their house, situated close to the front line, was bombed.
Legal procedure and *crimes* – charged and prosecuted for membership in a terrorist organisation, the war crime of child recruitment (person under 15 years of age) into an armed group, war crimes against persons with aggravated parental abduction of minors and resulting in death; neglect of the duty of care and education; bodily harm[111].
Sentence – 5 years and 3 months' imprisonment (not final), through a verdict that held handing over one's own child to a militia's training camp as the war crime of child recruitment[112]

9.2 The Netherlands

- *Dutch national convicted for posing with a crucified enemy soldier and sharing the photo on Facebook*

District Court of The Hague, 23 July 2019, reference 09/748003-18 & 09/748003-19
Facts – Law enforcement authorities found photos of the suspect, a Dutch foreign terrorist fighter, showing him armed and in combat clothes. During his stay in Syria, he posed laughing next to a deceased man hanging on a cross. This photo was later shared publicly and disseminated on Facebook.
Legal procedure and *crimes* – prosecuted and convicted for membership in a terrorist organisation and the war crime of outrage upon personal dignity (inhumane and degrading treatment of dead bodies)
Sentence – 7.5 years' imprisonment (5 years for membership in a terrorist organisation and 2.5 years for the war crime) [113]

- *Dutch national prosecuted for commenting on and sharing a humiliating video filmed in Iraq*

Ongoing case before the District Court of The Hague
Facts – Law enforcement authorities found a Telegram chat in which the suspect, a Dutch woman living in the Netherlands, is suspected of sharing and commenting on a video. The video appears to have been filmed in Iraq by ISIS, the sharing and commenting by the suspect is believed to have taken place in The Netherlands. The video shows detainees – persons not or no longer participating in hostilities – being burned alive. The commenting is degrading to the victims. The suspect is not visible in the video, nor seems to be involved in the making of the video.
Legal procedure and *crimes* – The suspect is currently being prosecuted for membership in a terrorist organisation, training for terrorist offences, incitement to commit terrorist offences and the war crime of outrages upon personal dignity (inhumane and degrading treatment of persons).

9.3 Hungary

- *Syrian national prosecuted for murder committed as part of an act of terror and crimes against humanity*

111 Federal Court of Justice (Germany), 17 October 2019, reference AK 56/19, translated. Retrieved from http://www.eurojust.europa.eu/doclibrary/genocide-network/GNnationaljurisprudence/Case%20number%20AK56-19%20-%20Federal%20Court%20of%20Justice,%20Germany%20(October%202019)/Anonymised-DE-case-AK56-19.pdf
112 https://www.sueddeutsche.de/panorama/prozesse-duesseldorf-mit-kindern-zum-dschihad-fuenf-jahre-haft-fuer-is-terroristin-dpa.urn-newsml-dpa-com-20090101-200428-99-868328
113 District Court of The Hague (Netherlands), 23 July 2019, reference 09/748003-18 & 09/748003-19. Retrieved from https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2019:7430&showbutton=true

Ongoing case[114] before the Municipal Court of Budapest
Facts – A Syrian national was apprehended at the airport with forged documents. He had allegedly been the commander of a small armed unit within ISIS in 2015. The defendant was presumably responsible for occupying the town of al-Shokni in Holms. Part of the plan was to create a "death list" of people who were not willing to identify themselves with the goals of ISIS. In May 2015, as part of a widespread and systemic attack directed against the local civilian population, the defendant personally beheaded at least one person. The act was filmed and the video was subsequently made public as a means of intimidation. Following this act, the defendant and his armed fellows murdered at least 25 people in the town as part of a systemic attack on the civilian population. The defendant personally assisted in the execution of at least two people and personally shot another civilian.[115]
Legal procedure and *crimes* – indicted in September 2019 based on the charges of murder committed as part of an act of terror and crimes against humanity in Syria, linked to ISIS. Prosecutors are seeking life imprisonment.

