



Human Rights
Institute

JUSTICE AND ACCOUNTABILITY FOR THE ATROCITIES OF DAESH - PROGRESS MADE AND THE WAY FORWARD

WORKING DRAFT

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EXECUTIVE SUMMARY

In 2024, the world will mark the 10th anniversary of the genocide perpetrated against the Yazidis by Daesh, a terror organisation, which began on 3 August 2014 with the Daesh attack on Sinjar. However, at the time of the attack, the genocidal campaign was long underway and the early warning signs and risk factors were already visible in 2013 and before. The years since the attack on Sinjar have seen some limited responses, including legal responses. However, these have often been fragmented and have fallen short of leaving survivors with a sense that justice has been achieved. The time between now and the 10th anniversary of this genocide presents States, international organisations and other actors with an invaluable opportunity to implement measures for justice and accountability for the Yazidis. As such, this report makes the following findings and recommendations:

Stopping the atrocities

The Global Coalition against Daesh, a coalition of over 80 countries, worked together to defeat Daesh. However, small groupings of fighters are still present in the region. Furthermore, the atrocities are still ongoing, albeit on a smaller scale than at the height of Daesh's control over the region. To this day, over 2,700 Yazidi women and children continue to be enslaved and there have not been many joint efforts to rescue them, even though the location of many of them is known. Many of them have been in captivity from a young age, and for several years, and have little memories of their families, with no contact to the outside world, and often have forgotten their original language. As such, their rescue is highly complicated, but this does not mean that they should simply be left behind with their perpetrators.

Recommendations:

- States and international actors to work together to locate, provide resources and personnel to rescue the missing women and children and provide them with comprehensive assistance. This should be done in collaboration with organisations supporting the Yazidi community, incl. Nadia's Initiative, Free Yezidi Foundation and Yazda, among others.
- To provide safe spaces for kidnapped women and children - who may be traumatised and have little memory of the families they were taken from ten

years ago - to offer psychosocial support to them before they are comfortable being returned to the communities.

Bringing Daesh members to justice

Some of the perpetrators are being prosecuted, whether in the countries where the crimes were committed, including Iraq, or abroad. However, the number of criminal prosecutions remains low and, in Iraq, they relate predominantly for terror-related offences. Some of the trials, especially in Iraq, raise concerns relating to the right to a fair trial, the protection of victims/witness rights, and the rule of law, and as such, cannot provide justice that is urgently needed.

Furthermore, the following issues have been identified during the trip to Iraq:

- There is very little coordination and collaboration between the many actors undertaking the work of collecting evidence, especially testimonies from survivors. Many survivors say that they have testified several times to many actors and there has been no follow-up and they felt that their testimonies did not serve to bring perpetrators to justice. (Many actors, including the UN, are unable to engage with the cases or share evidence with Iraqi courts because of the use of the death penalty. The same applies to Kurdistan despite the death penalty being subject to a moratorium. Others are limited by their mandates.) Coordination and collaboration of efforts between actors and organisations working with survivors would be beneficial for the survivors, who would not have to provide witness statements to several actors, among others. Furthermore, better coordination could help to strengthen justice efforts.
- Trials of Daesh fighters in Iraq are rarely monitored, to ensure that the rule of law is upheld, and the rights of victims properly observed. Systematic monitoring of trials in Iraq is needed but difficult to accommodate as information on trials is often not available to the public, through a lack of media freedom or lack of publicly available information.
- Some survivors complained of corruption among lawyers who are said to promise results - under compensation schemes such as the Yazidi Survivors Law or Martyrs' Law, or for the provision of identification documents - upon higher payments. Corruption was also reported among officials including those responsible for the production of basic documents such as passports.

- Some individuals mentioned that law enforcement officials have been accused of putting pressure on complainants to withdraw their complaints.
- All of the trials in Iraq, apart from one, were for terror-related offences. There has been only one trial of a Daesh member for rape in the country. Currently, international crimes of crimes against humanity and genocide are not incorporated into national legislation, meaning there are limited opportunities for these offences to be tried.

The prosecutions of the perpetrators for terror-related offences have been initiated in many countries. However, such prosecutions are still few in comparison with the number of perpetrators. The prosecutions for international crimes, under the principle of universal jurisdiction, have been initiated only in a few countries including Germany, the Netherlands, Sweden and France. German courts are leading in prosecuting Daesh members for genocide and crimes against humanity. Moreover, Dutch courts have also begun the trials of the perpetrators, including women who joined Daesh. The main challenges can be summarised as:

- Prosecutions are predominantly for terror-related offences.
- A small number of prosecutions in comparison with the number of perpetrators e.g. foreign fighters returning to their countries.

Despite some initiatives to establish an ad-hoc tribunal for Daesh, the proposals have not progressed far. Considering the very few legal responses to the crimes, the topic should be urgently revived.

During the trip to Iraq, survivors expressed their frustration with the lengthy pursuit of justice in comparison with the ease with which the perpetrators, especially Daesh foreign fighters, were allowed to travel the world and commit horrific atrocities. These failures of States to prevent the atrocities raise the issue of state responsibility for the Daesh genocide.

Recommendations:

- States and international bodies to map all initiatives engaged in collecting and preserving evidence of Daesh atrocities and identify best practices for indexing the evidence and collaborating with prosecutors globally;

- States to facilitate the collaboration of their war crimes units with UNITAD and CIGE and others who hold evidence of Daesh crimes, to facilitate prosecutions of returned foreign fighters;
- States and international bodies to identify challenges preventing courts from prosecuting Daesh for their involvement in atrocity crimes and introduce steps to rectify the challenges including:
 - Criminalising genocide and crimes against humanity in the Iraqi Penal Code;
 - Engaging the Iraqi authorities to suspend the use of the death penalty in cases of Daesh fighters where there is credible evidence of further crimes committed against Yazidis, to allow for the cooperation with UNITAD and other agencies with evidence, to bring forward additional prosecutions;
 - Expanding provisions pertaining to the use of universal jurisdiction in various countries, including in the UK;
 - Supporting the draft convention on cooperation between States in dealing with atrocity crimes.
- Work towards establishing an ad-hoc tribunal for Daesh atrocities.

Pursuing state responsibility under the Genocide Convention

- States to consider bringing proceedings before the International Court of Justice for States' failures to prevent and punish this genocide.

Assisting victims and survivors

Victims and survivors have been provided with some assistance. However, this assistance is running low and many projects are being closed. The majority of the Yazidi IDPs still live in camps, and the ongoing insecurity in Sinjar means that they will not be able to return anytime soon. UNHCR says there are 180,000 still living in camps. During the trip to Iraq, the team found that:

- Many of the survivors missed out on school and were not able to return to school after liberation, mostly because of their age. There used to be 14 educational centres in Kurdistan to assist people under the age of 24 to continue their education. At the beginning of 2023, the number of such centres decreased to 4. In addition, given that women and girls are still being returned from captivity and have been held since 2014, many have surpassed the age of 24 and missed out on crucial years of education. The issue requires attention as some estimate a very high percentage of Yazidi women and girls are illiterate, and whilst short term projects have been funded to attempt to rectify this, there is little long term assistance in this area.
- Victims and survivors are to benefit from compensation schemes, including under the newly adopted Yazidi Survivor Law. However, as the law is not yet implemented, and there are ongoing challenges around it, survivors may not be able to access it for many years. Under the Martyrs' Law, victims and families of victims are to be granted financial assistance. However, reportedly, very few of the families of victims of Daesh atrocities have been granted such compensation due to lack of documentation necessary to apply and the slow progress of such applications, among others.
- Little if any assistance is provided to those who testified or wish to testify - to protect them from retaliation and to provide them with assistance to enable them to testify. Indeed, those testifying have been subjected to various pressures and threats. Some survivors continue to be contacted by their perpetrators, including with threats.

Recommendations:

- States and international bodies to map past and existing humanitarian and development projects providing assistance to the communities (whether provided by States or NGOs) and identify gaps requiring attention, particularly focused on long term support and initiatives that could be funded over shorter term projects;
- States and international bodies to work with communities on identifying new projects to help the communities re-establish their lives, including focused on education and long term support to survivors who missed crucial years of their education during captivity;

- States and international bodies to work with the Iraqi government and relevant authorities on challenges preventing the communities from accessing financial assistance that they are eligible for; including by way of providing funding to UNHCR to assist in the provision of civil documentation, working with Iraqi government to strengthen the legislation and implementation of the Yazidi Survivor Law, among others.
- States and international bodies to provide assistance - via the provision of security and financial support in-country, or resettlement support if this is what is preferred - to all victims, survivors and witnesses willing to testify.
- States to re-open humanitarian pathways for Yazidi survivors to resettle, due to overwhelming demand of those who feel unsafe in-country. Safety and wellbeing of survivors is in reality fundamental to their willingness and ability to provide testimony.

Strengthening the protection of the targeted communities

Considering the vulnerability of the targeted communities after the atrocities, but also the long-standing discrimination against them and inequalities, steps are needed to strengthen the legal protections of the communities, and so help to prevent further atrocities in the future.

Among others:

- The Iraqi government promised to introduce laws criminalising genocide and other international crimes. Apart from allowing prosecutions of the perpetrators for their involvement in genocide, such laws can help to deter further crime. However, as years go by, such laws (e.g. an amendment to the Iraqi Penal Code) have not yet been introduced.
- The Iraqi Penal Code contains several provisions that prevent prosecutions of such crimes as those committed by Daesh, including for rape and abductions if the perpetrator marries the victims. These 'defences' must be repealed as a matter of urgency.

- The Iraqi Parliament is currently considering a bill on freedom of religion or belief. This bill must be used to ensure the right to freedom of religion or belief of everyone everywhere, and comply with international standards.
- The Iraqi law contains provisions that significantly affect religious or belief minorities and must be repealed. Among others, a woman is required to register her child with the religion of the father. Because of that, many Yazidi women decided not to register their children born out of rape. As a result, the children do not have access to basic services as they do not have any documentation.
- Only a few States have some form of mechanisms that enable them to monitor early warning signs and risk factors of atrocities, even in countries where such atrocities have been perpetrated in the past. As such, they are not equipped to prevent future atrocities.

Recommendations:

- Iraq to introduce legal reforms including
 - Introducing laws criminalising genocide and other international crimes;
 - Repeal any laws that affect religious or belief communities e.g. laws requiring children to be registered with the religion of the father;
 - Repeal legal provisions providing defences to rape, sexual violence, abductions etc;
 - Introduce strong protections of the right to freedom of religion or belief and minority groups' protections;
 - States to introduce comprehensive mechanisms that would enable them to monitor early warning signs and risk factors of atrocities.
 - States to adopt genocide and atrocity prevention strategies to guide them through responses.

Other issues

Among the issues that affect access to justice are the below:

Corruption

Corruption is not a new issue in Iraq. Indeed, whilst there have been slight improvements in the last few years, Iraq has historically scored very poorly on the Transparency International Corruption Perception Index. According to the 2022 assessment, Iraq was ranked 157th out of the 180 countries assessed and received only 23 points out of 100.¹

The issue of corruption was mentioned by many, with those accused being lawyers, law enforcement and local authorities. The issue requires an urgent response, in general, but also as a means of securing justice and accountability for victims and survivors. To this day, many of victims and survivors continue to be affected by the issue in their pursuit of justice and accountability.

The situation in Sinjar

The challenging situation in Sinjar means that the communities cannot return to the area, or often even visit. Reports suggested that Yazidis face significant scrutiny when attempting to pass through the check point to travel to Sinjar. Reports suggest ongoing acts of violence, including killings in Sinjar. Yazidis in Sinjar and also those in other parts, struggle to access basic services, including documents, and as such, face serious limitations.

Furthermore, Turkey continues to target Sinjar with air strikes.

