



**ISIS fighters and their families facing justice:** Eight options and four principles



**Cover photo:**

An ISIS tunnel system in Ninewa, Iraq. Underground tunnels and passages smashed between adjoining houses were used to evade aerial surveillance.

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**Ceasefire Centre for Civilian Rights**

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# ISIS fighters and their families facing justice:

## Eight options and four principles

Crimes under international law committed by the Islamic State of Iraq and al-Sham (ISIS), including systematic attacks on civilian populations, have shocked the world. Now that the remaining ISIS-controlled territory in Syria is regained, attention is at last focusing on bringing ISIS leaders and fighters to justice. These include Iraqi and Syrian nationals, as well as the so-called ‘foreign fighters’ – nationals of other states in the Middle East and North Africa, as well as European, North American and other nationals. In particular, a global debate has begun about what to do with foreign fighters and their families, including a significant number of women and children.

This Ceasefire briefing considers eight accountability options potentially facing ISIS fighters and their families. It assesses the feasibility of each option and its implications, and then highlights four cross-cutting principles that should be taken into account in any decisions on justice mechanisms.

Since at least 2014, the need to hold ISIS accountable for its crimes has been considered a global priority. Which mechanism or mechanisms are now implemented will have major implications for the security of individual states across the world, for the long-term stability of the Middle East and North Africa, and, most pressing of all, for delivering justice to the tens of thousands of ISIS victims.

### 1. The International Criminal Court

The International Criminal Court, based in The Hague in the Netherlands, has the jurisdiction to prosecute war crimes, crimes against humanity, genocide and the crime of aggression. However, neither Syria nor Iraq are state parties to the Rome Statute governing the Court, and the Court’s jurisdiction is therefore limited without a UN Security Council Resolution. Some role for the Court is still possible in that the

ICC Prosecutor can investigate crimes allegedly committed in Syria or Iraq by the nationals of any state party.

#### *Could it happen?*

In May 2014, Russia and China vetoed a draft resolution to refer Syria’s situation to the ICC. There were some indications in 2015-16 that some in the Iraqi government were considering the possibility of Iraq making a declaration (under Rome Statute Art. 12(3)) to accept ICC jurisdiction, but this is now highly unlikely. Jurisdiction over state party nationals is still a possibility, however, which could in theory cover ISIS suspects from Tunisia and Jordan, as well as suspects from European states who are ICC state parties. In February 2018 a junior UK Defence Minister *argued* that two British ISIS suspects should be sent to The Hague, but possible war crimes by UK service personnel in Iraq are already the subject of a preliminary investigation at the ICC and the UK is unlikely to take any steps to invite ICC jurisdiction. The policy of stripping key ISIS suspects of their citizenship may also affect the nationality basis of ICC jurisdiction.

#### *Implications*

The ICC only has the capacity to try a limited number of suspects and under the policy of the Office of the Prosecutor, investigations are focused on those who bear the greatest responsibility for crimes. Given that the foreign fighters facing potential prosecution potentially number in the thousands, the ICC is not a feasible forum for their trial. If there were prosecutions of low-level foreign fighters at the ICC, this would raise difficult questions over why those with much greater responsibility for war crimes and crimes against humanity committed in Syria and Iraq were not being brought before the ICC. Finally, the question of what to do with ISIS members not accused of ICC crimes, and more generally the ISIS families, would still remain.

## 2. Special international or hybrid tribunal

Sweden's prime minister Stefan Löfven has called for the establishment of a special international tribunal to try European ISIS fighters, following the model of the tribunals set up for Rwanda and the Former Yugoslavia.

Special tribunals enable a larger number of alleged perpetrators to be tried and also offer the ability to combine international and domestic laws and processes (for which they are sometimes known as 'hybrid' tribunals). In particular, the jurisdiction of a special tribunal might be drawn more widely than the ICC core crimes to include other offences related to terrorism. Special tribunals can be based in the country where the crimes took place but can also be located abroad if another suitable host can be found. The Special Tribunal for Sierra Leone was originally established in Sierra Leone but later was moved to The Hague for security reasons. Perhaps the most immediate precedent is the Iraqi Special Tribunal, which was set up in Baghdad to try those responsible for the crimes of the former Ba'ath regime (see option 4 below).

