
Criminal Liability and Prosecution of Islamic State Fighters in Iraq

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Purpose:

This paper summarises the operation of the Islamic State in Iraq and includes a review of law enforcement by the authorities. The purpose of this paper is to add to the body of expertise by presenting the measures taken by the authorities to prosecute fighters of this terrorist organisation.

Methods:

The descriptive research methodology was applied when reviewing primary and secondary sources and to interpret the data obtained from interviews, which provide practical insights into the subject matter.

Findings:

The results show that the Islamic State did commit war crimes, crimes against humanity and crime of genocide in Iraq. However, at the international level and to date, no individual has been held accountable for these crimes. As Iraq is not a partner in certain international instruments, it is not possible to prosecute such acts in the country where the acts were committed. In the absence of a national strategy to prosecute suspected Islamic State fighters, processes under counter-terrorism law are thus being carried out in Iraq. The available data point to violations of the rights of suspects of fair prosecution process and the need to categorise suspects according to the severity of the crimes, which has been introduced to some extent only in Iraqi Kurdistan. In addition to prosecution, de-radicalisation must be included in the process of reintegrating Islamic State fighters into society, and thus procedures to achieve this need to be developed. At the level of society, it is necessary to address risk factors that could lead to radicalisation and to establish mechanisms to detect and prevent it.

Practical Implications:

The paper identifies some shortcomings related to the prosecution of the Islamic State in Iraq, and indicates the direction of further necessary practical measures that should be taken to guarantee effective and fair prosecution of Islamic State fighters, and the limitation of the risk of further radicalisation.

Originality:

The content of the article deals with a relatively poorly researched area and is to some extent based on interviews with government officials in Iraqi Kurdistan

who have highlighted challenges that will need to be addressed in the future.

Keywords: prosecution, war crimes, crimes against humanity, genocide, Islamic State, Iraq

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Kazenska odgovornost in pregon borcev Islamske države v Iraku

Namen prispevka:

Prispevek povzema delovanje Islamske države v Iraku in vključuje pregled kazenskega pregona s strani oblasti. Namen prispevka je razširiti strokovno znanje in predstaviti ukrepe, ki jih oblasti izvajajo za pregon borcev te teroristične organizacije.

Metode:

Uporabljena je bila deskriptivna metoda za pregled primarnih in sekundarnih virov ter interpretacijo podatkov, pridobljenih z intervjuji, ki prinašajo praktični vpogled na obravnavano tematiko.

Ugotovitve:

Rezultati kažejo, da je Islamska država v Iraku izvajala vojne zločine, zločine proti človeštvu in genocid. Na mednarodni ravni do danes za te zločine še ni odgovarjal noben posameznik. Ker Irak ni partner v določenih mednarodnih instrumentih, kazenski pregon tovrstnih dejanj ni mogoč v državi, kjer so bila dejanja izvršena. V Iraku se tako izvajajo procesi po protiteroristični zakonodaji, pri čemer je opazna odsotnost nacionalne strategije za pregon osumljenih borcev Islamske države. Razpoložljivi podatki kažejo na kršitve pravic osumljencev v procesu kazenskega pregona in potrebo po kategorizaciji osumljencev glede na resnost kaznivih dejanj, ki je do določene mere uvedena zgolj v iraškem Kurdistanu. V proces reintegracije borcev Islamske države je treba poleg kazenskega pregona vključiti tudi deradikalizacijo. Oblikovati je treba postopke za deradikalizacijo posameznikov in njihovo ponovno vključitev v družbo, na ravni družbe pa nasloviti dejavnike tveganja, ki bi lahko vodili k radikalizaciji, ter vzpostaviti mehanizme za zaznavanje in preprečevanje radikalizacije.

Praktična uporabnost:

Prispevek identificira nekatere pomanjkljivosti, povezane s kriminalizacijo in kazenskim pregonom Islamske države v Iraku, ter nakazuje smer potrebnih nadaljnjih potrebnih praktičnih ukrepov, ki jih bi bilo treba izvesti za učinkovit in pravičen pregon borcev Islamske države ter zmanjšanje tveganja ponovne radikalizacije.

Izvirnost prispevka:

Vsebina prispevka obravnava relativno neraziskano področje in v določenem delu temelji na izvedenih intervjujih s predstavniki oblasti v iraškem Kurdistanu,

v katerih so bili izpostavljeni izzivi, ki jih bo treba nasloviti v prihodnosti.

Ključne besede: kazenski pregon, vojni zločini, zločini proti človeštvu, genocid, Islamska država, Irak

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1 INTRODUCTION

Islamic State represents the biggest security threat that the world has faced in recent years or even decades. The world has never seen such a rapid advance of any terrorist organisation, which has seized assets, taken control over territory, key military and economic centres, natural resources and critical infrastructure, and seen great success in spreading its message with the use of social networks. In doing so, it has resorted to extreme violence, with abductions, rapes, beheadings and other criminal acts. The methods used have intimidated opponents and recruited foreign fighters, and resulted in mass killings, forced displacements and conversions, the exploitation of women and children, genocide and other war crimes and crimes against humanity.

Many criminal behaviour theories, such as those set out by Bavcon and Šelih (2003), Masters and Roberson (1990), Hartjen (1978), Meško (2016), and even that by the sociologist Durkheim (1973), who researched crime and deviance as elements of a functional society, could be applied to Islamic State. Comprehensive reviews of the criminalisation and prosecution of Islamic State fighters in Western countries have been carried out by individual authors, who have done research on the criminalisation and prosecution of Islamic State fighters. Such research has mostly focused on the foreign terrorist fighters who travelled from Western countries to Iraq and Syria, from the proclamation of the Caliphate in June 2014 to the present day, and taking into account the risk factors during the active operation of the Islamic State and after its defeat. Fewer studies have focused on the Middle East region and the countries where the Islamic State won the biggest numbers of supporters, along with large territorial and administrative areas and almost unlimited financial resources.

