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Detention and Prosecution of Former ISIS Fighters in Iraq: Lessons Learned and an Assessment of the Deficits of the Judicial System

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About Us

The Bulan Institute for Peace Innovations is a research institute and non-governmental organization that aims to promote peacebuilding and human rights-based dialogue on security in Eurasia, Central Asia, and South Asia. Its headquarters are located in Geneva, Switzerland, with an additional regional office in Bishkek, Kyrgyzstan. The Institute works to promote human rights through field-centered research on preventing terrorism and violent extremism, the repatriation of former foreign fighters and associated rehabilitation and reintegration programs. Through collaboration with national and international civil society actors, the Bulan Institute aims to engage in international peacebuilding efforts. Since 2018, the Bulan Institute has been observing state policies regarding returning foreign fighters, with a special focus on women and children.

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Introduction

After the collapse of the last territorial stronghold of ISIS in northern Syria and the capture of large numbers of its members, camps and prisons in northeast Syria have exceeded capacity. Consequently, the detainment of former fighters and their associates has become an urgent issue. The Iraqi government, which has already tried ISIS fighters captured in its territory, has received some prisoners from Syria and has participated in discussions regarding further prisoners being transferred into their custody. However, multiple human rights organizations, including the Office of the High Commissioner for Human Rights (OHCHR) and the UN Assistance Mission to Iraq (UNAMI), have expressed concern over severe flaws in the Iraqi judicial system. Their numerous criticisms include Iraq's law enforcement and the forced disappearances of suspected ISIS members, practicing the death penalty, unlawful detention, the government's failure to ensure due process and fair trials, the use of torture to extract confessions, the lack of legislation specifying punishments for particular crimes, mistreatment of suspected ISIS members by security forces, and the frequency with which capital punishment is handed down following rushed trials.

Such widespread deficits within the Iraqi judicial system are considered to be not only a violation of international standards for human rights, but also violations of Iraq's own constitution, which has existed in its current form since 2005. As a result, human rights observers studying Iraq have warned against sending detainees to Iraqi prisons, citing the numerous flaws and systemic failure with respect to human rights. This paper will examine these concerns as part of a human rights review of the deficits within Iraq's judiciary as relevant to the case of foreign fighters.

General Overview

After the fall of ISIS in the region, Iraq has grappled with addressing the thousands of fighters in its territory, including how to conduct the trials of foreign fighters. Since January 2020, Iraq has conducted at least 794 criminal trials against those suspected of association with ISIS and affiliated groups under its anti-terrorism legal framework. In forty-four cases, the defendants were children at the time of their purported criminal activity. Human Rights Watch estimated that Iraqi federal authorities and Kurdish authorities had detained around 1,500 children in Iraq at the end of 2018, and at least 185 children of foreign nationals were convicted and sentenced to prison terms under anti-terrorism laws by mid-2019. Ongoing court trials demonstrate an effort to ensure accountability for the criminal atrocities committed by ISIS and its affiliates, but international organizations, human rights defenders, and journalists have all voiced concerns over the standards at which such criminal trials are being conducted.¹

¹ "Iraq: UN Report on ISIL Trials Recognizes Efforts and Raises Concerns," (Geneva / Baghdad: United Nations Office of the High Commissioner for Human Rights, January 28, 2020), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25504>; Jo Becker, "Iraq's ISIS Trials Don't Deliver Justice – Including for Children," *Human Rights Watch* (blog), January 31, 2020, <https://www.hrw.org/news/2020/01/31/iraqs-isis-trials-dont-deliver-justice-including-children>; "Iraq: ISIS Child Suspects Arbitrarily Arrested, Tortured," *Human Rights Watch* (blog), March 6, 2019, <https://www.hrw.org/news/2019/03/06/iraq-isis-child-suspects-arbitrarily-arrested-tortured>; Nadim Houry, Serafettin Pektaş, and Johan Leman, "The 'Unreturned': Dealing with the Foreign Fighters and Their Families Who Remain in

The UN Assistance Mission to Iraq (UNAMI) reports that judges are regularly prepared for court trials with files which are provided for them in advance, indicating these judicial proceedings are conducted in an organized manner.² However, the report also identifies several shortfalls related to court trials, including a lack of differentiation between the activities and the motives of those associated with the terrorist groups. The courts regularly regarded membership of a terrorist group as the principal concern, overlooking other factors related to a defendant's situation. Such factors include whether the defendant's membership is active or passive, the degree of violence alleged or the significance of the defendant's activities, the socioeconomic circumstances and survival dependence involved, and the experience of forced membership. Furthermore, the focus on membership results in punishments that may not be commensurate with the crimes committed, as evident in the cases of domestic workers, medical workers, women who have participated under duress, and children. In response, the international community has criticized Iraq for indiscriminate use of capital punishment. "For a nation that for more than 15 years has been an incubator for Islamist extremists and has been torn apart by terrorist bombings, Iraqis have little appetite for leniency or concern about mitigating circumstances that in other nations could be grounds for clemency," writes the *New York Times*.³ Moreover, journalists have cited concerns over broad strokes in prosecutions lacking robust investigation, reportedly fostering a lack of incentive to investigate the most egregious of offenses, such as rape, slavery, extrajudicial killings, and other crimes against humanity.

