

RESEARCH ARTICLE

# Doubling Down on Accountability in Europe: Prosecuting ‘Terrorists’ for Core International Crimes and Terrorist Offences Committed in the Context of the Conflict in Syria and Iraq

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**Abstract:** This article examines the prosecution of members of ISIL/Da'esh and other designated terrorist groups for both core international crimes and terrorist offences in the context of the conflict in Syria and Iraq. It discusses the different core international crimes that both male and female terrorists have been convicted for, the different prosecutorial strategies that have been used, and the sentences that have been imposed in several European countries. While prosecuting membership offences and other terrorist offences has certain advantages, this article argues that pursuing charges for core international crimes in addition to terrorist offences leads to a more complete accountability.

**Keywords:** Prosecution, foreign fighters, accountability, international crimes, membership of a terrorist organisation, prosecutorial strategies

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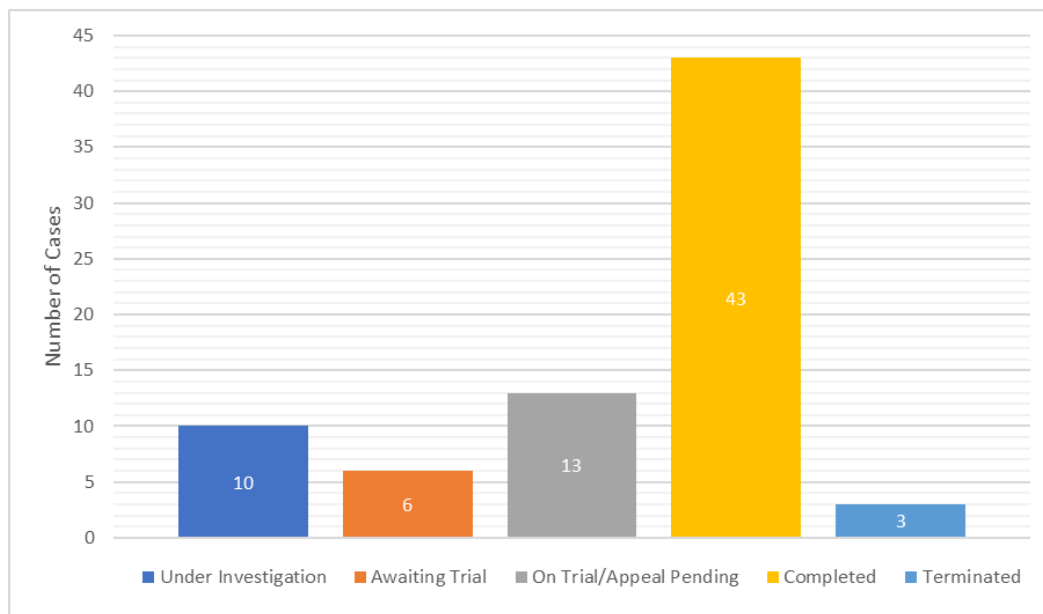
## Introduction

ISIL/Da'esh has carried out attacks against civilians, spread terror, and committed human rights violations at an unprecedented scale. Many of the individuals who joined the ranks of ISIL/Da'esh have been involved in desecrating corpses, and systematically committing sexual and gender-based violence crimes against Yazidi population, ranging from enslavement, rape, selling, and forcibly transferring them to different ISIL/Da'esh controlled territories.<sup>1</sup> Several of the crimes that have committed by terrorist groups amount to war crimes, crimes against humanity, or genocide. The Independent International Commission of Inquiry on the Syrian Arab Republic (CoI on Syria) has reported that other designated terrorist groups such as Hay'at Tahrir al-Sham, Jabhat Fatah al-Sham, and Ansar al-Sham committed war crimes in the conflict in Syria.<sup>2</sup> In Iraq, the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh/Islamic State in Iraq and the Levant (UNITAD) has continued its investigations into the commission of core international crimes perpetrated by ISIL/Da'esh against the Yazidi community, but also reported on core international crimes committed against other minorities.<sup>3</sup> As a result of the conflict, millions of Syrians and Iraqis have been internally displaced or sought refuge abroad, with European countries being the second largest hosts to the Syrian and Iraqi diaspora.<sup>4</sup>

The international community is still struggling to hold members of ISIL/Da'esh and other terrorist groups accountable. In the last few years, the number of prosecutions for war crimes, crimes against humanity, and genocide committed in Syria and Iraq has been steadily increasing in several European countries. This includes crimes committed by members of terrorist groups, non-state armed groups that have not been designated, and by Syrian or Iraqi government forces.

So far, no proper data has been collected on how many terrorists have been convicted for core international crimes and terrorist offences in different countries, which core international crimes men and women have been convicted for, which prosecutorial strategies have been used, or which sentences they have received. This article fills this data gap by providing an analysis based on an extensive dataset of criminal cases focusing exclusively on prosecutions of alleged terrorists who have been charged for terrorist offences and core international crimes. This analysis only looks at the prosecution of core international crimes committed by alleged terrorists, including European citizens who have travelled to the conflict zones – also referred to as 'foreign fighters', as well as Syrian and Iraqi nationals who joined designated terrorist groups and have now settled in Europe. By analysing recent European case-law, this article will demonstrate how alleged terrorists are being prosecuted for terrorist offences and core international crimes – war crimes, crimes against humanity, and genocide – committed in Syria and Iraq and how this contributes to achieving accountability. Section 1 explains the most common core international crimes men and women in Europe have been convicted for. Section 2 focuses on membership of a terrorist organisation as the most common terrorist offence. Section 3 explains the different prosecutorial strategies that have contributed to the successful prosecution, whilst section 4 provides a snapshot of the evidence that has been used in these cases. The final section addresses penalties and sentencing.

*Table 1: Case Status of Cases Including Terrorism and Core International Crimes Charges (n=75, as of 15 November 2023)*



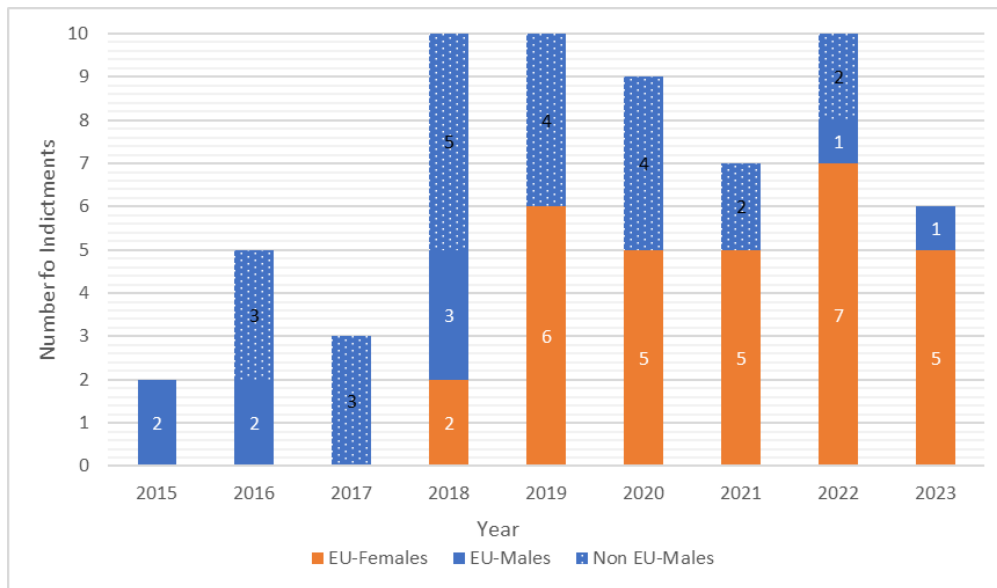
## Methodology

The assessments made in this article are based on the same dataset which was already used for a previous paper by this author. The 75 cases included in this dataset were quantitatively analysed, including 41 cases with final convictions and two acquittals. Additionally, this article has taken into account other relevant cases concerning issues on admissibility of terrorism and core international crimes charges such as for example the proceedings against Lafarge SA in France or Nils D. in Germany, decisions regarding questions of double jeopardy in relation to a potential second trial against him.<sup>5</sup> A list of all cases with at least a first instance verdict considered for this article can be found in the annex. This analysis is based on an assessment of open-source information, including press releases and corroborative media reporting as well as where possible, full written judgements.

## For What Core International Crimes Have Terrorists Been Prosecuted?

ISIL/Da'esh alone has attracted nearly 40,000 foreigners from 60 different countries. It is estimated that around 5,000 men, women, and children from Europe have travelled to conflict zones, many of which have died. After the fall of Baghuz in 2019, more than 55,000 women and children are currently still detained in make-shift camps while young boys and men are being held in prisons in North-eastern Syria, without adjudication or even informal assessment of their cases. While many European countries were reluctant to repatriate their citizens, the number of repatriations were steadily increasing throughout 2022. In the last three months of 2022, France, Germany, and the Netherlands repatriated 31 women and 75 children from the camps.<sup>6</sup> So far, no men have been actively repatriated by European countries due to perceived high(er) security risks. This trend is also reflected in the dataset, illustrating that after 2019, predominantly women have been prosecuted, while the prosecution of men mostly relates to Syrian and Iraqi nationals and not European men.

Table 2: Gender-Aggregated Chronology of New Cumulative Indictments per Year (n=61, as of 15 November 2023)



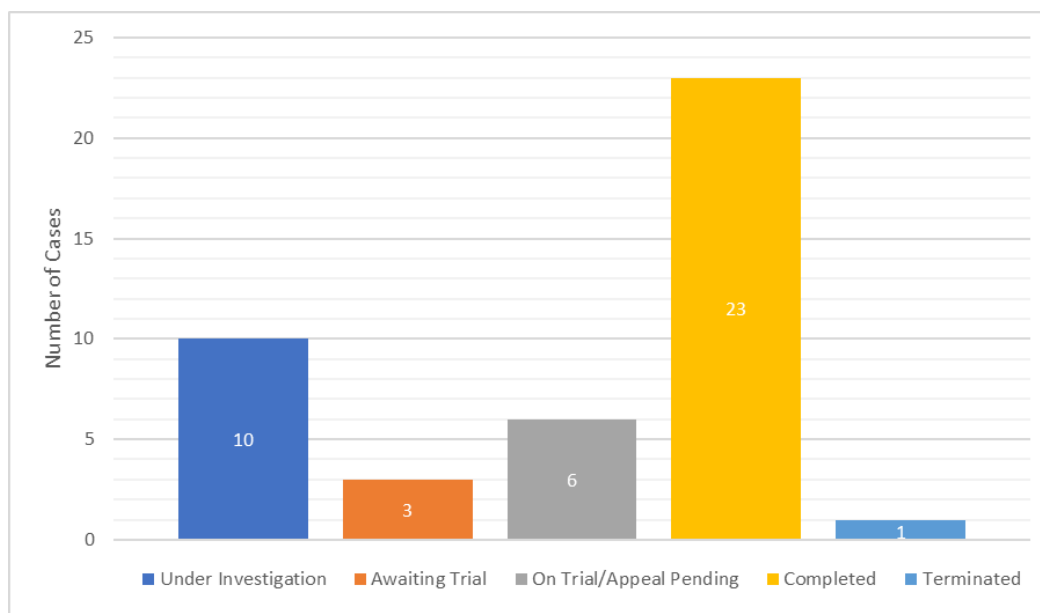
To establish individual criminal responsibility a perpetrator must be linked to the commission of specific core international crimes. Each international crime contains three elements. The first is the material element, also referred to as *actus reus*, which contains the prohibited conduct. The second is the mental element, also referred to as *mens rea*, which refers to the intent or knowledge of the perpetrator. Third, is the contextual element which is what distinguishes core international crimes from ordinary crimes as it reflects the seriousness of the crimes. In order to qualify as war crimes, the crime must have a nexus with an armed conflict. For crimes against humanity, the contextual element requires that crime is linked to a widespread or systematic attack against the civilian population. Lastly, the contextual element for genocide requires the intent to destroy in whole or in part a group. To successfully prosecute core international crimes, all three elements need to be proven. One of the challenges is linking the crimes to an individual perpetrator, also referred to as linking evidence. The section will provide a gender-aggregated analysis of the types of core international crimes that terrorists have been convicted for, before assessing how terrorism is being prosecuted as a terrorist offence, most notably as membership of a terrorist organisation.

Although terrorism is not recognised as a separate core international crime, certain terrorist acts could qualify as a war crime, crimes against humanity, or genocide. Practically all European countries have ratified the Rome Statute of the International Criminal Court, which serves as a blueprint for criminalising core international crimes in their legal system. The Rome Statute and Elements of Crimes have been negotiated by all state parties building on both treaty and customary international law, as well as relevant jurisprudence of international courts and tribunals.<sup>7</sup>

### ***For What Core International Crimes Have Men Been Convicted?***

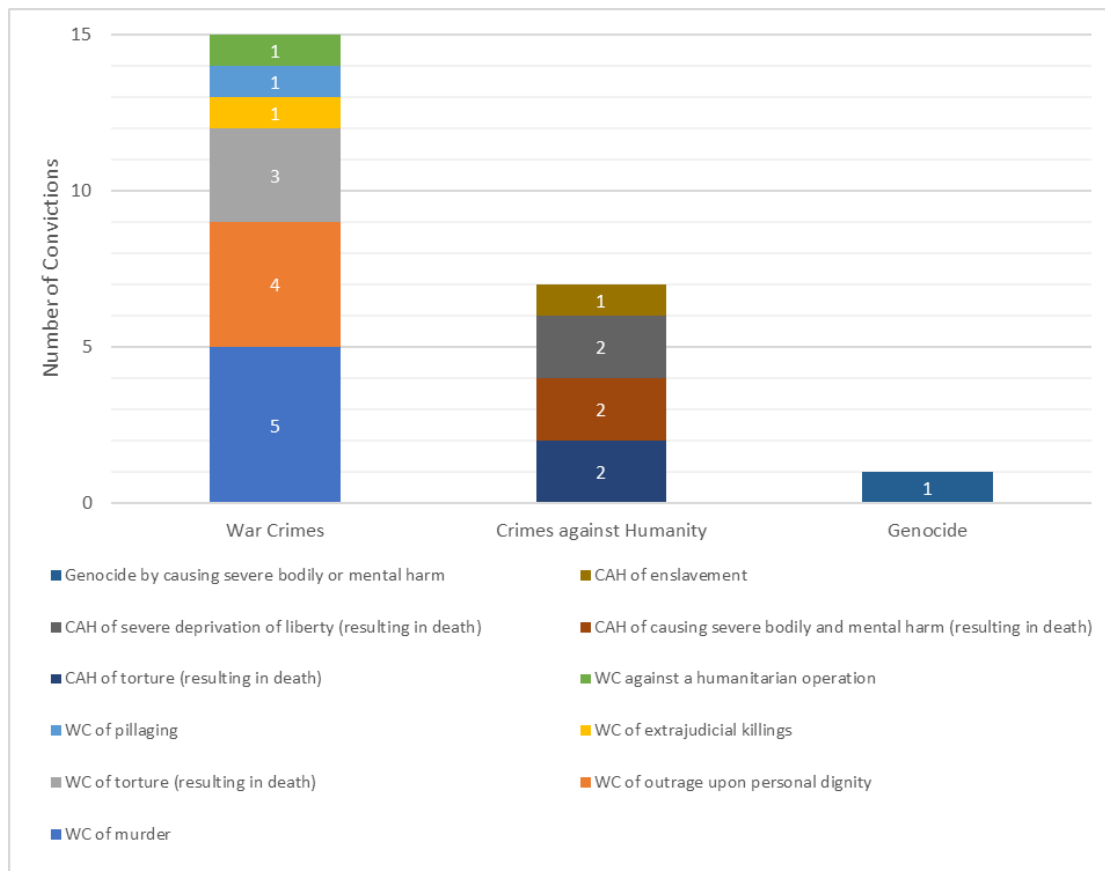
As can be seen from the data, as of 15 November 2023, 23 cases concerning male defendants charged with both, terrorism, and core international crimes, were completed by a final verdict. At the same time, six more cases were pending on trial or appeal. The majority of the convicts - 13 men - are foreigners to the prosecuting states, meaning Syrian or Iraqi members of a terrorist group who are now residing in Europe.