A review of the literature shows that the field is poorly theoretically researched, as research related to the Islamic State is focused mainly on the treatment of foreign fighters and their de-radicalisation upon return to their home states. Many studies and analyses forget about one important element of the process after someone has forcibly or voluntarily left the organisation. While life after leaving the Islamic State should be marked by a process of the de-radicalisation, which has become highly sophisticated in Western countries in recent years, in Iraq and Syria far less work is being done to achieve this. Individuals who are suspected of Islamic State membership are subjected to criminal investigation, prosecution, trial and imprisonment or other form of punishment, and not included in any de-radicalisation programmes.

Since criminal prosecution and imprisonment are the prevailing forms of confronting and managing Islamic State fighters in Iraq, we wanted to analyse the

legislation which could be applied to these cases at the international and national levels. Furthermore, the procedures and some cases of prosecuting Islamic State fighters will be re-examined using the available analyses of international organisations which work in the region. The various human rights violations, war crimes and crimes against humanity that the Islamic State committed during its active years of operation in Iraq have been identified. In this paper, we will focus on genocide, war crimes and crimes against humanity in general, and not specific actions. The paper will analyse the prescribed penalties for those actions and their actual implementation at national and international levels.

The purpose of this article is to add to the body of expertise by reviewing the operation of the Islamic State in Iraq and the crimes committed by its fighters. The aim is to analyse the human rights violations, war crimes and crimes of genocide committed by the Islamic State, at the normative and implementation levels in Iraq and internationally. The potential measures that should be taken by authorities to successfully prosecute Islamic State fighters and prevent and combat further radicalisation will be pointed out. The research questions are as follows: What law enforcement processes are the Islamic State supporters and members subject to internationally and in Iraq? Are there uniform prosecution procedures and punishments for crimes committed by Islamic State at the international level and in Iraq? Is the imprisonment of Islamic State fighters based on the existing legislation sufficient measure to get justice for victims and to reduce the risk of further radicalisation? To answer the research questions, we first analyse Islamic State operations, with an emphasis on Iraq. The article then summarises the international and Iraqi legislation to prosecute crimes committed by the Islamic State, and its implementation based on the cases that have already been carried out in accordance with it. Concluding remarks draw findings on punishment as a possibility for victim recovery, justice and the deterrence of radicalisation.

The methods used to address these issues include analysis of primary and secondary sources. Additionally, some data will be used from four earlier interviews the author conducted for other research purposes with the representatives of military and security-intelligence authorities in Iraqi Kurdistan in 2019 and the director of International Institute for Middle East and Balkan Studies in 2015. Note has to be made that Iraq is a federal parliamentary republic, administratively divided into 18 governorates and one region, the autonomous Kurdistan Region in Iraq with its own separate and autonomous executive, legislative and judicial branch. The analysis within the article applies to Iraq as a whole, with Kurdistan Region included. If they are found, any discrepancies in legislation and its implementation or outstanding findings connected to both entities will be explained in the article.

2 CRIME, WAR CRIMES, CRIMES AGAINST HUMANITY AND GENOCIDE

Human behaviour and operation are led by certain rules established in society. Breaching those rules and operating in socially unusual way means engaging in deviant behaviour, which is perceived as a “socially negative phenomenon”

(Meško, 2016, p. 15). This includes crime, which generally represents behaviours that threaten fundamental human values and are legally defined as criminal acts. Hartjen goes further and identifies five conditions for a criminal act (in Meško, 2016):

- causes damage,
- is prohibited at the time of occurrence,
- criminal intent,
- criminal act connected with the consequence,
- legally prescribed penalty.

Bavcon and Šelih (in Meško, 2016) believe that crime is set of actions which threaten basic human values, such as life, physical integrity, security, property and human rights and basic social values. The interpretation of criminal acts varies in different societies and cultures, and therefore many criminologists define criminal offenses as those acts which are punishable and prosecuted by law (Kanduč, 2007, 2015). Durkheim (in Kanduč, 2007) advocated a similar definition, noting that the consequence of any criminal act is punishment. A criminal act affects the moral consciousness and beliefs of a social group, and with punishment this impact is softened. He went even further and argued that a crime is treated as such because of the social perception of the related act, and not merely because of the nature of the act itself. According to utilitarian theory, punishment prevents further criminal activities and deters offenders from breaking the law. On the other hand, retributivist theory advocates the idea of punishment as imposing penance, by which the crime is nullified (Kanduč, 2007).

The perception of crimes is socially or culturally conditioned, so punishments could vary in different societies and countries. Some acts are not punishable by law in all countries or – and in most cases – they are not subject to the same penalties. Mechanisms for prosecution of the worst criminal acts are therefore set at national and international levels. Criminal liability for war crimes, crimes against humanity and crimes of genocide at the international level was established with United Nations General Assembly Resolution 95 (I) of 11 December 1946. Even when national law does not define these cases as international crimes, the perpetrators could be prosecuted under the international criminal law which was in force at the time such crimes were committed (Cassese, 2009). This legality principle derives from the Universal Declaration of Human Rights (1948, article 11) and applies to national law, so retrospective prosecution is not possible.

The United Nations General Assembly recognised genocide as a crime under international law in 1946 (United Nations, 2021). Two years later genocide was qualified as an independent crime in the Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention). The Convention defines genocide as actions committed with intent to destroy (whole or in part) a national, ethnic, racial or religious group. These actions may include killing or seriously harming members of the group, influencing the living or other conditions of the group to destroy it, preventing births within the group or transferring children to another group (Convention on the Prevention and Punishment of the Crime of Genocide, article 2). The same definition of genocide as in the Genocide Convention is also included in the Rome Statute of the International Criminal

Court (article 6), along with the statutes of other international organisations, and the national legislation of many states (Rome Statute of the International Criminal Court, 1998; European Asylum Support Office, 2021).