Documents

Obtaining basic civic documents, whether passports, ID cards, birth certificates has been challenging for many survivors, and the Yazidi community more broadly. Documents are one of the main priorities for UNHCR and the US Consulate at the moment.

¹ Transparency International, Index 2022. Available at: <https://www.transparency.org/en/cpi/2022/index/irq>

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I. INTRODUCTION

In 2013/14, Daesh (also known as Islamic State, ISIS, ISIL), a non-state actor and terror organisation, unleashed a genocidal campaign against the Yazidis and other religious minorities in Iraq and also in Syria. On 3 August 2014, Daesh attacked the Yazidis in Sinjar, and so began some of the most egregious atrocities against the community, as seen in recent years. They brought about this genocide by way of murder, enslavement, deportation and forcible transfer of populations, imprisonment, torture, abduction of women and children, exploitation, abuse, rape, sexual violence, and forced marriage, among others. These atrocities have been widely reported on by the United Nations and other actors.² To this day, over 2,700 women and children are still missing, after they were abducted by Daesh in 2014. If alive, it is considered that they continue to be enslaved and subjected to a litany of abuses. Following the attack on Sinjar, Daesh also attacked many villages in Ninevah Plains and forced over 120,000 Christians to flee to Kurdistan.

Daesh specifically targeted religious minorities such as Yazidis, Christians, Shabak communities and others for destruction in an attempt to annihilate religious pluralism, and with an intent to destroy their distinct ethno-religious identities. Daesh specifically targeted religious minority women and girls, subjected them to abductions, forcible conversions, forcible marriage, rape and sexual violence, reproductive violence and much more.

Some steps have been taken to address the atrocities by Daesh. However, these efforts have often been fragmented and inadequate to leave victims and survivors with a feeling of justice. In 2024, the world will mark the 10th anniversary of the Daesh atrocities, and specifically, of the genocidal atrocities and crimes against humanity against the Yazidis, Christians and other religious or belief minorities. The time leading to the occasion of the 10th anniversary in August 2024 should be used to revive the efforts to address the horrific atrocities perpetrated by Daesh, and secure deliverable commitments from States and the international community.

This report focuses on steps taken in recent years to ensure justice and accountability, the gaps among them, and steps that need to be taken to strengthen the legal system

² *Ibid*, 19. See also: United Nations (2020) *Conflict-Related Sexual Violence. Report of the United Nations Secretary-General*, 6.

in Iraq. The report aims to provide practical recommendations for States on what can and should be done to assist in the pursuit of justice and accountability for the Daesh atrocities.

Section II discusses the steps taken in Iraq, Syria, and globally to prosecute Daesh for its crimes.

Section III identifies some of the assistance provided to victims and survivors, focusing specifically on Iraq.

Section IV discusses the steps that need to be taken to strengthen the legal system in Iraq and how other countries could assist with this task.

Section V identifies recommendations.

This report is to be presented to the UN Human Rights Council side event and to members of the International Religious Freedom or Belief Alliance (IRFBA) for consideration. The report further provides a basis for action for the Inter-Parliamentary Group on Bringing Daesh to Justice.

METHODOLOGY

This report is a product of in-depth research into the issues pertaining to justice and accountability for Daesh atrocities. The report was produced after desktop research, including a review of existing data on the topic, a fact-finding mission to Iraq between 11 and 15 February 2023, and further interviews with experts and organisations working with victims and survivors.

During the fact-finding trip to Iraq, the team met with representatives of UNITAD, UNHCR, UNAMI, Judge Ayman and the documentation unit in Kurdistan, the US Consulate, the UK Consulate, Vian Dakhil MP and Dr Nagham Hasan. Furthermore, the team met with Yazda and the Yazidi Survivors Network, the Free Yezidi Foundation and some of the people supported by them, i.e. survivors from camps and outside. During the trip, the team was assisted by Anne Norona and the team from Yezidi Emergency Support (Y.E.S).

AUTHORS

This report is authored by the International Bar Association's Human Rights Institute (IBAHRI) and The City Law School (CLS).

The IBAHRI is an autonomous and financially independent entity from the International Bar Association that works with the global legal community to promote and protect human rights and the independence of the legal profession worldwide. The work of the IBAHRI globally demonstrates the commitment to equality, non-discrimination and gender parity/mainstreaming, a primary consideration across all programmes. The IBAHRI also focuses on addressing pertinent human rights issues in the administration of justice which forms the basis of targeted capacity-building and advocacy projects. Further, the IBAHRI is a world-leading institution in the creation, and delivery of, human rights training and technical assistance for legal practitioners and institutions, building their capacity to effectively promote and protect human rights under a just rule of law.

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CLS is the first law school in London to educate students and practitioners at all stages of legal education. CLS is unique in offering a broad range of courses while remaining committed to excellence in research and professional scholarship. CLS has a leading reputation for research in international justice, with several research groups active in this area including the International Law and Affairs Group and the City Centre for Law and Criminal Justice. CLS is also at the leading edge of innovation in academic and professional education, including its renowned undergraduate LLB Bachelor of Laws (Honours) degree, its nationally-leading Bar Vocational Studies and the new Solicitors' Practice Programme launching in 2023.

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Further assistance, including by way of reviewing, was provided by Eleonora Scala.

LIMITATIONS

This report is based on desktop research and interviews with several NGOs working with survivors and survivors themselves. The report presents a sample of the data identified. Moreover, it was only possible to access publicly-available documents for the desk research segment. This was a limitation, as the latest information relating, for instance, to the conduct of trials in Iraq was not always publicly-available.

II. JUSTICE AND ACCOUNTABILITY FOR THE DAESH GENOCIDE

1. THE GENOCIDE

The atrocities against the Yazidis, Christians and other religious or belief minorities have been recognised as meeting the legal definition of genocide by several actors. In January 2016, the Parliamentary Assembly of the Council of Europe (PACE) passed a resolution making the determination.³ This was followed by a similar recognition by the European Parliament in February 2016.⁴ In March 2016, the US State Department announced the conclusion of its assessment and recognised the atrocities as genocide.⁵ In April 2016, the UK House of Commons unanimously recognised the atrocities against the Yazidis and other religious minorities as genocide.⁶ Similarly, over a dozen Parliaments have made this determination, in addition to two more governments (Canada and the Netherlands).

While most of the regions previously held by Daesh are now liberated, to this day, over 2,700 Yazidi women and children continue to be enslaved and there have been limited efforts to rescue them, despite the fact that the location of many of them is known. Furthermore, the Daesh ideology continues to spread with many active Daesh members still engaged in propaganda and recruitment activities, including in camps in the region.

The below section discusses the steps towards justice and accountability taken in Iraq, Syria and other countries.

2. IRAQ

³ Resolution 2091 (2016), Foreign fighters in Syria and Iraq. Available at: <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=22482&lang=en>.

⁴ European Parliament resolution of 4 February 2016 on the systematic mass murder of religious minorities by the so-called 'ISIS/Daesh' (2016/2529(RSP)). Available at: https://www.europarl.europa.eu/doceo/document/TA-8-2016-0051_EN.html.

⁵ John Kerry, Remarks on Daesh and Genocide, 17 March 2016. Available at: <https://2009-2017.state.gov/secretary/remarks/2016/03/254782.htm>.

⁶ House of Commons, Daesh: Genocide of Minorities, 20 April 2016. Available at: <https://hansard.parliament.uk/Commons/2016-04-20/division/2EB7838E-4BC5-4D43-A479-C85DDA177CDD/DaeshGenocideOfMinorities?outputType=Names>.

Following the atrocities against the Yazidis and other religious minorities committed in its territory by Daesh, Iraq has taken some steps, including in collaboration with the United Nations and international partners, towards justice and accountability.

2.1. INVESTIGATIONS

Both Iraqi and Kurdish authorities are said to collect evidence and investigate the crimes.

For example, in September 2014, the Council of Ministers in the Kurdistan Regional Government (KRG) created the Commission of Investigation and Gathering Evidence (CIGE) with a mandate to investigate and collect evidence of crimes committed in the Shingal area and the Nineveh Plains. CIGE collects data on atrocities against the Yazidi, Christian, Turkmen, Shabak, and Kakai, including forced displacement, extrajudicial and summary executions, mass killings (and mass graves), abductions, detentions, missing persons, all forms of gender-based violence, recruitment of child soldiers, forced religious conversion, forced labour, destruction of cultural and religious heritage and much more. CIGE is run by Judge Ayman Mostafa, the investigating judge of the Commission. As indicated by Judge Ayman, survivors and witnesses continue to come forward to testify every day. While CIGE has not been able to support criminal proceedings in Iraq, it has been collaborating with prosecutors in other countries.

Iraq has been collaborating with the United Nations and international partners. The UN Assistance Mission for Iraq (UNAMI) has worked in Iraq to, *inter alia*, advance inclusive, political dialogue and national and community-level reconciliation; and to promote the protection of human rights and judicial and legal reforms. When renewing UNAMI's mandate in May 2021, the UN Security Council reiterated the need to hold perpetrators of conflict-related sexual violence accountable.

While the authorities in Iraq and Kurdistan collect the evidence, including from victims and survivors, some of the people interviewed by the team raised the issue of them being treated as alleged perpetrators until proven innocent. A number of them raised that, upon liberation from Daesh, they were subjected to lengthy detention and investigation (often for several weeks) before they were eventually released. Reportedly, many Yazidis continue to be detained and subjected to investigations. As indicated, some of the detained Yazidis do not want to disclose their identity due to a lack of trust and fear of retaliation by Daesh (believing that the Daesh 'caliphate' is still in existence).

2.1.1. PROSECUTIONS OF THE PERPETRATORS

While, to date, it has not been possible to pursue criminal accountability of Daesh fighters for genocide or other international crimes in Iraq, there have been a large number of trials of Daesh fighters for terrorism-related offences. For instance, from January 2018 to October 2019, the Iraqi judiciary processed over 20,000 terrorism-related cases, with thousands more pending.⁷ Only one trial was for rape. It was reported that there is difficulty in bringing additional prosecutions against those who have already been prosecuted for terrorism-related offences, for several reasons:

- Iraq applies the death penalty for terrorism crimes. The UN is unable to be involved in cases where the death penalty is possible, even if there is a moratorium (as in Kurdistan), on policy grounds. Thus, UNITAD cannot supply evidence for cases of those already prosecuted to bring additional prosecutions against the individual specifically related to the genocide of the Yazidis, whether in Iraqi or Kurdish courts.
- There is a lack of cooperation with authorities in Iraq and those in Kurdistan who hold evidence, such as CIGE.
- Survivors in-country do not feel safe to come forward for fear of repercussions for speaking out. (Some survivors continue to be concerned about Daesh members. Some have family members who are still enslaved and are concerned about the consequences they may face.)
- Survivors abroad do not feel safe to return to the country in order to testify and are in need of greater protection in order to do so.

2.1.2. DUE PROCESS, THE RIGHT TO A FAIR TRIAL ISSUE AND WITNESS PROTECTION

⁷ United Nations Assistance Mission for Iraq and Office of the United Nations High Commissioner for Human Rights, Human Rights in the Administration of Justice in Iraq: Trials under the anti-terrorism laws and implications for justice, accountability and social cohesion in the aftermath of ISIL, (2020) iv. Available at: https://www.ohchr.org/sites/default/files/Documents/Countries/IQ/UNAMI_Report_HRAAdministrationJustice_Iraq_28January2020.pdf.

Some of the trials have been subjected to external monitoring. However, as raised by UNITAD, the trials are rarely reported publicly in advance, and as such, it is difficult to organise comprehensive monitoring of such trials. Therefore, it is difficult to assess the scale of the issue. However, over the years, challenges in relation to due process and fair trial have been raised by several actors.