Problems and Deficits within the Iraqi Judicial System

The Iraqi judicial system has been consistently criticized by UNAMI, Amnesty International, Human Rights Watch, and numerous other human rights and legal observers for its handling of terrorism-related cases. Due process and the rule of law are not consistently applied in the trials of suspected terrorists, creating an unfair legal environment. Convictions that arise from terrorism-related trials normally lead to capital punishment, with the death penalty being highly prevalent under the stringent punishments mandated by Iraqi anti-terrorism laws.⁴

Iraq has two main anti-terrorism laws: one adopted by federal authorities, and the other adopted by the Kurdistan Regional Government in the north of the country. Both share a broad definition of terrorism, identifying actions ranging from the "use of violence to spread fear" to "any act with terrorist motives that threatens the national unity of the State," to "damage to public

Syria and Iraq," in *Militant Jihadism*, vol. 6, Today and Tomorrow (Leuven University Press, 2019), 59–82, <https://doi.org/10.2307/j.ctvq2vzmt.7>.

² "Iraq: UN Report on ISIL Trials Recognizes Efforts and Raises Concerns."

³ Margaret Coker and Falih Hassan, "A 10-Minute Trial, a Death Sentence: Iraqi Justice for ISIS Suspects," *New York Times*, April 17, 2018, <https://www.nytimes.com/2018/04/17/world/middleeast/iraq-isis-trials.html>.

⁴ "Human Rights in the Administration of Justice in Iraq: Trials under the Anti-Terrorism Laws and Implications for Justice, Accountability and Social Cohesion in the Aftermath of ISIL.", iv; "Iraq: Open Letter to Iraq's New Prime Minister" (Amnesty International, May 7, 2020),

<https://www.amnesty.org/download/Documents/MDE1422902020ENGLISH.pdf>, 1; "Iraq: Change Approach to Foreign Women, Children in ISIS-Linked Trials," Human Rights Watch (blog), June 21, 2018,

<https://www.hrw.org/news/2018/06/21/iraq-change-approach-foreign-women-children-isis-linked-trials>.

property” as such.⁵ In the Kurdistan region, membership of any terrorist organization is explicitly forbidden. However, in terms of implementation, punishments arising from the applications of anti-terrorism law in the Kurdistan region range from imprisonment for less than 15 years to the death penalty, whereas the federal anti-terrorism law mandates the death penalty in all cases of suspected terrorism.⁶

Experts claim that, in order to ensure those who committed atrocities against the Iraqi people are effectively put to justice, it is important that criminal proceedings be aligned with strictly upheld standards and that defendants receive a fair trial which complies with due process. Due process strengthens judicial and democratic institutions and would serve to further stabilize the Iraqi state. However, the mandate of the United Nations Special Rapporteur on the promotion and protection of human rights while countering terrorism has described the system in Iraq as deficient for ensuring fair accountability. Reiterating the importance of rigorous accountability mechanisms, the mandate states, “The inadequate and dysfunctional judicial systems in both Iraq and Syria are not an answer [to address impunity].”⁷

Further, the benefits of trials occurring near evidence, victims and witnesses do not outweigh the threats to serious accountability, the rapporteur suggested. Trials conducted outside of fair and just standards compromise the integrity of the judiciary, the democratic system, and effective justice for victims of egregious violations. While cautioning that weak accountability measures sow the seeds of longer-term instability, the mandate reiterates, “There is no substitute for fair trial and meaningful accountability. Those lessons painfully learnt in other regions should not be jettisoned in Iraq and Syria for the sake of expediency.”⁸

Lacking Framework for Legal Recourse

According to the 2016 UN Human Rights Council report, the crimes ISIS committed against the Yazidis were classified as genocide, including mass killings, sexual slavery, enslavement, torture, and forcible transfer causing serious bodily and mental harm. However, at present, Iraqi law does not criminalize international crimes, such as genocide, crimes against humanity or war crimes, in its Penal Code or other laws. Therefore, Iraqi courts do not have the formal legal support for trials against ISIS fighters for these crimes. For now, the prosecution of international crimes in Iraq is based on Anti-Terrorism Law no. 13 (2005). As a criminal law in force, it lacks specific definitions of terrorism and violence, and brings problems of ambiguity. This creates the

⁵ “Human Rights in the Administration of Justice in Iraq: Trials under the Anti-Terrorism Laws and Implications for Justice, Accountability and Social Cohesion in the Aftermath of ISIL” (Baghdad: OHCHR/UNAMI, January 28, 2020), pg. 4.

https://www.ohchr.org/Documents/Countries/IQ/UNAMI_Report_HRAAdministrationJustice_Iraq_28January2020.pdf.