*Table 3: Case Status of Cases Including Terrorism and Core International Crimes Charges Concerning Alleged Male Perpetrators (n=43, as of 15 November 2023)*



The 21 convicted males have faced various core international crimes charges with underlying crimes ranging from murder, inhumane treatment, and torture to enslavement.

Table 4: Core International Crimes Convictions Rendered Against Male Defendants Charged with both, Terrorism and Core International Crimes (n=21, as of 15 November 2023)



## Murder

The most common core international crime that men have been convicted for in the context of the Syrian and Iraqi conflict, is murder as a war crime. Members of ISIL/Da'esh but also of other non-state armed groups designated as terrorist organisations have carried out brutal attacks in the context of the armed conflicts in Syria and Iraq. ISIL/Da'esh has systematically carried out mass executions, murder, and suicide-bombings and engaged in hostage-taking. The investigations carried out by UNITAD confirm that the killings were carried out at a large scale by ISIL/Da'esh against Yazidis, but also against Christian, Kaka'I, Shabak, Sunni, and Shia Turkmen communities.<sup>8</sup> The investigations into the massacre at Tikrit or mass executions at Badush prison in Mosul, both in 2014, demonstrate the extent to which killings took place under ISIL/Da'esh.

These acts took place during a non-international armed conflict in Syria and Iraq. Murder is prohibited during international and non-international armed conflict under international humanitarian law.<sup>9</sup> In order to prove that unlawful killings constitute war crimes, it is not only necessary to establish that the perpetrator intentionally committed the killings of protected persons such as *hors de combat* - combatants that have been captured, surrendered, or otherwise incapable of fighting – or civilians, medical or religious personnel that are not taking part in hostilities, but was also aware of their protected status.<sup>10</sup> The intentional killing of a protected

person constitutes a grave breach under the Geneva Conventions.<sup>11</sup> Furthermore, there must be a clear link between the killings and the armed conflict without being motivated by private motives. Factors that can be taken into account are how the armed conflict has facilitated the perpetrator to carry out the unlawful killings, the nature, and ability to carry out the unlawful killings, but also how the murder was perpetrated and for which purposes.<sup>12</sup> Abdul Jawad A.K. was one of the founding members of a fighting unit (Katiba) which was part of the terrorist organisation Jabhat al-Nusra between 2012 and 2014. Among others, the Higher Regional Court of Stuttgart, Germany found Abdul Jawad A.K. guilty of several counts of murder as a war crime. Abdul Jawad A.K. claimed he carried out the executions of persons who were sentenced to death by a local Sharia judge.<sup>13</sup>

### *Outrage Upon Personal Dignity*

Several persons have been prosecuted for outrage upon personal dignity as a war crime in the context of the conflict in Syria and Iraq.<sup>14</sup> Outrage upon personal dignity can be committed not only against living persons but also against deceased persons, for example by mutilating or decapitating the heads of the deceased, or taking pictures and videos of the dead in humiliating positions for propaganda purposes.<sup>15</sup> Under international humanitarian law outrage upon personal dignity is prohibited during an international and non-international armed conflict.<sup>16</sup> To prove outrage upon personal dignity, the degrading acts must have been committed against combatants which are *hors de combat* or civilians, medical or religious personnel that are not taking part in hostilities. The perpetrators must be aware of their protected status and of the existence of an armed conflict.<sup>17</sup> In order to prove this crime has been committed, prosecutors need to establish whether an act or omission constitute an outrage upon personal dignity taking into account what is generally recognised as meeting this standard on an objective basis, but also taking into account a more 'subjective' view relating to the cultural background of the victim. The latter can be assessed by expert witnesses to ensure the cultural and religious circumstances are taken into account. The mental element requires that the perpetrator intended to commit the offence and was aware that their conduct or omission was likely to humiliate, degrade, or violate the dignity of a person.<sup>18</sup> Finally, the contextual element consists of proving a nexus to the conflict.

Already in 2014, the CoI for Syria reported that ISIL/Da'esh beheaded and executed prisoners and apostates in public, that citizens were encouraged to watch the executions, and that the bodies were denied a decent burial in accordance with religious rituals. ISIL/Da'esh deliberately recorded executions and shared the clips online for propaganda purposes. This practice also contributes to humiliating and degrading the deceased.<sup>19</sup> These recordings of individual ISIL/Da'esh members involved in desecrating bodies can now be used as evidence against them in criminal proceedings. This information does not always prove they have killed a person but can be used to prove outrage upon personal dignity.

One of the challenges of introducing evidence in criminal proceedings is to prove the authenticity of a photo or a post on social media. How this is done in practice can be illustrated in the case against Abdelkarim el B., who filmed, encouraged, and contributed to the desecrating of a dead Syrian soldier by cutting his ears and nose, and standing on his body. He was arrested in Turkey

and extradited to Germany to stand trial. The phone with the footage was obtained through mutual legal assistance (MLA) request from Turkish authorities and was further analysed by forensic experts in Germany who were able to confirm the authenticity which contributed to a successful conviction for outrage upon personal dignity as a war crime. Although not concerning a male member of a terrorist organisation, in a remarkable case a Dutch woman, Yousra L., was convicted on first instance for a war crime of outrage upon personal dignity committed while being present in the Netherlands.<sup>20</sup> Yousra L. who had not travelled to the conflict zone, was one of the hosts of a Telegram ISIL/Da'esh group "GreenB1rds" and in this capacity was involved in spreading ISIL/Da'esh ideology and calling for armed jihad in 2019. She was accused of distributing a video of prisoners of war being burnt alive by ISIL/Da'esh in Iraq and adding her own degrading comments, which is considered degrading the deceased. According to the court, it should have been clear to Yousra L. from the videos that the persons were prisoners of war, who are protected under international humanitarian law. To prove the nexus with the armed conflict, the judges did not consider it necessary that the accused had to be present in the conflict zone but established the nexus by the fact that Yousra L., a firm supporter of ISIL/Da'esh contributed to the continuation of degrading the personal dignity of the prisoners by sharing the videos as part of the ISIL/Da'esh media strategy. Although Yousra L. was not posing herself in the photo, evidence proved that Yousra L. had disseminated the photos and shared them with over 80 persons in the chat group that she was the host of. Yousra L. was sentenced to six years imprisonment and compulsory psychiatric treatment. As of writing, her appeal is pending to date.

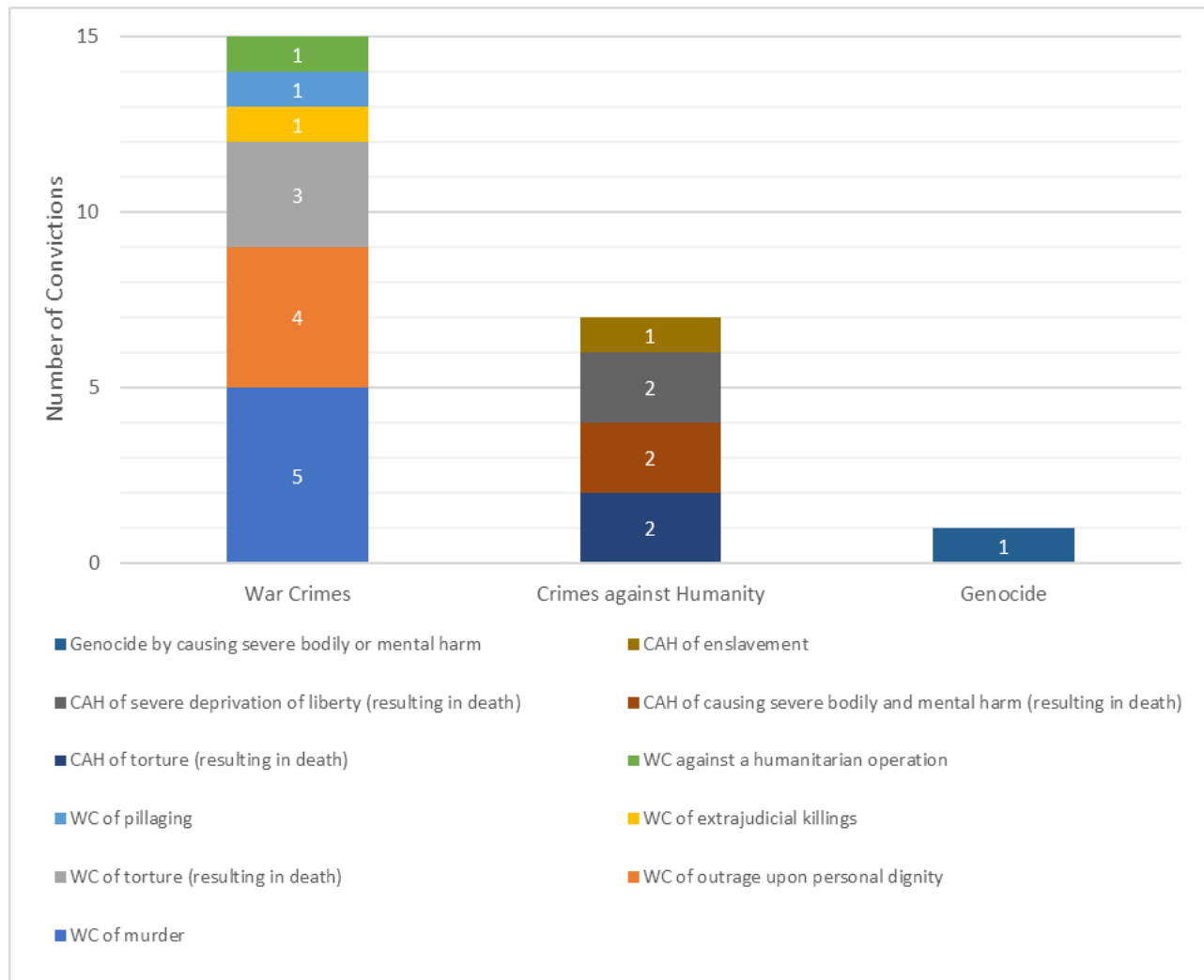
However, not all prosecutions are successful. In the case against Ahmad Al-Y. in the Netherlands, the accused was acquitted of outrage upon personal dignity, because even though the judges considered his behaviour to be disrespectful, it did not amount to a degrading treatment.<sup>21</sup> These cases illustrate that domestic courts are well equipped to assess the authenticity of digital evidence, leading to convictions for the war crime of outrage upon personal dignity even when committed far away of the conflict zone.

### ***For What Core International Crimes Have Women Been Convicted?***

Although the number of prosecutions of men exceeds those of women, there is a shift taking place as women are being prosecuted more frequently for terrorist offences and now also cumulatively for core international crimes. Zooming in on the relevant case-law in European countries, as of November 15, 2023, 19 women have been convicted after facing terrorism and core international crimes charges, with seven more being still on trial or having an appeal pending.

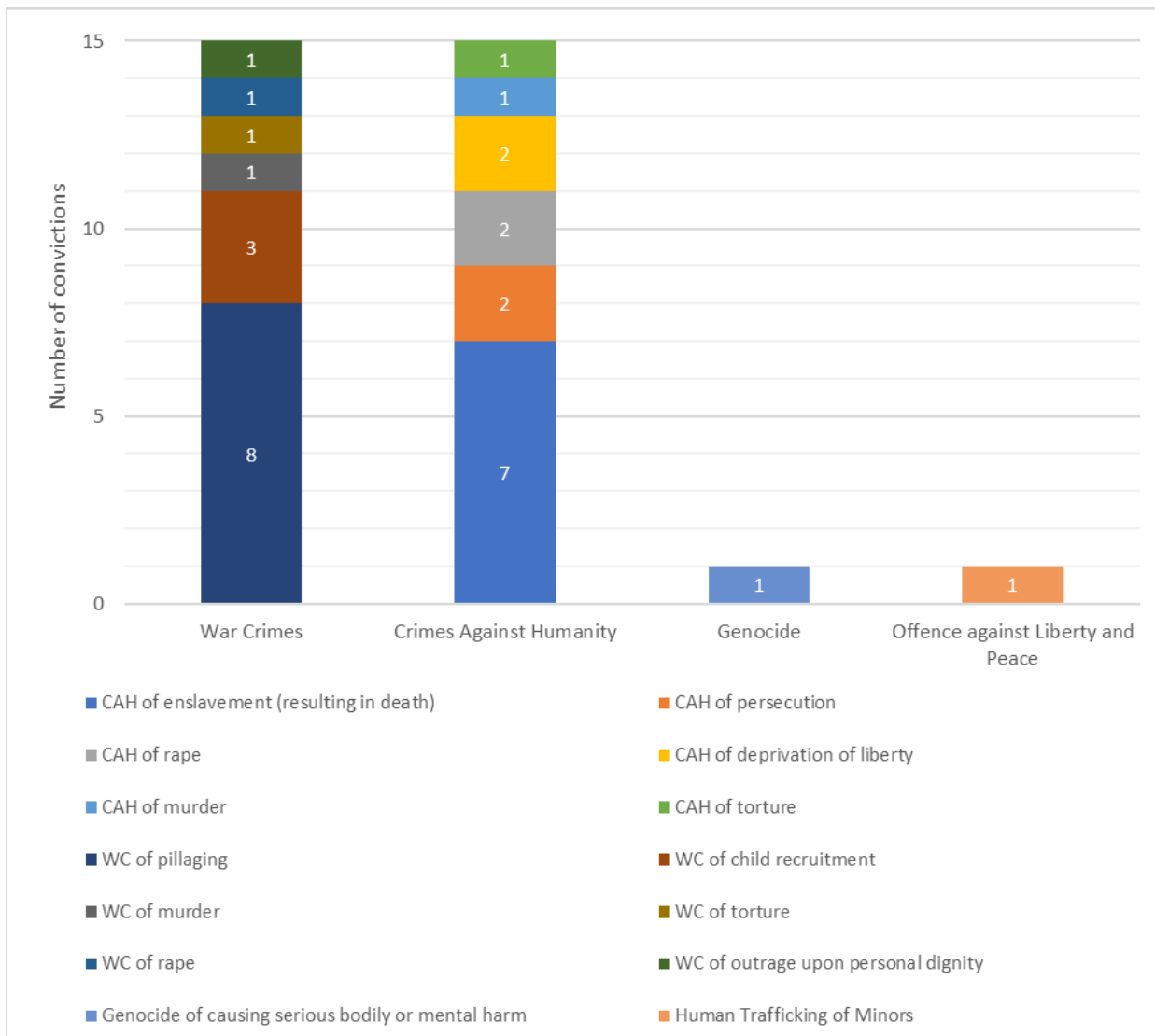


*Table 5: Case Status of Cases Including Terrorism and Core International Crimes Charges Concerning Alleged Female Perpetrators (n=31, as of 15 November 2023)*



As can be seen from the data, these women were mainly convicted for pillaging as a war crime, their involvement in slavery and rape as a crime against humanity or enlisting their own children as child soldiers. All the women are nationals of European countries who have travelled to the conflict zone and returned to their home country.

