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Addressing the issue of Daesh foreign fighters and their families returning from Syria and other countries to the member States of the Council of Europe

Report[1]
Committee on Legal Affairs and Human Rights
Rapporteur: Mr Pieter OMTZIGT, Netherlands, Group of the European People's Party

Summary

Individuals who act in the name of Daesh have perpetrated acts of genocide and other serious crimes under international law. This has been recognised by several national parliaments and criminal courts in Council of Europe member States.

The continued detention and prosecution of Daesh foreign fighters in Syria or Iraq is not an option. These fighters have forfeited their right to family life and pose a threat to society. The best solution would be their prosecution before an international tribunal. Member States should give priority to the establishment of a special international tribunal or hybrid tribunal with jurisdiction over international crimes committed by Daesh foreign fighters.

Pending the setting up of such a tribunal, prosecution of foreign fighters in their States of nationality or in other member States is the most obvious alternative. In this context, States should prioritise cumulative prosecution for both terrorism and international crimes, including genocide with respect to crimes committed against the Yazidis and other groups. The Committee on Legal Affairs and Human Rights proposes several recommendations to member States in the area of prosecution.

The committee also invites States to consider bringing before the International Court of Justice proceedings under the 1948 Genocide Convention, for failure to prevent and punish acts of genocide committed by Daesh.

1. Reference to committee: Doc. 14878, Reference 4452 of 24 June 2019.

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A. Draft resolution[2]

1. The Parliamentary Assembly recalls its Resolution 2091 (2016) "Foreign fighters in Syria and Iraq" and Resolution 2190 (2017) "Prosecuting and punishing the crimes against humanity or even possible genocide committed by Daesh". It reiterates its position that "individuals who act in the name of … Daesh… have perpetrated acts of genocide and other serious crimes punishable under international law" and that "there is conclusive evidence that Daesh has committed genocidal acts against members of the Yazidi, Christian and non-Sunni Muslim minorities". Many of these acts, such as enslavement, sexual slavery, rape, imprisonment, torture and murder, also amounted to war crimes and crimes against humanity.

2. It notes that both the United Nations Commission of Inquiry on Syria in 2016 and the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL (UNITAD) in 2021 concluded that Daesh committed genocide against the Yazidis. The UNITAD has also identified evidence of crimes committed against other groups, such as Shia, Christians and other communities.

3. Numerous national parliaments have also formally condemned Daesh's actions as genocide or crimes against humanity. Several criminal courts in Council of Europe member States have convicted Daesh members for terrorism-related offences, war crimes and crimes against humanity committed in Syria and Iraq. In 2021 a German court convicted an Iraqi Daesh member for genocide, crimes against humanity and war crimes, for cuffing a five-year-old Yazidi girl to a window in the scorching heat and letting her die in front of her mother, motivated by the intent to eliminate the Yazidi religious minority. This is the first time that a court, anywhere in the world, has recognised as genocidal a crime committed against a Yazidi victim.

4. The Assembly also recalls that States have a general obligation under the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention) to prevent and punish acts of genocide, including complicity in genocide. According to the International Court of Justice, the duty of prevention requires a State to employ all means reasonably available, taking into account its capacity to influence effectively the actions of persons likely to commit, or already committing genocide. States therefore have a legal obligation to prevent genocide the very moment a State learns or should normally have learned of the serious risk of genocide, for instance by preventing the travel, recruitment and financing of foreign terrorist fighters who joined Daesh and who were likely to participate in the commission of genocide, and effectively prosecuting the perpetrators as a means to deter further crimes.

5. Since the outbreak of the Syrian armed conflict in 2011, thousands of foreigners from all over the world joined Daesh in Syria and Iraq, including with their families. A considerable number of European citizens were among them. In response to the phenomenon of foreign terrorist fighters, United Nations Security Council Resolution 2178 (2014) established and reinforced international obligations to prevent and criminalise the travel, recruitment, and financing of foreign terrorist fighters. It also called on States to develop and implement prosecution, rehabilitation and reintegration for returning foreign terrorist fighters.

6. The Council of Europe reacted by adopting the 2015 Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (CETS No. 217), becoming the first international organisation to set up a regional legal instrument to implement the obligations imposed by the United Nations regarding foreign terrorist fighters. However, this protocol, which came into force on 1 July 2017, has to date been ratified by only 23 member States.

7. Although some Daesh foreign fighters voluntarily returned to their countries in Europe or Central Asia, thousands of them, including European citizens and accompanying family members, remained in Iraq and Syria. Many are now held in detention in camps and prisons in northeast Syria, under the authority of the Autonomous Administration of North and East Syria, and Iraq. In Syria, the autonomous administration courts reportedly try only Syrian Daesh detainees but not foreigners (Iraqi and European). Those interned in camps, including children, live in substandard conditions, exposed to violence, sexual abuse and (further) radicalisation. Those held in Iraq are unlikely to receive a fair trial in compliance with international human rights standards and risk being sentenced to the death penalty. In addition, Iraq has not yet incorporated international crimes in its domestic legislation, and Iraqi courts therefore can only prosecute suspected Daesh fighters under anti-terrorism legislation.

8. The Assembly considers that the continued detention of Daesh foreign fighters in Syria or Iraq is untenable. Their prosecution in Syria or Iraq is currently not an adequate and human rights-compliant solution. It may also be counter-productive in terms of security concerns, given the risk of further radicalisation by Daesh in camps and the recurrence of prison breakouts, which may lead to an increase in the number of

2. Draft resolution unanimously adopted by the committee on 23 June 2022.

foreign fighters returning to Europe. Council of Europe member States should therefore reconsider their position that national Daesh fighters should primarily be tried in the countries where the crimes were committed.

9. The Assembly is convinced that the best solution would be the prosecution of Daesh foreign fighters before an international tribunal, given the international nature of the crimes committed, including genocide, and also given that Daesh fighters come from over 100 countries. Neither Syria nor Iraq are Parties to the International Criminal Court (ICC) and the ICC Prosecutor declined in 2015 to open a preliminary examination in relation to offences allegedly committed by nationals of States Parties to the Rome Statute of the ICC. There is a proposal for a hybrid tribunal within Iraqi national courts with assistance from international experts, as set out in Assembly Resolution 2190 (2017), but this has not yet received the necessary political support from the Iraqi authorities. The Assembly thus regrets that there is still no international or hybrid judicial mechanism capable of trying Daesh fighters for international crimes committed in Syria and Iraq.

10. Pending the setting up of an international or hybrid tribunal, prosecution of Daesh foreign fighters in their States of nationality, or in other member States providing for universal jurisdiction, is the most obvious alternative to pursue and ensure accountability for their crimes. The Assembly acknowledges however the challenges national authorities face as well as the existence of legitimate security concerns of their citizens with regard to the return of individuals who have committed heinous crimes and joined a terrorist group engaged in an armed conflict abroad.

11. The Assembly considers that foreign fighters who are suspected of having taken part in genocide or in other serious international crimes constitute a serious threat to society. It is an ideology that drove them to commit such crimes, including genocide against the Yazidis, and this ideology will not disappear on its own. The Assembly considers that, having taken into account the ongoing threat posed by Daesh fighters, it is crucial to consider that they have forfeited their right to family life under Article 8 of the European Convention of Human Rights (ETS No. 5). Furthermore, separation from their children may also be necessary for the best interests of the child. States should therefore consider repatriating foreign fighters' children to their State of nationality to be with family members, without repatriating their parents.

12. The Assembly is extremely worried about the situation and the appalling conditions in which the survivors of Daesh crimes still live in Iraq or Syria, often in camps and without the possibility of a safe return to their areas of origin and homes. Many, particularly Yazidi women and children, are still missing.

13. On the basis of the foregoing, the Assembly calls on Council of Europe member States to:

13.1. give priority to the establishment of a special international tribunal or hybrid tribunal with jurisdiction over international crimes committed by Daesh foreign fighters, by actively contributing to the setting up of such a tribunal within the United Nations or other international organisations;

13.2. pending the setting up of such a tribunal, give priority to the prosecution by their national courts of suspected Daesh fighters and members who come within their jurisdiction or control, on the basis of the principle of active personality (for nationals) or universal jurisdiction;

13.3. provide for universal jurisdiction over international crimes covered by the Rome Statute of the ICC, and if this is already the case, expand its use by not limiting the initiation of preliminary investigations to cases where the suspects are located within their territory, following the example set by Germany;

13.4. prioritise where possible cumulative prosecution of Daesh foreign fighters for both terrorism-related offences and international crimes such as genocide, crimes against humanity and war crimes, following recent examples in Germany and the Netherlands, duly reflecting the gravity and the different nature of the offences committed;

13.5. with respect to crimes committed against Yazidis and other affected minorities, prioritise genocide as a criminal charge, having regard to Daesh's declared intention to destroy, in whole or in part, these groups, as stressed in Assembly Resolution 2190 (2017);

13.6. prosecute, in a non-discriminatory manner, avoiding gender stereotypes, all Daesh foreign fighters and members, including women, having regard to the actual role they may have played in the commission of crimes, as perpetrators, supporters, facilitators, recruiters or fund raisers;

13.7. where children are suspected of having committed criminal acts, prosecute only under internationally recognised juvenile justice and fair trial standards, in accordance with Resolution 2321 (2020) "International obligations concerning the repatriation of children from war and conflict zones" and the United Nations Key Principles for the Protection, Repatriation, Prosecution, Rehabilitation and Reintegration of Women and Children with links to United Nations Listed Terrorist Groups;

13.8. set up and adequately fund, specialised units or staff within prosecution, law enforcement and judicial co-operation services for the prosecution of foreign terrorist fighters;