### *Could it happen?*

Setting up a special tribunal requires a resolution of the UN Security Council (as in the case of the tribunals for Rwanda and the Former Yugoslavia) and/or the consent of the host state. Any proposal that would include jurisdiction over crimes in Syria would almost certainly meet the same opposition in the Security Council as a proposal for ICC referral. One idea might be for states concerned about their foreign fighters effectively to pool their criminal jurisdiction over such fighters – for example, a number of European states could do this without the need for a Security Council resolution. However, this would still leave the problems of where to locate such a tribunal, where to imprison convicts, and where families – as well as acquitted suspects – would go. The Hague has become something of a default location for international criminal proceedings, but now that the Netherlands too has adopted a policy of seeking to exclude their own ISIS suspects by stripping them of citizenship, it would be extraordinary if they offered to take others. For Syria and Iraq, see options 3 and 4 below.

### *Implications*

Proposals for an international special tribunal are predicated on the assumption that the tribunal would be based elsewhere, but no state has offered to host such a tribunal and it does not appear likely that one will in the near future. Even if the reluctance of the autonomous administration in north-east Syria to holding foreign fighter trials there could somehow be overcome, as well as the difficult jurisdictional issues, the fragile nature of the administration would mean that security concerns and related costs would be enormous. Most Syrians would be unlikely to welcome such an initiative and would probably dismiss it as partial and one-sided, given that it was exclusively concerned with one set of perpetrators and could not deliver justice to the vast majority of Syrian victims.

## 3. Prosecution in Syria

Prosecution in the state where the crimes were committed (mostly Iraq or Syria), together with prosecution in the state of nationality of the alleged perpetrator (see option 5) are the usual bases for criminal jurisdiction.

ISIS fighters and their families captured from Hajarin and Baghouz are currently being held by the Syrian Democratic Forces (SDF) of the Kurdish-controlled autonomous administration in north-east Syria. Although SDF forces are backed by the US and the international coalition against ISIS, that support may end soon and the administration has dangerous enemies: it has no formal relationship with the Syrian government and its existence is threatened by Turkey, which has already occupied the northern province of Afrin.

As regards the government of Syria, the UN Commission of Inquiry on Syria concluded back in 2013 that 'given the protracted and increasingly sectarian nature of the conflict, it seems highly improbable that effective and independent prosecutions that meet essential international standards could be carried out in Syria anytime in the near future.' Since those words were written, the situation has deteriorated. The defection of the Syrian military photographer 'Caesar' with 55,000 photos of torture and abuse, showing the bodies of some 11,000 detainees, removed any doubts over the nature of the Syrian prison system.

**Could it happen?**

Given that many of the ISIS foreign fighters and their families currently held in detention are in Syria, this option may appear the default for foreign governments anxious to rid themselves of a complex problem. However, official spokesmen for the SDF and the autonomous administration in north-east Syria *have stated* that while the administration can try Syrian nationals they do not have the legal infrastructure to try foreign fighters and have called on their countries of nationality to take them back and prosecute them at home, warning that leaving them in Syria would be ‘a big mistake’. (Full disclosure: Ceasefire has been involved in the training of judges and lawyers from north-east Syria in international humanitarian law and fair trial standards.)

**Implications**

Given the chaotic conditions, leaving foreign ISIS fighters and their families in Syria means losing control over their fate. Any agreement to hand them over to the custody of the Syrian government would be politically untenable for European or North American governments which have consistently criticised the repressive nature of the Assad government. It would also invite a host of legal claims. In addition to the danger that ISIS fighters and their families will be mistreated in Syrian custody is the significant risk that Syria might just let ISIS fighters go free (see option 8).

**4. Prosecution in Iraq**

Of those ISIS fighters who have already been brought to trial, the vast majority have been prosecuted in Iraq. Most of these are Iraqi nationals, but Iraqi cases also include foreign fighters. For example, Tarek Jadaoun (known as Abu Hamza al-Beljiki), reportedly a Belgian national, was *sentenced to death* at the Baghdad Central Criminal Court in May 2018. More recently, Iraqi President Barham Salih *announced* on 25 February 2019 that Iraq would try 13 French ISIS fighters handed over by SDF forces from Syria.

