

ISIS-only tribunal: selective, politicised justice will do more harm than good

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Amidst heightened fears that ISIS fighters could escape captivity in north-eastern Syria as a result of the Turkish incursion into the region, powerful European states are pressing ahead with attempts to wash their hands of their own citizens with ISIS ties by establishing a hybrid tribunal or similar mechanism limited to trying ISIS-affiliated perpetrators of international crimes in Iraq, and possibly also Syria. Such a tribunal would leave victims' needs unmet, threaten prospects for reconciliation in Iraq and Syria, and risk further undermining already fragile trust in international justice. To do justice to ISIS' victims and prevent a resurgence of the extremist group, the international community must pursue accountability for ISIS and others who have committed grave abuses in Iraq and Syria, but resist adopting a counterproductively politicised and selective approach that would appear to encourage impunity and worsen rather than alleviate conflict in the longer term. International justice is a last-resort avenue for when domestic paths to justice have been exhausted, not a long-term replacement for a functioning national judiciary; western states must take responsibility for holding their citizens who joined ISIS accountable in their own countries, provide support to Iraq to meet victims' needs and demands, and support Syrian victims in their struggles for justice and redress.

Background: ISIS in Iraq and Syria

In mid-2014, ISIS overran swathes of territory across western Iraq and eastern Syria, establishing a 'caliphate' that committed gross human rights violations against the populations under its control likely amounting to war crimes, crimes against humanity and genocide. ISIS has now been militarily defeated by various armed groups, Iraqi and Syrian state forces, and international air power, finally losing the last of its territory in Iraq and Syria in late 2017 and early 2019 respectively. However, the group continues to launch sporadic attacks and has left physical destruction, social divisions and mass displacement in its wake, as well as tens of thousands of direct and indirect victims searching for answers and justice.

By the time the last of ISIS' territory in Syria was retaken, tens of thousands of former fighters and their family members had been rounded up and held in prisons and camps controlled by the Kurdish-dominated Syrian Democratic Forces (SDF) in north-eastern Syria. They are predominantly Iraqis and Syrians but also include foreign nationals from some 70 states,¹ many of which are reluctant to take their citizens back. The question of what to do with them has gained new urgency since the Turkish offensive into new areas of SDF-controlled Syria in October 2019,

¹ According to officials in north-eastern Syria, approximately 14,500 ISIS-affiliated foreigners are held in the region, of whom around 1,000 are male suspected fighters. Much larger numbers of Iraqis and Syrians are also being held. See: <https://rojvainformationcenter.com/storage/2019/07/Bringing-ISIS-to-justice-Rojava-Information-Center-Report-2019-Website.pdf>

as the SDF stepped up its warnings, claiming that it could not hold these prisoners indefinitely with limited resources while under attack, and several escapes were reported from SDF facilities.

Flawed justice

A number of initiatives to hold ISIS accountable for its crimes have been launched, but are problematic or have shortcomings. Though other parties involved in liberating territory from ISIS are accused of committing human rights violations during the conflict, there have so far been no effective or extensive attempts to hold non-ISIS perpetrators to account.

Domestically, Iraq has sentenced thousands of alleged ISIS members to death or lengthy prison sentences in trials that frequently fail to meet basic standards of fairness. Cases are mainly brought under anti-terror legislation,² meaning defendants are frequently convicted on the basis of ISIS membership rather than actual deeds, and victims have little opportunity to participate in or be properly informed of proceedings.³ The rapid trials in Iraq also leave little opportunity to obtain supplementary information of vital importance to victims' family members, such as the whereabouts of remains. In Syria, the SDF has conducted trial proceedings for Syrian nationals accused of fighting with ISIS, commendable for not imposing the death penalty, but the trials have lacked legal standing due to the territory's lack of sovereignty, limited resources and expertise to hold fair trials, and the challenges of attempting to administer justice in a conflict zone.

On the international level, in September 2017, the UN Security Council passed Resolution 2379 ordering the establishment of an investigative team (known as UNITAD) to collect evidence and assist Iraqi and potentially other courts in prosecuting ISIS criminals. It does not have a mandate to investigate crimes by other parties, but has been investigating ISIS crimes including the persecution of Yazidis, the Speicher killings, and the crimes that accompanied the occupation of Mosul.