13.9. make use of different types of evidence, including internet-based evidence and battlefield evidence, and ensure that such evidence is admissible for the successful prosecution of Daesh terrorist fighters, having regard to Recommendation CM/Rec(2022)8 of the Committee of Ministers of the Council of Europe to member States on the use of information collected in conflict zones as evidence in criminal proceedings related to terrorist offences and in full compliance with Article 6 of the European Convention on Human Rights;

13.10. make better use of evidence collected by United Nations investigative mechanisms such as UNITAD and the United Nations International Impartial and Independent Mechanism for Syria (IIIM), as well as by non-governmental organisations documenting atrocities in Iraq and Syria, and ensure that such evidence can be lawfully used in criminal proceedings in their jurisdictions;

13.11. contribute to the collection and preservation of evidence of Daesh crimes, including by making voluntary contributions, seconding national experts and signing co-operation agreements with UNITAD and IIIM;

13.12. make full use of existing mutual legal assistance tools between States in investigations and proceedings against Daesh foreign fighters, including under the relevant international, Council of Europe and European Union instruments, such as the possibility of setting up joint investigation teams like the one established in 2021 between France and Sweden to support proceedings concerning crimes committed against the Yazidis in Syria and Iraq;

13.13. take due account of the rights and needs of victims and witnesses in criminal proceedings against Daesh foreign fighters, including by taking the necessary measures to reach out to victims and affected communities, such as interpretation, broadcasting of the hearings and engaging with non-governmental organisations representing them;

13.14. insofar as they have not yet done so, ratify and fully implement the 2005 Council of Europe Convention on the Prevention of Terrorism (CETS No. 196) and its 2015 Additional Protocol;

13.15. design and implement rehabilitation and reintegration strategies for all returning Daesh foreign fighters and their families, including, in particular, deradicalisation programmes specifically tailored for children and young adults. These programmes are necessary for all persons and are not a substitute for prosecution and punishment;

13.16. consider bringing before the International Court of Justice, proceedings against States which allegedly failed to prevent and punish acts of genocide committed by Daesh, in order to hold those States to account under the Genocide Convention;

13.17. support the Iraqi authorities, UNITAD and other organisations in locating the missing Daesh victims and ensuring the safe and voluntary return of the survivors to their areas of origin.

14. The Assembly also calls on:

14.1. Iraq to adopt legislation on international crimes without further delay, with the assistance of UNITAD and other relevant stakeholders, and to actively participate in negotiations with a view to establishing a special international tribunal or hybrid tribunal;

14.2. the ICC Prosecutor to reconsider the decision not to open a preliminary examination into crimes committed by Daesh foreign fighters who are nationals of State Parties to the Rome Statute of the ICC;

14.3. UNITAD and IIIM to continue their instrumental work of gathering evidence on crimes committed by Daesh members in Iraq and Syria and share such evidence with national courts to the extent possible.

B. Draft recommendation[3]

1. The Parliamentary Assembly refers to its Resolution … (2022) "Addressing the issue of Daesh foreign fighters and their families returning from Syria and other countries to the member States of the Council of Europe".

2. The Assembly recalls its support for the Council of Europe Counter-Terrorism Strategy (2018-2022), which has covered issues such as the gathering of evidence from conflict zones for the purpose of criminal prosecution, the prosecution of foreign terrorist fighters, deradicalisation, disengagement and social reintegration and the roles of women and children in terrorism.

3. The Assembly welcomes the adoption by the Committee of Ministers of its Recommendation CM/Rec(2022)8 to member States on the use of information collected in conflict zones as evidence in criminal proceedings related to terrorist offences.

4. The Assembly invites the Committee of Ministers to:

4.1. draft a recommendation on deradicalisation, disengagement and social reintegration of those involved in terrorist offences, on the basis of the ongoing collection of good practices from member States by the Council of Europe Committee on Counter-Terrorism (CDCT);

4.2. consider inviting the CDCT to examine the issue of cumulative prosecution of foreign terrorist fighters, for terrorism and other crimes under international criminal law and international humanitarian law, and also consider the interaction between anti-terrorism legislation and these branches of international law, and draft guidelines in this field;

4.3. encourage all member States to participate in setting up a special international tribunal or hybrid tribunal with jurisdiction over international crimes committed by Daesh foreign fighters, and examine ways and means for the Council of Europe as a whole to play an active role in setting up and operating such a tribunal.

3. Draft recommendation unanimously adopted by the committee on 23 June 2022.

C. Explanatory memorandum, by Mr Pieter Omtzigt, rapporteur

1. Introduction

1. The motion underlying this report, which I tabled on 12 April 2019, was referred to the Committee on Legal Affairs and Human Rights for report on 25 June 2019. The Committee appointed me rapporteur on 1 October 2019.

2. As indicated in the motion, in March 2019, the Syrian Democratic Forces (SDF), an armed opposition group, declared that Daesh (also known as "Islamic State"/IS, ISIS or ISIL) had been "defeated". Over 5 000 of the "foreign fighters" who had constituted part of Daesh were from European countries (with approximately 3 700 from the United Kingdom, Belgium, France and Germany alone). Many of them were accompanied by women and children. It was estimated that over one-half of the foreign fighters had already returned to their countries of origin. The return of foreign fighters poses serious security risks for European societies.

3. In Resolution 2190 (2017) "Prosecuting and punishing the crimes against humanity or even possible genocide committed by Daesh", the Parliamentary Assembly reiterated its view that Daesh had committed acts of genocide and other serious crimes under international law. It then called for prompt and effective action to ensure prosecution of such crimes, whether by national courts in the countries where the crimes were committed or in other countries by application of universal jurisdiction, or by the International Criminal Court.

4. The present report will analyse the current situation and examine what progress has been made, with a view to making recommendations for a stronger national and international response that recognises the need to, at the same time, fight impunity and minimise threats to security posed by Daesh foreign fighters returning to Europe. There is a European interest in co-ordinating policies in this area.

5. In the course of the preparation of the report, the committee held two hearings. On 9 November 2020, the committee heard Dr Lars Otte, Senior public prosecutor from the Office of the Federal Prosecutor General at the Federal Court of Justice in Germany, and Mr Sinan Can, investigative journalist from the Dutch public television BNNVARA. On 23 May 2022, another hearing was held with the participation of Dr Leyla Ferman, Chair of Women for Justice (Germany), and Ms Naomi Prodeau, lead lawyer of the investigations team from Free Yezidi Foundation (Iraq). A questionnaire was also sent to national parliaments via the European Centre for Parliamentary Research and Documentation (ECPRD): I would like to thank the parliaments of the 25 member States which replied.

2. The Assembly's position to date

6. In Resolution 2091 (2016) "Foreign fighters in Syria and Iraq", the Assembly expressed its view that States should act on the presumption that Daesh had committed genocide and should be aware that this entailed a duty to act under the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention). The Assembly therefore called on member and observer States to fulfil their positive obligations under the Genocide Convention by taking all necessary measures to prevent genocide. It also called on them to work out a comprehensive response to the foreign fighter problem, striking the right balance between repression of criminal behaviour, protection of populations and human rights, prevention of radicalisation, deradicalisation and reintegration of returnees after appropriate punishment has been served. The Assembly also called for addressing the root causes of radicalisation. In this context, the Assembly called on member and observer States to sign and ratify the Council of Europe Convention of the Prevention of Terrorism (CETS No. 196) and its 2015 additional protocol aimed at addressing the phenomenon of foreign terrorist fighters (CETS No. 217).[4]

4. The Additional Protocol targets specifically a series of criminal activities related to the phenomenon of "foreign terrorist fighters" and returnees. It requires Parties to criminalise travelling abroad for the purposes of terrorism and financing or organising or otherwise facilitating travel for this purpose. It has been ratified by 24 States (as of 23 May 2022). Although the Protocol itself does not define "foreign terrorist fighters", its explanatory report states that individuals who travel abroad for the purposes of terrorism are often referred to as "foreign terrorist fighters" and mentions the United Nations Security Council (UNSC) Resolution 2178 of 24 September 2014. According to the UNSC Resolution, "foreign terrorist fighters" are "individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict".

7. In Resolution 2190 (2017) "Prosecuting and punishing the crimes against humanity or even possible genocide committed by Daesh", the Assembly reiterated its view that Daesh had committed acts of genocide and other serious crimes under international law. In this respect, it considered that Daesh had committed genocidal acts against members of the Yazidi, Christian and non-Sunni Muslim minorities. It then called on member and observer States for prompt and effective action in accordance with their obligation under the Genocide Convention to prevent and punish acts of genocide, including by prosecuting any suspected Daesh members who came within their jurisdiction or control, by application of universal jurisdiction, and by prosecuting all offences committed within their jurisdiction relating to Daesh's activities abroad. The Assembly also asked States to refrain from applying their anti-terrorist legislation to the detriment of their universal jurisdiction when examining cases involving crimes covered by the Rome Statute of the International Criminal Court. It also called on the United Nations to consider establishing a special judicial mechanism for trying crimes committed by Daesh in Iraq, which could be based on existing international or hybrid models, or a system based in the Iraqi national courts with assistance from international experts.