⁶ Ibid.

⁷ “Statement of the Mandate of the United Nations Special Rapporteur on the Promotion and Protection of Human Rights While Countering Terrorism,” Joint Regional High-Level Conference Convened by the OSCE, UNOCT and Switzerland, in Cooperation with the Albanian OSCE Chairmanship on “Foreign Terrorist Fighters – Addressing Current Challenges” (Vienna: United Nations Office of the High Commissioner for Human Rights, February 11, 2020), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25554>.

⁸ “Statement of the Mandate of the United Nations Special Rapporteur on the Promotion and Protection of Human Rights While Countering Terrorism.”

possibility of political interference in judgements, especially in the absence of a standardized process of prosecution against international crimes.⁹

Individuals who are suspected of being ISIS members are not guaranteed the opportunity to have their day in court. Once suspects are arrested, pre-trial investigations are controlled by the police and military, rendering them vulnerable to the threat of force. Human rights violations prior to trials have been a regular issue in recent years as the Iraqi military has begun to perform quasi-judicial functions, further weakening the authority of the courts. The term “army justice” is used as a reference towards military intervention in the judicial process, vividly illustrating the problematic role of the Iraqi military.¹⁰

Use of Torture During Investigations

UNAMI’s 2020 report highlighted how excessively contingent trial outcomes were on confessions. This reliance on confessions raises particular concern given the reported use of torture in acquiring confessions, as noted by UNAMI’s trial monitoring activities. Limited access to legal representation and frequent allegations of torture violate international standards. A 2015 comprehensive report jointly written by UNAMI and OHCHR spoke with concern regarding the repeated allegations by defendants of the use of torture, including in cases charged under anti-terrorism laws.¹¹ In particular, the report notes torture-based confessions would be disputed evidence, and that convictions based on such disputed evidence would be wrongful.

UNAMI also observed cases in which a presiding judge modified a non-capital offense to a capital offense and proceeded to charge on questionable confession evidence. When the presiding judge was criticized for this practice, the report suggests the judge had a lackluster judicial response to such allegations. Finally, the use of torture to elicit confessions is further prohibited under articles 19 and 37 of Iraq’s current 2005 constitution, indicating another failure to implement the rule of law.¹²

⁹ “‘They Came to Destroy’: ISIS Crimes Against the Yazidis,” Human Rights Situations That Require the Council’s Attention (Geneva, June 15, 2016), https://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A_HRC_32_CRP.2_en.pdf; Ingrid Elliott, “Supplement to the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict,” (March 2018: Koninklijke Brill NV), 25, accessed July 14, 2020, https://doi.org/10.1163/2210-7975_HRD-5555-20180004.

¹⁰ Mara Redlich Revkin, “After the Islamic State: Balancing Accountability and Reconciliation in Iraq,” *The Limits of Punishment: Transitional Justice and Violent Extremism* (Institute for Integrated Transitions, Centre for Policy Research, United Nations University, 2018), pg. 23, <https://i.unu.edu/media/cpr.unu.edu/attachment/3384/LoPIraq050119.pdf>; Jane Arraf, “For Iraqi Families With ISIS Links, Agonizing Choices — And Consequences,” *NPR*, December 18, 2016, <https://www.npr.org/sections/parallels/2016/12/18/505879926/for-iraqi-families-with-isis-links-agonizing-choices-and-consequences?t=1594760276945>.

¹¹ “Report on the Judicial Response to Allegations of Torture in Iraq” (Baghdad: OHCHR/UNAMI, February 2015), pg. I, https://www.ohchr.org/Documents/Countries/IQ/ReportResponseTorture_Feb2015.pdf.

¹² “Human Rights in the Administration of Justice in Iraq: Trials under the Anti-Terrorism Laws and Implications for Justice, Accountability and Social Cohesion in the Aftermath of ISIL,” 3-4.

Problems with Access to Evidence

Another shortcoming of the Iraqi judicial system is that lawyers appointed by the state may not be prepared to defend their clients because the evidence against them is classified by the state as part of its general counter-terrorism strategy. Some lawyers interviewed by the New York Times have admitted a lack of access to evidence against clients due to the classified status of information pertaining to terrorist offenses. This lack of transparency contradicts the OSCE's definition of a fair trial, in which "the accused must have access to the evidence presented against them and a meaningful opportunity to refute it. It is impermissible under international human rights standards to withhold information that is exculpatory for the accused (without sufficient safeguards)."¹³

Absence of Victims, Witnesses and Translators

Defendants seldom have a meaningful opportunity to engage with the evidence held against them in a substantive manner with an attentive judge. Human Rights Watch further added that victims of and witnesses to alleged crimes rarely feature in court trials, another violation of Iraq's Criminal Procedure Code, which demands the cross-examination of witnesses during the procedure of trials.¹⁴