Proposals for an ISIS-only tribunal

European states met twice in 2019 to explore an initiative proposed by Sweden and supported by the Netherlands to establish an international or hybrid tribunal to hold ISIS accountable.⁴ Movement on the proposal accelerated after the start of the October 2019 Turkish offensive, with hastily convened meetings in Copenhagen and Baghdad, and a visit by the French foreign minister to Iraq to push for a mechanism to try foreign fighters on Iraqi soil.⁵

As European states press Iraq to consent to receiving foreign ISIS suspects from Syria, there is little clarity as to what form the judicial proceedings against them would take. An international tribunal was mooted earlier in 2019, but now appears unlikely. A hybrid tribunal, based in Iraq

² Iraq's Anti-Terrorism Law, (no. 13 of 2005) is often problematically applied for political gains, and has been widely criticised for its over-broad and vague definition of terrorist acts and its prescription of the death penalty or life imprisonment for all terrorist crimes, regardless of their gravity. See for example the American Bar Association's 2014 commentary on the law:

https://www.americanbar.org/content/dam/aba/administrative/human_rights/ABA%20Center%20for%20Human%20Rights%20Analysis%20of%20Iraq%20CT%20Law.pdf

³ According to Iraqi criminal procedure law, victims can take part in trials as "partie civile." However, expedited trials and the lack of outreach and communication on their proceedings leave victims with insufficient time, information and capacity to participate.

⁴ See <https://www.government.se/press-releases/2019/06/sweden-hosted-expert-meeting-on-tribunal/>; <https://www.nrc.nl/nieuws/2019/09/25/nederland-isers-in-irak-berechten-a3974688>

⁵ See <http://tiny.cc/54bhfz>; <https://www.reuters.com/article/us-syria-security-france-iraq/frances-le-drian-to-go-to-iraq-to-discuss-trials-for-jihadists-from-syria-idUSKBN1WV0RC>;

and supported by international expertise and funding, is another option still under discussion, despite negative comments by the Iraqi foreign minister about basing such a court in Iraq.⁶

All signals indicate that the jurisdiction of the potential tribunal will be limited to the prosecution of ISIS affiliates only. But other key questions remain unanswered, such as whether it would apply Iraqi or international law, whether it would cover crimes committed in Iraq only or also Syria, suspects of which nationalities would be covered by its jurisdiction, which states would cooperate in its functioning, and the question of the death penalty. For most states pushing for the establishment of such court, it is illegal under their international obligations to transfer or facilitate the transfer of detainees to states where they may face torture or the death penalty.

It is possible that the proposed tribunal may be tasked solely with prosecuting foreign ISIS members, while others would face the Iraqi judicial system. Such a proposal would be even more fundamentally unjust than other possible forms of an ISIS-only tribunal, with some perpetrators enjoying more rights than others. In such a scenario, foreigners could face fairer trials without the possibility of the death penalty, while Iraqis transferred from Syria would be left to face the death penalty with fewer safeguards in the Iraqi justice system.⁷ For victims too, those who suffered at the hands of foreign fighters would have their day in court while those whose tormentors were Iraqi or Syrian would not, and victims of perpetrators affiliated to groups other than ISIS would be side-lined entirely.

Unjust and politically motivated

The international community, Iraq, and Syria seem unanimous in their opposition to ISIS and insistence on its defeat and punishment. But other parties that may be responsible for international crimes in the context of conflict in Iraq and Syria enjoy protection from powerful backers, granting them impunity for their actions and shielding them from criticism. These political factors lead to a counterproductive and unfair situation in which some perpetrators enjoy impunity while others are punished, and where some victims' suffering is recognised and addressed while others' is largely ignored.

European states are reluctant to bring ISIS-affiliated citizens home to face justice, due to fears of returnees committing atrocities in Europe or radicalising others, difficulties gathering sufficient evidence to try them for crimes committed abroad, and popular opposition to the repatriation of ISIS members.⁸ Though the Turkish incursion has led some countries to accept the necessity of repatriating unaccompanied minors, it also appears to have sharpened their resolve to quickly find a solution that lets them avoid bringing home adult citizens.⁹

Selective justice is counterproductive

UNSCR 2379, which created UNITAD, and current proposals for an ISIS tribunal have some welcome elements, such as an apparent affirmation of international commitment to justice and willingness to invest in it. But they also set a dangerous precedent for selective justice sanctioned at the highest level of global politics. At a time of global crisis of confidence in the rules-based,

⁶ Speaking in the Hague in October 2019, the Iraqi foreign minister [cast doubt](#) on the likelihood of Iraq agreeing to any hybrid tribunal for foreign fighters on Iraqi soil and stressed that the death penalty would continue to apply for anyone tried for crimes committed in Iraq. An Iraqi foreign ministry [statement](#) in October 2019 hinted that Iraq could consider accepting non-Iraqis suspected of committing crimes on Iraqi territory transferred from SDF captivity in Syria, but not those whose crimes took place in Syria.