War crimes derive from the International Humanitarian Law, which defines the rules of armed conflicts with the objective of restricting of the means and methods used, and protecting civilians and individuals no longer taking part in the hostilities. Based on the classification of the armed conflict (international or non-international), the applicable set of rules is determined and thus the international criminal responsibility of the participating parties. More precisely for the context of this study, the fourth Geneva Convention – which protects the civilian population and individuals taking no active part in the hostilities – and customary international law apply in Iraq, where we have witnessed an intense armed conflict between the state's security forces and organised non-state armed groups. Based on the case law for the former Yugoslavia, additional criteria connected to the intensity of the conflict and to the organisation of the parties need to be fulfilled for a non-international armed conflict to be recognized. The required intensity of the conflict was already reached in the first few months after the proclamation of the Caliphate due to the high number of confrontations, type of weapons used, number of people fighting, casualties and displaced civilians. At the same time, the Islamic State was highly organised with a clear command structure and the ability to plan and carry out military operations, and can be therefore defined as an organised non-state armed group. The relevant International Humanitarian Laws are thus applicable to Islamic State as well (IV Geneva Convention relative to the protection of civilian persons in time of war of 12 August 1949; Eurojust, 2020). The exact definition of war crimes is also included in Article 8 of the Rome Statute (Rome Statute of the International Criminal Court, 1998). According to this, breaches of the Geneva Conventions are the most serious war crimes, prosecuted under national and international laws, and specifically wilful killing, torture, causing great suffering or injuries, unnecessary and extensive destruction of property, exploitation of prisoners of war as combat forces or depriving them of their rights, unlawful deportation or transfer of the population and hostage-taking.

Crimes against humanity are defined in article 7 of the Rome Statute as murder, extermination, enslavement, forcible transfer or disappearance of people, imprisonment, torture, sexual violence, persecution of any group (religious, political, racial etc.), segregation or other inhumane acts intentionally causing suffering or serious harm, if these acts are committed widely and systematically against civilian population (Rome Statute of the International Criminal Court, 1998). It is not necessary that crimes against humanity target the whole population, but only that the attacks target a broad and intentionally selected group. Crimes against humanity are acts committed in accordance with the policy of a government or an organisation capable of carrying attacks against civilians. The attacks are widespread based on both the number of victims and scale of the attacks. Systematicity, however, derives from the organisation and pattern of the attacks, which is planned and coordinated (Eurojust, 2020).

This theoretical chapter on different types of the worst crimes known to humanity and a review of the legislation addressing these crimes provides a basis for the identification and categorisation of Islamic State actions, which are presented in the next chapter. Based on the presented actions, it is thus possible to quickly determine their gravity and legality, according to the relevant national and international legal standards.

3 ISLAMIC STATE IN IRAQ

3.3 The rise and fall of the Islamic State

The Islamic State is an international Sunni terrorist organisation whose ideology is based on an extreme Salafist interpretation of Islam. According to experts, it arose in response to Western military intervention in Iraq in 2003. It was founded on the remains of the Jama'at al-Tawid wal-Jihad organisation known as Al-Qaeda in Iraq, founded by al-Zarkawi in 2004. The Zarqawi-led Al-Qaeda in Iraq was focused on jihad in Muslim countries, and launched violent actions against foreign forces in Iraq, bombings and public executions and became a magnet for foreign fighters. After its leader's death in 2006 it seemed that Al-Qaeda in Iraq would collapse, but a few months later its leadership was taken over by Abu Omar al Baghdadi, and the organisation was renamed the Islamic State of Iraq (Clarke, 2019). The period after that, marked by execution of Saddam Hussein and the constant pressure by US and coalition forces, was very violent, with more than 50 civilians killed by the Islamic State of Iraq or other violent militias each day. After the death of his predecessor, Abu Bakr al Baghdadi took command in May 2010. Under his leadership, the Islamic State of Iraq carried out a number of suicide bombings in the country in 2010 and 2011, and released a number of prisoners who had sworn allegiance to it. Following the escalation of the civil war in Syria, the Islamic State of Iraq unilaterally declared affiliation with the Syrian Jabhat al Nusra in 2013 and renamed itself the Islamic State of Iraq and Syria. Its unification in Iraq was possible due to sectarian tensions and the civil war in Syria, which enabled the expansion of its activities (Cockburn, 2015; Gaffney, 2019; Inkret, 2016; Stern & Berger, 2015). During this time, at the beginning of 2014, Al-Qaeda publicly distanced itself from the Islamic State of Iraq and Syria, which had begun to build its visibility on social media by posting videos of executions. It thus gained sympathisers around the world and started to attract foreign fighters as well as home-grown terrorists who started to carry out attacks in their home countries around Europe (Stern & Berger 2015). After the proclamation of the Caliphate in June 2014, the group became known as the Islamic State.

Gaffney (2019: 315) attributes the Islamic State's rapid rise to "large numbers of supporters, unlimited financial resources, skilful use of social media and the ability to operate as a military organization". The group operated on two levels – online with its own use of social media, and on the territories it seized by immediately establishing its authority. With the help of modern technology, it managed to connect thousands of supporters online who were willing to take

part in the fight against the rest of the world. In the physical environment, it established a fully functioning economy and civilian institutions. At both levels of operation it relied on extreme violence, which served as a tool to intimidate opponents and recruit foreign fighters. The Islamic State thus succeeded in doing what no terrorist organisation had done before – mastering social media and social networks, and becoming extremely rich due to the seizure of assets, taking control of companies and oil stocks (Gurcan, 2014; Stern & Berger 2015).

The Islamic State's strength began to wane after the intervention of international forces, which joined with the national armies in Iraq and Iraqi Kurdistan and local militias in both countries. The biggest, richest terrorist organisation in the world thus started to lose territory and power, and was finally defeated in 2017. However, these territorial losses did not mean the end of the Islamic State, as its influence is still present in the Middle East and globally (Chatham House, 2021).

3.3 Islamic State criminal operations in Iraq

The Islamic State changed the map of the Middle East by conquering some strategically important cities in Iraq and Syria. The operations in Iraq started in January 2014 with the group taking control of the Sunni city of Fallujah in the Iraqi province of Anbar. Within a few months, the entire province had become a battleground. In addition to operations that would open the way to the Iraqi capital, the Islamic State took control of the border region between the cities of Wilayat Al-Barakah in Syria and Wilayat Ninawa in Iraq. However, the Islamic State gained the global attention in June 2014 with capturing of Mosul. The second largest city in Iraq then served as an Iraqi capital of the self-proclaimed Caliphate until its liberation in 2017. In addition, the Islamic State captured the cities of Abbasi and Tikrit, areas around Mount Sinjar, Tel Afar and the Ninewa Plateau and a good part of the northern provinces by rapid offensives (BBC, 2014; Human Rights Council, 2015; Islamic State Report, 2014).