For example, in 2017, HRW reported on ‘serious legal shortcomings that undermine the efforts to bring [Daesh] suspects to justice, [...] no national strategy to ensure the credible prosecution of those responsible for the most serious crimes.’⁸ The report added that ‘authorities appear to be prosecuting all [Daesh] suspects in their custody under counter-terrorism laws, primarily for [Daesh] membership, and not focusing on specific actions or crimes that may have been committed.’⁹ At the time of their reporting, 7,374 people had been charged with Daesh membership since 2014, with 92 sentenced to death and executed – including one death sentence passed against a Daesh cook. Some of the issues reported by HRW are said to have been addressed. Indeed, in 2020, HRW reported that in some provinces, including Nineveh province, 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.’¹⁰

In its 2020 report, while UNAMI generally observed efficiency, structure and order in the conduct of the trials it monitored, it also expressed serious concerns that basic fair trial standards were not being respected.¹¹ Among the main challenges, it identified the following:

- ‘Violations of fair trial standards relating to equality before the courts and conduct of hearings – in particular as a result of ineffective legal representation, lack of adequate time and facilities to prepare a case, and a limited possibility to challenge prosecution evidence – which cumulatively placed the defendant at a serious disadvantage compared to the prosecution.

⁸ HRW, *Flawed Justice Accountability for ISIS Crimes in Iraq*. (5 December 2017). Available at: <https://www.hrw.org/report/2017/12/05/flawed-justice/accountability-isis-crimes-iraq>.

⁹ *Ibid.*

¹⁰ HRW, *Iraq. Events in 2019*. Available at: <https://www.hrw.org/world-report/2020/country-chapters/iraq>.

¹¹ *Ibid.*, iv–v.

- The over-reliance on confessions, with frequent allegations of torture or ill-treatment that were inadequately addressed by courts and that on their own constitute a human rights violation, further contributed to the disadvantaged position of defendants.
- Prosecutions under the anti-terrorism legal framework – with its overly broad and vague definition of terrorism and related offences – focused on ‘association’ with or ‘membership’ of a terrorist organisation, without sufficiently distinguishing between those who participated in violence and those who joined ISIL for survival and/or through coercion, and with harsh penalties that failed to distinguish degrees of underlying culpability.
- Under anti-terrorism laws, the death penalty is mandatory for a wide range of acts that do not meet the ‘most serious crimes’ threshold, which is necessary for imposing such a sentence. The overall findings also indicate the imposition of the death penalty following unfair trials.
- Practical restrictions on the publicity of hearings, lack of victim attendance in proceedings and over-reliance on a charge of ‘membership’ of a terrorist organisation limited the possibility for victims and their families, as well as the general public, to see the perpetrators being held to account, and failed to expose the full range of crimes committed.¹²

In the 2022 PACE report, Special Rapporteur Pieter Omtzigt highlighted that ‘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.’¹³

During their visit to Iraq, the team heard of several concerns in relation to due process and fair trial, especially in relation to the evidence used to convict individuals.

¹² Ibid.

¹³ PACE, 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 Resolution 2475 (2023). Available at: <https://pace.coe.int/en/files/31550/html>.

Concerns have been also raised in relation to the failure to involve survivors, whose testimonies are not needed for trials of terror-related offences.

Little if any assistance is provided to those who testified or wish to testify - to protect them from retaliation and to provide them with assistance to enable them to testify. Indeed, those testifying have been subjected to various pressures and threats. Some survivors continue to be contacted by their perpetrators, including with threats.

Ensuring due process and the right to a fair trial are crucial to ensure justice and accountability for victims and survivors. Furthermore, ensuring protections for witnesses can help to empower them to speak out and so assist the process of justice.

2.1.3. PROSECUTIONS FOR TERROR-RELATED CRIMES

All trials of Daesh members, apart from one, have been for terror-related offences. The fact that Daesh fighters are prosecuted for terror-related offences only, including for membership in a terror organisation, is problematic for a number of reasons.

One issue is that these prosecutions were based on the Iraqi anti-terrorism legal framework, which provided an overly broad and vague definition of terrorism and related offences, focused on 'association' with or 'membership' in a terrorist organisation, without sufficiently distinguishing between those who participated in violence and those who joined Daesh for survival and/or through coercion.¹⁴ Another issue relates to the fact that, under the Iraqi anti-terrorism laws, the death penalty is mandatory for a wide range of acts that did not meet the 'most serious crimes' threshold.

Prosecuting Daesh for terror-related offences only means that victims and survivors are not involved in such trials. This means that their voices and stories are not heard - this affects their personal journeys towards justice and the process of documenting historic events. Terror-related offences cannot encompass the nature and scale of the horrific atrocities the communities have been subjected to.

Furthermore, terror offences carry the death penalty, the very reason why the UN and many States cannot assist Iraqi courts in prosecuting Daesh fighters. In addition, as the perpetrators are given the death penalty and executed shortly after, even if there

¹⁴ Ibid.

was enough evidence to bring proceedings for other crimes, including rape and sexual violence, it is often too late to do so. As such, survivors are effectively deprived of their day in court.

2.1.4. PROSECUTION FOR RAPE

There has been only one prosecution and conviction of a Daesh member for rape in Iraq. Ashwaq Haji Hamid Talo, a 20-year-old Yazidi woman, testified against Mohammed Rashid Sahab, who was ultimately found guilty of participating in a terrorist organisation and in the rape and abduction of Yazidi women.¹⁵ He was given the death penalty - this because he was also convicted of terror-related offences. According to official statements, the hope was that this conviction would encourage other survivors to come forward.¹⁶ However, several survivors have raised the issue that they have testified to law enforcement and are willing to testify in court, but there has been no progress with their cases. As long as terror trials are being seen as 'quicker' or 'easier' and carry the death penalty, which is a higher sentence than for rape and sexual violence, prosecutors will continue to rely on terror-related offences. Prosecution for terror-related offences only does not address the nature and scale of the crimes, and the specific targeting of the Yazidis, or women and girls.

2.1.5. SPECIALISED AD-HOC TRIBUNAL FOR DAESH

Currently, there is no specialised ad-hoc tribunal for the crimes of Daesh in Iraq. In 2014, the KRG established the High Committee for the Recognition against Yazidi Kurds and other Ethnic and Religious Nationalities (the High Committee).¹⁷ The High Committee, recognised as a 'sub-committee' of the KRG Genocide Committee (similar to UNITAD), has sought to collect evidence in relation to crimes committed in Northern Iraq by Daesh.¹⁸ The High Committee has also sought to assist the local government in providing justice for 'grave crimes,' via proposals for a new law and the establishment of a KRG criminal tribunal.¹⁹ In April 2021, the Council of Ministers of the

¹⁵ Alissa Rubin, 'She Faced Her ISIS Rapist in Court, Then Watched Him Sentenced to Death' New York Times (2 March 2020). Available at: <https://www.nytimes.com/2020/03/02/world/middleeast/isis-iraq-trial.html>.

¹⁶ Ibid.

¹⁷ International Federation for Human Rights, 'Iraq Sexual and Gender-Based Crimes against the Yazidi Community: The Role of ISIL Foreign Fighters'.

¹⁸ Bojan Gavrilovic and Stephanie Schweininger, 'Criminal Tribunal and a Wide-Ranging Reparation Programme Is Necessary for the Victims of Sexual Violence and Torture in Iraq' (2019) 29 *Torture Journal: Journal on Rehabilitation of Torture Victims and Prevention of Torture* 110, 120.

¹⁹ Ibid., 119.

KRG announced its approval of a new criminal court to prosecute members of Daesh for international crimes.²⁰

However, in June 2021, the Iraqi Federal Supreme Court declared that a KRG draft law to establish a criminal tribunal for Daesh crimes in the Kurdistan Region of Iraq could not move forward on constitutional grounds. Reportedly, these grounds included the fact that the proposed draft law from the KRG included the 'authority to appoint non-Iraqi judges and prosecutors and the authority to impose the death penalty in addition to its jurisdiction over Iraqi citizens and foreigners.'²¹ While the KRG draft law criminalising international crimes and establishing a mechanism for their prosecution has been struck down, the Iraqi government has so far not acted to provide an alternative criminal accountability mechanism.

It is noteworthy that, with respect to crimes committed in the Saddam Hussein era, Law No. 10 of 2005, adopted on 18 October 2005, established the Supreme Iraqi Criminal Tribunal with jurisdiction over genocide, crimes against humanity, war crimes and other serious crimes committed between 1968 and 2003. The Tribunal has its own Statute and Rules of Procedure and Evidence. A similar tribunal could be established for the Daesh crimes in Iraq or the law could be amended to apply to the Daesh atrocities as well.

Indeed, as confirmed in the 2022 PACE report, there is a proposal for a 'hybrid tribunal within Iraqi national courts with assistance from international experts, (...) but this has not yet received the necessary political support from the Iraqi authorities.'²² It is crucial to consider this option as it could significantly strengthen the efforts to ensure justice and accountability for the most egregious crimes perpetrated by Daesh.

3. SYRIA

A review of the efforts to investigate and prosecute in Syria is much more challenging at this time. The below is predominately based on desktop research.

²⁰ UNITAD, 'Sixth Report of the Special Adviser and Head of the United Nations Investigative Team to Promote Accountability for Crimes Committed by Daesh/Islamic State in Iraq and the Levant' (2021) S/2021/419.

²¹ Khazan Jangiz, 'Iraq Rejects Kurdish Attempts to Establish Court for ISIS Crimes' Rudaw.net. Available at: <https://www.rudaw.net/english/kurdistan/270620212>.

²² PACE, 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 Resolution 2475 (2023). Available at: <https://pace.coe.int/en/files/31550/html>.

It is known that many Daesh fighters are held in detention camps and prisons in northeast Syria. As reported by Pieter Omtzigt in his 2022 report, '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.'²³ Further, as Matthew Krause states, '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.'²⁴ Similar concerns have been raised by Human Rights Watch which identified major concerns about due process, with suspects denied the right to a lawyer and to appeal their sentences.²⁵

In 2019, reports suggested that, at the time, 7,000 Syrian Daesh suspects had been tried and sentenced by courts and another 6,000 awaited trial.²⁶ These numbers did not include Iraqi or European Daesh members as the self-administration courts had the mandate to try Syrians only.

Reportedly, the trials of Daesh members in Syria are for terror-related offences only. Among others, on 3 September 2013, the Commission of Inquiry reported that it had:

'not yet identified any evidence that Syria is making a genuine and credible effort to punish severe crimes. In fact, given the protracted and increasingly sectarian nature of the conflict, it seems highly improbable that effective and independent prosecutions that meet essential international standards could be carried out in Syria anytime in the near future. There is not only a lack of willingness to institute proceedings, [but] a country torn by almost two years of bloody and destructive conflict is also unlikely to be capable of such an effort.'²⁷

²³ Ibid.

²⁴ Mathew Krause, 'Northeastern Syria: Complex Criminal Law in a Complicated Battlespace' Just Security (28 October 2019). Available at: <https://www.justsecurity.org/66725/northeastern-syria-complex-criminal-law-in-a-complicated-battlespace/>.

²⁵ See for example, Nadim Houry, 'Bringing ISIS to Justice: Running Out of Time?' HRW (5 February 2019). Available at: <https://www.hrw.org/news/2019/02/05/bringing-isis-justice-running-out-time>.

²⁶ Rojava Information Centre, 'Bringing ISIS to Justice: Towards an International Tribunal in North East Syria' (July 2019) 5. Available at: <https://rojavainformationcenter.com/2019/07/report-bringing-isis-to-justice-towards-an-international-tribunal-in-north-east-syria/>.

²⁷ Commission of Inquiry, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (2013) A/HRC/22/59 124.