8. In Resolution 2263 (2019) "Withdrawing nationality as a measure to combat terrorism: a human-rights compatible approach?", the Assembly considered that the practice of depriving of their nationality persons involved in terrorist activities (including "foreign fighters") or suspected of such involvement might lead to the "exporting of risks" and went against the principle of international co-operation in combating terrorism. It underlined that such practice also undermined the State's ability to fulfil its obligation to investigate and prosecute terrorist offences. The Assembly therefore called on member States to review such legislation in light of international human rights obligations, refrain from applying this measure and prioritise wider use of other counter-terrorism measures (for example, travel bans, surveillance measures or assigned residence orders).[5]

9. Finally, in Resolution 2321 (2020) "International obligations concerning the repatriation of children from war and conflict zones", the Assembly was appalled by the dire situation of children in Syria and Iraq whose parents, believed to be affiliated with Daesh, were citizens of Council of Europe member States. It was convinced that actively repatriating, rehabilitating and (re-)integrating these children without further delay were matters of human rights obligations and humanitarian duty. To this end, the Assembly urged member States to take all necessary measures to ensure immediate repatriation of these children, regardless of their age or degree of involvement in the conflict, and to repatriate them together with their mothers or primary care givers, unless it was not in the best interests of the child.

3. The Council of Europe member States' policies on the return of Daesh foreign fighters

10. European countries have, on the whole, been reluctant to repatriate their national Daesh fighters, and some have even taken active measures to prevent their return from Iraq and Syria. In May 2019, the French foreign minister, for example, said that French people who have fought in the Daesh caliphate must be tried in the place where they committed their crimes. One of the French nationals who had previously been transferred by the SDF to an Iraqi detention centre has even claimed that France organised his transfer, with French officials directly involved. In September 2019, the Dutch justice minister said that he had declined US assistance to repatriate 10 women Daesh suspects and their children as their return could result in "direct risks to the national security of the Netherlands".[6] Returnees who were involved in terrorist-related activities and/or in armed conflict abroad are understandably perceived as a security threat in member States. Governments that repatriate their nationals have to reckon with political consequences, as domestic populations focus on the potential security threats, whether immediately, for those returnees who cannot be detained or prosecuted, or in future, once any prison sentences have been served.

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5. Since the adoption of this resolution, the European Court of Human Rights has delivered new judgments and decisions concerning the revocation of nationality on the grounds of terrorism. In *Ghoumid and Others v. France,* Application No. 52273/16 et al, judgment of 25 June 2020, the Court considered that the revocation of French nationality did not breach Article 8 of the Convention (right to respect for private life), taking into consideration *inter alia* the fact that the applicants already had another nationality and the seriousness of the offence for which they had been convicted. It also found that the deprivation of nationality, characterised as an administrative sanction in French law, was not a "criminal sanction" which could raise an issue under the principle of *ne bis in idem* guaranteed by Article 4 of Protocol No. 7. See also, with regard to Article 8, *Said Abdul Salam Mubarak v. Denmark,* Application No. 74411/16, decision of 22 January 2019, and *Johansen v. Denmark,* Application No. 27801/19, decision of 1 February 2022 (in this case the applicant, Danish national by birth, was stripped of his nationality following his conviction for having gone to Syria to join the Islamic State), applications declared inadmissible as being manifestly ill-founded.

6. Introductory memorandum, AS/Jur (2020) 03, par. 21.

11. In order to obtain additional information on the member States' different approaches to the return and repatriation of Daesh fighters, I sent a questionnaire to national parliaments via the ECPRD. I have received replies from the following 25 member States: Austria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Ireland, Latvia, Lithuania, North Macedonia, the Netherlands, Norway, Poland, Portugal, Romania, San Marino, Slovak Republic, Slovenia, Spain. Switzerland, Türkiye and the United Kingdom.[7]

12. The questionnaire consisted of the following questions:

i. Do your authorities have a policy on deprivation of citizenship from terrorists, in particular Daesh (also known as ISIS or ISIL) members and suspects?

   – If possible, please indicate how has this policy been applied in practice, to how many people and with what results.

ii. Do your authorities have a policy on repatriation of nationals who are known or suspected to have been Daesh members?

iii. How many Daesh members or suspects have returned to your country?

   – If possible, please indicate how did these returns take place. For example, were they undertaken independently by the persons concerned, did they involve assisted repatriation, or did they result from involuntary deportation?

iv. How are returning Daesh members or suspects treated on arrival and following their return?

   – Are any special measures in place to ensure the avoidance of threats to national security?

   – Are returning Daesh members subjected to any deradicalisation process?

   – Is there differential treatment depending on the age of the person involved?

v. Have any returning Daesh members or suspects been prosecuted for criminal offences?

   – If so, for which offences?

   – What was the outcome of the prosecution?

3.1. Deprivation of citizenship

13. Concerning the first question, it appears from the answers to the questionnaire that 11 member States allow for deprivation of citizenship for terrorism-related crimes or for joining a terrorist organisation (Austria, Denmark, Finland, France, Germany, the Netherlands, Norway, Romania, Slovenia, Switzerland and the United Kingdom). While some legislations require a final conviction for a terrorist offence (for example Finland, Norway), others provide for the possibility to strip nationality from a citizen who is abroad and has joined an organisation that endangers national security (for example Netherlands) or actively takes part in combat actions/operations for an organised armed group or a terrorist organisation abroad (for example Austria, Germany), without the need for a conviction. Some member States have introduced or expanded these powers only in recent years (for example Denmark, Finland, Germany, Norway in 2019). A UK citizen can be deprived of their citizenship if the deprivation is conducive to the public good, and in cases of naturalised citizens, if they have conducted themselves in a manner which is seriously prejudicial to the vital interests of the United Kingdom. In most member States, however, it is not possible to withdraw a person's nationality if that person would become stateless as a result, in line with the prohibition included in Article 7.3 of the European Convention on Nationality (STE No. 166).[8]

14. Some replies indicated that although domestic legislation provides for deprivation of citizenship, no such procedure had yet been completed (Finland, Germany, Norway and Slovenia). In the Netherlands, 14 nationals had been deprived of nationality without a criminal conviction. In France, one of the largest European source countries of foreign fighters, nationality deprivation is rare, with 13 reported cases linked to terrorism-related convictions between 1996 and 2016. The United Kingdom has made a more extensive use of citizenship revocation compared to other countries, as approximately 150 persons linked to terrorism and serious crime have been deprived of their citizenship since 2010.[9]

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7. These replies were received between March and August 2020.

8. According to Article 7.3, such withdrawal is possible only in cases where the nationality has been acquired through fraud. See also the report on "Withdrawing nationality as a measure to combat terrorism: a human rights-compatible approach?", Doc. 14790.

9. House of Commons Library, "Returning terrorist fighters", 15 March 2019.

15. The replies to this question suggest that contrary to what Assembly Resolution 2263 (2019) recommended, some member States have recently expanded their powers of citizenship deprivation in relation to terrorism and foreign fighters.[10] As already noted by the Assembly, such a practice, beyond its human rights implications, goes against the principle of international co-operation in combating terrorism, reaffirmed in United Nations Security Council Resolution 2178 (2014).[11] This resolution does not only refer to the obligation to prevent foreign fighters from leaving their country of nationality or residence, but also requires States to develop and implement prosecution, rehabilitation and reintegration strategies for returning foreign fighters, which seems more difficult when they are legally prevented from returning.[12] In fact, prosecuting authorities tend to view deprivation of nationality as an encroachment on prosecution interests.[13]

3.2. Repatriation

16. As regards the second question, almost all replies indicated that there was no active repatriation policy for national Daesh fighters. Only Türkiye stated that it repatriates citizens who are known or suspected to have been ISIS members.[14] Although most countries claim that nationals are entitled to return independently from Syria and Iraq to the national territory, they prefer to analyse each situation on a case-by-case basis, through consular assistance or diplomatic channels. For instance, in France, the Conseil d'État rejected applications seeking repatriation of French nationals (women and children) detained in camps in Kurdish-controlled north-eastern Syria, on the grounds that the repatriation would entail negotiations with foreign authorities or intervention on foreign soil, and that such measures were indissociable from the conduct of France's international relations, an area in which French courts had no jurisdiction.[15] France has however repatriated 29 orphaned or separated children (with the consent of their mothers) between 2019 and 2020, but refuses to repatriate adults.

17. In other countries, there have been recent developments concerning the recognition of a legal obligation to repatriate nationals under national law, particularly with regard to children and those facing extreme hardship. In Croatia, a legal obligation has been introduced to repatriate citizens suspected to have been Daesh members. In Finland, the government decided in 2019 to actively try to bring all children back, on the basis of the constitutional obligation to ensure the basic rights of children. In Germany, the courts established in 2019 that a mother had to be repatriated with her three children from the Al-Hol camp in Syria, in view of the catastrophic humanitarian situation there and on the basis of the constitutional duty of the State to protect the right to life and physical integrity.[16]

18. Some replies have expressly indicated that States have no obligation under international law to repatriate nationals who are known or suspected to have been Daesh members, including their children (for example Norway). The question of whether such an obligation arises under international human rights law, particularly having regard to the situation of the camps or prisons in which they are detained or live in Syria or

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10. According to a recent study, 18 European States, including 16 Council of Europe member States, expanded their deprivation powers since the year 2000. At the same time, the available data suggest that in practice, nationality deprivation powers have been used against a relatively small number of citizens (212 in the United Kingdom, 52 in Belgium, 21 in the Netherlands, 16 in France, 6 in Denmark, 2 in Estonia and 1 in Austria). See: https://files.institutesi.org/Instrumentalising_Citizenship_Global_Trends_Report.pdf, March 2022, p. 29.

11. See also UNSC Resolution 2396 (2017). Both resolutions adopted under Chapter VII of the Charter of the United Nations.

12. See also Carlota Rigotti and Júlia Zomignani Barboza, "Unfolding the case of returnees: How the European Union and its member States are addressing the return of foreign fighters and their families", *International Review of the Red Cross* (2021), 103 (916-917), 681-703; Maarten P. Bolhuis and Joris van Wijk, "Citizenship Deprivation as a Counterterrorism Measure in Europe; Possible Follow-Up Scenarios, Human Rights Infringements and the Effect on Counterterrorism", *European Journal of Migration and Law* 22 (2020) 338-365.