9.4 France

- *Iraqi national indicted for participation in the massacre in Speicher – killings in connection with a terrorist group and a war crime*

Ongoing case
Facts – An Iraqi refugee allegedly participated in the June 2014 capture and execution of an estimated 1,700 young, mainly Shiite, army recruits from the Speicher military camp in Iraq. The massacre in Speicher is considered one of IS's worst crimes committed in Iraq. Video footage released by IS showed an assembly-line massacre in which gunmen herded their victims towards the quay, shot them in the back of the head and pushed them in the water one after the other. [116]
Legal procedure and *crimes* – arrested and indicted in Paris in March 2018, he was first charged with criminal association with terrorists, before information of his alleged participation in the "Tikrit massacre" surfaced. The indictment is based on charges including killings in connection with a terrorist group and war crimes, with a dual legal qualification.[117]

- *French IS foreign terrorist fighter wanted for membership in a terrorist organisation, crimes against humanity and the crime of genocide*

Ongoing case
Facts, legal procedures and *crimes* – In 2016 France opened a structural investigation against unknown persons to collect information and identify potential French perpetrators of genocide and crimes against humanity committed by ISIS against ethnic and religious minorities, specifically Christians and Yazidi in Syria and Iraq. In December 2016, information was received from a Yazidi victim in Germany that her sister was detained by an ISIS member, possibly French. By October 2017, and after witness identification and cooperation with specialised NGOs, testimonies of Yazidi women detained by ISIS members identified their abductors as being French nationals. In October 2019 a case was opened against a specific individual, a French IS foreign terrorist fighter, for crimes against humanity and the

114 Suspected IS Terrorist's Case Continues in Budapest, January 2020, *Hungary Today*. Retrieved from https://hungarytoday.hu/suspected-is-terrorists-case-continues-in-budapest/
115 http://ugyeszseg.hu/vademeles-terrorcselekmeny-es-emberiesseg-elleni-buntett-miatt-f-hassan-ellen-videoval-es-fotoval/
116 https://www.france24.com/en/20180608-iraqi-refugee-held-france-suspicion-war-crimes
117 https://www.arabnews.com/node/1318096/world; http://www.leparisien.fr/faits-divers/l-inquietant-passe-d-un-refugie-irakien-installe-en-france-09-06-2018-7761924.php

crime of genocide. He was identified and incriminated by two female witnesses from the Yazidi community who had been purchased, detained and raped by the defendant in Syria. His speeches on Yazidis, as well as ISIS propaganda directed against the Yazidi community, combined with his position in the chain of command of ISIS, all indicate the specific intent to commit genocide[118]. It is the first case in France of a French ISIS fighter cumulatively prosecuted for both terrorism and core international crimes.

- *Lafarge – complicity of a legal person in crimes against humanity by a legal person and financing a terrorist enterprise while violating sanctions*

Ongoing case before the Supreme Court
Facts – Lafarge maintained a cement factory operating in north-eastern Syria between 2012 and 2014. The company decided not to close the factory even though the situation in Syria was putting employees in serious danger. Employees were risking death and kidnapping due to the armed conflict taking place around the factory. Lafarge allegedly paid around 13 million euros to various armed groups, including ISIS.
Legal procedure and *crimes* – A criminal complaint against the multinational corporation Lafarge and its subsidiary Lafarge Cement Syria was filed in Paris in 2016. The legal action argued that Lafarge and its subsidiary Lafarge Cement Syria had to be investigated on charges of complicity in crimes against humanity, financing of a terrorist enterprise, deliberate endangerment of people's lives and working conditions incompatible with human dignity. French prosecution brought charges for complicity in crimes against humanity and the financing of terrorism, as well as the violation of sanctions.[119] In November 2019 the Appeal Court questioned the qualification of complicity in crimes against humanity and the process is ongoing before the Supreme Court.[120]

9.5 Sweden

Note: Membership in a terrorist organisation is not a criminal offence in Sweden. As such, the following cases have not been prosecuted under terrorism legislation but for war crimes. Nonetheless, these cases illustrate challenging legal or factual issues that could be applicable in similar cases against FTFs or other ISIS members or in cases when the terrorism-related elements are not existing or proven during the trial.