Whilst this assessment pre-dated some of the atrocities committed by Daesh in Iraq and Syria, the conclusion still holds true in that: '[c]riminal provisions too broadly define, and often outlaw, the mere exercise of rights and freedoms protected by international human rights law.'²⁸

It is further reported that the judiciary fails to properly monitor the national justice system and to provide 'effective remedy for victims of violations attributable to the State, with individuals not daring to challenge abuses for fear of retribution.'²⁹

Furthermore, there is no Syrian domestic legislation, available in the public domain, giving effect to the provisions of the Genocide Convention or enshrining in law the obligations imposed on Syria under Article V of the said Convention, namely 'to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention.'³⁰ There does not appear to be - as provided for in the database of laws maintained on the website(s) of the Syrian Parliament (Majlis Al-Sha3b) and/or Ministry of Justice (Wizarat Al-3Adl) - any laws passed since the events described above providing for the investigation of and/or prosecution of the commission of the most serious crimes under international law, including genocide.

Neither the 1953 Syrian Penal Code nor the 1950 Military Penal Code contains provisions for the prosecution of war crimes, crimes against humanity, or genocide.³¹ The Military Penal Code is merely concerned with the conduct of members of the Syrian armed forces without reference to international criminal law. In the Universal Periodic Review (UPR) to the Human Rights Council dated 5 July 2004, Syria stated that violations of the International Covenant on Civil and Political Rights (ICCPR) are punishable under the Penal Code.³²

²⁸ Human Rights Council, 'Out of Sight, Out of Mind: Deaths in Detention in the Syrian Arab Republic' (2016) A/HRC/31/CRP.1.

²⁹ Ibid.

³⁰ This section draws on the extensive research undertaken by the Yazidi Justice Committee (YJC), a leading group of human rights barristers, researchers, and academics, on this subject. The YJC research team collected evidence for a period of over two years and published its findings in a 2022 report Aarif Abraham, Aldo Zammit Borda and Tatyana Eatwell, 'State Responsibility and the Genocide of the Yazidis.'

³¹ Amnesty International, 'Universal Jurisdiction: A Preliminary Survey of Legislation Around the World-2012 Update' (2012) 111.

³² Human Rights Committee, 'Consideration of Reports Submitted by States Parties under Article 40 of the Covenant (Syria)', (2004) CCPR/C/SYR/2004/3.

The Syrian Penal Code, while providing for fair trial standards in theory, is often circumvented by the judiciary and state authorities through the enactment of various legislative decrees. In January 2022, human rights organisations represented their findings about the ongoing human rights violations in Syria for the consideration of the UPR of Syria.³³

4. LEGAL STEPS TAKEN OUTSIDE OF IRAQ AND SYRIA

Internationally, several steps have been taken to investigate and prosecute the perpetrators. Some of these steps are discussed below.

4.1. DOCUMENTING AND INVESTIGATING

4.1.1. UNITAD

In 2017, the Security Council unanimously adopted resolution 2379 (2017), which established the United Nations Investigative Team to Promote Accountability for Crimes Committed by Daesh/ISIL (UNITAD). UNITAD has been collecting evidence and conducting investigations into Daesh's crimes in Iraq since 2018. UNITAD has gathered a significant amount of data, including testimonies, forensic evidence from mass grave sites and digital data extracted from Daesh hard drives. Investigators have also completed an initial case brief identifying individuals and companies that provided financial services to Daesh.³⁴ UNITAD has been working with investigators in 14 countries to ensure effective prosecutions of the perpetrators.

4.1.2. IIIM

The UN General Assembly Resolution 71/248 of 21 December 2016 established the International, Impartial, and Independent Mechanism (IIIM) 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 2011.³⁵ The IIIM is only authorised to share case files, evidence and data with courts or tribunals that respect and comply with international human rights laws and standards, including the right to a fair trial. The Syrian Government spoke against the resolution

³³ United Nations Human Rights Council, 'Universal Periodic Review of Syria 2022 Joint Report' (2022). Available at: <https://stj-sy.org/en/recommendations-for-the-united-nations-humanrights-councils-universal-periodic-review-of-syria/>.

³⁴ UN News, 'ISIL Crimes against Yazidis Constitute Genocide, UN Investigation Team Finds' (10 May 2021).

³⁵ UN General Assembly, 'Resolution 71/248' (2017) A/RES/71/248. Available at: <https://iiim.un.org/who-we-are/mandate/>.

that established the IIIM.³⁶ The IIIM has not been allowed into Syria and has been conducting its investigations remotely. Nonetheless, the IIIM has been able to collect and preserve the evidence and work with investigators in 12 countries on bringing proceedings before domestic courts.

4.1.3. JOINT INITIATIVES

In October 2021, France and Sweden created a Joint Investigation Team (JIT) to support proceedings involving core international crimes committed by Daesh foreign terrorist fighters against the Yazidi population in Syria and Iraq.³⁷ 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.

4.1.4. NGO-LED INITIATIVES

Among NGO-led initiatives is Yazda's Genocide Documentation Project launched in October 2015. The documentation team has been collecting evidence in the form of witness and survivor testimonies, visual material on mass graves around Sinjar, Nineveh Province, where the atrocities were committed. The Genocide Documentation Project was established to:

- 'Document, consolidate, and archive existing survivor and witness testimonies on the genocide against Yazidis as well as the destruction of Yazidi cultural heritage sites in Sinjar prior to the genocide to inform future academic and public inquires,
- Support the legal work, including that of Amal Clooney, counsel to Yazda, United Nations Goodwill Ambassador Nadia Murad, and other survivors of the Yazidi genocide, which have resulted in the first ever prosecution of Daesh members for genocide, to pursue accountability before international and domestic courts for the crimes committed against the Yazidis,

³⁶ UN General Assembly, 'Statement of Mr Ja'afari (Syrian Arab Republic) to the UN General Assembly, Agenda Item 31, Prevention of Armed Conflict, Draft Resolution (A/71/L.48)' (2016) A/71/PV.66 21.

³⁷ Eurojust, 'Support to joint investigation team of Sweden and France targeting crimes against Yezidi victims in Syria and Iraq' (7 January 2022). Available at: <https://www.eurojust.europa.eu/news/support-joint-investigation-team-sweden-and-france-targeting-crimes-against-yezidi-victims#:~:text=The%20judicial%20authorities%20in%20Sweden,population%20in%20Syria%20and%20Iraq>.

- Provide support and background information to further domestic and international advocacy efforts that work to improve the conditions of Yazidis.³⁸

4.2. PROSECUTING

Courts in several States have undertaken prosecutions of the perpetrators, especially of Daesh foreign fighters who returned back to their home countries.³⁹ To date, there have been a small number of prosecutions of Daesh members for international crimes, including two successful prosecutions of Daesh members in Germany, for genocide, in cases led by Amal Clooney and Yazda.

According to the 2022 PACE report and responses to a questionnaire put to Members States of PACE, '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) and 360 (United Kingdom).'⁴⁰ These numbers differ significantly from the responses provided to the same questions in 2017, in that some of them are lower than initially provided (rather than higher as one would expect). It would be crucial to identify the reasons for the change in numbers to better understand the situation, and the possibility of holding those who have returned accountable for their involvement in the Daesh atrocities.

Prior to the 2022 PACE report, in 2017, PACE Special Rapporteur Pieter Omtzigt requested that Member States of the Council of Europe provide information on the number of prosecutions pursued against Daesh foreign fighter returnees within their respective jurisdictions.⁴¹ The inquiry revealed a startling picture, the number of prosecutions across all member states to the Council of Europe is very low and significantly lower than the number of foreign fighters returning to those countries.

³⁸ Guley Bor, 'Working Against the Clock: Documenting Mass Graves of the Yazidis Killed by the Islamic State' (2018). Available at: <https://www.yazda.org/publications/documenting-mass-graves-of-the-yazidis-killed-by-the-islamic-state>.

³⁹ Doughty Street Chambers, 'German Federal Court of Justice confirms the first-ever conviction of an ISIS member for genocide' (26 January 2023). Available at: <https://www.doughtystreet.co.uk/news/german-federal-court-justice-confirms-first-ever-conviction-isis-member-genocide>.

⁴⁰ PACE, 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, Doc. 15591, 5 July 2022. Available at: https://pace.coe.int/en/files/30219/html#_TOC_d19e661.

⁴¹ PACE, Prosecuting and punishing the crimes against humanity or even possible genocide committed by Daesh, Report, Doc. 14402, 22 September 2017. Available at: <https://pace.coe.int/en/files/24014#trace-2>.

The lack of transparency by States over the number of foreign fighters who remain in detention in Syria and Iraq, as well as their inability or reluctance to prosecute returning Daesh fighters, is a significant barrier to justice and accountability.

States need to take responsibility for their citizens who joined Daesh, to have them returned to their country of origin, and ensure that they are held accountable before a competent court. This is crucial to ensure justice and accountability. Moreover, the process of returning the cities back to their countries could help the efforts to identify some of the missing Yazidi women and children who are said to still be living with their perpetrators in Al-Hol camp, and other places.

On 23 January 2023, PACE adopted a resolution on '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.'⁴² The resolution calls for decisive steps to ensure justice and accountability, among others, and pending the setting up of an international or hybrid tribunal, to ensure the prosecution of Daesh foreign fighters in their States of nationality, or in other member states using universal jurisdiction.

Among the countries which undertook to proceed with prosecutions of Daesh fighters, the following countries deserve particular recognition.

4.2.1. GERMANY

German courts have now secured two convictions of Daesh members for genocide. On 17 January 2023, the German Federal Court of Justice confirmed the conviction against Daesh member Taha A.-J. for genocide, crimes against humanity and war crimes committed against Yazidi victims in Fallujah, Iraq. The decision comes after the Daesh member tried to appeal his conviction in November 2021. In its 2021 judgement, the Higher Regional Court of Frankfurt found that in 2015, Taha A.-J. 'purchased' and enslaved a five-year-old Yazidi girl named Reda and her mother. Taha's wife was implicated as well. Taha and his wife held Reda and her mother as captives at their residence in Fallujah and forced them to practise Islam, work as slaves and deprived them of sufficient food. Taha would beat them and subject them to abuse. Reda died after Taha tied her with a cable outdoors to the bars of the window and left her in the heat of up to 51 degrees Celsius as a punishment for wetting the bed and a measure to 'discipline' the girl.

⁴² PACE, 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 Resolution 2475 (2023). Available at: <https://pace.coe.int/en/files/31550/html>.

The genocide conviction and life sentence were affirmed on appeal, and no further appeal is possible. The Federal Court of Justice confirmed that ‘the defendant’s actions, which caused serious harm to Reda [and her mother], in conjunction with similar actions by other [Daesh] members, were capable of destroying the Kurdish religious group of the Yazidi faith.’⁴³ It further added that ‘it was precisely the organised enslavement of women and girls, especially in connection with religious re-education, that served to destroy the Yazidi religious minority in order to establish an Islamic caliphate. All in all, the approach was capable of bringing about ... the (partial) destruction of this group as such.’⁴⁴ The judgement is now final. Reda’s mother was represented by Amal Clooney, Natalie von Wistinghausen and Dr Jörg Oesterle. Reda’s mother participated in the proceedings against Taha as a co-plaintiff after she was supported by Yazda, a non-governmental organisation working with Yazidi communities.

German courts have convicted five other Daesh members for crimes against humanity and war crimes (Jennifer W., Sarah O., Nurten J., Omaima A., Romiena S.). Another woman, Leonora M., was convicted of membership in a terrorist organisation.⁴⁵ Further trials continue.

4.2.2. THE NETHERLANDS

On 26 January 2021, the Court of Appeal of the Hague sentenced a Dutch national to seven years imprisonment for participation in a terrorist organisation and war crime of outrage upon personal dignity. On 29 June 2021, the District Court of the Hague convicted a Dutch woman to six years imprisonment for membership in a terrorist organisation, participating in an organisation that has the purpose to commit war crimes and sharing videos showing Daesh prisoners being burned alive and therefore affecting the personal dignity of the deceased.