Additionally, defendants are consistently equipped with inadequate legal defenses. For example, translators are required under Iraqi law in cases involving defendants who do not speak Arabic, as the court proceedings are conducted in that language. In practice, translators may either be provided by the court when the fighters are of Iraqi nationality, or in instances involving foreign terrorist fighters, their consulates may provide translators. However, when translators were assigned by the court, Human Rights Watch asserted that they were of questionable qualification. Moreover, they were sometimes selected from those in attendance, further drawing the fairness and impartiality of the trial into question.¹⁵

Meting Out Capital Punishment

Rushed proceedings have been criticized for seeking expedient catch-all retribution for foreign fighters, family members, and bystanders. Sentences, which regularly involve the death penalty, are commonly issued on the same day as the trial. The New York Times reported on a "judicial assembly line" of ten-minute trials of Turkish women, in which all were assigned guilty verdicts and sentenced to death. The trials lacked rigorous investigation and the execution sentences were determined regardless of evidentiary limitations. Experts argue that such proceedings appear to seek retribution rather than justice, affirming that shallow standards of due process pose a serious risk to strong judicial institutions, rule of law, long-term stability, and human rights.¹⁶

¹³ Coker and Hassan, "A 10-Minute Trial, a Death Sentence: Iraqi Justice for ISIS Suspects."

¹⁴ "Iraq: Change Approach to Foreign Women, Children in ISIS-Linked Trials.;" Becker, "Iraq's ISIS Trials Don't Deliver Justice – Including for Children."

¹⁵ "Iraq: Change Approach to Foreign Women, Children in ISIS-Linked Trials.;" Becker, "Iraq's ISIS Trials Don't Deliver Justice – Including for Children."

¹⁶ "Iraq: Change Approach to Foreign Women, Children in ISIS-Linked Trials.;" Fred Abrahams, "Rush to Judgment in Iraq Harms Justice," *Human Rights Watch* (blog), March 26, 2018,

International analysts, including Michelle Bachelet, the UN High Commissioner for Human Rights, estimate that over a hundred and fifty executions have been carried out under anti-terrorism sentences. Although international standards for judicial proceedings stand in opposition of the use of capital punishment, the Iraqi federal anti-terrorism law continues to mandate the execution of foreign fighters suspected of ISIS collaboration. In defense of the death sentence, Iraqi General Yahya Rasool declared “To be loyal to the blood of the victims and to be loyal to the Iraqi people, criminals must receive the death penalty, a punishment that would deter them and those who sympathize with them.” Correspondingly, Amnesty International reported that Iraq was the state with the fourth-highest number of executions in 2019.¹⁷

Disappearances and Detentions

Forced disappearances have likewise been regularly reported. IDPs suspected of being ISIS affiliates have been the main target of arbitrary arrests and property confiscation. Amnesty International has highlighted how numerous men and boys fleeing military campaign against ISIS were arrested because of flawed screening processes, and they have since vanished into the Iraqi prison system. Security forces justify these actions as a means of collective punishment against former ISIS members, even if the evidence against the accused tends to be weak.¹⁸

Bachelet has called on foreign fighter detainees to be either prosecuted or released, stating the unacceptability of indefinite pre-trial detention.¹⁹ Indeed, human rights defenders have noted prolonged detention in overcrowded facilities with poor health and sanitary conditions devoid of medical attention. For example, Human Rights Watch reported the widespread issue of insufficient nourishment and at least one case of a woman giving birth in her shared cell.²⁰

Agent-Victim Dichotomy of Women

The mandate of the Special Rapporteur on promoting human rights while countering terrorism remarks that in circumstances such as those surrounding the conflict in Syria and Iraq, creating binary distinctions between victim and perpetrator is not always a simple or even feasible exercise. Any pre-existing lines of the sort are invariably muddled amid the realities of life under ISIS. For example, there are documented cases of women enacting criminal offenses while subjected to slavery, sexual violence, trafficking and grooming to marry, and providing sexual activities, labor, or caretaking tasks for a husband or the armed group.

<https://www.hrw.org/news/2018/03/26/rush-judgment-iraq-harms-justice>; Human Rights Watch (Organization), ed., *Flawed Justice: Accountability for ISIS Crimes in Iraq* (New York: Human Rights Watch, 2017).

¹⁷ Michelle Bachelet, “Opening Statement by UN High Commissioner for Human Rights Michelle Bachelet,” (41st Session of the Human Rights Council, Geneva, June 24, 2019),

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24724>; Coker and Hassan, “A 10-Minute Trial, a Death Sentence: Iraqi Justice for ISIS Suspects.”; “Death Penalty in 2019: Facts and Figures,” Global Report, Death Sentences and Executions (Amnesty International, April 21, 2020),

<https://www.amnesty.org/en/latest/news/2020/04/death-penalty-in-2019-facts-and-figures/>.