⁷ It is highly unlikely that an international or hybrid tribunal established to prosecute ISIS perpetrators would apply the death penalty, but Iraq remains committed to capital punishment.

⁸ See <https://www.hrw.org/news/2019/06/21/western-europe-must-repatriate-its-isis-fighters-and-families>

⁹ Countries reported to be considering repatriating children include Belgium, France and the UK.

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liberal international order, it is all the more important for influential states to live up to the ideals underpinning that order in order to prevent further erosion of trust.

Furthermore, the proposal for an ISIS-only tribunal represents an effort by European states to outsource their responsibility for dangerous or highly vulnerable individuals to a region recovering from decades of conflict with plenty of its own challenges to address. Such a tribunal would fuel the perception of one-sided justice targeting the 'enemies of the west' only, and feeding into a broader global narrative of Islamophobia whereby crimes by those espousing Islamist ideologies are more harshly punished than others. This impression of western hypocrisy will further fuel anti-western sentiment, bolster the radical ideology underlying the emergence of movements such as ISIS, and undermine countering violent extremism efforts.

Bad for reconciliation and recovery in Iraq and Syria

A one-sided approach to accountability is likely to have negative consequences for victims' rights, reconciliation, rebuilding state institutions and strengthening the rule of law in Iraq. It would protect the privilege and impunity of other groups that also committed abuses, leaving their victims without effective access to justice and signalling to other actors that their atrocities will go unpunished. This in turn threatens already fragile reconciliation processes, and compounds the grievances of those who suffered at the hands of groups other than ISIS, increasing the likelihood of renewed conflict and future radicalisation. Attempting to rush through proposals for an ISIS-only tribunal for political expediency in the context of fears of ISIS escapes from SDF prisons leaves even less room for victim and community consultation and participation, making it less likely to have a positive social impact and meaningfully address victims' needs and demands.

In Iraq, a tribunal dedicated solely to prosecuting ISIS, a group espousing an extreme and violent interpretation of Sunni Islam, would likely aggravate existing Sunni perceptions of being singled out and marginalised by an allegedly Shia-dominated central government. Likewise, in Syria, an ISIS-only tribunal would vex the hopes and aspirations of victims of other warring parties, likely with conflict-exacerbating effects.

An international or hybrid tribunal may send the message that Iraq's courts are not capable of dealing with crimes committed on its territory, further decreasing trust in an already weak and under-resourced judiciary that lacks popular confidence. International justice is a last-resort avenue for when domestic paths to justice have been exhausted, not a long-term replacement for a functioning national judiciary. Funds spent on a new tribunal would be better invested in strengthening and reforming the Iraqi judiciary, supporting it to become a long-term defence against international crimes in Iraq, and keeping decision-making responsibility in Iraqi hands.

If the international community decides nonetheless to move forward with an internationalized judicial mechanism, a hybrid court in Iraq with broad support from the international community, jurisdiction over crimes *by all perpetrators*, meaningful participation of victims and other affected

communities, and sufficient outreach and communication to the Iraqi public could possibly play a positive role in strengthening the rule of law, reconciliation and justice in Iraq. Unfortunately, it seems that these conditions for success are not present, as the real aim of the initiative is to help powerful states pass the burden of their ISIS-affiliated citizens elsewhere.

In July 2019 the head of UNITAD Karim Khan expressed his support for the establishment of a Nuremburg-style tribunal to try ISIS perpetrators. The Nuremburg trials, though a landmark in the development of international justice, had a questionable legal basis, were perceived as imposed by outside victorious powers, and failed to address crimes committed in Germany by the allied powers. They thus represent a poor model for serving justice in Iraq today and a potential repetition of the mistakes of recent Iraqi history, where the highly flawed de-Baathification process was known to be modelled on de-Nazification in post-WWII Germany rather than on more nuanced and carefully developed vetting programs adapted to the context.¹⁰

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Victims' needs left unmet

Proposals for an ISIS tribunal appear designed to ease European states' domestic political headaches, not to address the needs of victims and survivors. They represent a top-down solution, and have not been developed in consultation with a broad cross section of victims or with significant civil society involvement. The many families still searching for news about their loved ones kidnapped by ISIS following the collapse of its caliphate want answers, justice and the chance to move on with their lives in dignity, but powerful states' prioritization of the creation of an international tribunal over all other justice demands risks eclipsing the real needs and priorities of victims on the ground in Syria and Iraq.