Table 6: Core International Crimes Convictions Rendered Against Female Defendants Charged with Both, Terrorism and Core International Crimes (n=18, as of 15 November 2023)



While most of the children of females were born in Syria and Iraq, several children have been taken to conflict zone by their mothers who are now being prosecuted for the harm they have inflicted upon their children by enrolling them as fighters for ISIL/Da’esh or another terrorist group. The recruitment of children is prohibited in both international or non-international armed conflict under international humanitarian law.<sup>22</sup> As of November 15, 2023, Sweden, Germany, and the Netherlands have convicted female ISIL/Da’esh members for child recruitment as war crime. In March 2022, the Stockholm District Court found Lina I. guilty of complicity in the war crime of child recruitment as she failed to prevent her underage son from being used as a child soldier for ISIL/Da’esh.<sup>23</sup> In other cases, German prosecutors also successfully relied on charges of child neglect under domestic law, for example in the cases against Romiena S., Carla-Josephine S., Fadia S., and Stefanie A.<sup>24</sup>

## *Pillaging*

Under international humanitarian law, pillaging is prohibited during international and non-international armed conflicts.<sup>25</sup> To prove that pillaging has been committed as a war crime, one needs to prove that the property has been taken without permission of the legal owner, that the property is being used for personal use, that the person was aware the property was unlawfully taken from the owner, and that there is a nexus with an armed conflict.<sup>26</sup> As part of its strategy to create a state-like Caliphate, ISIL/Da'esh systematically confiscated property belonging to Yazidis, Shia Muslims, and Christians in the context of armed conflict. ISIL/Da'esh created a real estate department, *Diwan al-Aqarat wa al-Kharaj*, that granted apartments, houses, and household items to ISIL/Da'esh fighters. By occupying and often paying rent for the confiscated property, ISIL/Da'esh members – whether male or female – were financially contributing to ISIL/Da'esh during the period it had territorial control.<sup>27</sup> Furthermore, courts need to establish that the defendant knew or could have known that the house has been unlawfully obtained from the legal owners. Such knowledge was either directly admitted by the defendants or could be established through the extensive propaganda of ISIL/Da'esh on their housing policy which was also known to many defendants.

In the case against Mine K. the Higher Regional Court Düsseldorf ruled in 2019 that although the property in question was already confiscated earlier on by ISIL/Da'esh and being administered by their real estate branch, the continuation of the appropriation of property by ISIL/Da'esh members also constitutes pillaging as a war crime.<sup>28</sup> So far, only Germany has prosecuted for pillaging. On first instance, seven women were convicted of all pillaging counts, five women were convicted only for some counts (each count stands for a different property), and three women were acquitted of all counts. The (partial) acquittals resulted from the fact that it could not be established that ISIL/Da'esh had appropriated the property.<sup>29</sup>

## *(Sexual) Slavery*

Sexual slavery and other forms of sexual violence can be committed as a tactic of war and terrorism. ISIL/Da'esh, but also other terrorist groups and non-state armed groups, have committed such crimes at large scale in Syria and Iraq. The United Nations (UN) has on numerous occasions reported how ISIL/Da'esh has committed sexual and gender-based violence crimes in particular against Yazidis.<sup>30</sup> ISIL/Da'esh separated Yazidi women and girls, forcefully displaced them multiple times, traded them at slave markets, and subjected them to various forms of physical, sexual, and mental abuse. Yazidi women and girls who were captured by ISIL/Da'esh were considered 'property', with 80 percent of them being at the disposal of ISIL/Da'esh fighters.<sup>31</sup> Even though several UN Security Council Resolutions (UNSCR) recognise how sexual violence is being instrumentalised as a tactic of war, prolonging armed conflict, and being part of the ideology of terrorist groups, it has rarely led to any prosecutions.<sup>32</sup> The UN Secretary General, in a Report to the Security Council on Women, Peace and Security (S/2017/861) has specifically urged governments to take the full extent of international criminal law into consideration when prosecuting alleged terrorists for sexual and gender-based violence crimes when sufficient linkages exist to other crimes and not exclusively rely on terrorist offences.<sup>33</sup>

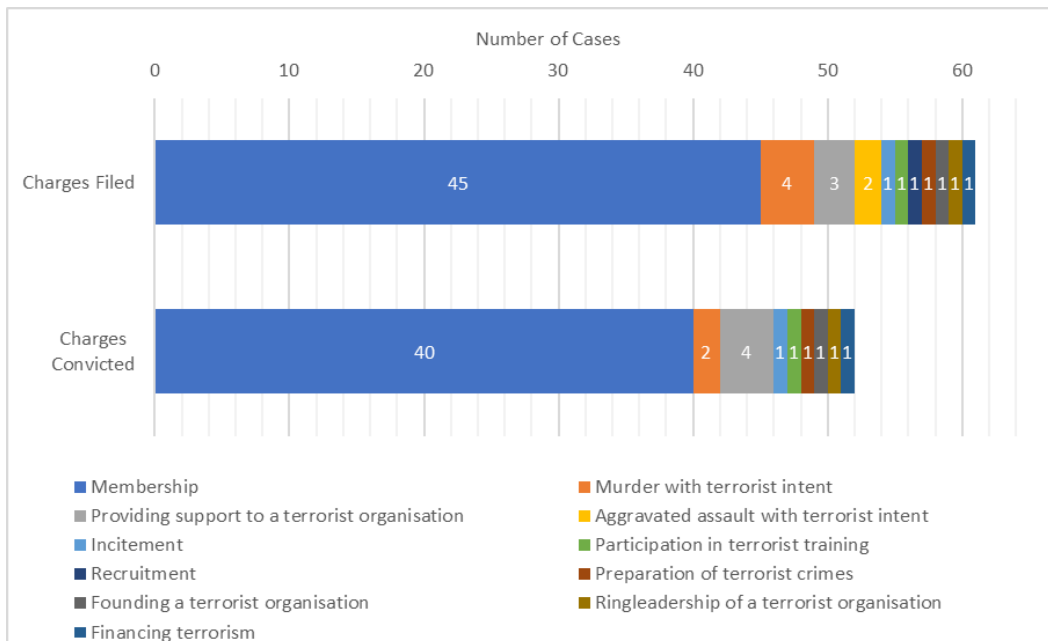
Not all gender-based violence crimes have a sexual component: it can also be physical, mental, or both, or a combination of all three. In Germany, in particular, women have been successfully prosecuted for directly perpetrating or aiding and abetting slavery and rape as crimes against humanity while being part of terrorist groups.<sup>34</sup> In May 2023, Camilla O. was sentenced on appeal for human trafficking of minors and aiding and abetting aggravated rape of a minor. She had taken her own under-aged daughters to Syria and agreed to marry one of them to an ISIL/Da'esh fighter who raped her multiple times.<sup>35</sup>

In the Netherlands, Hasna A. is awaiting trial, facing charges of slavery as a crime against humanity, amongst other charges.<sup>36</sup>

## The Most Common Conviction Across All Genders: Membership of a Terrorist Group

A closer look at the cases in which the accused were prosecuted for terrorist offences and for core international crimes, shows that the most commonly prosecuted terrorist offence is membership of a terrorist group. In the 61 cases filed against individuals for both terrorism and core international crimes charges, 40 convictions were rendered finding the defendants guilty of membership of a terrorist organisation.

*Table 7: Types of Terrorism Related Charges Filed and Convicted at Least on 1<sup>st</sup> Instance in Cumulative Criminal Proceedings (n=55, as of 15 November 2023)*



Pursuant to EU Directive 2017/541 on Combatting Terrorism,<sup>37</sup> and the Additional Protocol to the Council of Europe's Convention on the Prevention of Terrorism,<sup>38</sup> all EU Member States are required to criminalise participation in a terrorist group, which has been implemented across the EU in different ways.

Often, membership of a terrorist group presupposes that a structured group exists and that the group has a terrorist intent. When a terrorist group is listed by the UN, EU, or placed on a national list, courts tend to rely on the designation. Sometimes 'terrorist' groups are not listed because they are not considered to pose a threat to national security and only pose a terrorist

threat in a local context or for other political reasons, such as the Taliban. In such a situation, courts have to determine whether a group meets the criteria of a terrorist group. In several instances, in France,<sup>39</sup> Germany,<sup>40</sup> and the Netherlands,<sup>41</sup> courts had to determine whether *Ah-rar al-Sham*, an armed opposition group operating in Syria against Syrian government forces, constitutes a terrorist group.<sup>42</sup>

To establish individual criminal responsibility, the mental element and material element need to be proven. To prove membership in a terrorist organisation, often the individual is not required to personally have terrorist intent, but only needs to know of the terrorist intent of the group like in the Netherlands<sup>43</sup>, resulting in a weak version of *mens rea*. For example, in Belgium, persons can be convicted for membership of a terrorist organisation if they knew or could have known that their participation would contribute to the commission of criminal offences by a terrorist group.<sup>44</sup>

Additionally, there must be a link showing how the conduct of an individual contributes to the terrorist aim of the group, the material element of the crime. One of the problems with the implementation of this is that many countries have adopted a very broad definition of membership in a terrorist organisation. Consequently, it is left to the discretion of prosecutors and judges on how to interpret participation in a terrorist group. In practice, the question of what constitutes contribution to the aims of a terrorist group remains vague: is it cooking, praising the group, running a household, carrying out violent acts, being present in areas controlled by a group, or simply being affiliated with the terrorist group?

Membership offences and other terrorist offences do not constitute a separate category and are bound by the general principles of criminal law. Membership offences and other terrorist offences in the EU are not always defined clearly, thus violating the principle of legality.<sup>45</sup> The principle of *nulla poena sine culpa* – also referred to as individual criminal responsibility- is being eroded when the membership offence is not firmly based on conduct and intent. This is a slippery slope given the far-reaching implications that suspected membership in a terrorist group can have on the rights of individuals.<sup>46</sup> It can lead to an overreach of convictions for membership offences. The *actus reus* criteria should therefore be defined as narrowly as possible, ensuring that there is a genuine link with a terrorist group, and only intentional and substantial contributions to a terrorist group are considered as membership.

Despite several differences, in the Netherlands and Germany the criteria for membership in a terrorist organisation are based on participation in a (domestic) criminal organisation: it needs to be a structural association of two or more persons with some form of continuity. Case-law in Germany provides that the mere presence of an individual in the territory controlled by a terrorist group, such as ISIL/Da'esh, does not qualify as a contribution in furtherance of the group's objective which is required to establish membership.<sup>47</sup> However, Sibel H. who was initially released from pre-trial detention based on the Court decision mentioned here, was eventually found guilty of, among other offences, membership of ISIL/Da'esh. Additional evidence proved beyond reasonable doubt that she had not merely lived everyday life in ISIL/Da'esh territory, but running the household enabled her husband to fight for ISIL/Da'esh. She also possessed weapons on behalf of ISIL/Da'esh and unlawfully occupied property of Yazidi owners,

constituting a war crime.<sup>48</sup> According to the dataset, membership charges have not successfully been proven in several cases because the accused was either a member of a non-state armed group or there was not sufficient evidence to prove membership of a terrorist group at a specific time.<sup>49</sup>

Looking at the countries that have charged alleged terrorists for core international crimes, Finland has only criminalised membership of a terrorist organisation in early 2022,<sup>50</sup> and Sweden has criminalised membership of a terrorist group in June 2023,<sup>51</sup> which means that it cannot be applied retroactively to alleged terrorists who committed crimes in Syria or Iraq.

## Initiating Investigations and Effective Prosecutorial Strategies

Adopting effective and sometimes innovative prosecutorial strategies is vital to advance accountability for the full range of crimes that have been committed by alleged terrorists. Under the principle *aut dedere aut judicare*,<sup>52</sup> the obligation to prosecute means there is only an obligation to initiate investigations and submit the case to the prosecuting authorities.<sup>53</sup> While there is a necessity to hold perpetrators accountable for core international crimes, in many countries, prosecutors have broad discretion in deciding whether to prosecute a case. Factors, such as availability of evidence or willingness of witnesses to testify, are taken into account by prosecutors to determine whether a case should be brought to trial. Some countries that have a large number of refugees from Syria, such as Sweden and Germany, have a higher chance to successfully prosecute core international crimes as victims, witnesses, and even potential perpetrators are among the community.<sup>54</sup> These circumstances have also led to the adoption of special investigative and prosecutorial strategies in bringing alleged terrorists to justice. The following section briefly highlights some of these strategies and approaches, such as prosecutorial discretion, cumulative charging, and structural investigations that advance accountability.