13. See, for instance, the Dutch public prosecutor: https://files.institutesi.org/Instrumentalising_Citizenship_Global_Trends_Report.pdf, March 2022, p. 29.

14. Non-member States such as Russia, Kazakhstan and Uzbekistan also repatriated their fighters.

15. One of these cases is pending before the Grand Chamber of the European Court of Human Rights (*H.F. and M.F. v. France,* Application No. 24384/19, together with *J.D. and A.D. v. France,* Application No. 44234/20).

As this report was published in July 2022, the European Court of Human Rights has since then delivered its judgment in this case; see https://hudoc.echr.coe.int/eng?i=001-219333.

16. Administrative Court Berlin, 10 July 2019, and Higher Administrative Court Berlin-Brandenburg, 6 November 2019. According to the Higher Administrative Court, repatriation of the mother could only be refused if there was a concrete and tangible threat, which the German Government was unable to prove. See Doc. 15055, par. 22. According to available information, the Netherlands repatriated several female ISIS members with their children from a camp in northeast Syria, to ensure that the women would be brought to justice and after criminal courts had indicated that they would terminate criminal proceedings against them due to their absence (https://icct.nl/publication/repatriation-women-children-netherlands/, 11 February 2022).

Iraq, goes beyond the scope of the present report and has already been partially addressed in the report of Mr Stefan Schennach (Austria, SOC) on "International obligations concerning the repatriation of children from war and conflict zones"[17].

19. However, it should be noted that several human rights bodies have already taken clear positions in favour of the return and repatriation of foreign fighters and their families to their State of nationality, on the basis of existing human rights obligations, but also with a view to bringing Daesh fighters to justice for the crimes committed in Syria and Iraq (or on European soil) and protecting their victims' rights.[18] The UN Committee on the Rights of the Child has recently held that France violated the rights of French children detained for years in camps in northeast Syria by failing to repatriate them, and that the State had a positive obligation to protect them against an imminent risk to their lives, having regard to the inhuman sanitary conditions in which they lived.[19] The Committee explicitly referred to the French authorities' awareness of the situation and their ability to intervene, as shown by previous repatriations of children from camps in Syria and their co-operation with Kurdish authorities.[20] The European Court of Human Rights (Grand Chamber) will soon deliver a judgment or decision on similar cases, concerning the failure to repatriate two French women and their children who are being held in camps in north-eastern Syria. The Court will have to establish whether France exercises jurisdiction with regard to its nationals detained abroad, and if so, whether the refusal to repatriate them amounts to a violation of Article 3 of the Convention (prohibition of inhuman or degrading treatment) and Article 3.2 of Protocol No. 4 (ETS No. 46) (right to enter the territory of the State of nationality).[21]

3.3. Number of returnees

20. According to the replies to the third question, the vast majority of Daesh returnees voluntarily returned to their country of nationality or residence on their own. There have also been deportations or extraditions from Türkiye to France, Denmark, Germany, Ireland and Latvia. The total number of returnees from conflict areas indicated in some of the replies are as follows: 1 (Ireland, Latvia, Poland), 16 (Switzerland), 20 (Finland), 60 (the Netherlands), 75 (Denmark), 83 (North Macedonia), 97 (Austria), 122 (Germany), 300 (France)[22] and 360 (United Kingdom). Some delegations stated that there have been no such returns to their countries, or that it was not possible to know the exact number of returnees.

3.4. Deradicalisation and other special measures upon return

21. A number of replies indicated that deradicalisation measures (exit intervention programmes) are implemented for returnees (Austria, Cyprus, Denmark, Finland, France, Germany, Norway, Switzerland, Türkiye and the United Kingdom). Some States conduct prior individual risk assessment (Austria, Cyprus, Denmark, Finland and Germany). In Slovenia, the authorities argue that deradicalisation measures are not necessary since deradicalisation is not possible. Other replies stated more generally that Daesh members or suspects are detained and kept for questioning, placed under surveillance or prosecuted (see below). In case

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17. Doc. 15055.
18. UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism and UN Special Rapporteur on arbitrary, summary and extra-judicial executions, submissions in the case of *H.F. and M.F. v. France*, 28 September 2020;

Council of Europe Commissioner for Human Rights, third party intervention before the Court, 25 June 2021 (www.coe.int/en/web/commissioner/-/commissioner-publishes-her-observations-on-the-repatriation-of-european-nationals-held-in-camps-in-north-east-syria).

See also International Commission of Inquiry on the Syrian Arab Republic, established by the UN Human Rights Council), Report of 8 February 2022, pp. 19-20, recommending the repatriation of nationals held in the north-east of Syria for alleged association with Daesh, in particular children with their mothers;

UN Key Principles for the Protection, Repatriation, Prosecution, Rehabilitation and Reintegration of Women and Children with Links to United Nations Listed Terrorist Groups, April 2019, at p. 4.

According to recent figures, the camps in northeast Syria now hold approximately 42 000 non-Syrian nationals, including more than 30 000 Iraqi nationals and 11 000 third country nationals, of which at least 27 000 are children. In addition, several Daesh fighters and other individuals, including hundreds of boys, are held in prisons and detention centres,

19. "France violated rights of French children detained in Syrian camps", UN News, 23 February 2022.
20. The issue of whether France exercised jurisdiction over the children was examined in the previous admissibility decision of 30 September 2020.
21. See footnote 15 above. It appears from the facts that at least in one case the woman is subject to an arrest warrant issued by French anti-terrorism judges.
22. Within the context of the "Cazeneuve Protocol" which provided a procedure for the administrative transfer of French fighters from Türkiye to France.

prosecution is not possible, suspects may be kept in custody under special warrants issued by the Ministry of Interior (Cyprus) or subjected to special terrorism prevention measures, such as travel and movement restrictions, exclusion areas or GPS monitoring (United Kingdom).

22. Some replies indicated that deradicalisation and disengagement programmes are aimed at social reintegration (Cyprus, Finland, Norway, Switzerland). Specific programmes and measures designed for child returnees were also mentioned (Cyprus, Denmark, France and the Netherlands).

3.5. Criminal prosecution

23. Many countries' replies indicated that the criminal prosecution of Daesh foreign fighters returning from Syria and Iraq has been undertaken for terrorism-related offences, such as membership of a terrorist organisation, participation in terrorist activities, preparation of terrorist acts, support of a terrorist organisation abroad, recruitment, receiving training or travelling for terrorist purposes, as well as financing any of these acts. Those returning to France are generally charged with "*association de malfaiteurs en vue de préparer des actes terroristes*" (association of wrongdoers in relation to a terrorist enterprise). Other criminal offences applied include illegal participation in armed conflict (Latvia), involvement in a criminal organisation for the purpose of committing especially serious crimes against humanity or peace, war crimes, genocide, etc. (Latvia), entry and residence in conflict zones without prior permission (Denmark); and entering or remaining in a designated area outside the country (the United Kingdom).

24. According to the replies received, the numbers of prosecuted/convicted returning foreign fighters are as follows: one prosecuted in Ireland; 1 convicted in Latvia; 1 convicted in Poland; 4 convicted in the Czech Republic; 8 prosecuted in Portugal; 9 convicted in Norway; 15 convicted in Denmark; 103 prosecuted in Germany,[23] 400 convicted in Turkey.[24] In some countries, criminal investigations are initiated against foreign fighters who have not yet returned, and national or international arrest warrants are issued (Denmark, France and the Netherlands). In certain systems, they can be tried and convicted *in absentia*, which means that they are placed in detention to serve their sentences upon return (France).[25]

4. Ensuring justice and accountability for the crimes committed by Daesh foreign fighters

25. As already noted in previous resolutions, it is beyond question that Daesh and its supporters have been variously responsible for or complicit in a wide range of offences under national and international law, including terrorist offences, war crimes, crimes against humanity such as sexual slavery, imprisonment, rape, torture and murder, and genocide. In May 2021, the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL (UNITAD) confirmed that there was evidence that ISIS had committed genocide against the Yazidis as a religious group, as well as war crimes and crimes against humanity.[26] With respect to investigations into crimes committed against the Yazidis in Sinjar, the number of perpetrators identified by UNITAD was 1 743, including 102 foreign fighters. It also identified evidence substantiating the crime of direct and public incitement to commit genocide against Shia Muslims, in relation to mass executions of unarmed cadets and military personnel from Tiktir Air Academy in June 2014. In its latest report, published in November 2021, UNITAD stated that investigations into the commission of sexual violence against, and the enslavement of members of the Christian community by ISIL remained a key line of inquiry.[27]

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23. This number includes the stage of preliminary proceedings. The German reply indicated that out of the 122 returnees, 103 were subject to preliminary proceedings.
24. The Turkish reply stated that this number includes those convicted of crimes related to Daesh and other radical terrorist organisations.
25. For sentences of at least twelve years of prison.
26. www.unitad.un.org/news/special-adviser-khan-briefs-security-council-unitad-investigations. UNITAD was established by the UN Secretary-General pursuant to UNSC Resolution 2379 (2017), to support domestic efforts to hold ISIL accountable by collecting, preserving and storing evidence in Iraq of acts that might amount to war crimes, crimes against humanity and genocide committed in Iraq. National governments and parliaments have also recognised the genocide against the Yazidi community. For instance, the Dutch Parliament formally recognised the crimes against the Yazidis as crimes against humanity and genocide on 6 July 2021. See also my earlier report on "Prosecuting and punishing the crimes against humanity or even possible genocide committed by Daesh", Doc. 14402, 22 September 2017.
27. Seventh report of the Special Adviser and Head of the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh/Islamic State in Iraq and the Levant, S/2021/974, 24 November 2021. Other current lines of inquiry concern the mass executions (of mostly Shia prisoners) at Badush prison in Mosul in 2014, crimes committed against members of the Albu Nimr tribe (Sunni) between 2014 and 2016, crimes committed against Kaka'i, Shabak and Shia Turkmen communities, and the development and use of chemical and biological weapons.