¹⁸ “Death Penalty in 2019: Facts and Figures”; “Iraq: Open Letter to Iraq’s New Prime Minister,” 2.

¹⁹ Bachelet, “Opening Statement by UN High Commissioner for Human Rights Michelle Bachelet.”

²⁰ “Iraq: Change Approach to Foreign Women, Children in ISIS-Linked Trials.”

This reality of sexual and gender-based violence, amalgamated with coercion, bears disproportionate weight on women, and must be given due consideration during thorough prosecution. In one case, Ms. Nasli Ismael, a Russian citizen, declared in her trial in Iraq that she had followed her husband to Syria under pressure from him. After her arrival, three of her children were killed in an airstrike, and one toddler had been confined with her for over eight months spent in pre-trial detention. Following her plea of innocence, the judge proceeded to sentence her to execution.²¹

Women also face different realities of financial dependence and/or economic disenfranchisement. Many women have been sentenced for receiving a monthly living stipend after the death of their ISIS-affiliated husband. Experts urge for information on experiences to be disaggregated and maintain that informed analyses of the gender dimensions of mobilization are important factors of consideration.²²

Guilt by Association for Women

Complex situations surrounding the conflict may result in convoluted and tangled moral and legal distinctions that must be considered. Michelle Bachelet affirms in her June 2019 address to the Human Rights Council, “Flawed trials [...] can only serve the narrative of grievance and revenge”, rather than justice.²³ For this reason, the reliance of Iraqi courts on association with limited distinction between cases bodes ill for a precedent of fair and robust trials on a foundation of due process to establish accountability.

In its guidelines report, the Organization for Security and Co-operation in Europe (OSCE) advises states to “punish [FTF]-related offences in a manner commensurate with the crime and [...] criminal intent.”²⁴ Despite such international standards, Iraq’s policy on detained ISIS associated women remains disproportionately harsh. Although Iraqi Prime Minister Haider al-Abadi stated his intention in 2017 to repatriate women and children, many of whom he stated were not culpable in terrorist-related crimes, the position of the government appears to have shifted.²⁵ Rather, Iraqi courts have used overly broad laws to dole out ‘one-size-fits-all’ punishment for the perpetrator of crimes against humanity as well as for the wife of an Islamic State fighter who may have had little say in her husband’s choices. “Maternal responsibilities should never on their own qualify as ‘material support’ to terrorism in the eyes of the law,” claimed the Special Rapporteur.²⁶

²¹ Coker and Hassan, “A 10-Minute Trial, a Death Sentence: Iraqi Justice for ISIS Suspects.”

²² Houry, Pektas, and Leman, “The ‘Unreturned’: Dealing with the Foreign Fighters and Their Families Who Remain in Syria and Iraq,” 68; *Guidelines for Addressing the Threats and Challenges of “Foreign Terrorist Fighters” within a Human Rights Framework* (Warsaw: OSCE Office for Democratic Institutions and Human Rights (ODIHR), 2018), https://www.osce.org/files/f/documents/4/7/393503_2.pdf, 34.

²³ Bachelet, “Opening Statement by UN High Commissioner for Human Rights Michelle Bachelet.”

²⁴ *Guidelines for Addressing the Threats and Challenges of “Foreign Terrorist Fighters” within a Human Rights Framework*, 34.

²⁵ Houry, Pektas, and Leman, “The ‘Unreturned’: Dealing with the Foreign Fighters and Their Families Who Remain in Syria and Iraq,” 68.

²⁶ Coker and Hassan, “A 10-Minute Trial, a Death Sentence: Iraqi Justice for ISIS Suspects.”; “Statement of the Mandate of the United Nations Special Rapporteur on the Promotion and Protection of Human Rights While Countering Terrorism.”

Human Rights Watch counterterrorism expert Nadim Houry has argued, “Under Iraq’s current approach, those who killed for ISIS are basically getting the same sentence as those who simply married ISIS members and had children,” a policy which undermines justice and victims’ rights.²⁷ In a testament to the necessity of a mainstreamed gender dimension in detention policy, the organization also speaks of the importance to “guarantee humane and dignified treatment of detainees [...] at all times, with due regard to the specific risks and needs of female foreign fighters in detention.”²⁸

In view of analysis with a gender lens, a lack of differentiation between degrees of involvement in the armed group bodes is especially dire for women with potentially disproportionate implications. The European Country of Origin Information Network has claimed that women seen colluding with ISIS in any capacity have received unfair trials, often with the harshest penalties (particularly execution) being meted out to them. Iraqi courts have been sentencing women to death as well as life in prison for simple and non-violent crimes such as illegally entering Iraq and, in some cases, aiding, abetting, or having membership in ISIS, which carries a penalty of life in prison or death under Iraq’s counterterrorism law. Human rights observers have highlighted how many women who had even the slightest connection to ISIS, such as being married to an ISIS member, consistently received 20-year prison or death sentences. With such diversity in backgrounds and levels of engagement in criminal activity, it is important to distinguish their circumstances and responsibility to terrorist activities in prosecution.²⁹