### ***Prosecutorial Discretion: To Prosecute or Not To Prosecute***

In Germany – one of the countries at the forefront of prosecuting alleged terrorists for core international crimes – there is generally no prosecutorial discretion. However, an exception is made when it comes to core international crimes without a link to Germany and a suspect that will likely not be apprehended by German authorities. In such circumstances, the prosecutors may choose not to open investigations and prosecutions.<sup>55</sup> Although the United Kingdom has a very narrow concept of universal jurisdiction, in an attempt to create consistency and transparency, it has developed guidelines on when to consider opening an investigation. This is done through a so-called scoping exercise by the Metropolitan Police Counter Terrorism Command (SO15) in which the identity, nationality, and location of the perpetrator need to be established before looking into the identity of victims and witnesses.<sup>56</sup> Other factors that can be taken into consideration include the gravity of the crimes, chances of a successful conviction, access to evidence located abroad, the impact on victims, the public perception and interest, whether the identity of the suspected perpetrators are known, applicable immunities, and the need and availability of mutual legal assistance. Prioritisation of which cases to prosecute is also needed because such trials are resource intensive.<sup>57</sup>

Investigations can be initiated by competent authorities such as the (judicial) police or the prosecutor's offices. In addition, in several countries victims such as Yazidis and civil society organisations (CSOs) can file a (written) complaint to trigger the start of investigations. Strategic litigation, meaning CSOs representing the rights of victims in pursuit of accountability, is increasingly being used in light of universal jurisdiction in European countries.<sup>58</sup>

### ***Structural Investigations***

CSOs in Germany and France have been particularly active and lodged several criminal complaints against alleged perpetrators.<sup>59</sup> Although not all complaints have led to the initiation of proceedings against individual perpetrators, evidence submitted as part of CSO complaints has been integrated into ongoing investigations, in particular structural investigations.<sup>60</sup> In some countries structural investigations are permitted where no perpetrator has been identified, allowing investigators and prosecutors to collect evidence to prove for example the contextual elements of core international crimes or command structure which may later on lead to identifying and successfully prosecuting specific persons for core international crimes. Countries like Germany, Sweden, and France are familiar with structural investigations which are proactive and victim-centric and conduct them not only in relation to crimes committed in Syria and Iraq,<sup>61</sup> but more recently also in relation to crimes committed in Ukraine.<sup>62</sup>

The aim in structural investigations is to build a case and secure evidence at an early stage, through actively collecting evidence, for example by reaching out to affected communities to obtain witness statements or conducting open-source investigations without any time constraints. In Germany, asylum seekers are systematically being asked if they have witnessed any core international crimes and are able to identify perpetrators. Only in 2015, the Federal Office for Migration and Refugees submitted over 2,500 testimonies to the German Federal Prosecutor's Office.<sup>63</sup> Structural investigations are part of a prosecutorial strategy that do not require any changes in the law, nor do they provide the prosecutors with any 'new' investigative tools.<sup>64</sup> Considering the complexities of prosecuting core international crimes, structural investigations can help to prove the contextual elements of core international crimes, and uncover patterns and command structures, which can help later, once the alleged perpetrators are known. Structural investigations are not only accelerating future prosecutions, but information can also be shared through mutual legal assistance (MLA) with other countries. In this way, prosecutors can build a solid case and obtain necessary evidence before the perpetrator is identified and charged, while observing the right to fair trial and due process.<sup>65</sup> Ultimately, structural investigations contribute the prosecution of core international crimes and in achieving accountability in the long-term.<sup>66</sup>

### ***Cumulative Charging***

Ever since 2015, the prosecutorial strategy of so-called 'cumulative charging' has gained traction among prosecution authorities, especially in European countries.<sup>67</sup> Cumulative charging allows prosecutors to charge a defendant with multiple different crimes thus ensuring that a person is being held accountable for the full range of crimes they have committed. This type of charging should be distinguished from alternative charges, for example for murder or death by manslaughter, which are mutually exclusive. Cumulative charging contributes to bringing the accused to justice for the full of range of crimes they have committed, although it does not

automatically lead to cumulative sentencing. Cumulative charging is a common practice in both in civil and common law countries and in international criminal law.<sup>68</sup>

When cumulative charging is being applied, it could constitute a violation of the *ne bis in idem* principle (better known as double jeopardy in common law countries), which prohibits a person from being prosecuted twice for the same crime.<sup>69</sup> The aim is to provide protection from continuous prosecution and legal certainty once a decision is final, also referred to as *res judicata*. In Europe, this principle is enshrined in Art. 4 of Protocol No. 7 to the European Convention on Human Rights (ECHR).<sup>70</sup> The principle consists of different aspects: are both the proceedings criminal in nature? Does it concern the same facts, same legal qualifications or the same interests?<sup>71</sup> Does it concern the same offender? Has a final decision been reached?<sup>72</sup> In the *Akayesu case*, the Trial Chamber of the International Tribunal for Rwanda (ICTR) concluded that

*“it is acceptable to convict the accused of two offences in relation to the same set of facts in the following circumstances: (1) where the offences have different elements; or (2) where provisions creating the offences protect different interests; or (3) where it is necessary to record a conviction for both offences in order fully to describe what the accused did.”*<sup>73</sup>

In Germany, the Higher Regional Court of Hamburg dismissed a case against Harry S. based on an indictment concerning war crimes, after the defendant had already been found guilty of membership in a foreign terrorist organisation, based on the same facts.<sup>74</sup> Other underlying facts could also be used considering that different elements of crimes need to be proven. In the Netherlands, a Dutch district court convicted Ahmad Al-Khedr for war crimes, but acquitted him for membership in a terrorist organisation, because the underlying facts proved murder was a war crime but not that at the time that the Amhad Al-Khedr battalion was affiliated with Jabhat-Al-Nusra.<sup>75</sup> The underlying acts, legal qualifications and interest may in some cases be the same, overlap or differ. As alleged terrorists are being prosecuted for both terrorist offences and core international crimes, further research is needed to see which underlying facts can be used to prove different crimes.

Charging an alleged terrorist for terrorist offences and core international crimes – where possible – is now more frequently applied. According to our data, out of 41 persons who stood trial and have been charged for both, in seven cases the core international crimes charges could not be proven beyond reasonable doubt, notably pillaging as a war crime.<sup>76</sup> In another case, Swedish courts pursued terrorism charges that were filed in alternative to war crimes charges.<sup>77</sup> While the stacking of offences is permitted, it is important to ensure that the accused has a fair trial and is given enough time to prepare their defence.

The vast majority of crimes in Syria and Iraq have been committed during a non-international armed conflict, which is governed by international humanitarian law. There is no formal hierarchy between terrorism laws and IHL, but several counter-terrorism conventions contain a so-called exclusion clause that regulates the relationship between counterterrorism legislation and IHL during an armed conflict. In addition to the Terrorist Financing Convention, six counter-terrorism conventions have adopted a similar exclusion clause.<sup>78</sup> An exclusion clause only regulates the relationship between terrorist offences and war crimes and technically does not



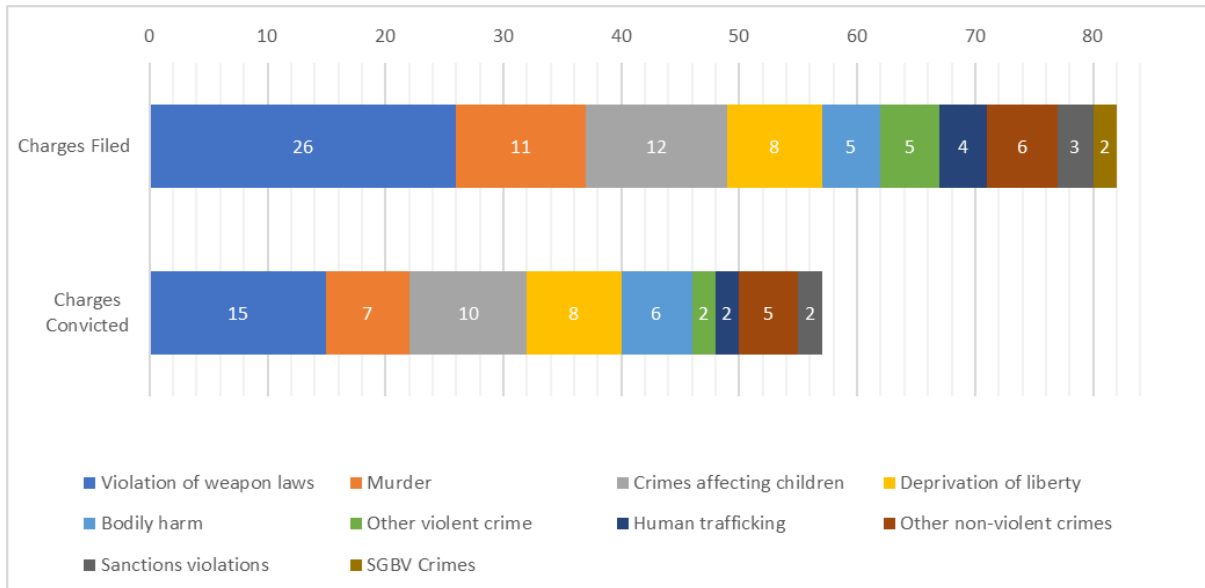
preclude cumulative charging for terrorist offences and crimes against humanity or genocide. The scope of how such an exclusion clause is implemented regionally or domestically varies considerably and can impact cumulative charging.<sup>79</sup> In some countries, the exclusion only applies to state armed forces and thus excludes the application of counter-terrorism legislation. In the Netherlands, the court ruled in the *Context* case that the exclusion clause in the preamble of the Framework Decision on Combatting Terrorism is not binding and does not prevent the application of both terrorism and IHL as long as it does not contravene the purpose of the Framework Decision. Furthermore, the court determined that only activities of state armed forces are excluded from terrorism provisions.<sup>80</sup> This means that members of terrorist groups and non-state armed groups can be cumulatively held accountable for terrorist offences and war crimes.

In Belgium, it is slightly different. Article 141bis of the Criminal Code excludes all activities of armed forces which are governed by IHL during armed conflict.<sup>81</sup> In the *Sharia4Belgium* case, the court held that Jabhat al Nusra cannot be considered a non-state armed group in a non-international armed conflict because they did not meet the organisational threshold to be regarded as a non-state armed group and thus did not apply the exclusion clause. In 2019 the Court of Appeal in Belgium ruled that the acts committed by Kurdistan Workers Party (PKK) are closely linked to an armed conflict and the exclusion clause is applicable. As a result, PKK is not a terrorist group and participation in its activities connected to the conflict, such as financing and recruiting members is not an offence. Acts committed by the ISIL/Da'esh and other terrorist groups could only be prosecuted as terrorist offences and not as war crimes. In November 2022, Y.S., who was convicted in absentia for membership of a terrorist group in 2015, invoked her right to a retrial. The court confirmed that there was a non-international armed conflict in Syria and ruled that ISIL/Da'esh does meet the threshold of non-state armed group, and that the exclusion clause should be applied. According to the court, the specific activities Y.S. is charged with do not qualify as war crimes— although the court does not explain why — and thus can be prosecuted for membership in a terrorist group.<sup>82</sup> In a later decision, a court concluded that Jabhat al Nusra is not considered organised enough to qualify as a non-state armed group, but that ISIL/Da'esh is a party to a non-international armed conflict and a terrorist group. The court distinguished between terrorism and combat activities, and ruled that online recruitment activities do not constitute direct participation in the hostilities, but rather only constitute a terrorist offence and does not fall under IHL.<sup>83</sup> It appears now that cumulatively charging for war crimes and terrorist offences of certain non-state armed groups, such as ISIL/Da'esh, is possible for activities that are not directly related to the hostilities. Whether this reasoning will be upheld in appeal and in other trials remains to be seen, but it could be a turning point in Belgium potentially paving the path for cumulatively prosecuting alleged terrorists for some of their activities as both terrorism and war crimes.

Cumulative charging is also being applied for terrorist offences and domestic crimes, such as murder, violation of domestic weapon laws, and child neglect. In fact, the first person who travelled to Syria in the Netherlands was convicted for preparation of arson or explosion, in addition to participation in training for terrorism purposes.<sup>84</sup> Since the data set only includes court cases with one of the charges being core international crimes, it does not include cumulative charging for terrorism and domestic crimes. In Germany, weapon offence charges are often

filed in addition to terrorist and/or core international crimes charges. In May 2022, the German Federal Court of Justice confirmed on appeal that Kim Teresa A. is guilty of membership in a foreign terrorist organisation, pillaging as a war crime, and domestic weapon offences. Among others, she had received AK-47 assault rifles from her husband and learnt how to use them to defend attacks against herself or against ISIL/Da’esh.<sup>85</sup> Out of (final and non-final convictions of) 39 individuals who faced cumulative charges in Germany, 29 were convicted for domestic offences.

*Table 8: Types of Domestic Charges Filed and Convicted at Least on 1<sup>st</sup> Instance in Cumulative Criminal Proceedings (n=55, as of 15 November 2023)*



Cumulative charging could also lead to cumulative jurisdiction. To assert jurisdiction, a court will need to examine whether it can prosecute the alleged perpetrator for a terrorist offence, a domestic offence, and core international crimes under domestic law. For example, a foreign national could be charged for degrading a person as a war crime under universal jurisdiction, for a terrorist offence if universal jurisdiction or active nationality personality applies, but not for all domestic offences. This is because domestic law is only applicable to those who are nationals and/or have committed crimes in the territory of a state. Cumulative charging contributes to closing the impunity gap and addresses a more complete range of underlying crimes that have been committed which does more justice to the victims.

## Evidence

In order to establish individual criminal responsibility, a prosecutor needs to link the crime to an individual. The evidence for core international crimes is often located in the conflict zone. While several defendants have provided extensive confessions,<sup>86</sup> prosecutors have relied on many different types of evidence to successfully secure convictions. Digital evidence in the form of social media postings, photos, and videos have by far been used in most of the cases, which often needed to be authenticated through forensics as discussed earlier in the case of Abdelkarim El B.<sup>87</sup>

Europe hosts the second largest number of Syrian refugees, with 70 percent located in just

two countries, Germany, and Sweden.<sup>88</sup> Among them are victims, witnesses, and sometimes perpetrators. Over the years, Swedish and German prosecutors have strengthened their engagement with Syrian refugees and civil society who have played an important role in holding alleged terrorists accountable. Several of the Yazidi victims have testified in court and actively participated in the trials in Germany as so-called joined plaintiffs (*NebenklägerInnen*), for example in the cases against Jennifer W., Nurten J., Omaima A., and Sarah O.

With the establishment of two distinct international mechanisms, UNITAD and IIIM that have been mandated to collect evidence of core international crimes committed in Syria and Iraq, the possibilities to prove international crimes have increased. For example, UNITAD has assisted the prosecution of Lina I. in Sweden by having an expert testify in court on evidence collected and analysed by UNITAD.<sup>89</sup> Lina I. was convicted for failing to prevent the recruitment of her own child as a war crime and sentenced to six years of imprisonment. Although neither UNITAD<sup>90</sup> nor IIIM<sup>91</sup> provides specific information about which cases they have assisted domestic prosecutions in, the number of requests for assistance is increasing each year.

Finally, 'battlefield' evidence, information obtained by the military from the conflict, has also successfully been used in the case of Oussama A., who was convicted for outrage upon personal dignity as a war crime. Part of the evidence included a payroll from ISIL/Da'esh that was obtained by the U.S. containing 40,000 names of foreigners which indicated that Oussama A. was employed as part of a sniper battalion.<sup>92</sup> Some of the challenges in using 'battlefield evidence' include the lack of experience of the military actors to collect evidence for criminal proceedings and the risk that the right to a fair trial, in particular equality of arms, is limited because the accused cannot challenge the evidence in a meaningful way.<sup>93</sup> While recognising these challenges, 'battlefield' evidence should be used with great caution but can help to piece together a complete picture and be used to prove the contextual elements and/or in addition to other types of evidence.<sup>94</sup>

## Penalties and Sentencing

Some important observations can be drawn on the number of convictions, duration of proceedings, length of sentences for prosecutions of core international crimes and terrorism, and mitigating as well as aggravating factors.