Trials of those accused of being part of ISIS have been conducted under Law No. 13 on counter-terrorism (2005). The system is confession-based, with confessions frequently extracted through torture, and thousands of suspects have already been tried in proceedings lasting only a few minutes

with a conviction rate reported at over 98 per cent. An Iraqi Special Tribunal was established with international support after the fall of Saddam Hussein but its temporal jurisdiction covered only the period of the former Ba’ath government (1968 – 2003) and there is little support in Iraq for the jurisdiction to be extended, with many political blocs fearing scrutiny over their own behaviour.

**Could it happen?**

Prosecution in Iraq is an ongoing possibility, but the question needs to be asked: prosecution for what? Crimes under international law such as war crimes and crimes against humanity are not criminalized under the Iraqi criminal code. Prosecutions of ISIS suspects, therefore, have been conducted under broad counter-terrorism laws. Mass killings and other grave crimes are yet to be properly investigated and those with greatest responsibility are being convicted for vaguely-worded terrorist offences alongside those with no other link to ISIS than through a family member.

**Implications**

Lack of due process, endemic torture and growing use of the death penalty all raise serious concerns over prosecution in Iraq and whether it can really deliver justice either to perpetrators or their victims. More broadly, the treatment in Iraq of ISIS families, and Arab Sunni communities over whom ISIS formerly held control, has been denounced as collective punishment and risks perpetuating the cycle of violence.

**5. Home state prosecution and de-radicalization**

Of the 4,000 – 5,000 foreign fighters believed to originate from Europe, approximately 30 per cent have already returned. In the UK the latest *official estimates* indicate that 40 per cent of the 900 who left the UK to join terrorist groups have returned. Of these, only 10 per cent have been prosecuted. A very small number of individuals have to comply with restrictions under a Terrorism Prevention and Investigation Measures (TPIM) notice. In other states, returning fighters – if they are identified – are subject to deradicalization programmes or prosecution depending on the policy and laws of the jurisdiction concerned.

More recently, a number of states have attempted to strip ISIS members of their citizenship as a

means of preventing their return, including in the high profile cases of Shamima Begum (UK) and Hoda Muthana (US).

#### ***Could it happen?***

Generally speaking the legal infrastructure is already in place to enable prosecution of ISIS fighters in their home state, although challenges remain, not least over access to documentary and physical evidence. Access to witness evidence is greatly assisted by the fact that a large number of victims and witnesses have fled Syria and Iraq and now reside in Europe, North America or in neighbouring countries in the region. In the case of ISIS family members who may not be accused of any specific offence other than membership or association with a proscribed organisation, the situation is more complex. In the UK they could be prosecuted under anti-terrorism legislation, in other countries such as Sweden that legislation is not yet in place.

#### ***Implications***

Justice mechanisms in the home state have the dual advantage of dealing with perpetrators in manageable numbers in the state in which they were radicalized, and enabling family members innocent of any crime, including children, to be protected. Over the years following 9/11, extensive international and regional arrangements for intelligence sharing and mutual legal assistance were established which are able to support the identification and prosecution of suspects, but the system risks being undermined as more states opt for exclusion of suspects through removing citizenship.

## **6. Prosecutions in foreign national courts under extra-territorial or universal jurisdiction**

In addition to prosecuting their own nationals, European and other states may also be able to prosecute foreign nationals under forms of extra-territorial jurisdiction. This includes jurisdiction established under a multi-lateral treaty such as the Convention against Torture (to which Syria is a state party). Many civil law countries can also prosecute individuals who have committed crimes against their nationals, under the passive nationality (or passive personality) principle. Many European states, including Germany, also have forms of universal jurisdiction, under which

the most serious crimes of international concern (including war crimes, crimes against humanity and genocide) can be prosecuted even if they were committed abroad and there is no nexus between the accused and the prosecuting jurisdiction.

#### ***Could it happen?***

Largely in response to the Syria conflict, the number of extra-territorial prosecutions in Europe has climbed in recent years. According to [Trial International](#), in 2018 such proceedings targeted at least 149 suspects in 15 countries, the greatest number in Germany and France. Charges included war crimes, crimes against humanity, torture and genocide, and there were eight convictions during the year. The extra-territorial collection of evidence, particularly in prevailing conditions in Syria and Iraq, remains a serious challenge, but it is not insurmountable. In late 2016 the UN General Assembly established an [International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011](#). The IIIM is not a prosecutor but has the task of collecting, analysing and preserving evidence to support potential prosecutions, whether at a national or international level.