By the end of 2014, the Islamic State controlled almost 32% of the territory of Iraq, excluding territories under the control of Kurdish forces (Peshmerga) in the autonomous region where the group failed to penetrate. Its rapid advance was due to unified leadership and a focus on gaining key military and economic centres, natural resources, and critical infrastructure (Aljaf, interview, August 20, 2015; Cockburn, 2014; Vovk, 2014).

In 2015 the Islamic State continued with its offensives, occupied the city of Ramadi and began a march on Baghdad. It took over a nearby international airport and launched a large-scale offensive on the city of Baiji, home to Iraq's largest oil refineries. In Iraq and Syria, the group took control of most of the countries' oil and natural gas reserves (Engel, 2015; Macias, 2015; Vick, 2015).

In regions under its control the Islamic State "introduced its own judicial system based on a strict interpretation of the Sharia" (European Asylum Support Office, 2021) with this resulting in severe crimes and human rights violations:

- forced displacements,
- forced religious and ideological conversions,
- ethnical cleansing and genocide,

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- abductions,
 - systematic and widespread killings of opponents, mass executions, beheadings,
 - sexual violence, including sexual slavery,
 - exploitation of children (child soldiers),
 - human trafficking,
 - destruction of cultural heritage.

Such violations were also common in the day-to-day operations of the Islamic State.

The Islamic State is well known for serious human rights violations and deliberate and systematic attacks on minorities in the territories it controlled. It targeted Shia Muslims as well as ethnic and religious minorities such as Christians, Yazidi, Shabaks, Turkmen, Kaka'i, and Kurds. In 2014 it committed "the 21st century's clearest case of genocide so far" (Yale University – Genocide Studies Program, 2021) when its troops invaded Sinjar region where the Yazidi people are located. In an extremely short period of time an estimated 5,000 Yazidi men and elderly women were killed, and approximately 6,000 women and children were held captive, sold as slaves, raped, beaten or used as child soldiers. The Yazidi group was intentionally targeted by the Islamic State and subjected to such acts that are defined as genocidal.

In addition to ethnic, religious, and sexual violence, Islamic State members committed many politically motivated crimes. They attacked members of the police and armed forces, civil servants, members of parliament, local religious and political leaders and anyone who publicly opposed them.

To achieve its goals, the Islamic State used the following methods: suicide attacks, car bombings, improvised explosive devices, beheadings, kidnappings, cyber terrorism, and piracy, among others. Human rights violations and war crimes resulted in mass migrations of 3.3 million Iraqis within and outside their country (Ellis, 2014; Human Rights Council, 2015). Despite the defeat of Islamic State in 2017, not all the refugees and displaced persons have yet returned to their homes.

Many Islamic State fighters originate from Iraq, although the exact number of Iraqi fighters or supporters is not known. The biggest group joining Islamic State was the Sunnis, who joined or associated the terrorist organisation as retaliation for Shia domination after the fall of Saddam Hussein's regime. At that time a minority Shiite population gained power under the auspices of the United States and international coalition. Many who joined the group mistakenly believed that the Islamic State would give control and power back to Sunnis and banish foreign forces from the country. Many who joined the Islamic State or moved to territories the group had seized for the above-mentioned reasons later regretted the decision, since the reality of life under the control of the Islamic State did not meet their expectations (Representative of Ministry of Peshmerga Affairs, Interview, October 31, 2019; Representative of Ministry of Peshmerga Affairs, Reforms Directorate, Interview, October 31, 2019). On the other hand, the group's ideology also played an important role in encouraging Sunni Iraqis to join. According to these reasons

and motives behind radicalisation and the decision to join the Islamic State, we can categorise its members in Iraq into three groups:

- extremely radicalised members who share the Islamic State's ideology and joined it because of this and do not regret their decision,
- individuals of Sunni origin who chose membership as a form of opposition to Shia power and foreign presence in the country, but later regretted their decision,
- foreign fighters from the West with a distorted view of Islam or different motives, such as adventure, money, rewards, sense of belonging, etc. (Representative of Ministry of Peshmerga Affairs, Interview, October 31, 2019; Representative of Ministry of Peshmerga Affairs, Reforms Directorate, Interview, October 31, 2019).

Kurds, who represent the biggest ethnic minority and are united in the autonomous Kurdistan Region in Northern Iraq, were much rare among members of the Islamic State.

Since the military defeat of the Islamic State the group does not hold any territory in Iraq, but continues to operate as an insurgent and terrorist group with many active and sleeper cells around the country. The number of areas with active Islamic State cells has doubled since 2018, and the group's activities have been detected in Anbar, Ninewa, Erbil, Baghdad Belts, Diyala, Kirkuk and Salah al-Din cities and regions. An estimated 1,300 active fighters and 12,700 supporters of the Islamic State were still present in Iraq in 2020 (European Asylum Support Office, 2021). The group has gained more and more freedom to operate in recent years, especially in areas where conventional military forces are not as much present, such as valleys, mountains, deserts and disputed areas, the latter of which have been revived as an indirect consequence of the fight against the Islamic State. Disputed areas between the Iraqi government and Kurdistan Regional Government came to the fore again in 2014 after the Kurdish forces drove out the Islamic State and took control of some strategically important cities that were historically Kurdish, but have been controlled by the Iraqi government in recent years. This caused tensions in 2017 when Iraqi security forces tried to retake the city of Kirkuk and its surroundings, but was resolved with the peaceful withdrawal of Kurdish forces. However, the old territorial dispute has once again been revived, and with the deliberate avoidance of conflict on both sides the resulting smaller military presence has created a security vacuum and safe haven for radicalised individuals, groups, and Islamic State sleeper cells (Mohammad, Interview, October 31, 2019; Representative of Ministry of Peshmerga Affairs, Interview, October 31, 2019; Representative of Ministry of Peshmerga Affairs, Reforms Directorate, Interview, October 31, 2019; Representative of Asayish, Interview, November 4, 2019).