Prosecution of Children

Of notable concern in the criminal proceedings in Iraq is the treatment of children in detention. The legal system of Iraq stipulates that criminal responsibility applies from nine years of age. Although Iraq has relinquished custody of some foreign children who faced criminal procedures in Iraq, other children remain in detention for illegal immigration to the country and supposed activities in support of ISIS.³⁰

While children may have committed acts of violence, international standards maintain that the incarceration of children should be a measure of last resort, with sentencing prioritizing rehabilitation. Children sentenced on charges of criminal activity in support of ISIS have spoken of being beaten, subjected to electric shock, and tortured in a multitude of other ways to extract confessions. Sentences given to children in such cases ranged from ten to twenty years’ imprisonment. In an investigation corroborating the findings of the UNAMI and OHCHR joint report, Human Rights Watch highlights with concern the sweeping and rash measures used to

²⁷ “Iraq: Change Approach to Foreign Women, Children in ISIS-Linked Trials.”

²⁸ *Guidelines for Addressing the Threats and Challenges of “Foreign Terrorist Fighters” within a Human Rights Framework*, 34.

²⁹ Belkis Wille, “Unfair ISIS Trial in Iraq Hands Women Harshest Sentences,” *Human Rights Watch* (blog), February 21, 2018, <https://www.hrw.org/news/2018/02/21/unfair-isis-trial-iraq-hands-women-harshest-sentences>; Houry, Pektas, and Leman, “The ‘Unreturned’: Dealing with the Foreign Fighters and Their Families Who Remain in Syria and Iraq,” 68; Coker and Hassan, “A 10-Minute Trial, a Death Sentence: Iraqi Justice for ISIS Suspects.”

³⁰ Ahmed Rasheed, Sarah Dadouch, and Ahmed Aboulenein, “Iraq Hands over 188 Turkish Children of Suspected Islamic State Members,” *Reuters*, May 29, 2019, <https://www.reuters.com/article/us-iraq-court-turkey-idUSKCN1SZ0XV>.

prosecute children holding any known affiliation to the terrorist group through inadequate investigations that failed to comply with international standards for fair trials and due process.³¹

Regardless, in a statement by an Iraqi state-issued lawyer representing dozens of foreign children under trial, it is indicated, “For children between the ages of 9 and 13, [...] if you are just prosecuted for illegal entry, your sentence is usually between six months and one year. For membership, you get [an additional] three to five years. If you are accused of participating in a violent act, like planting a bomb, then you can get between five and 15 years.” Children’s pre-trial placement varies by age. Those under the age of three are placed with their mother in shared adult cells, while children aged between three and nine years old are separated and placed in residential institutions. Once children reach nine years of age they are considered accountable for alleged crimes under Iraqi law and are held in juvenile detention.³² However, it is unacceptable to try children to this extent as they are unable to make independent decisions and to take responsibility for the crimes they have allegedly committed as members of ISIS.

The mandate of the Special Rapporteur on the promotion and protection of human rights while countering terrorism urges that children should be considered victims in recognition of the lack of means and opportunity to avoid or leave the conflict situation in which they found themselves. The mandate further suggests that children should be assessed on an individual basis for their rehabilitation and reintegration needs. The Convention on the Rights of the Child recognizes the special and vulnerable position of children whose unique rights must be safeguarded. In this context, the Special Rapporteur argues the judicial system must recognize “the fundamental vulnerability of children caught up in armed conflict, through a range of circumstances almost always not of their own making.”³³

Lessons Learned and Conclusion

Thousands of foreign fighters and their family members from at least fifty countries have been captured in Syria and Iraq, forcing these states to consider options for addressing their citizens’ alleged criminal actions on foreign soil.³⁴ As a result, three main solutions have emerged. The first possible solution is repatriation to their countries of origin to stand trial there. The second suggested policy involves prosecuting fighters under a newly created ad hoc international tribunal in an existing international court. The last option includes prosecution before domestic courts in Iraq or Syria. However, the Syrian government is not a viable option due to persistent human right violations, ongoing civil war, and war crimes committed by the Syrian leadership. In lieu of this, Iraq has been suggested as an alternative place to hold and prosecute prisoners accused of collaboration with ISIS and affiliated groups.

³¹ Becker, “Iraq’s ISIS Trials Don’t Deliver Justice – Including for Children.”; Jo Becker and Belkis Wille, “‘Everyone Must Confess’: Abuses against Children Suspected of ISIS Affiliation in Iraq” (Human Rights Watch, March 6, 2019), <https://www.hrw.org/report/2019/03/06/everyone-must-confess/abuses-against-children-suspected-isis-affiliation-iraq>.