26. Therefore, Daesh foreign fighters should be held to account not only for terrorism-related offences, in line with UN Security Council Resolutions 2178 (2014) and 2396 (2017) and national anti-terrorist legislation, but first and foremost for the more serious international crimes committed, including genocide, war crimes and crimes against humanity. Although it may be easier to prosecute foreign fighters for charges such as membership of a terrorist organisation, as the evidentiary threshold is lower compared to the actual crimes committed, the problem with this approach is that all foreign fighters receive a similar and often lower penalty, regardless of their role and whether they actively committed more heinous acts amounting to crimes under international law.[28] To limit the charges to terrorism-related offences fails to address the extreme seriousness of the crimes committed by Daesh in Iraq and Syria.

27. The question is how and by whom those suspected of these crimes should be prosecuted. Assembly Resolution 2190 (2017) recalled that the primary responsibility for prosecuting Daesh suspects lies on the States in which the crimes were committed, in other words Iraq and Syria.

4.1. Prosecution by the authorities in Iraq and Syria

28. Iraq has been prosecuting Daesh suspects for some time, but the procedure lacks basic procedural safeguards and results in indiscriminate, often disproportionate sentences. In December 2017, Human Rights Watch (HRW) found "serious legal shortcomings that undermine the efforts to bring ISIS suspects to justice", with "no national strategy to ensure the credible prosecution of those responsible for the most serious crimes"; "authorities appear to be prosecuting all ISIS suspects in their custody under counter-terrorism laws, primarily for ISIS membership, and not focusing on specific actions or crimes that may have been committed." 7 374 people had been charged with ISIS membership since 2014, with 92 sentenced to death and executed – including one death sentence passed against an ISIS cook. At the time HRW reported that Iraq held at least 20 000 ISIS suspects in detention, often in overcrowded and sometimes inhuman conditions, with children detained alongside adults.[29]

29. In March 2019, HRW reported that in Nineveh province in northern Iraq, judges were "requiring a higher evidentiary standard to detain and prosecute suspects, minimising the court's reliance on confessions alone, erroneous wanted lists, and unsubstantiated allegations": failings that HRW had criticised in its earlier report.[30] Elsewhere, serious concerns remained: in April 2019, Agnes Callamard, UN Special Rapporteur on extrajudicial, summary or arbitrary executions, called on the Iraqi authorities to "take appropriate steps to prosecute the crimes perpetrated against the Iraqi people, including alleged genocide, crimes against humanity and war crimes" and to "respect fair trial guarantees, ensure victim participation and uphold the right to truth." Her statement followed the conviction and sentencing to death of four senior Daesh figures for membership of Daesh, despite evidence (including from the defendants themselves) of their complicity in even more serious crimes.[31]

30. There are many foreign fighters amongst the detainees in Iraq, including nationals of European States. In February 2019, it was reported that 13 French nationals had been captured by the SDF in Syria and transferred to the authorities in Iraq, where they would be prosecuted. The 13 were part of a group of 500 transferred Daesh fighters whom the SDF was expected to transfer to Iraq.[32] In June 2019, it was reported that 11 French nationals had been sentenced to death by hanging for simple Daesh membership.[33] The trial judge stated that "the penalty is the death sentence, whether they fought or not." Observers suggested that France was in effect "outsourcing" the judicial process to Iraq, despite the trials being unfair and the punishment disproportionate.[34] It has been claimed that "the death sentences of jihadists were handed down on the basis of allegations of facts that were not clearly stated, discussed or proven, following trials that were usually expeditious and did not respect a number of the defendants' fundamental rights. These procedures are therefore contrary to all the international instruments ratified by France and Iraq."[35] The French

28. "Unfolding the case of returnees: How the European Union and its member States are addressing the return of foreign fighters and their families", op.cit., p. 696.
29. "Flawed Justice: Accountability for ISIS Crimes in Iraq", 5 December 2017.
30. "Iraq: Key Courts Improve ISIS Trial Procedures", 13 March 2019.
31. "Iraq: UN expert says prosecution of ISIL leadership must be fair and thorough", 4 April 2019.
32. "Iraq to prosecute 13 French Isis fighters captured in Syria", *Financial Times*, 25 February 2019.
33. "Ce que l'on sait des onze djihadistes français condamnés à mort en Irak", *La Chaine Info*, 3 June 2019.
34. "France Hands ISIS Suspects to Iraq, Which Sentences Them to Hang", *New York Times*, 29 May 2019.
35. "Jihadists in the East: the case of French citizens facing the death penalty in Iraq", Ensemble Contre la Peine de Mort.

Commission nationale consultative des droits de l'homme considered that France should give priority to the return of its nationals sentenced to death by the Iraqi courts, having also regard to the fact that French courts had full jurisdiction to try such persons on the basis of their nationality.[36]

31. According to more recent reports, while considerable efforts have been made by the Iraqi authorities to bring former Daesh fighters to justice, there are still "serious concerns" about the fairness of the proceedings and the application of the death penalty.[37] Furthermore, Iraq has not yet adopted an appropriate legal framework allowing for the prosecution for war crimes, crimes against humanity and genocide, which means that ISIS fighters can only be prosecuted under anti-terrorism legislation.[38] Yazidis are not involved in these trials.

32. The prospects for prosecution of Daesh members in Syria are even more complicated. This is primarily due to the multiplicity of actors – Syrian, SDF/ Kurdish, other Syrian opposition groups, Russian, Turkish, and US/ coalition military forces.

33. Syrian President Bashar al-Assad has stated that "Every terrorist in the areas controlled by the Syrian State will be subjected to Syrian law, and Syrian law is clear concerning terrorism. We have courts specialized in terrorism and they will be prosecuted."[39] It has been noted that "Syrian criminal justice is not known for its guarantees of due process, but rather its pre-trial torture and post-trial mass executions after trials lasting several minutes… Justice in the Syrian system, without due process and the protection of the rights of the accused, is not the type of accountability that would be palatable to the international community."[40] More specifically, prosecution of terrorist offences in Syria is said to suffer from a lack of legal certainty in the applicable laws, disproportionate sentencing, a lack of procedural guarantees such as effective legal representation, public trials and appeals processes, and a lack of judicial independence.[41]

34. The fact that the great majority of Daesh detainees in Syria are in Kurdish-led SDF captivity does not simplify the situation. Although still controlling extensive territory, the SDF do not qualify as a State entity and are not subject to legal obligations that would ensure fair trial guarantees.[42] According to a June 2019 report on trials of Daesh suspects in Rojava in Kurdish-controlled Syria, the "people's courts" consist of a bench of three judges applying elements of Syrian law; there are defence lawyers and an appeals process, torture has been prohibited and the death penalty abolished. It was even reported that the SDF no longer transferred Daesh suspects to Iraq, since people previously transferred had been executed there.[43] Other reports have noted, however, that "There are major concerns about due process, with suspects denied the right to a lawyer and to appeal their sentences"[44] and "there are few details about how justice is being carried out and what safeguards, if any, have been put in place to ensure accused fighters get a fair hearing."[45] In July 2019, it was reported that over 7 000 Syrian Daesh suspects had been tried and sentenced by these courts, with another 6 000 awaiting trial.[46] However, it has been reported that foreign detainees (Iraqi or European) cannot be prosecuted, since the self-administration courts only try Syrian nationals.[47] It also appears that these courts are currently not able to prosecute Daesh fighters for international crimes, such as genocide or war crimes.[48]

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36. www.cncdh.fr/sites/default/files/opinion_french_death_penalty_iraq.pdf, 28 January 2020.
37. UN Assistance Mission for Iraq and Office of the UN High Commissioner for Human Rights: https://news.un.org/en/story/2020/01/1056142, 28 January 2020.
38. UNITAD has stated that it is ready to provide support, upon the request of the Government of Iraq, with respect to the adoption of such legislation. Draft legislation had been introduced before the Iraqi parliament in 2020, before the parliamentary elections held in October 2021.
39. "Bachar el-Assad: 'Terrorists are terrorists. French or not, they must abide by Syrian law'", *Paris Match*, 28 November 2019. For further details of the legal situation in Syria, see "Bringing (Foreign) Terrorist Fighters to Justice in a Post-ISIS Landscape Part I: Prosecution by Iraqi and Syrian Courts", International Centre for Counter-Terrorism, 22 December 2017.
40. "Northeastern Syria: Complex Criminal Law in a Complicated Battlespace", Just Security, 28 October 2019.
41. "Enforcing human rights in counter-terrorism laws in Syria", Syrian Legal Forum.
42. Northeast Syria is currently administered by the Autonomous Administration of North and East Syria (AANES) with its unified military force, the SDF.
43. "'Revenge Is For The Weak': Kurdish Courts In Northeastern Syria Take On ISIS Cases", *National Public Radio*, 3 June 2019.
44. "Difficult Justice Questions", Human Rights Watch, 6 November 2017.
45. "Accused Syrian IS Fighters Starting to Face Justice", *Voice of America*, 6 August 2019.
46. "Bringing ISIS to Justice: Towards an International Tribunal in North East Syria", Rojava Information Centre, 5 July 2019.
47. International Commission of Inquiry on the Syrian Arab Republic, Report of 8 February 2022, p. 19.
48. Tanya Mehra and Matthew Wentworth, "New Kid on the Block: prosecution of ISIS fighters by the Autonomous Administration of North and East Syria", International Centre for Counter-Terrorism, 16 March 2021: https://icct.nl/publication/prosecution-of-isis-fighters-by-autonomous-administration-of-north-east-syria/.