4 CRIMINAL LIABILITY AND PROSECUTION OF ISLAMIC STATE FIGHTERS AT THE INTERNATIONAL LEVEL

The Islamic State was recognised as a terrorist organisation by most of nations and international organisations, although it did not operate as classical terrorist group. Soon after the proclamation of the Caliphate in June 2014, it established

a fully functioning state apparatus. However, it was not recognised as a state by other international subjects nor as an international organisation. As such it did not gain international legal subjectivity, had no international rights and obligations, and was not a subject to the rules of customary international law. It also had no authority to establish military forces and conduct military operations (Sancin et al., 2009). However, as Greenwood and Bowett point out (in Sancin et al., 2009), the existence of an armed conflict activates the application of the International Humanitarian Law (and the laws of armed conflict) and applies equally to all participating subjects, regardless of their legal status. Therefore, according to the International Humanitarian Law, the Islamic State fulfilled the criteria as a party to a non-international armed conflict acting as an organised non-state armed group. The International Humanitarian Law is thus applicable to Islamic State fighters, who could be held responsible for committing war crimes and other core international crimes.

Although its actions in Iraq and Syria are recognised as criminal, since they had criminal intent, caused damage and brought severe consequences, the operation of the Islamic State or any other group was not expected to this extent, and thus was not prohibited in all segments. In some cases, there were no or lenient prescribed penalties for individual actions at the state level or internationally. Despite mechanisms for prosecution of the worst criminal acts at both national and international levels, many changes to legislation have been made in the wake of the Islamic State, and its success in Iraq and Syria. In EU member states in particular, new judicial practices have developed to cumulatively prosecute and hold foreign terrorist fighters, fighting in Iraq and Syria, “accountable for war crimes, crimes against humanity and the crime of genocide, in addition to terrorism-related offences” (Eurojust, 2020: 3).

No adjustments have been made to the international legislation connected to the crime of genocide. Although 149 states have ratified the Genocide Convention, its principles are, according to the International Court of Justice (ICJ), part of general customary international law and thus legally binding regardless of ratification (United Nations, 2021). All crimes of genocide should be punished under the legislation, using competent tribunals of the country where the genocide was committed or an international tribunal with the jurisdiction recognised by the affected country (Convention on the Prevention and Punishment of the Crime of Genocide, article 4–6). Preliminary analysis of the crimes perpetrated against the Yazidi community, based on widely accessible resources, confirms basic the elements of the genocide, as killing or seriously harming the physical or mental health of the members of this ethnic group, along with harming their living conditions and transferring children by force have been detected. At present, no official conclusions on this matter have been made by international organisations, other subjects or individual states. Further investigations and research could lead to the formal conclusion that Islamic State committed the stated crimes with the intent of destroying whole or in part the Yazidi community and thus committing crime of genocide against this group.

The Islamic State committed war crimes in Iraq and Syria against the civilian population within the territories it controlled, especially targeting religious and

other minorities, like Yazidis. Even individuals who did not take part in hostilities orchestrated by the Islamic State became victims of “murder, execution without due process, mutilation, torture, cruel treatment, enforced disappearance, abductions and hostage-taking”. Women and girls suffered from sexual slavery, gang rape, executions and stoning, and were forced into pregnancy. Children were recruited as soldiers to participate in hostilities. Islamic State fighters wilfully perpetrated these war crimes while they were aware of status of civilians or individuals no longer participating in hostilities, and thus violated obligations towards civilians and persons *hors de combat* under international law (Eurojust, 2020: 12–13).

The Islamic State committed crimes against humanity in Iraq in the form of widespread and systematic attacks, targeting the civilian population. The group had all the means to carry out the attacks within a large part of the territory of the two states, Iraq and Syria, where it exercised control. The civilian population in Central and Northern Iraq, especial religious and ethnic minorities, were victims of the group’s killings, enforced disappearances, mutilation and torture. Islamic State fighters systematically targeted woman who were then subjected to sexual violence, enslavement, rape, forced pregnancy, stoning and murder. Another group that was systematically targeted by Islamic State were Yazidis, who were victims of the crimes against humanity “of sexual slavery, rape, sexual violence, enslavement, torture, other inhuman acts and severe deprivation of liberty” (Eurojust, 2020: 15). Such attacks were committed under the command of the Islamic State, which was highly organised and hierarchically structured. These details, together with the discriminatory, widespread and systematic nature of the attacks of the Islamic State on the civilian population in Iraq, thus meet the criteria for crimes against humanity prosecuted under international law.

Criminal liability for crimes of genocide, war crimes and crimes against humanity at the international level was established with United Nations General Assembly Resolution 95 (I) of 11 December 1946. Even when national law does not define these cases as international crimes, the perpetrators could be prosecuted under international criminal law (Cassese, 2009). Perpetrators could be prosecuted, for example, at the International Criminal Court, which was established in 2002. It has jurisdiction to prosecute crimes of genocide, crimes against humanity and war crimes (Türk, 2007), but it does not have any jurisdiction over perpetrators originating in Iraq, since the country is not a member of the International Criminal Court. Only foreign fighters who committed war crimes, crimes against humanity or the crime of genocide on Iraqi territory and are at the same time nationals of a state that is member of the court can be prosecuted by it.

The grounds for prosecuting Islamic State fighters at the international level lay in several international acts, which depend on the gravity and type of crime committed. There are also international institutions that prosecute the worst crimes under international regulations, or specialised courts are set up for particularly serious crimes, such as the international courts for Rwanda and the former Yugoslavia. Due to the scale of atrocities committed by Islamic State fighters in Iraq and Syria, the idea of establishing an international tribunal to prosecute those who had committed the worst crimes arose in 2019. As of today, however, no specialised tribunal for Iraq or Syria has been established. Not a single individual

who committed war crimes, crimes against humanity or the crime of the genocide has been held accountable under international law or has been brought to justice at the international level.

Iraq is one of the parties to the International Covenant on Civil and Political Rights, which ensures equal civil and political rights (1976). It applies to the prosecution of individuals and should be considered when national legislation is being drafted or implemented. The provisions related to the prosecution and enforcement of civil and procedural rights in trials will be outlined below in the context of the implementation of national legislation.