In February 2023, Rotterdam court, the District Court of The Hague, held the first pro forma hearings against twelve women that the Dutch government brought back from a

⁴³ Bundesgerichtshof, Beschluss 3 StR 230/22, 30 November 2022. Available at: <https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=132381&pos=0&anz=1>.

⁴⁴ Ibid.

⁴⁵ Doughty Street Chambers, German court hands down second genocide conviction against ISIS member following enslavement and abuse of Yazidi woman in Syria’ (28 July 2022). Available at: <https://www.doughtystreet.co.uk/news/german-court-hands-down-second-genocide-conviction-against-isis-member-following-enslavement>.

prison camp in Syria in November 2022.⁴⁶ The women were arrested after arrival on suspicion of terrorist crimes, as suspected members of Daesh, a terrorist organisation. As announced by the Dutch Public Prosecution Service, one of the women is also suspected of slavery as a crime against humanity. The woman is suspected of having used a Yazidi woman as a slave in Syria in 2015.

4.2.3. UNITED STATES

US courts have dealt with several prosecutions of Daesh members. Among others, an American woman, Allison Fluke-Ekren, was sentenced in federal court in Alexandria, Virginia, after pleading guilty to providing material support to a terrorist organisation, having led an all-female Daesh battalion terror team that planned attacks, among others, against US universities.

In October 2022, the Department of Justice published a statement confirming that Lafarge S.A., a global building materials manufacturer, and its Syrian subsidiary, Lafarge Cement Syria (LCS) S.A., pleaded guilty to a one-count charge of conspiring to provide material support and resources in Daesh and al-Nusra Front (ANF) in Northern Syria from 2013 to 2014. Following the guilty pleas, U.S. District Judge William F. Kuntz II sentenced the defendants to terms of probation and to pay financial penalties, including criminal fines and forfeiture of \$777.78 million.

4.2.4. FRANCE

In 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.⁴⁷

Daesh foreign fighter returnees in France are generally charged with association with a terrorist enterprise. Reportedly, in France, some criminal investigations are initiated against fighters who have not yet returned, and national or international arrest

⁴⁶ Openbaar Ministerie, ‘Teruggehaalde vrouw uit IS-kamp verdacht van misdrijven tegen Yezidi’s’ (10 February 2023). Available at: <https://www.om.nl/actueel/nieuws/2023/02/10/teruggehaalde-vrouw-uit-is-kamp-verdacht-van-misdrijven-tegen-yezidis>.

⁴⁷ Doughty Street Chambers, ‘Paris Court of Appeal confirms charges against French multinational Lafarge for complicity in crimes against humanity committed by ISIS’ (23 May 2022). Available at: <https://www.doughtystreet.co.uk/news/paris-court-appeal-confirms-charges-against-french-multinational-lafarge-complicity-crimes#:~:text=Paris%2C%20France%20%E2%80%93%20On%2018%20May,other%20armed%20groups%20in%20Syria>.

warrants are issued. Some have been tried in absentia.⁴⁸ In 2019, several French nationals have been sentenced to death in Iraq. France has been criticised for ‘outsourcing the judicial process to Iraq.’⁴⁹

4.2.5. SWEDEN

Among others, in March 2022, the District Court of Stockholm sentenced a Swedish woman to six years imprisonment for enlisting her son to Daesh, as a war crime.⁵⁰ Swedish courts have also prosecuted for the war crime of outrage upon personal dignity (here subjecting the bodies of dead persons to humiliating and degrading treatment intended to seriously violate their personal dignity).⁵¹ As under Swedish law, membership in a terrorist organisation is not a criminal offence, the courts resorted to war crimes in such cases.

4.2.6. UNITED KINGDOM

The data in relation to the prosecutions of Daesh fighters in the UK is unclear. The UK estimates that approximately 425 British Daesh members have now returned to the UK.⁵² In 2017, the United Kingdom’s reply to PACE inquiry suggested that 101 persons have been convicted for terror offences.⁵³ This figure includes: individuals who travelled to the region; individuals who tried to travel but were stopped; individuals who assisted the first two categories. However, this data is not disaggregated by proscribed organisations and as such it is difficult to identify who are the Daesh foreign fighter returnees among them. In March 2023, in response to a question from

⁴⁸ PACE, 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, Doc 15591. Available at: <https://pace.coe.int/en/files/30219#trace-2>.

⁴⁹ Alissa Rubin, ‘France Hands ISIS Suspects to Iraq, Which Sentences Them to Hang’, New York Times (29 May 2019). Available at: <https://www.nytimes.com/2019/05/29/world/middleeast/france-iraq-isis-trials.html>.

⁵⁰ Eurojust, ‘Cumulative prosecution of foreign terrorist fighters for core international crimes and terrorism-related offences’ (2020). Available at: https://www.eurojust.europa.eu/sites/default/files/Partners/Genocide/2020-05_Report-on-cumulative-prosecution-of-FTFs_EN.PDF.

⁵¹ Ibid., Scania and Blekinge Court of Appeal, 17 April 2017, B 569-16.

⁵² ‘Approximately 850 UK-linked individuals of national security concern have travelled to engage with the Syrian conflict. Of total travellers from the UK, just under half have returned to the UK, approximately 15% are deceased and just under half of the remainder have returned to the UK. The majority of individuals in theatre are affiliated with Daesh. The average age at time of travel of UK-linked individuals of national security concern engaging in the Syrian conflict has reduced significantly. Nearly half of those travelling aged 18 and under have departed since July 2014. We have also observed an increase in the number of women, families and minors engaging in the conflict, although they remain a small proportion of overall travellers. We judge that individuals who have travelled to the Syria theatre and engaged with extremist groups pose an increased risk on their return, due to the high probability of their having an increased capability and mindset to commit violent acts.’ UK response to PACE. See: <http://www.assembly.coe.int/LifeRay/JUR/Pdf/DocsAndDecs/2017/AS-JUR-2017-30-EN.pdf>.

⁵³ Ibid.

Lord Alton, the UK Government indicated that ‘over 32 individuals have been convicted of terrorism offences in British courts after previously travelling to the Iraq/Syria theatre of conflict as Daesh fighters.’⁵⁴

In addition to the removal of Shamima Begum’s citizenship recently being upheld, Ministers took away the British nationality of 23 people between 2014 and 2016 as Daesh took large swaths of territory in Syria and Iraq, and a further 104 in 2017 and 21 in 2018. No gender breakdown was provided.⁵⁵ Since then, no further information has been provided on the number of individuals who have had their citizenship removed by the UK, with estimated 15 British women still living in Syria.⁵⁶ The stripping of citizenship is a significant hindrance to more British Daesh foreign fighters being held accountable in the UK. The UK must ensure those responsible for crimes against the Yazidis are returned to the UK, and prosecuted for their crimes, including international crimes.

For now, all trials of Daesh fighters in the UK were for terror related offences only. There are certain challenges in the UK which may prevent prosecutions under the principle of universal jurisdiction. Among these challenges are the requirements to show that the suspect (i) is/was a UK national or UK resident at the time of the crime; or (ii) became a UK national or UK resident after the crime and still resides in the UK when proceedings are brought, and an additional consent of the Attorney General.⁵⁷ In many countries, there is no need for additional consent. The nationality or residency requirements mean that the UK has a limited form of universal jurisdiction, contrary to, for example, the German approach. These limitations need to be addressed to ensure that the UK can play an active role in ensuring justice and accountability for international crimes

4.3. ESTABLISHING AN INTERNATIONAL AD-HOC TRIBUNAL FOR DAESH

Over the years, there have been some attempts to establish an ad-hoc tribunal to prosecute Daesh fighters and members for their crimes.

⁵⁴ See: <https://questions-statements.parliament.uk/written-questions/detail/2023-02-23/HL5827>.

⁵⁵ Dan Sabbagh, ‘Watchdog steps in over secrecy about UK women in Syria stripped of citizenship’ (29 March 2021). Available at: <https://www.theguardian.com/world/2021/mar/29/watchdog-steps-in-secrecy-uk-women-syria-stripped-of-citizenship>.

⁵⁶ Ibid.

⁵⁷ House of Commons Library, Standard Note, Universal Jurisdiction, SN/IA/5422, 25 March 2010, 4. Available at: <https://researchbriefings.files.parliament.uk/documents/SN05422/SN05422.pdf>.

Among others, in 2018, Leiden University and the City of The Hague organised the Founding Conference on Bringing Daesh to Justice, securing commitments within Iraqi and Kurdish representatives to establish an ad-hoc tribunal. In 2019, there was some renewed interest in establishing an international tribunal to prosecute Daesh, as Germany, Norway and Sweden have been mapping the available options and possible support from other states. However, this did not materialise.

While an ad-hoc tribunal in the region could help to improve visibility of such trials, considering that survivors and witnesses raise the issue of the lack of trust and fear to testify in the region.

4.4. STATE RESPONSIBILITY UNDER THE 1948 GENOCIDE CONVENTION

In addition to pursuing individual criminal responsibility for Daesh fighters, an issue that has received less attention is bringing before the International Court of Justice (ICJ) States which have allegedly failed to prevent and punish acts of genocide committed by Daesh, in order to hold those States to account under the Genocide Convention.

In July 2022, an ad-hoc group of organisations under the name of 'Yazidi Justice Committee' published a report entitled 'State Responsibility and the Genocide of the Yazidis.' On the basis of over two years of research and analysis, this report found significant *prima facie* evidence that indicated that three States – Syria, Iraq and Turkey – had allegedly failed to comply with their duties under the Genocide Convention. In particular, with respect to Syria and Iraq, these states had allegedly failed – and continued to fail – in their duties to prevent and punish genocide, as well as in their duties to enact legislation penalising persons guilty of genocide.

The proposal to institute a case under the Genocide Convention has recently received the support of PACE with a resolution calling upon Member States of the Council of Europe to consider taking such action at the ICJ.

III. ASSISTANCE TO SURVIVORS OF DAESH ATROCITIES IN IRAQ

Victims and survivors have been provided with some assistance. However, this assistance is running low and many projects are being closed. Assistance to survivors is crucial to protect the communities once targeted for annihilation, and as such, part of the duty to prevent genocide. This is particularly the case as this genocide is ongoing.

1. HUMANITARIAN ASSISTANCE

Humanitarian assistance provided to the targeted communities is running low now, several years after the Daesh atrocities. During the trip to Iraq, the team was told how the assistance to the communities is decreasing, while the need is still there. The team was also told how some groups within the communities continue to be neglected. For example, boys, who were abducted by Daesh, forcibly converted, turned into child soldiers, and who managed to escape to rejoin their community, are provided with little if any assistance, including for psychological consequences of the abuse they suffered at the hands of Daesh.

Many members of the communities cannot access basic assistance because of the lack of documentation. Over 15,000 displaced children lack documentation and as such, cannot access various services. Children born out of rape may not receive government issued birth certificates.

2. EDUCATION

Members of the persecuted communities have limited or no access to education. This is particularly an issue among the Yazidi communities and the individuals who were abducted as children or teenagers and liberated years after. As they are above age, they cannot access free education. There used to be 14 educational centres in Kurdistan to assist people under the age of 24 to continue their education. At the beginning of 2023, the number of such centres decreased to 4.

Given that women and girls are still being returned from captivity and have been held since 2014, many have surpassed the age of 24 and missed out on crucial years of education. The issue requires attention as some estimate a very high percentage of Yazidi women and girls are illiterate. Whilst short term projects have been funded to attempt to rectify this, there is little long term assistance in this area.

Illiteracy continues to be a significant issue that requires an urgent response. Apart from affecting all aspects of lives, it will have a detrimental effect on victims and survivors seeking justice.