Moreover, the management of prisons and detention centres by the autonomous administration in Northeast Syria poses significant challenges in terms of security, as shown by the assault by Daesh on Ghwayran prison in Hasakah in January 2022, which led to the escape of hundreds of Daesh fighters.[49]

35. Given that, for various reasons, the authorities – whether *de facto* or *de jure* – in Syria and Iraq cannot generally be relied upon at present to deliver justice according to international standards and reflecting the gravity of the crimes committed, alternatives are needed. Only two possibilities exist: some form of an international or hybrid tribunal, and for foreign fighters, repatriation to their countries of nationality, for trial before the domestic courts.

4.2. Prosecution by an international or hybrid tribunal

36. My earlier report entitled "Prosecuting and punishing the crimes against humanity or even possible genocide committed by Daesh"[50] examined alternatives to prosecution by purely national authorities in either the region or in foreign fighters' countries of nationality.

37. The most obvious solution seems to be prosecution before the International Criminal Court (ICC). There are three legal avenues towards achieving this: first, Syria and/or Iraq accepts the ICC's jurisdiction (territorial jurisdiction), which in 2017 I considered to be unrealistic, and which still seems unrealistic today; second, the UN Security Council refers the situation to the ICC Prosecutor, which I considered unlikely in 2017 and consider even more unlikely today, given the military involvement of Russia, which has a Security Council veto, and the fact that such a referral would arguably relate to the entire "situation" in Syria,[51] and third, the ICC Prosecutor decides to investigate crimes committed by a national of a State that is party to the ICC Statute (personal jurisdiction), which the Prosecutor has so far declined to do. In 2015, the ICC's Prosecutor issued a "Statement on the alleged crimes committed by ISIS", in which she noted that although thousands of foreign fighters had joined ISIS, some of whom might have been involved in the commission of crimes under international law, ISIS was primarily led by nationals of Iraq and Syria, and so the prospects of investigating and prosecuting those most responsible within the leadership of ISIS appeared limited. She thus concluded that "the jurisdictional basis for opening a preliminary examination into this situation is too narrow at this stage".[52] Despite the Assembly's call to the ICC Prosecutor to reconsider this decision in light of subsequent submissions by concerned parties (paragraph 8.3 of Resolution 2190 (2017), the position has not changed since then.

38. Given the ICC's paralysis, an alternative would be an *ad hoc* international tribunal or some form of 'hybrid' (national/ international) tribunal. In 2017, I noted that "The UN Security Council has adopted resolutions establishing *ad hoc* international criminal tribunals twice in the past, for the former Yugoslavia in 1993 and for Rwanda in 1994. There have also been various special courts based on agreements between the national authorities of the State in which relevant offences were committed and the United Nations, such as the Special Court for Sierra Leone, established in 2002, and the Special Tribunal for Lebanon, established in 2007. Another model might be the special "hybrid" judicial mechanisms within the domestic legal system, such as the Special Panels for Serious Crimes in East Timor, established in 2000, the Extraordinary Chambers in the Courts of Cambodia, established in 2001, or the War Crimes Chamber of the State Court of Bosnia-Herzegovina, established in 2004, in which international judges sit alongside national ones." One could also mention in this context the Kosovo Specialist Chambers (part of the Kosovo*[53] judicial system, but located in the Hague), established in 2015.

39. Although the UN Security Council has adopted resolutions considering that Daesh constituted a global threat to international peace and security through its terrorist acts and its continued gross, systematic and widespread attacks against civilians, its violations of humanitarian law and its recruitment of foreign terrorist fighters,[54] it is currently unlikely that it would establish an *ad hoc* tribunal to prosecute and punish its crimes

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49. www.washingtonpost.com/world/2022/02/03/syria-hasakah-isis-prison-attack/, 3 February 2022.
50. Doc. 14402, 22 September 2017.
51. On 22 May 2014, a draft Security Council resolution to refer the situation in Syria to the ICC was vetoed by Russia and China. In 2018, the Independent International Commission of Inquiry on the Syrian Arab Republic recommended that the Security Council refer the situation to the ICC or an *ad hoc* tribunal, see conference room paper, "I lost my dignity": Sexual and gender-based violence in the Syrian Arab Republic, A/HRC/37/CRP.3. Some have argued that it would be possible to limit the UNSC referral to only the actions of Daesh/ISIS and excluding the crimes committed by the Assad Government, but this would raise problems of legitimacy and selectivity.
52. www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-fatou-bensouda-alleged-crimes-committed-isis, 8 April 2015.
53. *All reference to Kosovo, whether to the territory, institutions or population, in this text shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.

under Chapter VII of the UN Charter, such as those set up for the former Yugoslavia and Rwanda in the 90s. A hybrid tribunal on the basis of an agreement between the State in which the crimes were committed and the United Nations, even if not necessarily requiring the involvement of the UN Security Council,[55] is practically impossible without the consent and active participation of Iraq and/or Syria.

40. In 2019, the Swedish Government proposed the creation of an international tribunal to hold Daesh fighters accountable, which was supported by the Netherlands.[56] The legal basis for such a court could be a multilateral treaty under which the parties would transfer the jurisdiction they have over members of ISIS (active personality principle) to the tribunal. The proposal was criticised as being selective (addressing only one group involved in the conflict) and perceived to be designed for European States to avoid their responsibility to repatriate. It was also argued that without the participation or co-operation of the territorial States (Iraq and Syria) and with only a small number of States involved, the special tribunal could only make a limited contribution to accountability and justice.[57]

41. Although I am aware of the practical difficulties facing the creation of a new international tribunal, I continue to believe that the best solution would be an international judicial mechanism with a mandate to prosecute and punish international crimes committed by Daesh members. If, as seems to be the case, the proposal for a hybrid tribunal within Iraqi national courts (or a variant with international experts) remains blocked,[58] member States should instead consider establishing a fully international special tribunal. Such a tribunal could have jurisdiction over Daesh members who have the nationality of member States, are detained in Iraq and/or Syria, and cannot face trial there in accordance with international human rights standards. It would cover international crimes under customary international law, especially war crimes, crimes against humanity and genocide.[59] The establishment of this tribunal, possibly through a multilateral treaty, should be actively supported by member States within the UN General Assembly, the Council of Europe or the European Union. At the same time, Iraqi authorities should be highly encouraged to participate in negotiations with a view to establishing either a hybrid or a special international tribunal.

4.3. Prosecution by the authorities in Council of Europe member States

42. As noted above, most of the replies from national parliaments to the questionnaire referred to examples of prosecutions and convictions of Daesh returnees for terrorism-related offences. Indeed, States are bound by UN Security Council Resolution 2178 (2014) and by the 2015 Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (for those States that have ratified it) to criminalise the phenomenon of foreign terrorist fighters, by establishing serious criminal offences regarding the travel, recruitment and financing of foreign terrorist fighters. This criminalisation applies, although not exclusively, to acts committed by their own nationals, for instance the act of travelling to a State other than the State of nationality or residence for the purpose of terrorism (Article 4). Although there is no explicit wording that would create the obligation to repatriate foreign fighters living or held in detention abroad to their States of nationality for the purposes of prosecution, UN Security Council Resolution 2178 (2014) establishes a general obligation to develop and implement prosecution, rehabilitation and reintegration strategies for returning foreign terrorist fighters. Moreover, the Council of Europe Convention on the Prevention of Terrorism requires States to establish jurisdiction when the offence is committed by a national of the State, regardless of the place of commission.[60]

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54. UNSC Resolution 2379 (2017).
55. For instance, through endorsement by the UN General Assembly, like the Extraordinary Chambers in the Courts of Cambodia (Resolution 57/228, 13 May 2003).
56. https://ecfr.eu/article/commentary_a_tribunal_for_isis_fighters/, 31 May 2019. www.cbc.ca/radio/asithappens/as-it-happens-tuesday-edition-1.5152880/why-this-swedish-lawmaker-wants-to-set-up-a-new-court-for-isis-fighters-1.5146767, 28 May 2019.
57. http://opiniojuris.org/2021/03/15/scsl-symposium-a-legal-legacy-that-opens-the-way-to-justice-in-challenging-places-and-times-part-ii/, 15 March 2021. See also Marieke de Hoon, "Accountability for the Yazidi Genocide", Position Paper for the Dutch Parliament, 10 February 2022.
58. In October 2019, the Iraqi foreign minister cast doubt on the likelihood of Iraq agreeing to any hybrid tribunal for foreign fighters on Iraqi soil and stressed that the death penalty would continue to apply for anyone tried for crimes committed in Iraq: https://paxforpeace.nl/media/download/policybrief-iraq-isis-tribunal-2019-eng.pdf, 31 October 2019. It would seem that Iraqi authorities are not in favour of a hybrid tribunal and one of the arguments is that the Iraqi Constitution does not permit the nomination of non-Iraqi judges nor the creation of special courts. For instance, in 2021 the Federal Supreme Court of Iraq rejected the Kurdish Regional Government's plan to establish a special criminal court to prosecute ISIS members accused of international crimes, on the basis that the Constitution prohibited the establishment of a special or extraordinary court.
59. Some have argued that it should only focus on terrorism-related crimes: www.justsecurity.org/75544/a-tribunal-for-isis-fighters-a-national-security-and-human-rights-emergency/, 30 March 2021.