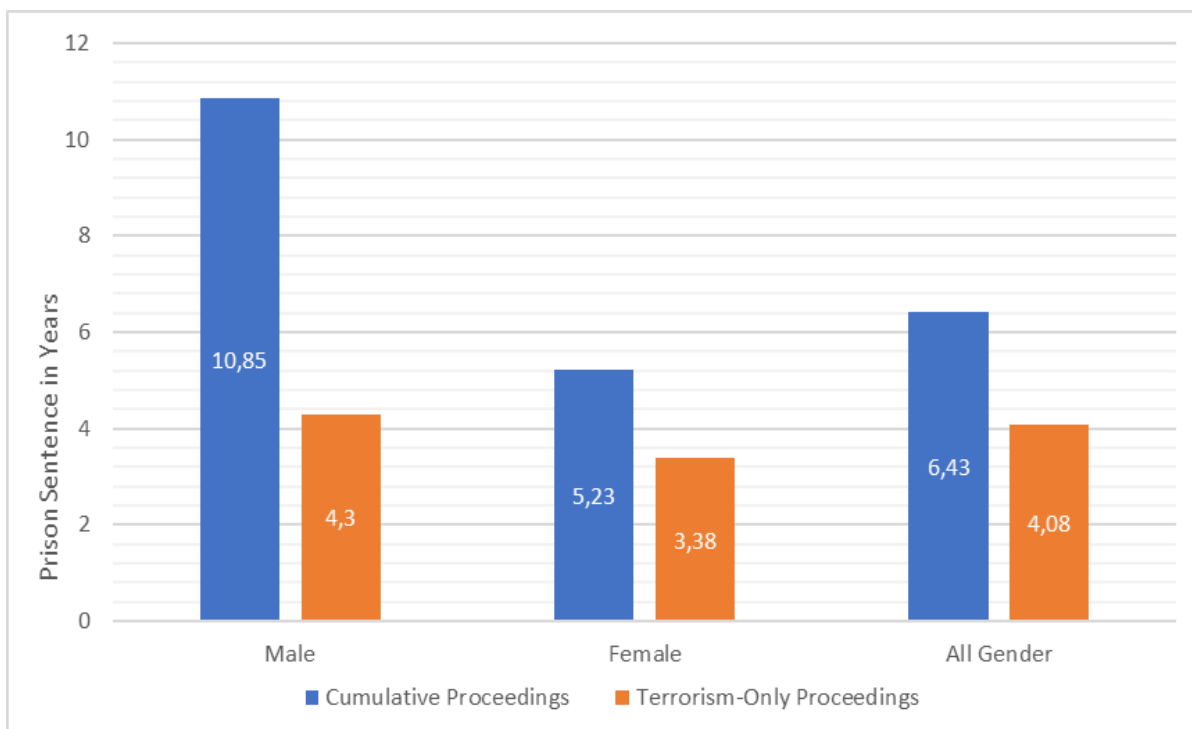
Cumulative charges can lead to multiple convictions or a single combined conviction. When the same underlying criminal acts lead to the conviction of two or more different crimes, this can be taken into account during sentencing. Depending on the sentencing rules in a country, the most severe sentence can be imposed and/or increased with part of the other sentence. The court may also choose to sentence a person concurrently or cumulatively. The latter allows a judge to impose separate sentences which are served consecutively when the accused has been convicted for two or more crimes that are unrelated to each other.<sup>95</sup> Concurrent sentencing refers to serving the sentences at the same time and is often applied when the same underlying criminal act qualifies as two distinct crimes. The kind of sentence a court would impose when cumulatively convicting for terrorist offences and core international crimes depends on many factors including mitigating or aggravating circumstances. In some (common law) countries,

like the UK,<sup>96</sup> and the US,<sup>97</sup> sentencing guidelines have been adopted and can also contribute to advance consistency in sentencing of similar sentences. The GCTF has adopted the Interlinkages Memorandum that also provides some guidance on the aggravating and mitigating factors that could be taken into consideration.<sup>98</sup>

### *Duration of the Proceedings and Length of Sentence*

Given that Germany and the Netherlands are the two countries with the most prosecutions for cumulative charges so far, a comparison can only be drawn with respect to these two countries. Based on relevant data available on 45 cases of cumulative charges proceedings offering relevant data points as well as a randomised selection of 34 terrorism-only proceedings in Germany and the Netherlands, it appears that the length of proceedings increases from 14,5 months in terrorism-only proceedings to 23,77 months when charged cumulatively.<sup>99</sup> The dataset further indicates that when there is sufficient evidence to prosecute an alleged terrorist for core international crimes and terrorist offences, this may lead to higher sentences compared to the sample dataset on terrorism-only proceedings in Germany and the Netherlands.<sup>100</sup> The average sentence when convicted cumulatively is 6,43 years and for terrorism only 4,08 years.

*Table 9: Comparison of Length of Prison Sentence for Terrorism Only and Cumulative Charges Convictions in Germany and the Netherlands (ncum=45, nterror=34; as of 15 November 2023)*



However, longer sentences are an outcome, not the objective. Under international law, states have the obligation to penalise both terrorist offences and core international crimes in a manner that duly reflects the seriousness of the crimes.<sup>101</sup> A distinction should be drawn between a sentence imposed by a court and the maximum sentence available by law. Core international crimes are considered the most heinous crimes and European countries in general have established long(er) sentences ranging from 15 years to life imprisonment, whereas the maximum sentences

for terrorist offences tend to be shorter.<sup>102</sup> Sentences for membership in a terrorist organisation range between one and fifteen years, with the exception of leading a terrorist organisation.<sup>103</sup> The tendency to increase maximum sentences for membership offences is not uncommon. In France, the penalties for leading or directing terrorist attacks have gradually been increased to life imprisonment.<sup>104</sup> In the Netherlands, a legislative proposal has been submitted in early 2023 to increase the maximum sentence for membership of a terrorist group from 15 to 20 years, although in reality, sentences given for only terrorist offences range between 5 to 7 years, and in many cases even lower.<sup>105</sup> The Dutch Council of State also noted that such an increase of maximum sentence would mean that membership, with a person not being engaged in the commission of terrorist offences, would be equally punishable as an attempt to and complicity in the commission of serious offences.<sup>106</sup>

### *Mitigating and Aggravating Factors*

Despite not all judgements being made available, open-source research and the analysis of fully available judgements, have led to the identification of some of the prevailing mitigating and aggravating factors that have been taken into account in trials against terrorists convicted for core international crimes and terrorist offences. Some of the factors can be both a mitigating as well as an aggravating factor, such as remorse or (not) having a criminal record. In some judgements the court would consider not showing remorse an aggravating factor, whereas in other judgements took a sign of remorse into account as a mitigating factor. Circumstances relating to (pre-trial) detention have been considered several times as a mitigating factor. This not only relates to the length or the type of detention to which the defendant was subjected between the commission of the crimes and the trial, but also to the conditions of the detention. In other judgements the detention in camps in North-eastern Syria, Iraq, or Turkey have been taken into account. Furthermore, the conditions in these camps, but also Covid-19 related restrictions which led to a tighter detention regime, were factors that judges took into consideration.<sup>107</sup> Although less frequently mentioned, the (over)exposure in the media<sup>108</sup>, and the risk of being expelled for foreign nationals following a criminal conviction, have also been taken into account by courts.<sup>109</sup> These sentencing considerations vary within a court, between courts within a country and across countries to draw any further conclusions.

*Table 10: Most Commonly Applied Mitigating and Aggravating Factors in Sentencing Considerations Following Criminal Trials of Alleged Terrorist for Terrorism and Core International Crimes Charges in Europe (as of 15 November 2023)*

Mitigating factors	Aggravating factors
<ul style="list-style-type: none"> <li>• (Partial) confession</li> <li>• Criminal record</li> <li>• Crimes occurred long time ago</li> <li>• Participation in rehabilitation programme</li> <li>• Attempted/voluntarily left terrorist group/ controlled territory</li> <li>• Short duration of stay with terrorist group</li> <li>• Contribution to investigations in other criminal cases</li> <li>• Length and conditions of detention</li> <li>• Remorse</li> </ul>	<ul style="list-style-type: none"> <li>• Length of membership in terrorist group</li> <li>• Cruelty of the crimes</li> <li>• Number of crimes</li> <li>• The brutal nature of a terrorist group</li> <li>• Role within/contribution to the terrorist group</li> <li>• Number and age of victims</li> <li>• Criminal record</li> <li>• Remorse</li> </ul>

While recidivism of convicted terrorists for new terrorist offences is a major concern, especially in European countries, where several terrorist offenders have been released from prison since 2021, the recidivism rate appears to be low.<sup>110</sup> The fear that convicted terrorists may commit another terrorist offence has already led to increasing the length of sentences and also withdrawing or limiting automatic early release for terrorist offences in the UK.<sup>111</sup> In France, automatic early release for convicted terrorists was already withdrawn by law in 2016, and in practice it is rarely granted when it is requested.<sup>112</sup> Furthermore, several countries such as France,<sup>113</sup> the Netherlands,<sup>114</sup> and the UK<sup>115</sup> have or are expanding post-release monitoring of convicted terrorists, including travel restrictions, reporting duties at police station, mandatory religious counselling or obligations to notify when changing jobs. Considering the duration and impact some of these measures have on human rights such as the freedom of movement or the right to work, it raises several issues: who decides and reviews these measures, for what specific purposes are these measures imposed and how can these measures be challenged.

The tension between protecting society from the risk of recidivism by convicted terrorists on the one hand and upholding the essence of the non bis in idem principle that a person should neither be prosecuted twice, nor punished twice for the same conduct, becomes evident. Measures imposed as part of the post-release monitoring can be, just like administrative measures, punitive in nature and thus infringe upon the right not to be punished twice for the same offence.

## Conclusion

The current research has certain limitations. First of all, the dataset excludes the prosecution of core international crimes committed by non-state armed groups and state officials such as the Syrian or Iraqi government forces. Another drawback is that the dataset contains predominantly German cases, followed by the Netherlands and Sweden. This does not necessarily need to limit the relevance of the findings. All the EU countries that have ratified and implemented the Rome Statute have defined the core international crimes in line with the definitions of the Rome Statutes. When other EU countries decide to charge alleged terrorists cumulatively, they can rely on the case-law for the interpretation of the core international crimes. Furthermore, countries can adopt a more pro-active prosecutorial strategy that does not always require amendments to the law. Finally, not all judgements can be obtained, thus we can only rely on press releases issued by the court. As more prosecutions take place in different countries and more judgments become available, it will be possible to draw more conclusions. Despite these limitations, certain observations and key trends can be made.

There are several advantages of relying solely on terrorism offences when holding alleged terrorists accountable in criminal proceedings. Firstly, over the years, the range of offences such as financing of terrorism, (facilitating) travel, and providing and receiving training has increased.<sup>116</sup> The evidence required to prove such terrorist offences is often not located in a conflict zone. Secondly, prosecuting for terrorism-related offences often permits the use of specialised investigative powers, longer pre-trial detention, and in some cases a lower standard of proof.<sup>117</sup> Finally, the symbolic function of prosecuting terrorism offences should not be underestimated. Membership in a foreign terrorist organisation has been criminalised by all EU member states, including more recently by Finland and Sweden. More than two thirds of the alleged terrorists who were charged with core international crimes, among others, also found guilty of membership in a terrorist organisation.

At the same time, membership offences are status offences and do not adequately distinguish between active and passive membership, nor do they properly reflect the full range of crimes that have been committed in the conflict zone. As noted earlier, the genuine link between the individual and the terrorist group as well as the precise degree of contribution of the alleged perpetrator is not always clear. While it may be logical to increase the maximum sentence for membership offences, they do not identify and recognise victims and the harm that is inflicted upon them. Membership offences are 'faceless' crimes. The (maximum) sentences imposed by law and imposed by courts should therefore not be higher than sentences following core international crimes convictions or carrying out terrorist attacks, considering the seriousness of the latter crimes.

The present dataset has further shown that women are being charged and convicted for different crimes than men. While women are being sentenced for their involvement in SGBV crimes and crimes committed against children such as child neglect, men are predominantly charged and convicted for inflicting physical harm resulting in death, and outrage upon personal dignity of a deceased person. Whether this constitutes gender-biased prosecution of female returnees is difficult to conclude based on the limited data available from a limited number of countries.<sup>118</sup>

However, women have indeed played different roles in FTOs than men, ranging from running a household and taking care of children to fulfilling different functions such as trainers, recruiters, teachers, doctors, or fundraisers. Women are predominantly involved in non-violent activities, whereas men are more often involved in fighting, killing, and other violent activities.<sup>119</sup> If evidence is available that an ISIL/Da'esh fighter has committed (more) violent crimes leading to physical harm and/or death, it is the prerogative of the prosecutor to charge them for the more violent war offences instead, or in addition to, pillaging as a war crime. Whether the same analogy can be applied to child recruitment and SGBV crimes is doubtful. Enlisting your own child as a fighter, and committing rape of Yazidis, causes such physical and mental harm, and is as serious and violent as many of the violent crimes that males have committed. As few men are being repatriated, it is difficult to compare which crimes they would be prosecuted for were they to return, making it difficult to draw any conclusions on whether there is indeed a gender-biased approach in prosecutions.

Another observation that can be drawn from the dataset is that the sentences are longer when terrorists are convicted cumulatively for terrorist offences and core international crimes. When terrorist offences and core international crimes are charged cumulatively, it is important to determine whether the same underlying facts can be considered as proof for both offences. Considering the different elements of crimes that need to be proven, prosecutors should carefully assess which underlying facts genuinely support and prove the commission of the crimes. When the crimes – such as membership in a terrorist group and war crimes – are intrinsically linked, a more integrated approach is required and could support the use of the same underlying acts to prove both crimes, which will be reflected in the sentencing. Prosecuting for the full range of crimes that have been committed is a recognition of the harm that has been inflicted on the victims and helps to establish a historical record.

Longer sentences are not a goal, but an outcome of prosecuting cumulatively for both terrorist offences and core international crimes. Provided that there is a political will and that the prerequisites of criminalising core international crimes and establishing jurisdiction are in place, this trend of prosecuting cumulatively is promising.<sup>120</sup> This article demonstrates what different prosecutorial strategies can be employed that facilitate holding perpetrators accountable for the full range of crimes they have committed. Cumulative charging and structural investigations do not require any changes in the legal system but need to be incorporated through practice. By analysing existing court cases, (other) prosecutors can build on proving the different elements of crimes. While in some cases evidence needs to be obtained from the conflict zone, which can be obtained through cooperation with international mechanisms such as UNITAD and IIIM, in other cases prosecutors could rely on digital evidence such as photos and videos that have been lawfully obtained and authenticated by a forensic institute to prove the crimes.