- *Iraqi citizen posing with the body parts of dead enemy soldiers*

Scania and Blekinge Court of Appeal, 17 April 2017, reference B 569-16
Facts – Pictures showed the defendant, an Iraqi migrant, posing next to the severed heads of dead enemy soldiers, posing next to dead enemy soldiers with someone placing a foot against a dead person's head and him placing a foot or a weapon against a dead person's chest. By posing in these pictures and by publishing the images on his Facebook account, he treated the photographed persons in a humiliating and degrading way, hence violating the personal dignity of the persons.

118 https://www.20minutes.fr/justice/2637243-20191026-sabri-essid-djihadiste-francais-presume-mort-vise-enquete-crimes-contre-humanite-premiere
119 https://www.business-humanrights.org/en/can-the-lafarge-case-be-a-game-changer-french-multinational-company-indicted-for-international-crimes-in-syria; Universal Jurisdiction Annual Report 2020, *NGOs sidelined as cement company indictment is confirmed*, p. 32. Accessible on http://content.delivra.com/etapcontent//Trial/UJAR%202020/TRIAL%20International_UJAR%202020_DIGITAL.pdf
120 https://www.reuters.com/article/us-lafargeholcim-syria-appeal/frances-lafarge-has-charge-of-crimes-against-humanity-lifted-lawyers-idUSKBN1XH14X

Legal procedure and *crimes* – convicted for the war crime of outrage upon personal dignity, for having subjected the bodies of dead persons to humiliating and degrading treatment intended to seriously violate their personal dignity. The ruling was based on Swedish law that contains penal provisions for war crimes in the Act on Criminal Responsibility for genocide, crimes against humanity and war crimes. The law based on which the defendant was convicted corresponds to Article 8(2)(c) of the Rome Statute.
Sentence – 9 months' imprisonment[121]

- *Syrian national participated in the extrajudicial killing of seven persons hors de combat and was convicted for a war crime (extrajudicial killing)*

Stockholm District Court, 16 February 2017, reference B 3787-16
Facts – The perpetrator, a Syrian national, actively participated in the deliberate, extrajudicial killings of seven persons no longer participating in hostilities, captured Syrian army soldiers and shot one of the victims himself. The central piece of evidence was a video published on YouTube, which showed the perpetrator. The video was first revealed by the *New York Times* in 2013. Other videos published on Facebook and YouTube helped prosecutors determine the time and place of the execution of the captured Syrian soldiers.
Legal procedure and *crimes* – convicted for committing a war crime
Sentence – life imprisonment[122]

- *Syrian national convicted for torturing a person hors de combat, video posted on Facebook*

Stockholm Court of Appeal, 5 August 2016, reference B 13656-14
Facts – The defendant, a Syrian permanent resident of Sweden, violently assaulted a man, taped the assault and posted the video on Facebook. Both the perpetrator and the victim were affiliated with Syrian opposition forces. The victim was already injured prior to the assault, during which his hands and feet were bound, he was further threatened with having his tongue cut out, and was repeatedly hit on the head and body with a baton.
Legal procedure and *crimes* – conviction for a war crime and torture. A trial at first instance was held in 2015, defining the timeline of the non-international armed conflict in Syria and convicting the accused for war crimes. Following an appeal, a new trial in 2016 convicted the perpetrator for aggravated assault according to Swedish law, being unable to link the beating with the armed conflict in Syria. In August 2016, the Appeal Court overruled the second trial and reinstated the war crime qualification.
Sentence – 8 years' imprisonment, and lifetime ban from Sweden.[123]