43. Furthermore, international humanitarian law and international criminal law impose on States the obligation to prosecute certain crimes, regardless of where they happened, such as war crimes,[61] as well as other crimes covered by specific international treaties.[62] States have a right under international law to assert jurisdiction over crimes against humanity and genocide committed abroad, for instance by their nationals or on the basis of the principle of universal jurisdiction.[63] Some States that provide for universal jurisdiction over certain crimes limit however its application to alleged perpetrators who are physically present in their territory (for example the Netherlands).

4.3.1. Recent examples concerning international crimes committed by Daesh members

44. Cases related to Daesh crimes have been brought in several Council of Europe member States, most notably in Germany, France, Sweden and the Netherlands.[64]

45. On 26 January 2021, the Court of Appeal of the Hague sentenced a Dutch national who returned from Syria to seven years' imprisonment for participation in a terrorist organisation (IS) and war crime of outrage upon personal dignity. While in Syria, the accused posed next to a man who had been executed by IS and tied to a cross. In the photo, later posted by the accused on Facebook, he appeared to be proud and actively posing, the court finding that he had contributed to the humiliation and degradation of the deceased person, placed *hors de combat*.

46. In January 2022, two independent organisations that collect victim statements from Yazidis in Iraq reported that they found evidence of Dutch ISIS fighters' involvement in crimes committed against the Yazidis. One of the victims, Layla Taloo, has testified that she was enslaved and sexually abused by a Danish ISIS fighter and his Dutch wife. However, there is no indication where the Dutch wife is at the moment after she escaped from al-Hol detention camp in Syria last year.

47. Germany applies universal jurisdiction less restrictively than other States and consequently many more cases have been brought before German courts.[65] On 30 November 2021, the Higher Regional Court of Frankfurt convicted Taha al J., an Iraqi national, to life imprisonment for genocide, crimes against humanity and war crimes. This was the first time worldwide that a court recognised that the crimes committed against the Yazidis amounted to genocide. Taha al J. joined ISIS in 2015 and "bought" a Yazidi woman and her five-year-old daughter who were captured during the attack on Sinjar in 2014. Together with his wife, he held the woman and child as slaves and forced them to practice Islam. When the five-year-old girl urinated on her bed due to an illness, he punished her by cuffing her to a window in the scorching heat and letting her die in front of her mother. The German court concluded that Taha al J. acted against the Yazidi girl and her mother "with the intent to eliminate the Yazidi religious minority". The girl's mother participated in the proceedings as a co-plaintiff after an NGO identified and located her in Iraq; she was present in the courtroom when the judgment was handed down.[66] In October 2021, the Munich Higher Regional Court convicted Taha al J.'s wife (German national) to ten years imprisonment for crimes against humanity and her involvement in the death of the five-year-old Yazidi girl.

48. On 21 April 2021, a Higher Regional Court sentenced a German national to 4 years and 3 months of imprisonment for participation in a terrorist organisation, aiding and abetting the enslavement of a Yazidi woman (crime against humanity) and pillage (war crime). In 2015, the accused travelled with her three-year

60. Article 14 (jurisdiction), which is applicable to the offences set forth in the Additional Protocol.
61. First Geneva Convention, Article 49; Second Geneva Convention, Article 50; Third Geneva Convention, Article 129; and Fourth Geneva Convention, Article 146. These provisions require States to enact legislation to punish "grave breaches" (war crimes), to search for persons who allegedly committed such crimes and to bring them before their courts or to extradite them to another State for prosecution (*aut dedere aut judicare*). Under customary law, States are also obliged to investigate and prosecute war crimes committed by their nationals and this applies in both international and non-international armed conflicts (https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule158).
62. See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, Art. 7.
63. According to the International Court of Justice, Article VI of the Genocide Convention only obliges States to exercise territorial criminal jurisdiction, while it does not prohibit them from conferring jurisdiction based on other criteria, in particular the nationality of the accused (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment of 26 February 2007, para. 442).
64. See also Marieke de Hoon, "Accountability for the Yazidi Genocide", op. cit.; Genocide Network, Eurojust, Overview of National Jurisprudence, January 2022: www.eurojust.europa.eu/publication/overview-national-jurisprudence.
65. Germany is able to create files against suspects that are not on German territory, for instance based on evidence provided by refugees.
66. "German court hands down first genocide conviction against ISIS member", Doughty Street Chambers.

old daughter to Syria to join IS. She became the spouse of an ISIL fighter and was provided, free of charge, two dwellings appropriated by ISIL as spoils of war. She often received the visit of another spouse, accompanied by an enslaved Yazidi woman who carried out housework or childcare tasks for the accused.

49. In Sweden, in March 2022, the District Court of Stockholm sentenced a Swedish woman to six years imprisonment for enlisting her son to ISIL armed forces (war crime). The accused took her then 11-year-old son to Syria in April 2013. Soon after arrival, the boy was recruited and for two and a half years used as a child soldier by ISIL armed groups. The boy died in Raqqa, Syria, at the age of 16.

50. In France, on 7 September 2021, the Criminal Chamber of the Cour de cassation confirmed the indictment against Lafarge, a company incorporated under French law, on the charges of complicity in crimes against humanity, financing of terrorist activities and endangering the lives of others. Lafarge's local subsidiary operated a cement plant in a region of Syria occupied by various armed groups, including ISIL. The subsidiary made payments to these armed groups so that the activity would not be compromised. The court found that Lafarge financed, via its subsidiaries, ISIL activities through the payment of several million dollars at that it had precise knowledge of the actions of the organisation which were likely to constitute crimes against humanity. The case has been remitted to the interlocutory court for proceedings to move forward.

51. Finally, it is worth mentioning that in October 2021, France and Sweden signed a Joint Investigation Team (JIT) to support proceedings involving core international crimes committed by foreign terrorist fighters against the Yazidi population in Syria and Iraq. The JIT aims to avoid multiple interviews of the same victims, thus mitigating the risk of re-traumatisation. States that are not formally JIT partners may benefit from its work and actively contribute to the collection of information regarding the involvement of their own nationals.

52. From the examples mentioned above, we can see that several convictions have been handed down with regard to female Daesh members. As Ms Prodeau stated in our hearing of 23 May 2022, the Yazidi community is often alarmed by the perception that female members were victims themselves or by the possibility that they could escape culpability on the basis of gender stereotypes. In some instances, female Daesh members held Yazidi women captive or prepared them to be raped. Therefore, it is extremely important to address the individual responsibility of all returning Daesh members, including women, having regard to the specific role they may have played in the commission of crimes, including as supporters, facilitators or perpetrators.[67]

4.3.2. Evidentiary issues

53. Assembly Resolution 2190 (2017) recognised the significance of evidentiary issues to the prospects for prosecution of Daesh suspects, notably prosecution before an international tribunal outside the region or prosecution of foreign fighters in their countries of origin. Problems such as the preservation of material evidence, for example documentation and burial sites, the recording of witness testimony and the availability of witnesses to give evidence outside the region must be addressed. Without sufficient, specific evidence, the chances of justice being done for the extremely serious crimes that have been committed will be drastically reduced.

54. Two international bodies have been established to investigate violations of international human rights and humanitarian law in Syria: the "Independent International Commission of Inquiry on the Syrian Arab Republic", created by the United Nations Human Rights Council (HRC) in August 2011; and the "International, Impartial and Independent Mechanism to assist in the investigation and prosecution of persons responsible for the most serious crimes under International Law committed in the Syrian Arab Republic since March 2011" (IIIM), created by the UN General Assembly in December 2016. The Commission's mandate, as expressed in HRC Resolution 21/26, is "to conduct an international, transparent, independent and prompt investigation into abuses and violations of international law, with a view to hold to account those responsible for violations and abuses, including those that may amount to crimes against humanity and war crimes". The Mechanism's mandate is "to collect, consolidate, preserve and analyse evidence of violations of international humanitarian law and human rights violations and abuses and to prepare files in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards, in national, regional or

67. This is also in line with UNSC Resolution 2396 (2017), paras. 29-31, which refers to the spouses and children of foreign terrorist fighters. See also: https://opiniojuris.org/2021/09/09/isis-as-a-joint-criminal-enterprise-part-ii-the-role-of-women/, 9 September 2021; and the International Conference on the Roles of Women and Children in Terrorism, held on 15-16 December 2021 at the Council of Europe, https://rm.coe.int/event-summary-conf2021-women-and-children-in-terrorism-eng/1680a5bd45.

international courts or tribunals that have or may in the future have jurisdiction over these crimes, in accordance with international law." It should be noted that the mandate of both bodies extends to acts committed not only by Daesh but by all parties to the conflict in Syria.

55. The UNITAD was established in 2018 pursuant to UN Security Council Resolution 2379 (2017). Although UNITAD's term of reference determines that the evidence gathered would be primarily made available to Iraqi authorities, it also provides the possibility of sharing evidence with other States to assist them in domestic prosecutions against members of ISIS. The ability of UNITAD to collect testimonial evidence from witnesses combined with its capacity to identity corroborating internal ISIL documentation from digital battlefield evidence, has been of particular assistance in supporting different national proceedings. For instance, support was provided to the Portuguese authorities with respect to the arrest of two individuals suspected of having formed part of ISIL networks during its period of occupation of Mosul. UNITAD has also established a dedicated database to collate and cross-reference evidence relating to foreign terrorist fighters. It also has an associate status with the Genocide Network supported by Eurojust.[68]

56. These international UN mechanisms, while not being a court tasked with prosecuting and trying individual perpetrators, have become invaluable tools for the collection of evidence in support of national jurisdictions. I believe that member States should further support and engage with these investigative mechanisms, through voluntary financial contributions, nomination of seconded national experts, and by signing co-operation agreements with them with a view to using their evidentiary material in domestic criminal proceedings.