Given the continuous repatriations of women from North-Eastern Syria by an increasing number of countries<sup>121</sup> and the existing expertise in cumulative proceedings, the number of repatriations will likely continue and expand to more countries in the coming years. So far, members of ISIL/Da'esh and other terrorist groups were mainly prosecuted through a terrorism legal framework. As several countries in Europe have successfully started to also hold ISIL/Da'esh members accountable for core international crimes, this should encourage other countries to



cumulatively charge for both core international crimes and terrorist offences. When countries are doubling down on their efforts to bring terrorists to justice for the full range of crimes, it contributes to achieving a more complete accountability.

*Tanya Mehra is a Senior Research Fellow and Programme Lead (Rule of Law Responses to Terrorism) at the International Centre for Counter-Terrorism. Tanya's main areas of interest are international (criminal) law and rule of law approaches in countering terrorism, with a special focus on accountability of terrorism-related crimes, human rights implications of countering terrorism approaches. Other topics of interests include the repatriation of foreign terrorist fighters, military evidence and the use of administrative measures in judges, prosecutors and other actors of the criminal justice sector as well as international organisations such as UN CTED and GCTF. Tanya has previously worked at the T.M.C. Asser Instituut and has published in various academic and policy outlets.*

#### *Acknowledgments*

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## ANNEX

Prosecuting Country	Name/Case No.	Nationality Defendant	Gender	Date of latest Verdict
Finland	Ahmad S. 16/6930; 17/1229	Iraqi	Male	Friday, 28 February 2020
Finland	Daham S. 16/6930; 17/1229	Iraqi	Male	Friday, 28 February 2020
Germany	Abbas R. 1 – 3/18	Iraqi	Male	Friday, 4 June 2021
Germany	Abdalfatah H. A. 5-2 StE 5/17-4	Syrian	Male	Monday, 13 January 2020
Germany	Abdelkarim el B. 5-3 StE 4/16-4-3/16	German	Male	Tuesday, 8 November 2016
Germany	Abdelkarim el B. 5-3 StE 4/17-4-3/17	German	Male	Monday, 24 September 2018
Germany	Abdoulrahman A. A. 5-2 StE 5/17-4	Syrian	Male	Monday, 13 January 2020
Germany	Abdul Jawad A. K. 5-2 StE 5/17-4; 3 StR 394/20	Syrian	Male	Tuesday, 10 August 2021
Germany	Amin M. 5-2 OJs 15/20 - 1/22	Syrian	Male	Wednesday, 5 October 2022
Germany	Carla-Josephine S. 7 StS 4/19	German	Female	Wednesday, 29 April 2020
Germany	Derya Ö. III - 5 StS 2/19	German	Female	Tuesday, 17 December 2019
Germany	Fadia S. 7 StS 3/20	German-Lebanese	Female	Thursday, 1 July 2021
Germany	Fares A.B. 5 - 3 StE 6/19/3 StR 212/21	Syrian	Male	Tuesday, 10 August 2021
Germany	Jalda A. 3 St 2/22	German	Female	Wednesday, 27 July 2022
Germany	Jennifer W. 8 St 9/18; 3 StR 246/22	German	Female	Tuesday, 29. August 2023
Germany	Khaled A. (1) 2StE2/21-4 (1/21)	Syrian	Male	Tuesday, 4 May 2021
Germany	Khedr al-K. 6 StS 2/20; 3 StR 16/22	Syrian	Male	Tuesday, 5 April 2022
Germany	Kim-Teresa A. 5-2 OJs 29/20-1/21; 3 StR 89/22	German	Female	Tuesday, 3 May 2022

Germany	Leonora M. N/A	German	Female	Wednesday, 18 May 2022
Germany	Marcia M. 5 St 1/23	German	Female	Friday, 1 September 2023
Germany	Mine K. 2 StS 2/19	German	Female	Wednesday, 4 December 2019
Germany	Mohammed Rafea Yaseen Y.	Iraqi	Male	Wednesday, 3 June 2020
Germany	Monika K. III-6 StS 3/22	German - Polish	Female	Tuesday, 14 February 2023
Germany	Mustafa K. 5 StS-1/18	Syrian	Male	Thursday, 13 December 2018
Germany	Nadine K. 2 StE 9/22	German	Female	Wednesday, 21 June 2023
Germany	Nasim A. 5-2 OJs 24/19 - 4/20	German	Female	Friday, 28 May 2021
Germany	Nils D. III-6 StS 5/18; 3 StR 187/22	German	Male	Wednesday, 10 August 2022
Germany	Nurten J. 7 StS 2/20	German	Female	Wednesday, 21 April 2021
Germany	Omaima A. 3 St 1/20; 3 StR 26/21	German	Female	Monday, 22 March 2021
Germany	Omaima A. 4 St 1/21	German	Female	Thursday, 22 July 2021
Germany	Raad A. 1 - 3/18	Iraqi	Male	Friday, 4 June 2021
Germany	Raed E. 1 - 1/22	Syrian	Male	Thursday, 13 July 2023
Germany	Romiena S. 4 StS 3/21	German	Female	Wednesday, 1 June 2022
Germany	Sabine Ulrike S. 5-2 StE 11/18	German	Female	Friday, 5 July 2019
Germany	Sami al-S. 6 StS 2/20; 3 StR 16/22	Syrian	Male	Tuesday, 5 April 2022
Germany	Sarah K. III-5 StS 4/22	German	Female	Tuesday, 14 February 2023
Germany	Sarah O. 7 StS 3/19	German-Al- gerian	Female	Wednesday, 16 June 2021
Germany	Sibel H. 7 St 9/19 (4)	German	Female	Wednesday, 29 April 2020

Germany	Stefanie A. 3 St 2/21	German	Female	Thursday, 24 March 2022
Germany	Suliman Al S. 6 - 3 StE 5/16; 3 StR 149/18	Syrian	Male	Wednesday, 23 January 2019
Germany	Sultan K. 5 StS - 1/18; 3 StR 262/19	Syrian	Male	Wednesday, 16 October 2019
Germany	Taha al-J. 5-3 StE 1/20-4-1/20; 3 StR 230/22	Iraqi	Male	Wednesday, 30 November 2022
Germany	Zeynep G. 6 - 2/20	German	Female	Friday, 23 April 2021
Hungary	Hassan F.	Syrian	Male	Monday, 11 October 2021
Latvia	Mārtiņš G. K30-1047- 17/15/11840003615	Latvian	Male	Monday, 3 December 2018
Netherlands	Oussama A. 09/748003-18; 09/748003-19; 2200392619; 21/00479	Dutch	Male	Tuesday, 5 April 2022
Netherlands	Ahmad al Y. 09/748011-19; 2200128321	Syrian	Male	Tuesday, 6 December 2022
Netherlands	Ahmad al-K. 09/748001-18; 22-002229-21	Syrian	Male	Tuesday, 14 November 2023
Netherlands	Yousra L. 09/748012-19; 09/748012-19-P	Dutch	Female	Tuesday, 29 June 2021
Sweden	Al Amin S. B 9086-15; B 5306-15	Swedish	Male	Wednesday, 30 March 2016
Sweden	Fatosh I. B 4663-22; B 7721-21	Swedish	Female	Wednesday, 29 March 2023
Sweden	Hassan Mostafa al-M. B 9086-15; B 5306-15	Swedish	Male	Wednesday, 30 March 2016
Sweden	Lina I. B 20218-20	Swedish	Female	Friday, 4 March 2022
Sweden	Nathan B. B 2759-21	Swedish	Male	Wednesday, 4 January 2023

## Endnotes

- 1 UN Human Rights Council, "They came to destroy: ISIS Crimes Against the Yazidis", A/HRC/32/CRP.2, 15 June 2016, available at [https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/ColSyria/A\\_HRC\\_32\\_CRP2\\_en.pdf](https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/ColSyria/A_HRC_32_CRP2_en.pdf).
- 2 UN Human Rights Council, "Report of the Independent International Commission of Inquiry on the Syrian Arab Republic", A/HRC/44/61, 3 September 2020, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/224/45/PDF/G2022445.pdf?OpenElement>.
- 3 UN Security Council, "Tenth Report from the Special Adviser and Head of UNITAD", S/2023/367, 22 May 2023, available at [https://www.unitad.un.org/sites/www.unitad.un.org/files/general/unitad\\_10th\\_report\\_to\\_the\\_unsc-eng.pdf](https://www.unitad.un.org/sites/www.unitad.un.org/files/general/unitad_10th_report_to_the_unsc-eng.pdf).
- 4 UN High Commissioner for Refugees Cyprus, "Syrian Refugee Crisis – Globally, in Europe and in Cyprus", 18 March 2021, available at <https://www.unhcr.org/cy/2021/03/18/syria-refugee-crisis-globally-in-europe-and-in-cyprus-meet-some-syrian-refugees-in-cyprus/>; European Union Agency for Asylum, "Latest Asylum Trends", September 2023, available at <https://euaa.europa.eu/latest-asylum-trends-asylum>.
- 5 Case 19-87.367, *LaFarge*, Judgement, Court of Cassation, 7 September 2021; Case StB 52/18, *Nils D.*, Federal Court of Justice, Order, 18 December 2018.
- 6 'Global Repatriations Tracker | Rights and Security International', accessed 8 July 2023, available at <https://www.rightsandsecurity.org/action/resources/global-repatriations-tracker>.
- 7 Only Italy and Denmark have not yet implemented the Rome Statute. See the commentary of the Rome Statute on how the core international crimes have been drafted, available at <https://www.legal-tools.org/doc/aa0e2b/pdf/>.
- 8 UN Security Council, "Sixth Report of the Special Adviser and Head of UNITAD", S/2021/419, 3 May 2021, available at [https://www.unitad.un.org/sites/www.unitad.un.org/files/general/s.2021.419\\_-\\_sixth\\_unitad\\_report\\_en.pdf](https://www.unitad.un.org/sites/www.unitad.un.org/files/general/s.2021.419_-_sixth_unitad_report_en.pdf).
- 9 Common Article 3 to the Geneva Conventions I-IV; Article 75(2)(a) Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), 7 December 1978, UNTS 17512; Article 4(2)(a) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflict (Additional Protocol II), 7 December 1978, UNTS 17513; Article 8(2)(a)(i) and (c) (i) Rome Statute of the International Criminal Court (Rome Statute), 1 July 2002, UNTS 38544. Willful killing is also prohibited under international customary law. See International Committee of the Red Cross (ICRC), Customary IHL Database, "Rule 89", available at <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule89>.
- 10 International Criminal Court (ICC), "Elements of Crimes", Article 8(2)(c) (i)-1, 2013, available at <https://www.icc-cpi.int/sites/default/files/ElementsOfCrimesEng.pdf>.
- 11 Certain violations such as murder, torture and inhuman treatment are considered so serious that they constitute grave breaches under international humanitarian law. On torture and inhumane treatment: Article 50 Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 21 October 1950, UNTS 970; Article 51 Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 21 October 1950, UNTS 971; Article 130 Convention (III) relative to the Treatment of Prisoners of War, Geneva, 21 October 1950, UNTS 972; Article 147 Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 21 October 1950, UNTS 973.
- 12 In the Appeals Judgment against Kunarac, the ICTY determined: "In determining whether or not the act in question is sufficiently related to the armed conflict, the Trial Chamber may take into account, inter alia, the following factors: the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator's official duties". Case IT-96-23 and IT-96-23/1-A, *Prosecutor v. Kunarac, Kovač and Vuković*, Judgement, International Tribunal for the Former Yugoslavia, 12 June 2002, paras 57-58.
- 13 Under international humanitarian law non-state armed group can set up courts in the area they control, however such trials need to meet fair trial standards. In the current case the court ruled that the death sentence was solely based on the fact that the radical beliefs of the judge who considered the prisoners of war to be disbelievers based on their affiliation with the Syrian government. According to the court, the prisoners of war were denied having their case heard, denied a defence, and denied any legal remedies with the sentence being executed immediately, thus their deaths not only qualified as murder but also extra-judicial killings; Case 5-2 StE 5/17, *Abdul Jawad A.K.*, Judgement, OLG Stuttgart, 13 January 2020, paras 121-128.
- 14 Eurojust, "Prosecuting war crimes of outrage upon personal dignity based on evidence from open sources – Legal framework and recent developments in the Member States of the European Union", February 2018, available at <https://www.eurojust.europa.eu/sites/default/files/assets/2018-02-prosecuting-war-crimes-based-on-evidence-from-open-sources-en.pdf>.
- 15 International Criminal Court, Elements of Crime, under Article 8 (2) (c) (ii), para. 1.
- 16 Common Article to the Geneva Conventions I-IV, Article 8 (2) (b) (xxi) of the Rome Statute. Outrage upon personal dignity is also prohibited under international customary law. See International Committee of the Red Cross (ICRC), Customary IHL Database, "Rule 90", available at <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule90>; Willful killing is also prohibited under international customary law. See International Committee of the Red Cross (ICRC), Customary IHL Database, "Rule 89", available at <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule89>.