3. COMPENSATIONS

3.1. YAZIDI [FEMALE] SURVIVOR LAW

In March 2021, the Iraqi Council of Representatives voted to adopt the Yazidi [Female] Survivor Law (YSL).⁵⁸ This law aimed at providing assistance to survivors of the Daesh atrocities by introducing a system of reparations for female survivors of Daesh campaigns who were subject to sexual violence and other forms of abuse.⁵⁹ The law stipulates benefits in form of monthly stipends and a piece of residential land with a mortgage or a free housing unit for female survivors, while it provides for special

⁵⁸ Dr Ewelina U Ochab, 'Iraq Adopts New Law To Assist Survivors Of The Daesh Genocide' Forbes. Available at: <https://www.forbes.com/sites/ewelinaochab/2021/03/04/iraq-adopts-new-law-to-assist-survivors-of-the-daesh-genocide/>. This law was enacted following significant support from several international organisations, including the Coalition for Just Reparations. see: 'C4JR Delegation Presented C4JR Draft Law on Reparations for CRSV Survivors at the Iraqi Parliament – C4JR' (1 December 2020). See: <https://c4jr.org/011220202471>.

⁵⁹ Philip Loft and Nigel Walker, 'UK House of Commons Library: Atrocities against the Yazidi Religious Community' (2022) CDP-0027 (2022) 3.

education and employment opportunities, and medical and psychological support for both the children and female survivors. The law is momentous because it explicitly recognised that the crimes committed against the Yazidis and other communities constituted not only crimes against humanity but also genocide.⁶⁰

In spite of its limitations, the adoption of the YSL has been viewed as an important signal that accountability, reparations and the needs of victim-survivors matter to the Iraqi government.⁶¹ Indeed, it has been viewed as a milestone not only for recognising and providing remedies for the suffering of Yazidis and others targeted by Daesh, but it also puts Iraq in the small category of States prepared to take action to specifically address the rights and needs of the survivors of conflict-related sexual violence.⁶²

However, as it stands, the law is not implemented yet.

3.2. 'THE MARTYRS' LAW'

The Law No. 20 of 2009 and its 2015 and 2020 amendments (The Law on Compensation for Victims of Military Operations, Military Mistakes and Terrorist Actions, sometimes referred to as the Martyrs' Law) is to provide support to family members of individuals harmed or killed in incidents occurring on or after 20 March 2003. After amendments, the Martyrs' Law applies to victims of the former regime, victims of terrorism including Daesh victims, and victims of military 'mistakes.'

The law covers five categories: 1. martyrdom or loss; 2. full or partial disability; 3. injuries and conditions requiring short-term treatment; 4. damage to property; and 5. damage affecting employment and study.

For the categories pertaining to bodily harm, the law stipulates a one-off grant, between IQD1.75 million to IQD3.75 million, a monthly pension, and a plot of residential land. This is to be paid to the victim or their family members (parents, sons, daughters, spouses, brothers and sisters). Damage to property, whether vehicles, houses, agricultural lands, or fixtures, is to be assessed on a case-to-case basis. Damage to

⁶⁰ Tatiana Rouhana, 'Is Criminal Justice Enough to Address the Yazidi Genocide?' The Tahrir Institute for Middle East Policy (2022). Available at: <https://timep.org/commentary/analysis/is-criminal-justice-enough-to-address-the-yazidi-genocide/>.

⁶¹ *Minutes of the Meeting on 'Options for Survivor-Centred Justice in Iraq'* (Directed by Co-hosted by Coalition for Just Reparations, Jiyan Foundation, Yazda and International Coalition for the Responsibility to Protect, 2022).

⁶² UN News, 'Iraq: "Moral Obligation" to Ensure Justice for Yazidi and Other Survivors of ISIL Crimes' (30 September 2021). Available at: <https://news.un.org/en/story/2021/09/1101852>.

employment and study is to reinstate the victim to his or her former place of study and pay outstanding salaries or benefits. The amendment of 2015, added 'kidnapping' to the categories eligible for compensation under the law.

The families that the team met during its trip to Iraq suggested that they have not received such compensation and do not know anyone else who has. Some complained about the lengthy bureaucracy and burdensome documentation that continue to pose serious challenges to the Yazidi community, in particular. Others complained of the exorbitant fees charged by lawyers promising to help. The high fees ultimately prevent them from seeking their assistance.

Reportedly, in 2022, Prime Minister Mohammad Shiya al-Sudani cancelled the mandatory security check for the residents of the territories formerly invaded by Daesh.⁶³ As such, some individuals reported their concerns that without this security check, even Daesh members will be able to apply for compensation under the Martyrs' Law and so abuse the system that should benefit survivors.

Reimbursing families for purchasing their family members

Initially, families were able to apply to be reimbursed for the money they spent in 'purchasing' their family members back from Daesh. However, as traffickers got involved, and the costs of 'purchasing' their families back from the perpetrators increased significantly as a result, families were not able to claim the costs anymore. During the team's trip to Iraq, one woman told how she had to borrow money from friends to 'purchase' her relatives. She was able to recover only a small amount back.

3.3. SURVIVORS' GRANT

In 2019, the Supreme Committee for the Relief and Shelter of Families Displaced by Terrorist Operations (also known as the Higher Committee for the Relief and support of the Displaced) introduced interim compensation in the form of a one-off payment to Yazidi survivors.⁶⁴ According to the scheme, eligible survivors were to be awarded an

⁶³ See for example: <https://english.aawsat.com/home/article/3981211/al-sudani-cancels-security-checks-iraqi-provinces-liberated-isis>.

⁶⁴ 'Cabinet Approves Measures to Strengthen Support for People Displaced by Terrorist Operations' 25th December, 2019. Available at <https://gds.gov.iq/cabinet-approves-measures-to-strengthen-support-for-people-displaced-by-terrorist-operations/>.

amount of IQD 2,000,000. The grant scheme was to be implemented by the Ministry of Migration and Displacement. However, according to a research conducted by Yazda and IOM, only a small number of survivors received the grant.⁶⁵

3.4. IRAQI PENAL CODE COMPENSATION FOR RAPE

Article 393(4) of the Iraqi Penal Code suggests that 'If the victim was a virgin, the court must order that she receive appropriate compensation.'

4. RESETTLEMENT

Many members of the Yazidi community do not feel safe in Iraq and many members expressed their wish to seek a safe haven in other countries, especially Australia or Canada. However, the options for resettlement are limited at the moment, especially with so many other crises around the world. Some members of the Yazidi communities mentioned having applied for resettlement and waiting several years without much progress in their cases. In some cases, the main challenge is getting all relevant documents. As the Yazidi community was fleeing Sinjar, they left many documents behind. Trying to get new documents turned out to be a lengthy and costly process. However, as UNHCR and the US Consulate focus significantly on documentation, the issue may be addressed.

Some survivors mentioned situations whereby most of the families were taken to e.g. Australia but one young woman from that family would have been left behind. This issue requires further inquiry.

Because of the limited options for resettlement at the moment, UNHCR reports of many Yazidis taking irregular routes in the pursuit of safety. This exposes them to homelessness, abuse and other risks.

UNHCR has been reporting a high number of returns among the Yazidi community. According to them, this is due to integration issues and lack of social support. Yazidis are very community oriented people who live as a community. Those who were isolated from their community have been struggling to adjust to their new lives.

5. FORGOTTEN GROUPS

⁶⁵ Yazda and IOM, 'Interim relief program for CRSV in Iraq' (2021). Available at: https://irp.cdn-website.com/16670504/files/uploaded/Yazda_Publication_2021-03_ReliefProgramCRSVIraq_28062021_Download_EN_vf.pdf.

Generally, the Yazidi community continues to struggle to get the assistance they require. Approx. 180,000 Yazidis still live in camps in Kurdistan and in dire conditions.

However, also, among the Yazidi community, some groups are forgotten. For example, young men, who were abducted by Daesh as children and teenagers, forcibly converted and turned into child soldiers, struggle to access the assistance they need, whether medical or other assistance. There has been very little focus on the lived experiences of the Yazidi boys abducted by Daesh and little assistance that has been offered to them. During the visit to Iraq, the team met with a few of them who wanted to share their stories. These boys were taken by Daesh when they were 10-11 years old, and were put through a lengthy process of forced conversion, abuse and threats, in order to turn them into child soldiers. All of them reported being punished for any disobedience or behaviour that Daesh did not approve (even raising their voice). Whenever a boy managed to escape, his friends would have been punished for that, to disincentivise them from leaving.

Furthermore, there are some Yazidi families living outside of camps. They struggle to access the assistance they need.

IV. STRENGTHENING LEGAL SYSTEM IN IRAQ

There are certain shortfalls with the Iraqi Penal Code that prevent effective prosecutions for the Daesh atrocities. For example, the Iraqi Penal Code does not criminalise genocide and other international crimes. Furthermore, it does not address several crimes perpetrated against women and girls, limiting the number of acts for which Daesh fighters can face criminal prosecution. Strengthening legal systems in Iraq, in a way that responds to the recent Daesh genocide, will help to implement Iraq's obligations under the Genocide Convention.

1. HUMAN RIGHTS NATIONAL ACTION PLAN

In July 2021, Iraq adopted a five-year Human Rights National Action Plan that included legislating to hold perpetrators of sexual violence accountable and enacting a law criminalising international crimes: genocide, war crimes and crimes against humanity. This plan specifically listed 'working with international partners, such as the United Nations investigations team, to strengthen accountability for crimes committed by the terrorist [Daesh] organisation, with a view to bringing charges against those who have

committed genocide crimes, war crimes and crimes against humanity.’⁶⁶ While such a draft law has been under consideration for several years, it has yet to be enacted.

2. DOMESTIC LAW ON GENOCIDE

One of the main obstacles to criminal prosecutions of genocide, crimes against humanity and war crimes in Iraq remains the absence of an Iraqi penal law criminalising genocide and other international crimes.⁶⁷ As international crimes are not codified by Iraqi law, Iraqi courts thus do not have jurisdiction over the crime of genocide, crimes against humanity or war crimes committed within its territory. Moreover, Iraq is not a signatory to the Rome Statute of the International Criminal Court, which means that, in the current state of play, available avenues for criminal accountability for victims and survivors of the Daesh atrocities are severely limited.⁶⁸

In 2005, Iraq’s Parliament adopted the Law of the Supreme Iraqi Criminal Tribunal. The tribunal had temporal jurisdiction over crimes committed between 1968 and 2003. The Law of the Supreme Iraqi Criminal Tribunal provided definitions of genocide, crimes against humanity, war crimes and other serious crimes, which were consistent verbatim with the Rome Statute of the International Criminal Court.⁶⁹ The Law of the Supreme Iraqi Criminal Tribunal is the only domestic penal law which explicitly acknowledged the crime of genocide and other international crimes. However, it could not be applied to the acts of genocide committed against the Yazidis as it is time-barred to acts occurring until 1 May 2003.

In 2019/20, Iraqi authorities prepared a draft law on the Iraqi Criminal Tribunal for Crimes Committed by Daesh, which sought to establish the ability of Iraq to prosecute genocide, crimes against humanity and war crimes committed by Daesh before a

⁶⁶ Coalition for Just Reparations, ‘Position Paper On An Isil Accountability Mechanism In Iraq’ (2022) 5.

⁶⁷ Ewelina U Ochab and David Alton, ‘The Daesh Genocide Against Religious or Belief Minorities in Syria and Iraq’ in Ewelina U Ochab and David Alton, *State Responses to Crimes of Genocide: What Went Wrong and How to Change It* (Springer International Publishing 2022) 150. Available at: https://doi.org/10.1007/978-3-030-99162-3_5. This section draws on the extensive research undertaken by the Yazidi Justice Committee. Tatyana Eatwell and Aldo Zammit Borda, *State Responsibility and the Genocide of the Yazidis* (Bilingual edition, Independently published 2022).