³² “Iraq: Change Approach to Foreign Women, Children in ISIS-Linked Trials.”

³³ “Statement of the Mandate of the United Nations Special Rapporteur on the Promotion and Protection of Human Rights While Countering Terrorism.”

³⁴ Cholpon Orozobekova et al., “Western State Policies Regarding Returning Foreign Fighters in Syria and Iraq” (Bulan Institute, July 2020), 4-7, <https://bulaninstitute.org/wp-content/uploads/2020/07/Report-on-State-Policies-of-Western-Countries.pdf>.

France has led discussions with Iraq regarding the prosecution of French citizens on its soil and has promoted the transfer of prisoners to Iraq for this purpose. The governments of France and other European states argue that this solution would provide closer proximity to alleged scenes of crimes, victims, and witnesses, thus minimizing evidentiary challenges in the region. However, because of this policy, eleven French citizens stood trial in Iraq from May 2019 to June 2019, and all were sentenced to death, causing the wider international community to condemn these actions. The UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Agnes Callamard, stated in response to these death sentences that “there are serious allegations that the sentences were handed down following unfair trials, with the accused having no adequate legal representation or effective consular assistance.” Callamard further urged the French government to repatriate seven of their sentenced citizens to stand trial at home.³⁵

As can be seen from Callamard’s statement, there are critical and concerning deficits in the judicial system of Iraq, including the lack of a legal framework governing detainment and trial outcomes, the widespread usage of torture, the state’s focus on capital punishment, an absence of due process and fair trials, among many other severe shortcomings. As a result, Iraq is currently an unsuitable place to prosecute people suspected of supporting ISIS and its affiliates, including foreign fighters. Iraq’s systemic failure to detain suspects in a manner consistent with humanitarian standards and to conduct fair trials must be considered by all countries and international organizations involved. Consequently, sending captured foreign fighters and other prisoners in Syria to Iraq for trial would place them in the custody of a system that consistently violates national and international standards on fair trials, due process, and human rights.

The main lessons learned from the Iraqi experience on holding foreign fighters accountable are how the lack of fair trials, due process, and protections for human rights undermine state security more than they uphold it, as the public’s trust in the government decreases. The abuses of power committed by Iraqi authorities against suspected ISIS collaborators has demonstrated that the system is arbitrarily detaining and executing people in an overly simplistic and expedient manner. As an example of this, Ms. Fionnuala Ni Aolain, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, points out that, “The trials themselves have been roughly short, sometimes less than 10 minutes, particularly in cases involving capitular death penalty offenses.”³⁶ Furthermore, if states like France, Denmark, and the Netherlands allow their citizens to be mistreated by Iraqi authorities, they are in fact enabling the abuse of their citizens. This violates their own commitments to national and international agreements on human rights and good governance, including the abolition of the death penalty by European Union countries in accordance with Article 2 and Protocol 6 of the European Convention on Human Rights.³⁷

³⁵ Cholpon Orozobekova et al., “Western State Policies Regarding Returning Foreign Fighters in Syria and Iraq,” 15.

³⁶ “Fionnuala Ni Aolain: ‘States are under a legal obligation from the UN Security Council to repatriate,’” *Bulan Institute for Peace Innovations*, 3 June 2020. <https://bulaninstitute.org/states-are-under-a-legal-obligation-from-the-un-security-council-to-repatriate/>

³⁷ Ionel Zamfir, “The death penalty and the EU’s fight against it”, *European Parliamentary Research Service*, February 2019: [https://www.europarl.europa.eu/RegData/etudes/ATAG/2019/635516/EPRS_ATA\(2019\)635516_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2019/635516/EPRS_ATA(2019)635516_EN.pdf)

Therefore, states committed to the principles of human rights and good governance should not only avoid allowing their citizens to be sent to the Iraq to face flawed trials and further human rights abuses, but should also advocate for a better-functioning and fairer judicial system in Iraq. Additionally, states must consider the deficient manner in which the Iraqi judicial system treats women and children in their custody. As has been discussed previously, cases brought against women should be treated on a case-by-case basis because there are a number of factors at play in terms of women's' involvement in ISIS activities. While some women were indeed active members of the organization and should be held responsible for those actions, many were forced to travel to the region and were subjected to appalling treatment. The treatment of children by the Iraqi justice system is also something states must consider. Children cannot be held responsible for the actions that they committed on behalf of ISIS as they are not old enough to be properly tried as adults. The primary focus should be on repatriating and rehabilitating these children to prevent further trauma and radicalization.