- 17 International Criminal Court (ICC), “Elements of Crimes”, Article 8(2)(c)(ii), 2013 available at <https://www.icc-cpi.int/sites/default/files/ElementsOfCrimesEng.pdf>.
- 18 International Criminal Court (ICC), “Elements of Crimes”, Article 8(2)(b)(xxi), 2013 available at <https://www.icc-cpi.int/sites/default/files/ElementsOfCrimesEng.pdf>.
- 19 UN Human Rights Council, “Rule of Terror: Living under ISIS in Syria, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, 14 November 2014, available at <https://reliefweb.int/report/syrian-arab-republic/rule-terror-living-under-isis-syria>.
- 20 Yusra L. was convicted on first instance by the District Court of The Hague for war crime of outrage upon personal dignity (Section 6 Paragraph 1 I ICA in conjunction with Article 3 Geneva Conventions). In addition, Yusra L. was found guilty of a range of terrorist offences: membership in a terrorist organisation (Section 140, 140a Criminal Code of the Netherlands), Incitement to terrorism and dissemination of jihadi material (Section 131, 132), training to commit terrorist offences (Section 134a), transferring money to terrorists (Sanctions Act 1977, Art. 2 and 3, Terrorism Sanctions Regulation 2007-II). See: Cases 09/748012-19 and 09/748012-19-P, *Yusra L.*, Judgement, District Court of the Hague, 29 June 2021.
- 21 Case 09-748011-19 and 2200128321, *Ahmad al Y.*, Judgement, Court of Appeal of the Hague, 6 December 2022.
- 22 Child recruitment is prohibited in international and non-international armed conflict under Article 77(2) Additional Protocol I and Article 4(3)(c) Additional Protocol II and Article 8(2)(b)(xxvi) a€(e)(vii) of the Rome Statute. Child recruitment is also prohibited under international customary law, see International Committee of the Red Cross (ICRC), Customary IHL Database, “Rule 136”, available at <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule136>.
- 23 Case B 20218-20, *Lina I.*, Judgement, Stockholm District Court, 4 March 2022.
- 24 Case 3 St 2/21, *Stefanie A.*, Judgement, Hans OLG Hamburg, 25 March 2022 (on file with the author).
- 25 Pillaging is prohibited under Article 33(2) Geneva Convention IV, Article 4(2)(g) Additional Protocol I, Article 8(2)(b)(xvi) a€(2)(e)(v) of the Rome Statute. Pillaging is also prohibited under international customary law, see International Committee of the Red Cross (ICRC), Customary IHL Database, “Rule 52”, available at <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule52>.
- 26 International Criminal Court (ICC), “Elements of Crimes”, Article 8(2)(e)(v), 2013 available at <https://www.icc-cpi.int/sites/default/files/ElementsOfCrimesEng.pdf>.
- 27 A. Jawad Al-Tamimi, “The ISIS Files, The Islamic State’s Real Estate Department: Documents and Analysis”, George Washington University Program on Extremism, June 2022, available at <https://isisfiles.gwu.edu/downloads/jm214p12r?locale=en>.
- 28 Case 2 StS 2/19, *Mine K.*, Judgement, OLG Düsseldorf, 4 December 2019, paras 149-252.
- 29 Final convictions for all pillaging counts: Case 5-2 StE 11/18, *Sabine Ulrike S.*, Judgement, OLG Stuttgart, 5 July 2019; Case 2 StS 2/19, *Mine K.*, Judgement, OLG Düsseldorf, 4 December 2019; Case 5-2 OJs 29/20-1/21, *Kim-Teresa A.*, Judgment, OLG Frankfurt, 29 October 2021; Case 5 2 OJs 24/19 4/20, *Nasim A.*, Judgment, OLG Frankfurt, 28 May 2021. Convictions for all pillaging counts with appeal pending: Case 5 St 1/23, *Marcia M.*, Judgment, OLG Celle, 1 September 2023, Case III-5 StS 4/22, *Sarah K.*, Judgment, OLG Düsseldorf, 14 February 2023, Case III-6 StS 3/22, *Monika K.*, Judgment, OLG Düsseldorf, 14 February 2023. Final acquittals for all pillaging counts: Case 7 StS 3/19, *Sarah O.*, Judgement, OLG Düsseldorf, 16 June 2021; Case 6-2/20, *Zeynep G.*, Judgement, Kammergericht Berlin, 23 April 2021; Case 2 StE 9/22, *Nadine K.*, Judgment, OLG Koblenz, 21 June 2023. Final convictions for single pillaging count(s): Case 7 St 9/19 (4), *Sibel H.*, Judgement, OLG Munich, 29 April 2022; Case 3 St 2/22, *Jalda A.*, Judgement, Hans OLG Hamburg, 27 July 2022; Case III 5 StS 2/19 *Derya Ö.*, Judgment, OLG Düsseldorf, 17 December 2019; Case 7 StS 3/20, *Fadia S.*, Judgment, OLG Düsseldorf, 1 July 2021. Convictions for single pillaging count(s) with appeal pending: Case 7 StS 2/20, *Nurten J.*, Judgement, OLG Düsseldorf, 21 April 2021.
- 30 UN Human Rights Council, “They came to destroy: ISIS Crimes Against the Yazidis”, A/HRC/32/CRP.2, 15 June 2016, available at [https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/CoISyria/A\\_HRC\\_32\\_CRP.2\\_en.pdf](https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/CoISyria/A_HRC_32_CRP.2_en.pdf).
- 31 Ibid, para 55.
- 32 See: UN Security Council Resolution 1820(2008), S/RES/1820, 19 June 2008, available at [https://www.un.org/shestandsforpeace/sites/www.un.org/shestandsforpeace/files/unschr\\_1820\\_2008\\_on\\_wps\\_english.pdf](https://www.un.org/shestandsforpeace/sites/www.un.org/shestandsforpeace/files/unschr_1820_2008_on_wps_english.pdf); UN Security Council Resolution 2331(2016), S/RES/2331, 20 December 2016, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/451/58/PDF/N1645158.pdf?OpenElement>; UN Security Council Resolution 2242(2015), S/RES/2242, 13 October 2015, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/311/09/PDF/N1531109.pdf?OpenElement>; UN Security Council Resolution 2388(2018), S/RES/2388, 21 November 2017, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/393/19/PDF/N1739319.pdf?OpenElement>.
- 33 UN Security Council, “Report of the Secretary General on women and peace and security”, S/2017/861, 16 October 2017, para 61, available at <https://www.un.org/shestandsforpeace/content/report-secretary-general-women-and-peace-and-security-2017-s2017861>.
- 34 See for example: Case 7 StS 3/19, *Sarah O.*, Judgement, OLG Düsseldorf, 16 June 2021; Case 3 St 1/20, *Omaima A.*, Judgment, Hans OLG Hamburg, 2 October 2020; Case 3 St 2/22, *Jalda A.*, Judgement, Hans OLG Hamburg, 27 July 2022 (on file with the author).

35 In January 2023, the court of first instance found Camilla O. guilty of several counts of aiding and abetting aggravated rape of minors and sentenced her to 8 years and 6 months in prison. In May 2023, the court of appeal confirmed the sentence, but amended the guilty verdict to two counts of human trafficking of minors as an offence against liberty and peace and increased the sum of the previously ordered payment of victim compensation to both plaintiffs. She was sentenced to 6 years and 10 months imprisonment including making payments to the victims and Swedish Victims Fund. Case B 1070-23, *Camille O.*, Judgement, Court of Appeal Stockholm, 11 May 2023. On file with author.

36 Dutch Public Prosecution Service, “Teruggehaalde vrouw uit IS-kamp verdacht van misdrijven tegen Yezidi’s [Retrieved woman from IS camp suspected of crimes against Yazidis]”, News Item, 10 February 2023, available at <https://www.om.nl/actueel/nieuws/2023/02/10/teruggehaalde-vrouw-uit-is-kamp-verdacht-van-misdrijven-tegen-yezidis>.

37 According to the EU Directive on Combatting Terrorism, Member States shall take the necessary measures to ensure that the following acts, when committed intentionally, are punishable as a criminal offence: (a) directing a terrorist group; (b) participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group. See: Art. 4, Directive (EU) 2017/541 of the European Parliament and of the Council on combatting terrorism, 31 March 2017, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32017L0541>.

38 “[p]articipating in an association or group for the purpose of terrorism” means to participate in the activities of an association or group for the purpose of committing or contributing to the commission of one or more terrorist offences by the association or the group. [...] each Party shall adopt such measures as may be necessary to establish “participating in an association or group for the purpose of terrorism, as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offence under its domestic law.” See: Art. 1 and 2 Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, 22 October 2015, available at <https://rm.coe.int/168047c5ea>.

39 Le Figaro, “Deux ans ferme requis à Paris contre l’imam Bassam Ayachi [Two years in prison requested against imam Bassam Ayachi]”, 8 April 2022, available at <https://www.lefigaro.fr/flash-actu/deux-ans-ferme-requis-a-paris-contre-l-imam-bassam-ayachi-20220408>.

40 Case 5 StS 6/19, *Sabri B.*, Judgement, OLG Düsseldorf, 12 June 2020.

41 Case 09/748011-19, *Ahmad al Y.*, Judgement, District Court of the Hague, 21 April 2021.

42 Ahrar al-Sham has worked under larger coalitions and has closely cooperated with other designated terrorist groups such as former Jabhat al-Nusra and ISIL/Da’esh making it difficult to determine role and activities of Ahrar al-Sham. The fact that Ahrar al-Sham appears to pursue a political agenda that also clearly discriminates against minorities that are thus being targeted, has been one of the considerations to qualify Ahrar al-Sham as a terrorist organisation. For more information, see Mapping Militant Organizations, “Ahrar al-Sham.” Stanford University, last modified March 2022, available at <https://cisac.fsi.stanford.edu/mappingmilitants/profiles/ahrar-al-sham>.

43 This has also been repeatedly concluded in terrorism only trials in the Netherlands and also confirmed by the Supreme Court in 2022. See Case 21/01122, Judgement, Supreme Court, 21 November 2022, para 28.

44 Furthermore, in addition to being member or leader of a terrorist group, in Belgium a third category has been created criminalizing a person for participating in any decision within a terrorist group knowing that this participation could contribute to the commission of an offence by the terrorist group. See: Art. 140(1), Criminal Code of Belgium, available at [https://www.ejustice.just.fgov.be/cgi\\_loi/change\\_lg.pl?language=nl&la=N&cn=1867060801&table\\_name=wet](https://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=1867060801&table_name=wet).

45 H. Duffy, R. Pillay and K. Babická, ‘Counter-Terrorism and Human Rights in the Courts’, International Commission of Jurists, November 2020, p. 13, available at: <https://icj2.wpenginepowered.com/wp-content/uploads/2020/11/Guidance-counter-terrorism-ENG-2020-1.pdf>.

46 When membership is defined very broad it could affect CSO that are providing humanitarian assistance and restricting the right to association, peaceful assembly, and freedom of expression. While UNSC 2264(2022) carve out a humanitarian exemption, at national level not all States included such an exemption, making it very difficult for NGOs to provide humanitarian assistance in conflict areas where terrorist groups operate. See: UN Human Rights Council, “Impact of measures to address terrorism and violent extremism on civic space and the rights of civil society actors and human rights defenders”, A/HRC/40/52, 1 March 2019, paras 21f. and 43f., available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/057/59/PDF/G1905759.pdf?OpenElement>.

47 Case AK 18/22, Order, Federal Court of Justice, 21 April 2022, paras 6 and 21.

48 Case 7 St 9/19 (4), *Sibel H.*, Judgement, OLG Munich, 29 April 2022.

49 In one case the charge was dropped, in two other cases membership could not be proven in Germany because the accused was member of the Free Syrian Army, a non-state armed group which has not been designated as a terrorist organization. In another case the accused had flipped sides from a non-state armed group to a terrorist group, without conclusive evidence when this switch occurred. The fact that several armed oppositions groups have merged or loosely cooperate under an umbrella organization make it difficult to prove whether and during which period a group could meet the criteria of a terrorist organization, like in the case against Ahmad Al K. in the Netherlands. Furthermore, individual fighters can switch alliances during the course of a conflict making it difficult to prove their affiliation. See: Case 5-2 OJs 15/20, *Amin M.*, Judgement, OLG Frankfurt, 5 October 2022, Case 5-3 StE 5/16, *Suliman Al S.*, Judgement, OLG Stuttgart, 20 September 2017; Case 3 StR 149/18,

*Suliman Al S.*, Judgement, Federal Court of Justice, 23 August 2018; Case 6-3 StE 5/16, *Suliman Al S.*, Judgement, OLG Stuttgart, 23 January 2019; Case 5-3 StE 1/20-4-1/20 Taha Al. J., Judgement, OLG Frankfurt 30 November 2021; *Ahmad Al-K.*, Judgement, District Court of the Hague, 16 July 2021.

50 The law now provides that anyone “carries out a task that is essential for the said criminal activity of the terrorist group” is contributing to the activities of a terrorist group; See: Act 1267/2021 amending Chapters 17 and 34a of the Criminal Code (2021), available at <https://www.finlex.fi/fi/laki/alkup/2021/20211267>.

51 On 1 June 2023 membership of a terrorist organization became an offence in Sweden. The newly adopted law also criminalises aiding a terrorist group, financing participation, and travelling for the purpose of joining, as well as recruiting members for the terrorist group. Library of Congress, “Sweden: New Terrorist Crimes Legislation Enters into Force”, available at <https://www.loc.gov/item/global-legal-monitor/2023-06-13/sweden-new-terrorist-crimes-legislation-enters-into-force/>

52 Under the Geneva Conventions, there is an obligation to extradite or prosecute grave breaches. There appears to be no conventional basis however for the obligation to prosecute or extradite for crimes against humanity, genocide, war crimes other than grave breaches and war crimes in non-international armed conflict. See T. Mehra, “Improving the prospects of prosecuting ‘terrorists’ for core international crimes committed in the context of the conflict in Syria and Iraq”, ICCT Report, October 2023, available at <https://www.icct.nl/sites/default/files/2023-10/Improving%20prospects%20of%20prosecuting%20terrorists.pdf>.

53 International Law Commission, “The obligation to extradite or prosecute”, Yearbook of the International Law Commission II, no. 2 (2014): 103, para 21, available at [https://legal.un.org/ilc/publications/yearbooks/english/ilc\\_2014\\_v2\\_p2.pdf](https://legal.un.org/ilc/publications/yearbooks/english/ilc_2014_v2_p2.pdf).

54 Human Rights Watch, “These are the Crimes we are Fleeing: Justice for Syria in Swedish and German Courts” Report, October 2017, available at [https://www.hrw.org/report/2017/10/03/these-are-crimes-we-are-fleeing/justice-syria-swedish-and-german-courts#\\_ftn79](https://www.hrw.org/report/2017/10/03/these-are-crimes-we-are-fleeing/justice-syria-swedish-and-german-courts#_ftn79).

55 Sect. 153f Criminal Code of Germany.

56 The UK clearly favours prosecution on the basis of territorial jurisdiction and has extensive mutual legal assistance (MLA) agreements in place to ensure that suspects, including own nationals can be extradited provided certain safeguards are met. Other factors why there no prosecutions for core international crimes in the UK include strong counter-terrorism legislation with severe penalties and the high evidentiary threshold making it difficult to use evidence from abroad in court. See UK Ministry of Justice, “Note on the investigation and prosecution of crimes of universal jurisdiction”, Policy Paper 21 May 2018, available at <https://www.gov.uk/government/publications/universal-jurisdiction-information-note>.

57 According to the Eurojust Genocide Network, the countries with the most human and financial resources within law enforcement and prosecution services are the ones that are most effectively prosecuting core international crimes cases. See: Genocide Network, “20 Years On: Main Developments in the Fight Against Impunity for Core International Crimes in the EU”, May 2022, pp. 12-15, available at <https://www.eurojust.europa.eu/sites/default/files/assets/developments-in-the-fight-against-impunity-for-core-international-crimes-in-the-eu.pdf>.

58 B. McGonigle Leyh, “Using Strategic Litigation and Universal Jurisdiction to Advance Accountability for Serious International Crimes” *International Journal of Transitional Justice* 16, no. 3 (November 2022): 363-379, available at <https://academic.oup.com/ijtj/article/16/3/363/6763559#382082469>.

59 In 2019, the France based Syrian Center for Media and Freedom of Expression together with the International Federation of Human Rights (FiDH) filed a complaint against Islam Alloush, spokesperson of Jaysh al-Islam for his alleged involvement in war crimes committed by the group. He was consequently arrested in January 2020 and remained in investigative detention ever since. See: ‘Islam Alloush’, *TRIAL International* (blog), accessed 9 March 2023, available at <https://trialinternational.org/latest-post/islam-alloush/>.