⁶⁸ United Nations Assistance Mission for Iraq and Office of the United Nations High Commissioner for Human Rights, ‘Human Rights in the Administration of Justice in Iraq: Trials under the Anti-Terrorism Laws and Implications for Justice, Accountability and Social Cohesion in the Aftermath of ISIL’ (2020) 6. Available at: <https://www.ohchr.org/en/documents/country-reports/human-rights-administration-justice-iraq-trials-under-anti-terrorism-laws> accessed 14 February 2023.

⁶⁹ International Commission on Missing People, ‘Legal Framework Relative To The Issue Of Missing Persons In Iraq’ (2021) 32. Available at: <https://www.icmp.int/?resources=legal-framework-relative-to-the-issue-of-missing-persons-in-iraq>.

competent domestic tribunal.⁷⁰ This draft law was essentially an amended version of the Law of the Supreme Iraqi Criminal Tribunal with jurisdiction over crimes committed by Daesh in Iraq and elsewhere. Provisions of the draft law defining genocide, crimes against humanity and war crimes were in line with the Rome Statute.⁷¹ However, the adoption of this draft law by the Council of Representatives of Iraq was impacted by various factors, including the onset of COVID, and has yet to materialise.⁷² As long as the law is not adopted, allegations of genocide, crimes against humanity or war crimes cannot be processed through the domestic judicial system of Iraq.

2.1. THE NEED FOR DOMESTIC LAW ON GENOCIDE

There are various, compelling reasons for the need for an Iraqi penal law and mechanism for genocide and other international crimes. While Iraq ratified the Genocide Convention in 1959, it has yet to implement it. Article V of the Genocide Convention states that: ‘The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.’ By failing to enact a law criminalising genocide, the current Iraqi Penal Code puts Iraq in violation of its obligations under the Genocide Convention.⁷³ This is the clear conclusion reached by the YJC report, which observes that:

‘Iraq has failed to enact the necessary domestic legislation to give effect to the country’s obligations under Article V of the Genocide Convention, and in turn to provide the necessary domestic legal basis to give effect to the provisions of the Genocide Convention. The existing Iraqi legal framework falls short of Iraq’s treaty obligations under the Genocide Convention, particularly due to its failure to criminalise genocide as a distinct crime.’⁷⁴

⁷⁰ UN News, ‘Six Years after Genocide, International Community Must Prioritize Justice for Yazidi Community’. Available at: <https://news.un.org/en/story/2020/08/1069432>.

⁷¹ International Commission on Missing People, ‘Legal Framework Relative To The Issue Of Missing Persons In Iraq’ (2021) 32.

⁷² Alice Wairimu Nderitu, ‘Discussing Practical Suggestions on How ISIL Accountability Mechanism in Iraq Can Best Serve the Cause of Justice and Interests of Survivors and Their Communities: “Options for Survivor-Centered Justice in Iraq”’ (Coalition for Just Reparations and Yazda, 2022).

⁷³ Global Justice Centre, ‘Iraq’s Criminal Laws Preclude Justice For Women And Girls’ (2018) 10 <www.globaljusticecenter.net>.

⁷⁴ Abraham, Eatwell and Borda, 152.

In addition to rectifying this important lapse, the need for an Iraqi penal law and mechanism to prosecute international crimes in Iraq would promote the interests of survivor-centred justice. Providing national authorities with the necessary legal framework and mechanism to undertake atrocity trials on their territory not only promotes sovereignty and efficiency but also contributes to restoring trust in national institutions.⁷⁵

In cases such as the Daesh campaign, crimes will have been committed to such a degree that the basic rules of society will have been profoundly challenged and the institutions in charge of enforcing and safeguarding those rules will have been severely damaged or have failed entirely. Those institutions will include the police, the prosecution services, and the judges as well as parliament and other facets of government. One of the reasons why national proceedings are to be valued above international ones wherever possible is that they can help to restore public confidence in the national institutions that failed citizens and help to re-establish damaged confidence in the basic rules of society.⁷⁶

This desire to see criminal prosecutions of genocide and other international crimes undertaken locally, in Iraq, is reflected in the below quote from a member of the Yazidi Survivors Network:

'Iraq is where the terror started for us, Yazidis; It is from where most [Daesh] leaders are from; It is where we were killed or abducted from. If [Daesh] members are not persecuted in Iraq, then where will they be prosecuted? It is important that this justice takes place in Iraq, only then will we be able to trust our country again. We have been waiting for this for eight years, until when will we need to wait.'⁷⁷

2.2. PROSECUTING TERROR OFFENCES VS. GENOCIDE

There are several, compelling reasons why Iraq should take action to prosecute international crimes committed against the Yazidis and other religious minorities in

⁷⁵ Paul Seils, 'Handbook on Complementarity: An Introduction to the Role of National Courts and the ICC in Prosecuting International Crimes' (International Centre for Transitional Justice 2016). Available at: https://www.ictj.org/sites/default/files/ICTJ_Handbook_ICC_Complementarity_2016.pdf.

⁷⁶ Ibid.

⁷⁷ *Minutes of the Meeting on 'Options for Survivor-Centred Justice in Iraq'* (Directed by Co-hosted by Coalition for Just Reparations, Jiyan Foundation, Yazda and International Coalition for the Responsibility to Protect, 2022).

Iraq not as terrorism offences but as international crimes, namely, genocide, crimes against humanity or war crimes.

Firstly, it matters from the perspective of ‘fair labelling’ of crimes. While Daesh fighters undoubtedly sought to spread terror amongst many minorities in Iraq, with respect to the Yazidis, they intended something more heinous – they intended to destroy this religious minority in whole or in part.⁷⁸ Iraqi anti-terror laws define terrorism broadly, characterising it as the ‘use of violence to spread fear’ and ‘any act with terrorist motives that threaten the national unity of the State,’ or has the ‘aim to disturb the peace, and stability and national unity,’ or ‘to bring about horror or fear among people and to create chaos to achieve terrorist goals.’⁷⁹ The definition of terrorism cannot encompass the unique harms of the crime of genocide. This, in turn, limits the ability of Iraqi courts to punish perpetrators for the commission of, or other acts related to genocide. This view is reflected in the words of a Yazidi victim-survivor, who observed:

‘In 2014, in front of all of the globe all the types of crimes were committed against us. All of our community suffered from these crimes. There is very clear evidence because we were different in our religious identity. To us, this wasn't terrorism. Today, we are seeing that our own government and other governments of the world don't care about providing justice [for the survivors].’⁸⁰

Secondly, when charges are brought against Daesh fighters on the basis of terrorism-related offences, the atrocities committed against the Yazidis need not even feature in the trials. Evidence relating to the Yazidi genocide would be considered extraneous and irrelevant to the terrorism-related charges based on the anti-terror laws. As a result, even though large numbers of Daesh fighters may be prosecuted and convicted for terrorism-related offences, the calls for recognition, justice and accountability of Yazidi victims and survivors for the genocide their community has suffered and is suffering, will remain unheeded.

⁷⁸ James Chalmers and Fiona Leverick, ‘Fair Labelling in Criminal Law’ (2008) 71 *Modern Law Review* 217; Hilmi M Zawati, *Fair Labelling and the Dilemma of Prosecuting Gender-Based Crimes at the International Criminal Court* (Oxford University Press 2014).

⁷⁹ Federal Anti-Terrorism Law Article 1; Kurdistan Anti-terror Law.

⁸⁰ *Minutes of the Meeting on ‘Options for Survivor-Centred Justice in Iraq’* (Directed by Co-hosted by Coalition for Just Reparations, Jiyan Foundation, Yazda and International Coalition for the Responsibility to Protect, 2022).

In particular, criminal prosecutions on the basis of Iraqi anti-terrorism laws tend to disregard and marginalise allegations of sexual violence committed by Daesh fighters. Indeed, during the Daesh campaign, thousands of Yazidis were enslaved, with women and children abducted from their families and subjected to the most brutal abuses, including serial rape and other forms of unendurable sexual violence. For many, this abuse lasted years, often leading to death. The intent of these acts was to permanently destroy the capacity of these women and children to have children and build families within the Yazidi community.⁸¹ The failure of anti-terrorism trials to capture the full range of the horrific crimes Daesh committed denies sexual violence survivors a critical opportunity to address the crimes committed against them, negates their agency, and often silences their voices.⁸²

Thirdly, atrocity crimes trials play an important role in writing the historical narratives of the events.⁸³ Failing to investigate and prosecute genocide as a distinct crime misses an opportunity to build a complete historical record, honour the experiences of victims, and ensure full accountability for Daesh's criminality.⁸⁴ With a continued focus on terrorism-related offences, there is a real risk that the genocide against the Yazidis will gradually be written out of the official juridical records of the conflict. In this context, Nadia Murad, the Nobel Peace Prize Laureate, warned that: **'Public trials and recognition of the genocide meanwhile will help avert future violence and facilitate the healing of survivors.'**⁸⁵ The impunity may lead to a new wave of similar atrocities in the future. Pointing out that Yazidis have been persecuted for centuries, Nadia Murad also noted that: **'where impunity is accepted, violence is repeated. Accountability is essential. If world leaders have the political will to act on this evidence, then justice surely is within reach.'**⁸⁶

⁸¹ See also Aldo Zammit Borda, 'Putting Reproductive Violence on the Agenda: A Case Study of the Yazidis' [2022] *Journal of Genocide Research* 1.

⁸² Tatiana Rouhana, 'Is Criminal Justice Enough to Address the Yazidi Genocide?' The Tahrir Institute for Middle East Policy (2022). Available at: <https://timep.org/commentary/analysis/is-criminal-justice-enough-to-address-the-yazidi-genocide/>.

⁸³ Aldo Zammit Borda, *Histories Written by International Criminal Courts and Tribunals: Developing a Responsible History Framework*: 26 (1st ed. 2021 edition, TMC Asser Press 2020).

⁸⁴ Global Justice Centre, 'Iraq's Criminal Laws Preclude Justice For Women And Girls' (2018) 10. Available at: www.globaljusticecenter.net.

⁸⁵ UN News, 'ISIL Crimes against Yazidis Constitute Genocide, UN Investigation Team Finds' (10 May 2021).

⁸⁶ *Ibid.*

2.3. PROSECUTING DAESH FOR GENOCIDE IN IRAQ - THE PRINCIPLE OF LEGALITY

The principle of legality in international criminal law is usually described by using the Latin maxims *nullum crimen sine lege* and *nulla poena sine lege* (no crime and no penalty without law).⁸⁷ It postulates that a person may only be held criminally liable and punished if at the moment when they performed a certain act this act was regarded as a criminal offence under the applicable law.⁸⁸ The *nullum crimen* principle has two aspects: non-retroactivity and clarity, both of which seek to ensure that the law is reasonably publicised, so people can know whether their planned course of action is acceptable or not. It is a fundamental principle of criminal law that criminal responsibility can only be based on a pre-existing prohibition of conduct that is understood to have criminal consequences.⁸⁹

In view of the *nullum crimen* principle, it may be asked whether enacting a new penal law in Iraq criminalising genocide and other international crimes after such crimes had been committed would run counter to the principle of legality. However, here, the enactment of such a law in Iraq would not infringe on the *nullum crimen* principle. This is because the international crimes that Daesh fighters allegedly committed were clearly and unambiguously proscribed in treaties and customary international law applicable to Iraq at the time when the prohibited acts were committed. It is not necessary for such acts to be proscribed by domestic laws, so long as they were prohibited by international laws applicable to Iraq at the time of the offence. The important issue from the perspective of the *nullum crimen* principle is whether the treaty (or other sources of international law) was applicable to the relevant armed conflict.⁹⁰

Moreover, the fact that at the time the acts were committed, no domestic court or mechanism existed with jurisdiction to adjudicate crimes proscribed by international law is not a bar to prosecution and is not a violation of the *nullum crimen* principle.⁹¹ In the High Command Trial, the Tribunal held:

⁸⁷ Antonio Cassese, *Cassese's International Criminal Law* (OUP Oxford 2013) 22.