#### ***Implications***

The growing use of extra-territorial jurisdiction, including under the universality principle, presents an important contribution to the search for justice in Syria and other contemporary conflicts. Logistic challenges as well as legal obstacles (including, where applicable, sovereign and state immunity) mean that the number of suspects that can be tried will always be limited. Such proceedings are most appropriate in cases concerning the most serious crimes under international law, where impunity would otherwise prevail. While Syrians and a wide range of other nationals have been prosecuted, it is unlikely that European prosecutors will bring cases against the nationals of another European state where a more appropriate forum exists.

## **7. The 'Guantánamo option': extra-legal detention**

Two ISIS suspects, Alexander Kotey and Shafee El Sheikh, held by the SDF in Syria since January

2018, were stripped of their UK citizenship before potential transfer to US authorities. (Alleged members of a four-man ISIS cell dubbed ‘the Beatles’ because of their British accents, Kotey and El Sheikh are believed to have been involved in the murder of British and American hostages, among others). A number of reports indicate that the US is considering holding them at the detention centre in Guantánamo Bay. A letter from the UK Home Secretary to the US Attorney-General in July 2018 agreeing to provide mutual legal assistance sought no assurances that the suspects would not face the death penalty (nor be transferred to Guantánamo), in contradiction to UK policy, and the Home Secretary’s decision was upheld by the High Court in January 2019.

#### ***Could it happen?***

Global condemnation – including by the UN, EU and the US Congress – of early practices in the ‘war on terror’, including extraordinary rendition, indefinite detention at Guantánamo and in other so-called grey sites, makes it less likely (although not impossible) that such practices could be repeated in the case of ISIS detainees. Although US authorities have reportedly discussed transferring the two ISIS ‘Beatles’ to Guantánamo, such exceptional arrangements would probably be considered impracticable for the greater number of ISIS suspects now being held in Syria.

#### ***Implications***

Before they were murdered, Western hostages of ISIS in Syria were paraded in orange jumpsuits in an attempt to demonstrate a parallel with the treatment of Muslim prisoners in Guantánamo. For ISIS suspects now to be sent to Guantánamo may be perceived as the use of extra-legal detention and mistreatment coming full circle. Inevitably it would attract widespread criticism as a high-profile indication that due process and the rule of law had been abandoned in the fight against terrorism.

part of evacuation deals. Significant numbers of ISIS fighters have also crossed the border into Turkey and avoided prosecution.

#### ***Could it happen?***

On 17 February 2019, the US President called on Britain, France, Germany and other European allies to take back 800 ISIS fighters and try them or the US ‘will be forced to release them’. As the autonomous administration in north-east Syria is unable and/or unwilling to try them, the prospect of such fighters being let go or handed over to Syrian authorities is very real. Given the Syrian government’s record on torture and extra-judicial executions, moves to hand over ISIS suspects to Syrian custody would trigger a wave of human rights claims in European courts. But their actual treatment by Syrian authorities is hard to predict: while death in Syrian custody is very possible (with or without trial), there is also a significant chance of the suspects being moved to Idlib and let loose.

#### ***Implications***

As the nationality of the suspect provides one of the main bases for criminal jurisdiction, the strategy pursued by some states of stripping citizenship from foreign fighters makes it more likely that they will be let free. This is particularly the case given the policy followed by a number of states in the region of instrumentalizing jihadi fighters and using them as proxies or as a means of destabilizing their enemies. In the medium-term, foreign fighters rendered effectively stateless could form a cadre of outlaws over whom no state is willing to exercise jurisdiction, raising children in a radicalized environment to harbour grievances against the state that rejected them.

## **8. Letting them go**

Given the scale and gravity of the crimes committed by ISIS, this option appears unthinkable. In the current situation, however, it is one of the most likely to occur. The Syrian government has repeatedly facilitated the movement of ISIS fighters to other areas in Syria, such as Idlib, including as

## Four principles for accountability

Implementation of any of the accountability mechanisms described above faces a number of practical and ethical challenges. Ceasefire argues that an understanding of the four principles below should guide the choice of mechanism in each case.

### i Addressing the needs of victims

Of all ISIS' crimes, its genocidal attacks on the Yazidi population and enslavement of Yazidi women and children are egregious. Yet there have been no prosecutions of ISIS perpetrators for crimes against Yazidis and, while civilian activists in Iraq and Syria have at great effort and risk been able to liberate hundreds of victims, there has been no concerted international effort to track the thousands of missing from Yazidi and other communities. On the contrary, hundreds of Yazidi women and children are feared to have been killed in the course of anti-ISIS bombardment in Mosul, Raqqa, Hajjin and Baghouz.