57. With regard to access to battlefield evidence, the 2020 Eurojust Memorandum on Battlefield Evidence suggested that in the past few years several countries have used such evidence in criminal proceedings against foreign terrorist fighters and other persons involved in armed conflicts.[69] It is also important to note that the Committee of Ministers of the Council of Europe has recently adopted a specific recommendation on the use of information collected in conflict zones as evidence in criminal proceedings related to terrorist offences (CM/Rec(2022)8, 30 March 2022). The recommendation states that member States should take all necessary measures to ensure that information collected by military personnel and intelligence services in conflict zones is admissible as evidence under national criminal procedure laws. Member States are also encouraged to develop their co-operation with other stakeholders such as NGOs,[70] media outlets and private companies and contractors in order to use the information that they could have.

58. In this context, the "Operation Gallant Phoenix", an initiative of the US Government with its secretariat in Jordan, involves military and intelligence services from 27 States as well as their police authorities. It operates as a multilateral information-sharing platform and has become a major source of information and evidence on foreign terrorist fighters and their affiliates for law enforcement and judicial authorities.[71]

4.3.3. Cumulative prosecution

59. A report published in 2020 by the Genocide Network highlighted existing jurisprudence and national practices to show that it was possible to cumulatively prosecute and hold foreign terrorist fighters accountable for war crimes, crimes against humanity and the crime of genocide, in addition to terrorism-related offences (notably membership of a terrorist organisation).[72] Recent cases in several member States (France, Germany and the Netherlands) seem to confirm this trend, which usually leads to sentences significantly higher than those handed down for terrorist offences only. For instance, on 29 June 2021, the District Court of the Hague convicted a Dutch woman to six years' imprisonment for membership of a terrorist organisation and participating in an organisation that has the purpose to commit war crimes, for sharing videos showing ISIS prisoners being burned alive and therefore affecting the personal dignity of the deceased. The court considered for the first time that ISIS is not only a terrorist organisation but also a criminal organisation with the purpose to commit war crimes based on its inhumane and cruel treatment of persons who do not adhere to their beliefs.

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68. Seventh report of the Special Adviser and Head of the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh/Islamic State in Iraq and the Levant, S/2021/974, 24 November 2021, pp. 20-21.
69. www.eurojust.europa.eu/sites/default/files/assets/developments-in-the-fight-against-impunity-for-core-international-crimes-in-the-eu.pdf, May 2022, pp. 26-27.
70. For instance, Ms Prodeau explained in the hearing of 23 May 2022 how her organisation, Free Yezidi Foundation, collects information from Yazidi survivors and shares it with prosecutors from Council of Europe members States and UN investigative mechanisms.
71. "'Operation Gallant Phoenix', la guerre secrète des données contre les djihadistes", *lemonde.fr*, 25 March 2021.
72. www.eurojust.europa.eu/publication/cumulative-prosecution-foreign-terrorist-fighters-core-international-crimes-terrorism-related, May 2020.

60. Cumulative prosecution takes better account of the gravity of the offences committed by Daesh members and shows that anti-terrorism legislation and international criminal law/international humanitarian law can be complementary in ensuring comprehensive accountability and proportionate sentences.[73]

5. Other avenues for accountability: the question of State responsibility for genocide

61. In parallel to prosecuting Daesh members for international crimes in international or domestic courts, the question arises as to whether certain States could be held accountable before an international court for failure to comply with their obligations under the 1948 Genocide Convention in relation to the genocide committed by Daesh against the Yazidi and other protected groups. Those duties include: to refrain from committing genocide (by their own organs, agents or on their behalf);[74] to prevent genocide;[75] to punish persons where the crime has occurred;[76] and to enact necessary legislation to give effect to the obligations under the Convention.[77] The duty to prevent is particularly important. It requires a State to take measures to prevent the commission of genocide the instant a State learns of, or should have learned of, the existence of a serious risk that genocide will be committed. From that moment onwards, if the State has means available to it that are likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent, it is duty-bound to make such use of these means as the circumstances permit. This is an obligation of conduct rather than result, in the sense that States should "employ all means reasonably available to them, so as to prevent genocide so far as possible". For instance, regard must be had to the "capacity to influence effectively the action of persons likely to commit, or already committing, genocide", which depends *inter alia* on the strength of the links, or the geographical distance of the State concerned from the scene of the events.[78] This duty may indeed apply extraterritorially.[79]

62. By virtue of Article IX of the Genocide Convention, disputes between Contracting P arties relating to the interpretation, application or fulfilment of the Convention, including those relating to the responsibility of a State for genocide, may be submitted to the International Court of Justice (ICJ) by any of the parties to the dispute. The ICJ has held that all the States parties to the Convention have a common interest to ensure that acts of genocide are prevented and that, if they occur, their authors do not enjoy impunity. The obligations in question are owed by any State party to all the other States parties to the Convention. Therefore, any State party may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes,* and to bring that failure to an end.[80]

63. Given the impossibility to establish the responsibility of Daesh, as a non-State actor, before international courts, member States could envisage bringing proceedings before the ICJ against States which allegedly failed to prevent and punish the acts of genocide committed by Daesh, or whose international responsibility may otherwise be engaged under the Genocide Convention.

6. Conclusions

64. In Resolution 2190 (2017), the Assembly reiterated its view that Daesh members had committed acts of genocide and other serious international crimes in Syria and Iraq. It called on member States to take prompt and effective action in accordance with their obligation under the 1948 Genocide Convention to prevent and punish acts of genocide, and their general responsibility to act against crimes under international law, including by investigating and prosecuting any suspected Daesh members who came within their jurisdiction or control on the basis of the principle of universal jurisdiction. It also called on the United Nations to consider establishing a special judicial mechanism for trying crimes committed by Daesh in Iraq.

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73. In this respect, the Council of Europe Committee on Counter-Terrorism (CDCT) is currently considering further engaging on the interaction between international humanitarian law and terrorism, within the context of the preparation of the next Council of Europe Counter-Terrorism Strategy (2023-2027).
74. Articles III, including complicity in genocide, and IV.
75. Article I.
76. Articles I and IV.
77. Article V.
78. ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment of 26 February 2007, paras. 430-431.
79. In the *Bosnia and Herzegovina v. Serbia and Montenegro,* the ICJ concluded that the Respondent State had violated its obligation to prevent the Srebrenica genocide of 1995, which was not carried out in its territory nor committed by its organs or agents.
80. See ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (the Gambia v. Myanmar*), Request for the indication of provisional measures, Order of 23 January 2020, paras. 41-42.

65. Unfortunately, there has been little progress in the implementation of this resolution. With regard to the different venues for prosecuting Daesh foreign fighters and providing justice, the prosecution in Iraq and Syria does not seem to be an acceptable solution anymore. Human rights considerations (fair trial standards, death penalty) and the fact that there is still no legislative framework for prosecuting international crimes makes it difficult for European States to maintain the position that their nationals should be tried in these countries since their crimes were committed there. Furthermore, the option of establishing a hybrid judicial mechanism in Iraq, with some sort of international participation, remains unlikely without the agreement of the State concerned. In the absence of any other international tribunal where Daesh foreign fighters could be tried, and given the ICC Prosecutor's position on the matter, member States should give priority to the establishment of a special international tribunal with a mandate to prosecute their own Daesh foreign fighters detained in Syria and Iraq, with the involvement or support of the UN General Assembly, the European Union or the Council of Europe. Iraqi authorities should still be encouraged to participate in negotiations with a view to establishing a special international tribunal or hybrid tribunal.

66. Pending the setting up of such an international judicial mechanism the most obvious option remains the prosecution of foreign fighters before domestic courts of member States, on the basis of the active personality principle or universal jurisdiction, as already suggested by Assembly Resolution 2190 (2017). Despite all the challenges and difficulties, particularly in terms of access to evidence located in conflict zones, recent examples from Germany (with the first ever conviction for genocide), the Netherlands and Sweden show that member States have the capacity to try Daesh members in Europe. By applying both anti-terrorism legislation and international crimes such as genocide, crimes against humanity and war crimes, prosecuting and judicial authorities are in a better position to comprehensively address the complexity and seriousness of the various offences committed by Daesh fighters, while at the same time acting in conformity with States' obligations under international law. Recent successful convictions should indeed be commended, but they remain limited compared to the number of returnees and foreign fighters still detained in Iraq and Syria without facing trial. Leaving these persons indefinitely in camps or prisons, with the risk of further indoctrination and radicalisation by Daesh and prison breakouts, may be counterproductive in terms of prevention of terrorism and European and global security and does not contribute to accountability. However, States should clearly prioritise genocide as a criminal charge, at least with respect to crimes committed against Yazidis and other affected minorities. They should also address the criminal responsibility of all Daesh members, including women, according to their actual role and involvement, and avoiding gender stereotypes. Furthermore, they should design and implement rehabilitation and reintegration strategies for all returnees, putting emphasis on deradicalisation programmes for children and young adults. These measures should in no way be a substitute for prosecution and punishment of those criminally responsible.

67. Finally, in parallel to establishing the criminal responsibility of individual members of Daesh before international or domestic courts, member States should also envisage making use of other existing accountability mechanisms, for instance by taking steps to hold States internationally responsible under the Genocide Convention for the alleged failure to prevent and punish the Daesh genocide. States had a legal obligation to prevent the genocide that Daesh was committing, by impeding the flow of foreign terrorist fighters to areas controlled by Daesh and by effectively prosecuting the perpetrators as a means to deter further crimes.