⁸⁸ *Ibid.*

⁸⁹ Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press 2009) 18.

⁹⁰ *Ibid.*, 19.

⁹¹ Karim AA Khan and Rodney Dixon, *Archbold International Criminal Courts: Practice, Procedure and Evidence* (Sweet and Maxwell 2009) 1258 (17–40).

‘Even after the crime is charged to have been committed we know of no principle of justice that would give the defendant a vested right to a trial only in an existing forum. In the exercise of its sovereignty, the State has the right to set up a Tribunal at any time it sees fit and confer jurisdiction on it to try violators of its criminal laws.’⁹²

3. DOMESTIC LAWS ON SEXUAL AND GENDER-BASED VIOLENCE

The Iraqi Penal Code is not adequate to address the issue of sexual and gender-based violence.

Substantial provisions

3.1. RAPE AND SEXUAL ASSAULT

Rape and sexual assault are defined in Article 393 of the Iraqi Penal Code. The definition is very narrow and based on the lack of consent. However, it does not cover the use of force or threat which are important considerations in cases of conflict-related sexual violence.

While the Iraqi Penal Code criminalises rape, Paragraph 398 of the code contains a defence which ultimately prevents prosecutions - a defence of marrying the victim. Paragraph 398 states:

‘If the offender mentioned in this Section then lawfully marries the victim, any action becomes void and any investigation or other procedure is discontinued and, if a sentence has already been passed in respect of such action, then the sentence will be quashed. Legal proceedings will resume or the sentence will be reinstated, according to the circumstances if such marriage ends in divorce brought about by the husband without legal justification or in a divorce ordered by the court for wrongs committed by the husband or for his bad behaviour within 3 years following the cessation of the proceedings. The public prosecutor, the accused, the victim or any person who has an interest in the proceedings may, according to the circumstances, make an application for the proceedings, investigation, procedures or execution of the sentence to be stopped or for their resumption or for the reinstatement of the sentence.’

⁹² United Nations War Crimes Commission, ‘Law Reports of Trials of War Criminals Vol. XII’ (1949) 62–3.

As such, the law does not only fail to protect the victim but empowers the perpetrators.

3.2. MARITAL RAPE AND DOMESTIC VIOLENCE

Marital rape is not criminalised in Iraq; moreover, the law does not criminalise domestic violence, and as it is clear from Paragraph 41(1) of the Iraqi Penal Code, the ‘punishment’ of a wife can be justified. The issue became glaring with the rise of Daesh and its use of rape, sexual violence and forced marriage against women and girls.

Paragraph 41(1) of the Iraqi Penal Code states that ‘(1) The punishment of a wife by her husband, the disciplining by parents and teachers of children under their authority within certain limits prescribed by law or by custom.’ It may be argued that Paragraph 41(1) of the Iraqi Penal Code is a provision that ultimately prevents women and girls from ever seeing justice for the violence they suffered at the hands of Daesh if the marriages between the fighters and the abducted and enslaved women and girls are accepted.

In 2011, Kurdistan Parliament passed a law on domestic violence, Act No 8 of 2011, addressing the failure of the Iraqi Penal Code which is silent on the issue.

Iraqi legislators are currently looking into draft laws.

3.3. FORCED AND ‘PLEASURE’ MARRIAGES

Under Iraqi law, forced marriages are not automatically void if they have been consumed. Reports suggest that survivors of the Daesh genocide are very vulnerable to being abused yet again with the so-called ‘pleasure’ marriages.

3.4. CHILD MARRIAGE

The law allows marriage for women from the age of 15 if fitness and capacity are established, and no reasonable objection from guardians.

3.5. UNLAWFUL SEIZURE, KIDNAPPING AND DETENTION

While the Iraqi Penal Code criminalises the acts of unlawful seizure, kidnapping and detention, Paragraph 427 provides for defence of marrying the victim:

‘If the offender mentioned in this Section then lawfully marries the victim, any action becomes void and any investigation or other procedure is discontinued and, if a sentence has already been passed in respect of such action, the sentence will be quashed. Legal proceedings will resume or the sentence will be reinstated according to the circumstances if the marriage ends in a divorce brought about by the husband without legal justification or in a divorce ordered by the court for wrongs committed by the husband or for his bad behaviour within 3 years following the cessation of the proceedings. The public prosecutor, the accused, the victim or any person who has an interest in the proceedings may, according to the circumstances, make an application for the proceedings, investigation, procedures or execution of the sentence to be stopped or for their resumption or for the reinstatement of the sentence.’

As such, the law does not only fail to protect the victim but empowers the perpetrators.

3.6. OTHER BARRIERS TO PROSECUTIONS - PROCEDURAL ISSUES

There are several procedural barriers to prosecutions including:

- In cases the victim and the perpetrator are married, a complaint can only be brought by the victim or her representative.
- Offences perpetrated outside Iraq can be brought forward only with the permission of the Minister of Justice (Paragraph B of Article 3 of the Iraqi Criminal Procedure Code).
- The law imposes a time-limit for bringing complaints to three months (Article 6 of the Iraqi Criminal Procedure Code).

4. LAW AFFECTING RELIGIOUS OR BELIEF MINORITIES

4.1. LAW ON FREEDOM OF RELIGION OR BELIEF

The Iraqi Constitution of 2005 provides for freedom of religion or belief for Muslims, Christians, Yazidis and Sabeen Mandeans but not for any other religions or beliefs. The practice of the Baha’i faith is prohibited by law in Iraq (but allowed in Kurdistan). The

Iraqi legislature is currently looking into introducing a new bill on freedom of religion or belief to provide more comprehensive protection.⁹³

Minorities are not adequately protected in Iraq. In Kurdistan, Law No. 5 of (2015) for the Protection of Minorities in the Kurdistan Region is to provide protections for minorities. The law known as the Protection of the Rights of the Components of Iraqi Kurdistan Law is to preserve the rights of the national minorities (Turkmens, Chaldeans, Syrians, Assyrians, and Armenians) and religious or belief groups (Christian, Yezidi, Sabeen, Mandaean, Kakkia', Shabek, Kurds Failil, and Zoroastrianism).

4.2. IDENTITY CARDS

In 2015, the Iraqi legislature introduced a new law, the National Identity Card Law, to say that a child born to one Muslim parent, even if the child is born out of rape, has to be registered as Muslim. The alternative is for the child to be undocumented. Such a law is highly controversial and as religious minorities struggle for their survival in Iraq, the law will only prolong their suffering and prevent them from being able to rebuild their lives.

According to Article 26(2) of the 2015 National Identity Card Law, 'children... follow the religion of Islam from the Muslim parents.' The law does not appear to say anything about cases where a minority religious woman or girl is raped and therefore enables the interpretation that these provisions still apply. Article 26(1) states that 'a non-Muslim may change his religion in accordance with the law.' However, this applies only to the conversion of non-Muslims to Islam and not the other way around. The alternative is not registering the child. However, if the child is unregistered, the child is not able to access various services, including education.

The law, which is contrary to the international standard on the right to freedom of religion or belief, is extremely controversial, especially in light of the genocidal campaign unleashed by Daesh against religious minorities in Iraq, including Yazidis and Christians. Daesh, apart from a litany of barbaric atrocities, has been infamous for using rape and sexual violence as a weapon of war, and as a method of its genocidal campaign against religious minorities. In the self-proclaimed Daesh caliphate, women and girls were subjected to horrendous and daily abuse at the hands of Daesh fighters to whom they were forcibly married. Some of these rapes resulted in pregnancies. In such cases, under the 2015 National Identity Card Law, the children born to Yazidi

⁹³ For a detailed analysis see CRIED report: <https://www.ohchr.org/sites/default/files/Documents/Issues/Religion/Submissions/CSOs/23.creid.pdf> and also US State Department, International Religious Freedom Report 2021.

women or girls and Daesh fighters, who are Muslim, would have to be registered as Muslim. This has a severe and lasting punishing effect on the future of these children and their Yazidi families.

In 2021, a bill referred to as 'My name is my mother's name' was introduced to ensure that a mother's religion can be passed down to her child. Reportedly, the bill did not proceed due to significant objections.

5. MECHANISMS TO PREVENT FUTURE ATROCITIES

Iraq does not have any comprehensive mechanisms that would equip it to prevent future atrocities. Only a few States have some form of mechanisms that enable them to monitor early warning signs and risk factors of atrocities, even in countries where such atrocities have been perpetrated in the past. As such, the ability of these States to prevent atrocity crimes is non-existing. Also, not many States have atrocity prevention strategies that would help to guide them through responses.

V. RECOMMENDATIONS

Stopping the atrocities

- States and international actors to work together to locate, provide resources and personnel to rescue the missing women and children and provide them with comprehensive assistance. This should be done in collaboration with organisations supporting the Yazidi community, incl. Nadia's Initiative, Free Yezidi Foundation and Yazda, among others.
- To provide safe spaces for kidnapped women and children - who may be traumatised and have little memory of the families they were taken from ten years ago - to offer psychosocial support to them before they are comfortable being returned to the communities.

Bringing Daesh members to justice

- States and international bodies to map all initiatives engaged in collecting and preserving evidence of Daesh atrocities and identify best practices for indexing the evidence and collaborating with prosecutors globally;
- States to facilitate the collaboration of their war crimes units with UNITAD and CIGE and others who hold evidence of Daesh crimes, to facilitate prosecutions of returned foreign fighters;
- States and international bodies to identify challenges preventing courts from prosecuting Daesh for their involvement in atrocity crimes and introduce steps to rectify the challenges including:
 - Criminalising genocide and crimes against humanity in the Iraqi Penal Code;
 - Engaging the Iraqi authorities to suspend the use of the death penalty in cases of Daesh fighters where there is credible evidence of further crimes committed against Yazidis, to allow for the cooperation with UNITAD and other agencies with evidence, to bring forward additional prosecutions;
 - Expanding provisions pertaining to the use of universal jurisdiction in various countries, including in the UK;
 - Supporting the draft convention on cooperation between States in dealing with atrocity crimes.
- Work towards establishing an ad-hoc tribunal for Daesh atrocities.

Pursuing state responsibility under the Genocide Convention

- States to consider bringing proceedings before the International Court of Justice for States' failures to prevent and punish this genocide.

Assisting victims and survivors

- States and international bodies to map past and existing humanitarian and development projects providing assistance to the communities (whether provided by States or NGOs) and identify gaps requiring attention, particularly

focused on long term support and initiatives that could be funded over shorter term projects;

- States and international bodies to work with communities on identifying new projects to help the communities re-establish their lives, including focused on education and long term support to survivors who missed crucial years of their education during captivity;
- States and international bodies to work with the Iraqi government and relevant authorities on challenges preventing the communities from accessing financial assistance that they are eligible for; including by way of providing funding to UNHCR to assist in the provision of civil documentation, working with Iraqi government to strengthen the legislation and implementation of the Yazidi Survivor Law, among others.
- States and international bodies to provide assistance - via the provision of security and financial support in-country, or resettlement support if this is what is preferred - to all victims, survivors and witnesses willing to testify.
- States to re-open humanitarian pathways for Yazidi survivors to resettle, due to overwhelming demand of those who feel unsafe in-country. Safety and wellbeing of survivors is in reality fundamental to their willingness and ability to provide testimony.

Strengthening the protection of the targeted communities

- Iraq to introduce legal reforms including
 - Introducing laws criminalising genocide and other international crimes;
 - Repeal any laws that affect religious or belief communities e.g. laws requiring children to be registered with the religion of the father;
 - Repeal legal provisions providing defences to rape, sexual violence, abductions etc;
 - Introduce strong protections of the right to freedom of religion or belief and minority groups' protections;

- States to introduce comprehensive mechanisms that would enable them to monitor early warning signs and risk factors of atrocities.
- States to adopt genocide and atrocity prevention strategies to guide them through responses.



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