The international community must likewise take on the responsibility of further strengthening the peacebuilding efforts and humanitarian mission in Iraq through providing consistent aid and guidance. Specifically, the international community can increase its assistance to the Iraqi authorities in an effort to establish a well-functioning judicial system.³⁸ Considering Iraq's limited resources, prioritizing the prosecution of the most serious crimes with the assistance of the international community would be a feasible option.³⁹ However, this potential over-emphasis on serious crimes, such as war crimes and crimes against humanity, could be used as an excuse by Iraqi authorities to restore guilt by association, allowing them to eliminate impunity and enable them to enact harsh punishment against suspects without distinction. Furthermore, the fair prosecution of serious crimes requires not only systematic legislation that matches with international standards, but also a better-organized platform for global cooperation, which currently does not exist in the Iraqi judicial system.

Because of the severe shortcomings present in Iraq's judicial system, the acceleration of established judicial and supervisory systems in Iraq, with help from experienced countries, must be a priority. As of April 2020, the EU had contributed €3.5 million to support the digitization of evidence of ISIS crimes in Iraq in cooperation with The United Nation Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL (UNITAD). This will strengthen the evidentiary basis for UNITAD and Iraqi national authorities in developing comprehensive case files supporting domestic proceedings brought against ISIS members, including for crimes that may constitute crimes against humanity, war crimes, and genocide, in line with international standards.⁴⁰ Developments such as enhanced access to call data records, IMEI data and ISIS

³⁸ Mohammed Hussein Bahr Aluloom, "Letter Dated 27 May 2020 from the Permanent Representative of Iraq to the United Nations Addressed to the Secretary-General," May 28, 2020, UN Security Council, <https://undocs.org/en/S/2020/448>.

³⁹ Human Rights Watch (Organization), *Flawed Justice*, 8.

⁴⁰ Georges Fakhry, "The European Union and UNITAD Sign Agreement to Support Digitization of Evidence of ISIL Crimes in Iraq," *UN Iraq* (blog), April 7, 2020, https://www.uniraq.org/index.php?option=com_k2&view=item&id=12113:the-european-union-and-unitad-sign-agreement-to-support-digitization-of-evidence-of-isil-crimes-in-iraq&Itemid=605&lang=en.

records extracted from digital devices have the potential to shift the paradigm for prosecutions of ISIS members in Iraq and globally, if used effectively.⁴¹

Despite this progress, deficiencies in the Iraqi judicial system cannot be solved quickly since the designing, drafting, and enactment of laws and policies takes time. In the meantime, gross violations of human rights continue to be perpetrated. UNAMI has reported frequent use of torture against suspects during interrogation, including women and children, by the Iraqi military.⁴² As a vulnerable group powerless against unfair treatment in detention camps, cases related to women and children remain particularly concerning. In these cases especially, thorough case-by-case trials, rather than the current show trials that end with indiscriminate retributive sentences, are the best solution. Until the Iraqi judicial system can function by national and international standards, a process that may take a long time, it is imperative that states consider alternative options for the prosecution of their citizens.

Consequently, the international community must develop additional measures that not only hold ISIS and other terrorist fighters accountable, but likewise ensure that international community does not violate international human rights standards while prosecuting ISIS fighters. . Even though the crisis with coronavirus has delayed the issue of returning foreign fighters, states will return to the discussion to find an appropriate solution to deal with trapped people in northeast Syria. Currently, the strongest strategies in this regard are the repatriation and prosecution of foreign fighters before the courts of their countries of origin, and the creation of a newly dedicated international tribunal in an existing international court, as previously mentioned. Our analyses have shown that transferring ISIS fighters and their associates to Iraqi prisons would be a mistake by above-discussed severe shortcomings. The Bulan Institute urges states to follow recommendations and guidance of the United Nations and its mandates. Special Rapporteurs of the United Nations Office of the High Commissioner for Human Rights (OHCHR) have stated that the return and repatriation of foreign fighters and their families from conflict zones is urgent, highlighting that it is the only international law-compliant response to the situation being faced by women, men and children still suffering human rights violations in poorly managed camps in Syria and Iraq.⁴³ Leading Western states should find an appropriate solution to address the situation with trapped ISIS fighters and their associates in northeast Syria. The camps contain more than 75,000 people with potential links to terrorist groups and pose a threat to international peace. The more time they spend in the crowded camps in dire conditions provides the incentive for radicalization and networking among extremists.

⁴¹ Karim Asad Ahmad Khan, "Letter Dated 11 May 2020 from 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 Addressed to the President of the Security Council," pg. 19, May 11, 2020, <https://undocs.org/en/s/2020/386>.

⁴² "Human Rights in the Administration of Justice in Iraq: Trials under the Anti-Terrorism Laws and Implications for Justice, Accountability and Social Cohesion in the Aftermath of ISIL," 8-9.

⁴³ "Extra-Territorial Jurisdiction of States over Children and Their Guardians in Camps, Prisons, or Elsewhere in the Northern Syrian Arab Republic" (Geneva: UN Human Rights Council, 2020), <https://www.ohchr.org/Documents/Issues/Executions/UNSRsPublicJurisdictionAnalysis2020.pdf>

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