5 CRIMINAL LIABILITY AND PROSECUTION OF ISLAMIC STATE FIGHTERS IN IRAQ

The judicial system in Iraq combines a mixture of civil and Islamic law. It is divided into four areas, based on the jurisdiction: constitutional, general, administrative and military/internal security forces judiciary.

The highest authority in the Iraqi judicial system is the Federal Supreme Court, with jurisdiction over constitutional issues and disputes among the Kurdish region, governorates and central government (Central Intelligence Agency, 2021). The highest authority of the general judiciary is the Supreme Judicial Council, which is specialised in administration of general judiciary and thus has courts in nine different areas and on different levels. The courts of the Supreme Judicial Council (Republic of Iraq, Supreme Judicial Council, 2021) include:

- Court of Cassation as supreme judicial commission that examines the decisions with sentences of more than five years in prison in civil, criminal and family court.
- Appeal Courts in each governorate (with the exception of two in Baghdad and none in Kurdistan), specialised in civil and criminal claims with a maximum penalty of five years in prison.
- Courts of First Instance / Trial Courts specialised in civil cases.
- Family Courts specialised in family cases, marriage, divorces, etc.
- Courts of Investigation specialised in investigations of all crimes with minimum penalties of five years, misdemeanours under five years and violations with penalties under three months.
- Courts of Assizes in each governorate specialised in cases with penalties over five years. The verdicts are reviewed by Court of Cassation.
- Courts of Misdemeanours specialised in crimes with maximum penalties of five years. The verdicts are reviewed by Appeal Courts.
- Courts of Juveniles specialised in cases with minors (under age 18) involved.
- Courts of Labour specialised in cases in the field of labour.

Although the Republic of Iraq is a party to some international legal instruments, it is not a signatory to the Rome Statute of International Criminal Court and it has not submitted an International Court of Justice declaration yet (Central Intelligence Agency, 2021). Therefore, the Iraqi courts do not have

jurisdiction over the crime of genocide, war crimes or crimes against humanity committed within Iraqi territory.

The Republic of Iraq is a party to the abovementioned four Geneva Conventions of 1949 which in article 3 prohibits sentencing without the judgement of the competent court, providing the judicial guarantees of civilised society. The rights of defence and fair trial and the prohibition of forced confessions are provided under article 19 of Iraq's Constitution (Constitute, 2005). Further rights in all phases of investigation and trial are defined under the Criminal Procedure Code, which also allows statements from secret informants and judgements based only on the confession of defendant without any evidence. These provisions raised some concerns with the United Nations Assistance Mission for Iraq in the past, along with the minimum age of criminal liability of just nine years (United Nations Assistance Mission for Iraq, 2020).

Anti-terrorism legislation has been in force for fifteen years now, both at the level of central government and Kurdistan Regional Government. Both the Federal Anti-Terrorism Law and KRI Anti-Terror Law are based on a broad definition of terrorism, and describe terrorist acts as using violence with intention of spreading fear, as acts with motives that threaten unity of the state or damage public property. The laws differ in the criminalisation of the membership of a terrorist organisation and the prescribed penalties. The federal legislation anticipates the death penalty for all terrorist offences (incitement, planning, financing, assisting terrorists or carrying out a terrorist attack). The prescribed sentences under the Kurdish law vary for different acts of terrorism, ranging from the death penalty to life imprisonment or imprisonment under fifteen years. As the United Nations Assistance Mission for Iraq notes in its analysis of the functioning of the judicial system in the prosecution of the Islamic State, the legislation should be based on a more precise definition of terrorist acts, since too broad definitions make anti-terrorism laws susceptible to subjective interpretations. At the same time, the legislation should correspond to the general »characteristics of conduct to be suppressed in the fight against international terrorism« (United Nations Assistance Mission for Iraq, 2020, p. 4). Meaning that the strictest penalties should be limited to the worst terrorist offences, which is not the case with the Federal Anti-Terrorism Law nor the KRI Anti-Terror Law. The laws differ on fair trial rights, too, since only Kurdish law includes provisions related to them, but at the same time allows the court to use confessions obtained under duress.

The right to liberty, equality before courts and fairness of hearings derives from the International Covenant on Civil and Political Rights (1976, article 9–10, 14), which enables the presentation of cases and enjoyment of procedural rights. On this regard, the United Nations Assistance Mission for Iraq has noted issues related to the provision of adequate time and facilities for defence, effective legal representation, and reliance on anonymous informants (United Nations Assistance Mission for Iraq, 2020).

The right to adequate time and facilities to prepare defence and of provision of effective legal representation in all stages of the process is stated in the International Covenant on Civil and Political Rights (1976, article 14) and through principles 3, 6, 7 and 8 of the United Nations Principles and Guidelines on Access

to Legal Aid in Criminal Justice Systems (United Nations Office on Drugs and Crime, 2013). In the case of Iraq, courts did appoint lawyers to defendants in most cases. However, these court-appointed lawyers played a passive role in the proceedings. Non-compliance with the provisions of this international regulation and guidelines was noted by the United Nations Assistance Mission for Iraq, since court-appointed defence lawyers were mostly assigned on the first day of trial, leaving them with no time to prepare the defence. In the case of terrorism-related procedures, the right to public hearings, granted through public access to trials, was limited or authorised by courts. In some cases, family members of defendants or victims and their representatives were not allowed to participate in the trials. That left victims without answers about the causes and conditions that led to their victimisation, and without the possibility to see the perpetrators punished for their crimes (United Nations Assistance Mission for Iraq, 2020).