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121 Genocide Network, Eurojust (2018). Prosecuting war crimes of outrage upon personal dignity based on evidence from open sources, p. 8 and 14. Accessible on http://www.eurojust.europa.eu/doclibrary/genocide-network/KnowledgeSharing/Prosecuting%20war%20crimes%20of%20outrage%20upon%20personal%20dignity%20based%20on%20evidence%20from%20open%20sources%20(February%202018)/2018-02_Prosecuting-war-crimes-based-on-evidence-from-open-sources_EN.pdf; Scania and Blekinge Court of Appeal (Sweden), 17 April 2017, reference B 569-16, translated. Retrieved from http://www.eurojust.europa.eu/doclibrary/genocide-network/GNnationaljurisprudence/Case%20number%20B3187-16%20-%20Scania%20and%20Blekinge%20Court%20of%20Appeal,%20Sweden%20(April%202017)/2017-04_SE-Scania-and-Blekinge-Court-of-Appeal_EN.pdf
122 Genocide Network, Eurojust (2018). Prosecuting war crimes of outrage upon personal dignity based on evidence from open sources, p. 8 ; Stockholm District Court (Sweden), 16 February 2017, reference B 3787-16, translated. Retrieved from http://www.eurojust.europa.eu/doclibrary/genocide-network/GNnationaljurisprudence/Case%20number%20B3787-16%20-%20Stockholm%20City%20Court,%20Sweden%20(February%202017)/2017-02-SE-Stockholm-City-Court_EN.pdf
123 https://trialinternational.org/latest-post/mouhannad-droubi/

9.6 Finland

Note: Membership in a terrorist organisation is not a criminal offence in Finland. As such, the following cases have not been prosecuted under terrorism legislation but for core international crimes. Nonetheless, these cases illustrate challenging legal or factual issues that could be applicable in similar cases against FTFs or other ISIS members or in cases when the terrorism-related elements are not existing or proven during the trial.

- *Iraqi national posing with the severed head of a dead enemy soldier*

District Court of Kanta-Häme, 22 March 2016, reference R 16/214
Facts – The defendant, an Iraqi citizen, was a sergeant in the Iraqi army and took part in the operation against ISIS between 2014 and 2015. He took and published a picture on his Facebook profile in April 2015, depicting himself holding the severed head of an enemy soldier who had died in combat or in a bomb attack. The conduct of the defendant amounted to desecrating and violating the dignity of a dead person, namely the war crime of degrading and inhumane treatment (outrage upon personal dignity) of a person protected under IHL. The picture showed the defendant crouching down on the ground, holding an assault rifle pointed at the ground, looking at the camera, with the severed head close by in front of him on the ground. He was not alleged to have taken part in the severing of the head from the body of the person referred to in the charge, or to have otherwise played any role in its removal from the body.[124]
Legal procedure and *crimes* – convicted for the war crime of outrage upon personal dignity
Sentence – 13-month suspended sentence

- *Iraqi twins suspected of participation in the Camp Speicher massacre*

Ongoing case
Facts – In June 2014, an estimated 1,700 young, unarmed, and mostly Shiite Iraqi recruits and soldiers from the Camp Speicher army base were captured and killed by ISIS fighters in a massacre in the town of Tikrit (Iraq). The defendants, two Iraqi twin brothers, were prosecuted for involvement in the massacre and for killing captured recruits and soldiers.
Legal procedures and crimes – Regarding the fact that the massacre had a terroristic purpose and that it was aimed at persons who were protected by the Geneva conventions, the defendants were indicted for murders with a terrorist intent and/or an aggravated war crime committed through murders. The indictments were, however, dismissed both by the District Court and the Court of Appeal due to the lack of evidence regarding the defendants' involvement. A retrial is ongoing.

10. Gathering of information and evidence of crimes committed by foreign terrorist fighters and ISIS members

ISIS committed horrendous crimes in the territories of Syria and Iraq. For European investigators and prosecutors, this area is predominantly inaccessible due to local insecurity or ongoing armed conflict. Despite restricted access to the crime scenes, prosecuting ISIS members is possible through the use of

124 District Court of Kanta-Häme (Finland), Judgment of 22 March 2016, Case number R 16/214, translated. Retrieved from http://www.eurojust.europa.eu/doclibrary/genocide-network/GNnationaljurisprudence/Case%20number%20R%2016-214%20-%20District%20Court%20of%20Kanta-H%C3%A4me,%20Finland%20(March%202016)/2016-03_FI-District-Court-Kanta-Hame_EN.pdf

evidence coming out of combat zones in Iraq and Syria. In addition to the traditional sources of information available to national authorities as part of a criminal investigation, there are various sources about the activities and crimes committed by foreign fighters that can provide leads for investigation or evidence for prosecution. Those include information collected by:

- United Nations bodies: the International, Impartial and Independent Mechanism for Syria (IIIM), Independent International Commission of Inquiry on the Syrian Arab Republic (UN CoI Syria) and the United Nations Investigative Team for Accountability of Daesh/ISIL (UNITAD);
- specialised civil society organisations, such as:
    - Commission for International Justice and Accountability (CIJA)
    - European Center for Constitutional and Human Rights (ECCHR)
    - Human Rights Watch (HRW)
    - TRIAL International
    - International Federation for Human Rights (FIDH)
    - Redress
    - Syrian Observatory for Human Rights
    - Amnesty International (AI)
    - Yazda
- military forces that have collected information during the hostilities, such as the United States-led battlefield project
- open source information deriving from social media accounts and other publicly available information, or captured electronic devices.

Furthermore, victims and witnesses arriving as asylum seekers to Europe can offer valuable testimonies. National prosecutorial and law enforcement authorities can make effective use of the scattered information through closer cooperation on two levels – within the state between various national units and between national authorities of other states and with the above-mentioned counterparts. Improved cooperation and exchange of information between immigration services, counter-terrorism units and international crimes units within prosecution or law enforcement can greatly improve joint strategy and lead to cumulative prosecution. Europol's analytical capacity on terrorism and core international crimes and Eurojust's expertise for prosecutors and judicial authorities reinforce national endeavours and ensure cross-border cooperation.

Joint cooperation between national authorities, regional and international organisations and civil society, supported by the Genocide Network, Eurojust and Europol, create further potential in sharing of operational information, legal opinions, knowledge and best practices.

11. Conclusion

Information collected by organisations such as UNITAD and IIIM, by national military forces or by specialised NGOs and open source information demonstrate that serious crimes were committed by ISIS and its affiliates during the conflict in Iraq and Syria. The acts of violence meet the legal definitions of core international crimes and should therefore be investigated and prosecuted by national authorities to avoid impunity for these crimes. Prosecuting ISIS fighters for core international crimes they have committed will not only fulfil the legal obligation of States to prosecute the most serious international crimes, crimes against humanity, war crimes or the crime of genocide, but will also lead to a more tailored approach, longer sentences and the full criminal responsibility of perpetrators. Furthermore, by recognising and naming these crimes for what they are, justice is brought to the victims.

Until recently, the "foreign terrorist fighters" phenomenon led most States to focus on preventing and punishing terrorism-related offences in Europe. However, cases from different Member States have demonstrated that it is possible to adjudicate foreign terrorist fighters cumulatively for terrorism offences and for core international crimes. Existing national jurisprudence and developing national practice include cases of membership in a terrorist organisation or any other terrorist offence that are cumulatively prosecuted with the war crimes of inhumane treatment of dead persons, pillage and enlisting child soldiers, murder as a crime against humanity, murder as the crime of genocide.

By collecting further evidence after the fall of ISIS, such as testimonies and internal documents, the availability of victims and witnesses, working with international stakeholders and civil society or by using open source information, prosecuting core international crimes is becoming more decisive and assertive. Focusing on both aspects of ISIS´s conduct, counter-terrorism and core international crimes, brings national prosecutors and law enforcement officers working in terrorism units and in international crimes units closer and stimulates collaboration and coordination. In order to hold perpetrators accountable, it is of great significance for States to share information and good practices with each other, for which the expertise of the Genocide Network, Eurojust and Europol can be of great support.

12. Annex

The following Annex could be a useful tool for national law enforcement officers and prosecutors when investigating and prosecuting foreign terrorist fighters. When considering evidence such as videos, pictures, documents or witness testimony, it is important to evaluate it not only from the perspective of terrorism-related offences, but also as potential evidence of war crimes, crimes against humanity or even the crime of genocide. In some countries, national law allows that one act can be prosecuted both as a terrorist crime and as a core international crime, provided that all relevant facts of the act are not exhaustively judged under one set of legislation. For core international crimes, particular acts can be prosecuted as an act of a war crime or a crime against humanity or the crime of genocide, depending on the context and the perpetrator's intent.