An ISIS tribunal would be able to deliver justice to at best a tiny percentage of those who committed crimes. Though a tribunal would bring welcome attention and acknowledgement of the ordeals suffered by some victims, it would do little to address the needs and demands of wider victim communities, such as safe and voluntary returns for the displaced, fair compensation at the individual and collective level, opening mass graves, and other measures to reveal the fate of the missing and disappeared.

Iraq and Syria are not the same

While ISIS committed atrocities across its territories in both Iraq and Syria, any international justice measures must take into consideration the very different prevailing circumstances in the two countries. In Iraq, ISIS was the main perpetrator of atrocities, and the effort to regain territory from the group was the principal conflict happening in the country. But in Syria, the battle against ISIS was just one of many fronts in a multifaceted conflict with horrific abuses on all sides, and especially on the part of the Assad regime.

Iraq is a sovereign state with a government chosen through free elections, which should be supported to strengthen its public legitimacy and commitment to the rule of law. In Iraq, it is imperative for the state to take the leading role in administering justice, and to be a key partner

¹⁰ See <https://www.ictj.org/publication/bitter-legacy-lessons-de-baathification-iraq>

in any international justice measures addressing crimes committed in its territory or by its nationals.

In Syria, by contrast, the state is a brutal dictatorship guilty of the worst atrocities over the course of the conflict there, and any involvement by the Syrian state in an international tribunal would serve only to legitimise the Assad regime, to bolster its narrative of counterterrorism, and to insult the millions of victims of its brutal policies. The prospect of working with the Assad regime on an international tribunal would send a troubling signal to others that atrocities are permissible so long as they are committed in the name of fighting terrorism; indeed, the Dutch government, one of the international proponents of a tribunal, has already ruled out cooperation with it. It is likewise unthinkable for Syrian domestic courts to have any legitimacy in prosecuting international crimes that have occurred in Syria. In the context of grave human rights violations by the Assad regime, an international focus on ISIS crimes could foster the impression that the Syrian regime is the lesser criminal, encouraging normalisation of relations at a time when many states seem resigned to Assad's 'victory' – and leaving victims to pay the price.

The SDF has called for multilateral cooperation to establish an international tribunal to hold ISIS accountable in its de-facto autonomous enclave in northern Syria. But this would also be highly problematic given the record of abuses by the SDF,¹¹ who would not be held accountable by the international tribunal, as well as the difficulties of cooperating with a non-state actor to establish a tribunal under international law and the practical difficulties given renewed hostilities in the area. Nonetheless, coordination could be sought with SDF's political leadership on issues such as repatriating citizens, mass graves, and revealing the fate of the missing.

Despite the inherently problematic nature of a tribunal targeting ISIS exclusively, such a tribunal may enjoy a degree of support in Iraq. But in Syria, it would be bitterly opposed by large segments of Syrian society, especially those opposed to the Assad regime, and would present another obstacle to any reconciliation or just post-conflict settlement in Syria. Initial proposals for such a tribunal were rejected by Syrian civil society groups.¹²

Domestic alternatives exist

International justice avenues are by their nature reserved for exceptional cases, when states are unwilling or unable to provide justice domestically. Typically, they are expensive, contribute very little to developing the capacity of the domestic judiciary, and address only the crimes of a small number of perpetrators, while leaving unmet the broader demands of victims, such as reparations, truth-seeking, and reforms to address structural injustices.

The favouring of international justice when domestic justice avenues in their own countries have not been exhausted thus appears to be an attempt to wash their hands of troublesome citizens, and marks an unwillingness rather than an inability to serve justice themselves.

¹¹ See for example the Independent International Commission of Inquiry on the Syrian Arab Republic's September 2019 report: https://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A_HRC_42_51.docx

¹² See for example the letter signed by Syrian and international human rights NGOs in June 2019: <https://www.justiceinitiative.org/newsroom/ngos-challenge-swedens-proposal-for-an-isis-only-war-crimes-tribunal>

In Iraq, though the judicial system suffers from undeniably serious structural problems, it is not clear that the state is unwilling or unable to provide justice, at least as regards ISIS; despite major flaws,¹³ trial procedures for ISIS defendants have improved in some key courts in 2018-19,¹⁴ though much more needs to be done.