More than two thirds of criminal cases in Iraq related to Islamic State were based on anonymous witness with no opportunities for cross-examination. The transfer of most of the weight of the legal procedure to anonymous statements without compensation for the disadvantage is contrary to the International Covenant on Civil and Political Rights (1976, article 14; United Nations Assistance Mission for Iraq, 2020). According to Human Rights Watch, when investigating suspected Islamic State members both Iraqi and Kurdistan Regional Government forces derive evidence from unreliable sources, and identify suspects based on wanted lists or reports from the community. The lack of further evidence may result in the unlawful detention of individuals. Furthermore, conditions in detention and during interrogation were found to be overcrowded and sometimes inhumane, and the process rights of suspects were systematically violated (Human Rights Watch, 2017). There were even some reports of torture, which is in contravention of both international law and the Iraqi Constitution (2005, article 35). Many confessions were obtained from defendants during the proceedings and withdrawn at the trial, and allegations of torture or ill-treatment have been made in almost half of the terrorism-related cases. International organisations such as Human Rights Watch (2017) and the United Nations Assistance Mission for Iraq (2020) have received reports of forced confessions obtained by torture and ill-treatment by law enforcement and security authorities in Iraq. These confessions were mostly not questioned by judges during the related trials, and were thus used as evidence. In a few cases medical reports confirmed torture, but in only one case was such a confession excluded as evidence. Use of these methods in the proceedings would mean violation of article 7 of International Covenant on Civil and Political Rights.

The armed forces of the Iraqi government and Kurdistan Regional government have detained thousands of suspected Islamic State fighters and affiliates, including hundreds of children during the years of active military campaigns against this terrorist organisation from 2014 to 2017, and even after its defeat (Human Rights Watch, 2017). In the absence of a national strategy for prosecution and under the high expectations of a severe approach against terrorism being adopted by the judiciary, Human Rights Watch reported on the rapid prosecution of thousands of suspected members of the Islamic State in counterterrorism courts in Iraq and Iraqi

Kurdistan, with little distinction made on the severity of offenses. As prescribed under international law, such trials should be based on the principles of legality and individual criminal liability. That means that individuals should be punished for acts they have committed, based on a precise law. Broad definitions under the Federal Anti-Terrorism Law and interpretations of membership of and association with the Islamic State allowed allow convictions for a wide range of defendants. In most of the cases the indictment was no more specific than “joining the terrorist organisation”. According to Human Rights Watch (2017), the penalties based on the counterterrorism legislation are disproportionate. The indictment only requires proof of membership or proof that an individual worked in an Islamic State institution, and not proof of an individual crime. This way of interpreting the legislation and prosecution allows for the long imprisonment of individuals who were perhaps only living on the seized territories. On the other hand, it might happen that those committing the most serious crimes and atrocities will not get penalties commensurate with their actions. However, federal courts in Iraq have imposed a range of sentences for terrorist offences, despite the death penalty being required under the Federal Anti-Terrorism Law, but with no clear sentencing criteria and no distinction made on voluntary or coerced association with the Islamic State (United Nations Assistance Mission for Iraq, 2020). In contrast, officials in Iraqi Kurdistan have attempted to avoid such indiscriminate punishment and highlighted two groups of suspects and sentences based on the categorisation of membership. The first group of suspects has been categorised as Islamic State supporters and members who mostly joined to oppose to Shia control and foreign presence in the country. Those individuals lived inside or outside the Islamic State territories and actively showed their support for this terrorist organisation, were confirmed members or worked at one of the civilian organisations under Islamic State’s control but did not participate in any killings. If these individuals show clear and unmistakable signs of remorse and there was no proof of previous violent behaviour, then they were imprisoned from two to five years. The second group represent Islamic State fighters, who were extremely radicalised, shared the group’s extreme ideology, actively participated in fighting, killings and executions, or have committed other crimes against humanity and not shown any remorse (Mohammad, Interview, October 31, 2019; Representative of Ministry of Peshmerga Affairs, Interview, October 31, 2019). In Kurdistan courts the most common sentence for extremely radicalised members or fighters of Islamic State is from 10 years to life imprisonment, rather than the death penalty. Both groups of suspects have been prosecuted in accordance with counterterrorism legislation, which regulates radicalisation and terrorism to some extent. The counterterrorism legislation in Iraq and Iraqi Kurdistan and its broad interpretation allows prosecution and punishment in case of individuals who were involuntary associated with the Islamic State. Along with low standards of proof and other disadvantages when presenting the defence case, this could lead to collective punishment of certain communities (United Nations Assistance Mission for Iraq, 2020).

Another issue of concern for international organisations like Human Rights Watch and the United Nations Assistance Mission for Iraq regarding the

prosecution and criminal liability of Islamic State fighters is the sentencing and execution of a death penalty. The death penalty is strictly limited to the most serious crimes in those states where it still exists under the International Covenant on Civil and Political Rights (1976, article 6). Due to the above-described issues with regard to getting adequate time and facilities for defence, effective legal representation, and reliance on anonymous informants or even forced confessions, concerns about the execution of the death penalty and its compliance with article 6 and 14 of this international regulation have been raised. Furthermore, violations of the Geneva Convention (IV Geneva Convention relative to the protection of civilian persons in time of war of 12 August 1949, article 3) may have taken place with executions carried out without trials, and death sentences being given for mere membership of the terrorist organisation. Death sentences may be given due to a general interpretation of the terrorism legislation, and not tied to specific terrorist acts (United Nations Assistance Mission for Iraq, 2020). The death penalty is allowed as a punishment for significant violations of legislation and severe crimes in Iraqi Kurdistan, but according to officials from the Ministry of Peshmerga Affairs¹ and Asayish² it is not imposed often, due issues with regard to human rights. A moratorium on the death penalty was in place in this autonomous region for more than a decade, but it was lifted in 2015 and 2016 with at least two recorded executions of Islamic State fighters (Mohammad, Interview, October 31, 2019; Representative of Ministry of Peshmerga Affairs, Interview, October 31, 2019; Representative of Asayish, Interview, November 4, 2019; United Nations Assistance Mission for Iraq, 2020).

Based on the above-described observations, registered events and analysis of international and national legislation, we can easily claim that the operation of the Islamic State contained elements of terrorist acts, crimes of genocide, war crimes and crimes against humanity. Countries facing the threat of the Islamic State on a larger scale due to the high active presence of their fighters, members and supporters or countries of origin of the foreign fighters, have adapted their legislation and procedures to prosecute its fighters. However, Peshmerga Chief of Staff Lieutenant General Jamal Mohammad (Mohammad, Interview, October 31, 2019) believes that such adaptation of legislation should be done in all countries around the world which are facing the threat of the Islamic State. Terrorists cannot be prosecuted according the traditional legislation, and this is why Western countries should tighten the legislation and imprison foreign Islamic State fighters for a long time. The legislation, its implementation and prescribed penalties should be harmonised on all levels and in all countries. Offenders would then face the same prosecution procedures and punishments for the same types of crimes. However, the penalties should result from the categorisation of crimes based on the precise definition of the type and degree of involvement of an individual with the Islamic State, and the severity of the crimes committed.