This annex may support practitioners in recognising evidence of a possible core international crime and is partially based on existing jurisprudence from Member States. The below examples are indicative and non-exhaustive, with the intention of illustrating several acts and increasing awareness of opportunities for prosecuting core international crimes.

Indicative description of an act	Possible core international crime	International criminal law provision
Picture or video which includes one or more of the following acts: - Posing with the body or body parts of dead enemy soldiers or civilians; - showing the body naked or in a humiliating/mocking way; - standing on top of the body, urinating on the body, dragging the body around, crucifying the body; - cutting off the body parts of (dead) enemy soldiers, damaging/shooting the body; - using the body as propaganda (e.g. mentioning the victim's name/affiliation) - Pictures or videos of civilians or fighters who are treated violently (raped, enslaved), humiliated (cutting hair/beards), used as human shields/slaves, inhumanely detained or used as propaganda)	War crime of inhumane and degrading treatment as an outrage upon personal dignity	Common Article 3 of Geneva Conventions 1949; Article 8 (2) (c) (ii) Rome Statute, applicable in NIACs
Living in a house or apartment given by ISIS in the occupied territories in Syria and Iraq / receiving furniture or other domestic appliances confiscated by ISIS	War crime of pillaging	Article 8 (2) (e) (v) Rome Statute, applicable in NIAC
Having household assistance, treating persons assisting in the household as slaves	War crime of cruel treatment War crime of outrage upon personal dignity	Common Article 3 of Geneva Conventions 1949; Article 8 (2) (c) (i) Rome

Indicative description of an act	Possible core international crime	International criminal law provision
	War crime of sexual slavery, war crime of rape Crime against humanity of enslavement	Statute, applicable in NIACs Common Article 3 of Geneva Conventions 1949; Article 8 (2) (c) (ii) Rome Statute, applicable in NIACs Article 8 (2) (e) (vi) Rome Statute, applicable in NIAC Article 7 (1) (c) Rome Statute
Marriage	War crime of cruel treatment War crime of outrage upon personal dignity War crime of rape / War crime of sexual slavery	Common Article 3 of Geneva Conventions 1949; Article 8 (2) (c) (i) Rome Statute, applicable in NIACs Common Article 3 of Geneva Conventions 1949; Article 8 (2) (c) (ii) Rome Statute, applicable in NIACs Article 8 (2) (e) (vi) Rome Statute, applicable in NIAC
Destruction of cultural heritage or selling cultural property, artefacts	War crime of directing attacks against buildings dedicated to religion, art, education, historic monuments War crime of pillaging	Article 8 (2) (e) (iv) Rome Statute, applicable in NIAC Article 8 (2) (e) (v) Rome Statute, applicable in NIAC
Killing and/or torturing and/or mutilating a prisoner of war/captured enemy combatant	War crime of violence to life and person (murder, mutilation, cruel treatment, torture)	Common Article 3 of Geneva Conventions 1949; Article 8 (2) (c) (i) Rome Statute, applicable in NIAC
Killing or attacking civilians	War crime of intentional attacks against civilians Crime of genocide	Article 8 (2) (e) (i) Rome Statute, applicable in NIAC Article 6 Rome Statute, applicable in NIAC
Attacks and violent acts against religious minorities (Yazidi), sexual violence or household assistance of a minority	Crime against humanity of rape, sexual slavery Crime against humanity of enslavement (in the course of trafficking of persons, e.g. buying a Yazidi woman) Crime of genocide	Article 7 (1) (g) Rome Statute Article 7 (1) (c) Rome Statute Article 6 Rome Statute, applicable in NIAC
Sentencing or executing captured enemy combatant, soldiers, civilians without due process guarantees	War crime of sentencing or execution	Common Article 3 of Geneva Conventions 1949; Article 8 (2) (c) (iv) Rome Statute, applicable in NIAC

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