As for European states, trying their citizens at home is an issue of political will, not of feasibility. The favouring of international justice when domestic justice avenues in their own countries have not been exhausted thus appears to be an attempt to wash their hands of troublesome citizens, and marks an unwillingness rather than an inability to serve justice themselves. Several examples show that it is perfectly possible to try European ISIS members in Europe:

- In July 2019, the Netherlands successfully convicted a Dutch-born former Islamic State fighter of war crimes.¹⁵
- In April 2019, the trial of a German woman accused of the war crime of allowing an enslaved Yazidi girl to die of thirst during her time as an ISIS member in Iraq began in Munich.¹⁶ Further investigations by the German War Crimes Unit, especially among the large Yazidi community residing in Germany, are also ongoing,¹⁷ and another woman was convicted of ISIS membership in Germany in July 2019.¹⁸
- In July 2019, Italy repatriated one of its citizens accused of fighting with ISIS from Syria, and is expected to bring the suspect to trial.¹⁹

Similarly, measures and resources to deal with the potential risks of returnees are available, even in cases where prosecutions are not possible or appropriate. Kosovo for example has successfully repatriated ISIS-affiliated citizens and implemented rehabilitation and reintegration programs to mitigate risks of their radicalising others or committing terrorist acts at home.²⁰ Though controversial for their restrictions on civil liberties, many European countries, including the Netherlands and the UK, have passed laws that allow for controls on those suspected of posing a “terrorist risk”, even absent sufficient evidence to convict them of a crime. Others such as Denmark have developed best practices in counter-radicalisation programming.

Recommendations

In order to support even-handed and victim-centred justice in **Iraq**, the international community should:

- Repatriate ISIS-affiliated citizens and their families from Iraq to face trial for their crimes or – in the case of minors and other victims - receive support at home
- Support the Iraqi judiciary to implement fair trials without the possibility of the death penalty, and to collect and preserve evidence for use in trials elsewhere, including via effective victim participation and outreach
- Support the Iraqi state and civil society to address victims’ full range of needs beyond criminal justice, including:
 - Safe and voluntary returns for the displaced and resolution of land and property conflicts

¹³ See Human Rights Watch’s December 2017 report: <https://www.hrw.org/news/2017/12/05/iraq-flawed-prosecution-isis-suspects>

¹⁴ See Human Rights Watch’s March 2019 update: <https://www.hrw.org/news/2019/03/13/iraq-key-courts-improve-isis-trial-procedures>

¹⁵ See <https://www.justiceinfo.net/en/tribunals/national-tribunals/42008-first-dutch-islamic-state-fighter-convicted-for-war-crimes.html>

¹⁶ See <https://www.dw.com/en/german-is-member-on-trial-for-war-crimes-in-munich/a-48259664>

¹⁷ See <https://www.dw.com/en/germany-pursues-justice-for-survivors-of-yazidi-genocide/a-49871986>

¹⁸ See <https://www.telegraph.co.uk/news/2019/07/05/germany-convicts-first-isis-bride-precedent-setting-case/>

¹⁹ See <https://www.rudaw.net/english/middleeast/syria/30062019>

²⁰ See <https://www.dw.com/en/islamic-state-returnees-in-kosovo-guided-back-into-society/a-50668479>

- Fair and comprehensive reparations programs, at the individual and collective level
- Truth-seeking mechanisms to reveal the fate of the disappeared and missing, and professional exhumations of all mass grave sites

In **Syria**, it is currently impossible for prosecutions for international crimes to be pursued domestically, and routes to international prosecutions are blocked. Given these obstacles, the international community should:

- Repatriate ISIS-affiliated citizens and their families held in northern Syria to face trial for their crimes or – in the case of minors and other victims – receive support at home
- Reinforce or enact national legislation allowing for extra-territorial investigation and prosecution of international crimes by all parties committed on Syrian territory in courts in Europe and elsewhere
- Support the International Impartial and Independent Mechanism (IIIM) and Syrian civil society organisations working on documentation of human rights violations, collecting evidence of crimes and criminal litigation
- Address the issue of the missing in Syria - including in territory formerly held by ISIS – by exploring the possibility of establishing an international mechanism for the missing and supporting their family members²¹

Domestic avenues for accountability for ISIS in Iraq and Europe remain available and should be exploited further, with reforms where needed, before resorting to an international or hybrid tribunal. However, if this proposal is pursued, it should:

- Cover international crimes by all parties, not only ISIS, and not be restricted to defendants of particular nationalities
- Partner meaningfully with female and male victims from all societal backgrounds, with civil society, and with the Iraqi state in decision-making, design and implementation
- Be accompanied by broad measures to uphold all victims' rights to justice, truth, reparation and guarantees of non-recurrence
- Refrain from cooperation with the Assad regime

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²¹ In line with UN Resolution 2474, adopted by the Security Council in June 2019, on the Protection of civilians in armed conflict - Missing persons in armed conflict. See: [https://undocs.org/S/RES/2474\(2019\)](https://undocs.org/S/RES/2474(2019))