Another issue, raised by Mohammad (Mohammad, Interview, October 31, 2019), is the sole focus on punishing Islamic State fighters. The reintegration and reconciliation process for Islamic State fighters is much more complicated

¹ *Armed forces of the Kurdistan Regional Government, authorised under the auspices of the Iraqi Constitution.*
² *Security and intelligence organisation of the Kurdistan Regional Government, often referred as the Kurdish intelligence agency or police.*

and wider than a prison sentence. If we take into account the background and process of the emergence of the Islamic State, how it extended its influence and operation to such dimensions, we can see several factors which need to be addressed. The elements and circumstances that allowed Islamic State to flourish or drove individuals to join this terrorist organisation will not disappear with the imprisonment of individual offenders. Those elements are mostly the political and security situation in Iraq and the wider region, unsolved historical disputes over territories or among religious groups, and the specific circumstances of the individuals. In the case of Iraq, the conflict between Shia and Sunni Muslims played a key role in the population supporting the Islamic State. Most of the Islamic State fighters of Sunni origin from Iraq joined the organisation for historical reasons, such as opposition to Shia domination after the fall of Saddam Hussein (Representative of Ministry of Peshmerga Affairs, Reforms Directorate, Interview, October 31, 2019). All this and more are push and pull factors that led to the radicalisation of individuals to the extent of joining the Islamic State, and all of them need to be addressed. Therefore, the Islamic State fighters need to undergo a process of de-radicalisation and not merely be imprisoned. Furthermore, risk factors for radicalisation must be eliminated at the levels of society and state, and effective mechanisms for recognising and preventing further radicalisation need to be established. Even after the military defeat of the Islamic State in 2017, it looks like the group will not be destroyed any time soon. It thus still represents a threat that must be approached thoughtfully, strategically and comprehensively, especially in those countries where it was present for many years, such as Iraq.

6 CONCLUSIONS

The Islamic State controlled more than a third of Iraqi territory at its peak, and took over key military and economic centres, natural resources and critical infrastructure. It established a fully functioning state apparatus in the territories it controlled with its own economic, social, educational, security and judicial system that was based on Sharia Law. The operations of this organisation were marked by numerous human rights violations and crimes, as forced displacements, forced religious and ideological conversions, ethnic cleansing and genocide, abductions, mass executions, beheadings, sexual violence and exploitation of woman and children, and the destruction of cultural heritage. These are serious crimes under the international law which Islamic State fighters should be accountable for, since the group fits the criteria as a party to a non-international armed conflict acting as an organised non-state armed group, and thus could be held responsible for committing war crimes.

However, things are not so black and white in this case, since prosecution under international law falls under international courts when the party or state in question is the party or a signatory to the relevant international document. Although criminal liability for crimes of genocide, war crimes and crimes against humanity was established at the international level and thus enables the prosecution at this level when national law does not define these crimes, in the case of Iraq this is not possible. The International Criminal Court, which

addresses these cases, does not have jurisdiction over perpetrators originating in Iraq, since the country is not a member. Only foreign fighters who are nationals of a member state could be prosecuted by this court. As of today, however, not a single foreign fighter who committed war crimes, crimes against humanity or the crime of genocide in Iraq has been held accountable under international law. Furthermore, no specialised tribunal for Iraq or Syria has been established as one of the possible solutions to bring to justice the Islamic State fighters from all over the world. Although all the data confirms the crime of genocide was perpetrated by the Islamic State in Iraq, no official conclusions and declarations on this matter were made by international organisations or individual states.

Similarly, there are no reports of the prosecution of Islamic State fighters of Iraqi origin who would be specifically accountable for war crimes, crimes against humanity or the crime of genocide under national legislation, since the Iraqi courts do not have jurisdiction over those crimes. There are several reports on finalised or on-going prosecution and trials, but with no distinction on the severity of the crimes committed. The suspects are mostly prosecuted for cooperation with the Islamic State, but it is usually not clear from the indictments or sentences whether the individual had been committing the crime of genocide, war crimes, worked as Islamic State administrative worker or just lived in a territory held by the group. Furthermore, severe human rights and international law violations have been reported in connection to these prosecution procedures. The suspects are denied the right of defence and fair trial, since court-appointed lawyers play a passive role or are appointed at the last minute. Another issue of concern are statements from secret informants and judgements based on confessions without any evidence, especially under the assumption, based on reports, that some of the confessions could have been forced.

The case of the Islamic State has shown that the related legislation, its implementation and prescribed penalties should be harmonised on all levels and in all countries. Offenders should face the same prosecution procedures and punishments based on the severity of the crimes committed. The same applies to the rights of the suspects during the trials and while serving the sentence.

Additionally, prosecution is not the only procedure the Islamic State fighters should undergo. The procedures and protocols for de-radicalisation of Islamic State fighters should be in place in every country facing the threat. Those procedures should take into account the background and factors that drove individuals to join this terrorist organisation. Furthermore, risk factors for radicalisation must be addressed at the levels of society and state. Special attention should be paid to vulnerable groups, as well as to converts and families of known and convicted Islamic State supporters and members. Effective mechanisms for recognising and preventing further radicalisation, as well as reintegration back into society, need to be established. Although the Islamic State has lost its influence and territories, this does not mean the end of the organisation. Its influence and ideology are still present in the Middle East and globally, and there are many sleeper cells present in Iraq. The authorities in this country and its constitutionally independent Kurdish region did not take many steps forward in this regard after the defeat of the Islamic State, as preventive and de-radicalisation programmes have still not

been created and procedures for prosecution and prescribed punishments have not been unified, while most of the risk factors for radicalisation have remained, or new ones have arisen.

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