Nobel Prize laureate Nadia Murad has supported efforts to investigate atrocities against the Yazidis, including the exhumation of mass graves. A former ISIS hostage and the families of other hostages who were murdered have also called for the perpetrators to be put on trial in the UK or the US.

The needs of victims do not stop at criminal prosecutions. With the exception of a limited reparations scheme administered by the Iraqi government under Law no. 20 (2009/2015), which is currently overwhelmed by the scale of claims, no reparations have been made available to the victims of violations in Syria and Iraq, including those who have seen civilian family members killed and their property destroyed in International Coalition bombing.

An approach to justice that fails to consult with the communities who have suffered most or to address the needs of victims may create widespread resentment and damage prospects for transitional justice in Iraq and Syria.

### ii The distinction between fighters and civilians

A fundamental principle of international humanitarian law (IHL) is the distinction between fighters/combatants, on the one hand, and civilians and other non-combatants on the other. The principle of distinction has frequently been violated in both Syria and Iraq, not least by ISIS which has repeatedly carried out attacks on civilian populations. This makes it all the more important that the principle is upheld in the international response to ISIS.

Attacks on civilians are prohibited under IHL and to attack civilians intentionally is a war crime. As a matter of *domestic* law, states will furthermore be able to prosecute insurgents under their ordinary criminal law for offences including murder. However, international conventions on terrorism frequently include a clause to exclude from their provisions the activities of armed forces during an armed conflict which are governed by international humanitarian law. This helps maintain the integrity of IHL, including the principle of distinction. The jurisprudence on implementing IHL exclusions from anti-terrorism legislation is mixed, but the purpose of such exclusions is clear: if those who adhere to the Geneva Conventions and other rules of international humanitarian law (including by targeting only military objectives) are subject to similar criminal sanctions as those who commit atrocities against civilians, prisoners, etc., this removes a major incentive for observing the law.

### iii Criminal justice should be based on individual responsibility, not collective punishment

Criminal prosecutions address the responsibility of the individual, based on his or her specific conduct. Collective punishments that target a whole group or community are inimical to the right to a fair trial and in an armed conflict are prohibited under international humanitarian law.

In both the current international debate on bringing ISIS members to justice and in the existing practice of the Iraqi criminal justice system, there is a widespread failure to recognize that individual culpability for ISIS-related crimes spans a very broad range. The priority should be on prosecuting those suspected of the most serious crimes



under international law, including war crimes, crimes against humanity and genocide. Where individuals are subject to prosecution for counter-terrorism offences based on membership or support for a proscribed organisation, distinctions should be made between those who assisted in the commission of specific crimes, those whose culpability depends on membership alone, and those who acted under duress, including for example Syrian and Iraqi women who were victims of forced marriages. Under no circumstances should children be penalized for the crimes of their parents.

The heavy reliance on broad anti-terrorist laws and related security measures for dealing with ISIS members in Iraq and, potentially, in Europe, carries the danger both of punishing the innocent and failing properly to punish those with greatest responsibility.

#### **iv The need for impartiality – ISIS is not the only perpetrator**

To be credible justice mechanisms need to be impartial and applied without discrimination. The

crimes committed by ISIS are truly shocking, but ISIS is far from being the greatest perpetrator in Syria. The Syrian government and its allies have killed a far larger number of civilians, including in indiscriminate bombardments and in prisons and detention centres where torture and extrajudicial killing are systematic. Neither is ISIS the only perpetrator of atrocities in Iraq, where numerous armed militias and Iraqi Security Forces have also been responsible for crimes under international law. Yet an independent investigation team, mandated by the UN Security Council in 2017 to support Iraqi domestic justice efforts, is concerned exclusively with crimes committed by ISIS.

In both Syria and Iraq, international justice efforts which are perceived to target only members of the Sunni Arab community are unlikely to be seen as credible and impartial across society and actual and perceived bias may even contribute to the sense of grievance and resentment which fuels new cycles of violence. Bringing ISIS perpetrators to justice is an urgent priority; excluding other perpetrators from justice mechanisms is a serious mistake.

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