60 For example, information submitted to the German Federal Prosecutor General as part of a CSO complaint concerning alleged aiding and abetting of crimes against humanity and war crimes by the German telecommunication firm Utimaco has been added to the ongoing structural investigation into crimes committed in Syria since 2011. See: European Center for Constitutional and Human Rights, “Surveillance in Syria: European firms may be aiding and abetting crimes against humanity”, available at [https://www.ecchr.eu/en/case/surveillance-in-syria-european-firms-may-be-aiding-and-abetting-crimes-against-humanity/#case\\_context](https://www.ecchr.eu/en/case/surveillance-in-syria-european-firms-may-be-aiding-and-abetting-crimes-against-humanity/#case_context).

61 Eurojust, “Conclusions of the 31st Genocide Network meeting, 6-7 April 2022”, 3 May 2022, available at <https://www.eurojust.europa.eu/publication/conclusions-31st-genocide-network-meeting-6-7-april-2022>.

62 beck-aktuell, “Ermittlungen zu möglichen Kriegsverbrechen in der Ukraine [Investigations into possible war crimes in Ukraine]”, 8 March 2022, available at <https://rsw.beck.de/aktuell/daily/meldung/detail/ermittlungen-zu-moeglichen-kriegsverbrechen-in-der-ukraine>.

63 Ben Knight, “Refugees in Germany reporting dozens of war crimes”, Deutsche Welle, 4 November 2016, available at <https://www.dw.com/en/refugees-in-germany-reporting-dozens-of-war-crimes/a-19179291>.

64 Wolfgang Kaleck and Patrick Kroker, “Syrian Torture Investigations in Germany and Beyond: Breathing New Life into Universal Jurisdiction in Europe?”, *Journal of International Criminal Justice* 16, no. 1 (March 2018): 165-191, available at <https://academic.oup.com/jicj/article-abstract/16/1/165/4956463>; Miriam Ingeson, “Structural Criminal Investigations in Sweden



– Reinventing Investigations of International Crimes”, *Scandinavian Studies in Law* 66, (5 October 2020), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3979458](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3979458).

65 Once the accused has been indicted, judicial authorities need to ensure that the trial will take place within a reasonable time and if applicable observe the limitations of pre-trial detention. See: Article 14, International Covenant on Civil and Political Rights (1966), available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>.

66 Several countries such as Germany, Sweden and France have relied on the use of structural investigations and indicated that this has improved the investigations of core international crimes. This has also been confirmed by a prosecutor in an interview with the author. Genocide Network, “Conclusions of the 31<sup>st</sup> meeting of the Network for investigation and prosecution of genocide, crimes against humanity and war crimes”, Eurojust, 6-7 April 2022, available at <https://www.eurojust.europa.eu/sites/default/files/assets/eurojust-31-genocide-network-meeting-conclusions.pdf>.

67 Eurojust, “Cumulative prosecution of foreign terrorist fighters for core international crimes and terrorism-related offences”, 19 May 2020, available at [https://www.eurojust.europa.eu/sites/default/files/Partners/Genocide/2020-05\\_Report-on-cumulative-prosecution-of-FTFs\\_EN.PDF](https://www.eurojust.europa.eu/sites/default/files/Partners/Genocide/2020-05_Report-on-cumulative-prosecution-of-FTFs_EN.PDF).

68 Bongani C. Majola, “Cumulative Charges under International Criminal Law Issues and Perspectives”, in *Promoting Accountability under International Law for Gross Human Rights Violations in Africa*, eds. Charles Chernor Jalloh and Alhagi B.M. Marong (Leiden: Brill, 2015), 202, available at <https://brill.com/edcollbook/title/25389>.

69 In the United States, the Blockburger test is used to determine whether cumulative charging would be a violation of double jeopardy. The court will look at the elements of the crimes on the basis of the relevant law, without taking the actual evidence into account to determine whether there is at least one different element of the crime. If so, the onus is on the prosecutor to prove one or more differentiating elements of the crimes. So for example, murder and murder as a terrorist act can be cumulatively charged, provided that the prosecutor could prove terrorist intent. The underlying notion is that prior to the start of the prosecution, it may not always be clear whether the evidence will hold in court, so if the charge for terrorism leads to acquittal, double jeopardy prevents the prosecutor trying the same person for the same underlying act but now for murder.

70 It is also contained in Art. 50 EU Charter of Fundamental Rights (CFR), 1 December 2009, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT>; and in Art. 54 The Schengen acquis - Convention implementing the Schengen Agreement (CISA), available at [https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=celex:42000A0922\(02\)](https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=celex:42000A0922(02)).

71 Terrorism and core international crimes can, but do not always necessarily, violate the same interests. Domestic terrorism poses a threat to *national security*, whereas core international crimes pose a threat to the *international community*. See the Preamble of the Rome Statute of the International Criminal Court recognising the grave nature of core international threaten the peace, security and well-being of the world and are a concern to the international community as a whole, see Preamble of the Rome Statute. Since 9/11 the UN Security Council has adopted over 40 resolutions to counter terrorism: UN Security Council Counter-Terrorism Committee, “Security Council Resolutions”, available at <https://www.un.org/securitycouncil/ctc/content/security-council-resolutions>. The Preamble of one of the first Security Council Resolutions on terrorism also states that terrorism poses a threat to international peace and security, see UN Security Council Resolution 1373 (2001), S/RES/1373, 28 September 2001, available at [https://www.unodc.org/pdf/crime/terrorism/res\\_1373\\_english.pdf](https://www.unodc.org/pdf/crime/terrorism/res_1373_english.pdf).

72 In context of terrorism, the imposition of administrative measures such as deprivation of nationality as result of criminal conviction for a terrorist offence raises the question whether this is a violation of the *ne bis in idem* principle. Especially when administrative measures are punitive in nature. It appears that the ECtHR concluded in Case 24130/11 and 29758/11, *A and B v. Norway*, Judgement, ECtHR, 15 November 2016 that where dual proceedings represent “complementary responses to socially offensive conducts” and are combined in an integrated manner so as to form a “coherent whole” in order to address the different aspects of the offence, they should rather be considered as parts of one single procedure, and not as an infringement of the *ne bis in idem* principle.

73 Case ICTR-96-4-T, *Prosecutor v. Jean-Paul Akayesu*, Judgement, International Criminal Tribunal for Rwanda, 2 September 1998, para 468.

74 The Court – also confirmed on appeal – ruled that a second trial would violate the *ne bis in idem* principle. Such a narrow interpretation of the *ne bis in idem* principle will have an impact on holding alleged terrorist accountable for the full range of crimes they have committed; See: Case 3 St 2/16, *Harry S.*, Judgment, HansOLG Hamburg, 5 July 2016; Case 3 St 2/17, *Harry S.*, Decision, HansOLG Hamburg, 12 October 2017; Case StB 27/17, *Harry S.*, Decision, Federal Court of Justice, 8 February 2018; (all decisions unpublished due to privacy rights of Accused).

75 Case 09/748001-18, *Ahmad Al-K.*, Judgement, District Court of the Hague, 16 July 2021.

76 Case 5 StS-1/18, *Mustafa K. and Sultan K.*, Judgement, OLG Celle, 13 December 2018; Case *Mohammed Rafea Yaseen Y.*, Judgement, OLG Düsseldorf, 3 June 2020; Case 6-2/20, *Zeynep G.*, Judgement, Kammergericht Berlin, 23 April 2021; Case 5 - 2 StE 5/17, *Abdoulrahman A.A. and Abdalfatah H. A.*, Judgement, OLG Stuttgart, 13 January 2020; Case *Leonora M.*, Judgement, OLG Naumburg, 18 May 2022.

77 Case B 5306-15, *Hassan Mostafa Al-M. and Al Amin S.*, Judgement, Court of Appeal of Western Sweden, 30 March 2016.

78 Convention for the Suppression of Unlawful Seizure of Aircraft, 14 October 1971, UNTS 12325; Convention on the Physical Protection of Nuclear Material, 1 February 1987, UNTS: 24631; Convention for the Suppression of Unlawful Acts against the

Safety of Maritime Navigation, 1 March 1992, UNTS 29004.; International Convention for the Suppression of Terrorist Bombings, 23 May 2001, UNTS 37517; International Convention for the Suppression of Acts of Nuclear Terrorism, 7 July 2007, UNTS 44004.; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 26 January 1973, UNTS 14118.

79 For more information on the application of the exclusion clause see: T. Van Poecke, F. Verbruggen, W. Yperman, "Terrorist offences and international humanitarian law: The armed conflict exclusion clause", *International Review of the Red Cross* 103, no. 916-917 (February 2022): 295, available at <https://international-review.icrc.org/articles/terrorist-offences-and-ihl-the-armed-conflict-exclusion-clause-916>; B. Saul, "From conflict to complementarity: Reconciling international counterterrorism law and international humanitarian law", *International Review of the Red Cross* 103, no. 916-917 (February 2022): 157, available at <https://international-review.icrc.org/articles/from-conflict-to-complementarity-916>.

80 Case 09/842489-14, *Unknown*, Judgement, District Court of the Hague, 10 December 2015, para 7.14.

81 Art. 141bis, Criminal Code of Belgium.

82 Case on file with author.

83 Case on file with author.

84 By consulting relevant websites on a regular basis and purchasing items such as aluminium powder, Omar H. was found guilty for obtaining knowledge and skills to commit terrorist offence. See: Case 2200477013, Judgement, Court of Appeal of the Hague, 27 January 2015.

85 Case 3 StR 89/22, *Kim-Teresa A.*, Order, Federal Court of Justice, 3 May 2022.

86 Case (1) 2StE2/21-4, *Khaled A.*, Judgement, Kammergericht Berlin, 4 May 2021; Case 4 StS 3/21, *Romiena S.*, Judgement, OLG Celle, 1 June 2022; Case 7 St 9/19 (4), *Sibel H.*, Judgement, OLG München, 29 April 2020.

87 C. Paulussen and T. Mehra, "Evidentiary and Charging Matters in the Context of Prosecuting Returning Foreign Fighters Before National Courts", in: F. Capone, C. Paulussen and R. Mignot-Mahdavi (eds.), *Returning Foreign Fighters: Responses, Legal Challenges and Ways Forward*, The Hague: T.M.C. Asser Press/Springer Verlag (2023), pp. 119-141.

88 UN High Commissioner for Refugees Cyprus, "Syrian Refugee Crisis – Globally, in Europe and in Cyprus", 18 March 2021, available at <https://www.unhcr.org/cy/2021/03/18/syria-refugee-crisis-globally-in-europe-and-in-cyprus-meet-some-syrian-refugees-in-cyprus/>.

89 UNITAD, "UNITAD Welcomes Swedish Court Ruling of ISIL Woman Committing Grave Violations of International Law", Press Release, 7 March 2022, available at <https://www.unitad.un.org/Swedish%20Conviction%20Press%20Release>.

90 UNITAD has received requests for assistance from 17 third countries and 39 competent judicial authorities including states that do not prosecute for core international crimes but in a manner that reflect the seriousness of the crime. In the US Musaibli was convicted to 14 years imprisonment for providing, attempting and conspiring to provide material support to ISIL/Daesh and attending an ISIS training camp; UNITAD, "Tenth Report of the Special Adviser and Head of the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh/Islamic State in Iraq and the Levant", S/2023/367, 22 May 2023, para 97, available at [https://www.unitad.un.org/sites/www.unitad.un.org/files/general/unitad\\_10th\\_report\\_to\\_the\\_unsc-eng.pdf](https://www.unitad.un.org/sites/www.unitad.un.org/files/general/unitad_10th_report_to_the_unsc-eng.pdf).

91 According to the latest reports IIIM has received 242 requests for assistance from 15 countries. See: IIIM, "Report of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011", A/77/751, 16 February 2023, para 4, available at <https://undocs.org/Home/Mobile?FinalSymbol=A%2F77%2F751&Language=E&Device-Type=Desktop&LangRequested=False>.

92 Case 2200392619, *Oussama A.*, Judgement, Court of Appeal of the Hague, 26 January 2021, p. 26.

93 The challenges mentioned are mainly concerning the different non-binding documents that have been developed on the use of battlefield evidence. There is no comprehensive overview (yet) on the use of battlefield evidence in courts, but the Special Rapporteur points out to risks posed by these non-binding documents. See: United Nations Human Rights Special Procedures, "Position of the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on the use of "Battlefield" or military produced evidence in the context of investigations or trials involving terrorism offences", April 2021, available at [https://www.ohchr.org/sites/default/files/Documents/Issues/Terrorism/SR/UNSRCT\\_Position\\_Battlefield-evidence-2021.pdf](https://www.ohchr.org/sites/default/files/Documents/Issues/Terrorism/SR/UNSRCT_Position_Battlefield-evidence-2021.pdf).

94 B. van Ginkel, C. Paulussen and T. Mehra, "Diversifying the Sources of Evidence in Terrorism Cases before Criminal Courts in (Post-)Conflict and High-Risk Situations: The Role of the Military" in: C. Finkelstein, C.J. Fuller, J.D. Ohlin and M. Regan (eds.), *Between Crime and War: Hybrid Legal Frameworks for Asymmetric Conflict*, New York: Oxford University Press (2023), pp. 491-518.

95 B. C. Majola, "Cumulative Charges", p. 201.

96 Sentencing Act (2020), available at <https://www.legislation.gov.uk/ukpga/2020/17/contents>.

97 United States Sentencing Commission, Guidelines Manual, §3E1.1 (Nov. 2021), available at <https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2021/GLMFull.pdf>.

98 GCTF, “Memorandum on criminal justice approaches to linkages between terrorism and core international crimes, sexual and gender-based violence crimes, human trafficking, migrant smuggling, slavery, and crimes against children”, September 2021, available at [https://www.thegctf.org/Portals/1/Documents/Links/Meetings/2021/19CC11MM/CJROL%20Memorandum/CJ-ROL\\_Memo-ENG.pdf?ver=BqP5OK\\_Txt0tY8JFGamBzw%3d%3d](https://www.thegctf.org/Portals/1/Documents/Links/Meetings/2021/19CC11MM/CJROL%20Memorandum/CJ-ROL_Memo-ENG.pdf?ver=BqP5OK_Txt0tY8JFGamBzw%3d%3d).

99 A date of arrest relevant for the calculations made here was only known for 34 of the 84 cases of the sample terrorism dataset. For more information on the terrorism cases dataset used for comparison, see endnote 100. The findings on increasing length of proceedings of cumulative charging cases compared to only terrorism charges cases was also identified in relation to Syria-related prosecutions in Germany, see Syria Justice and Accountability Centre, “Universal Jurisdiction Under Scrutiny a Quantitative Analysis of 250+ Syrian Cases.” June 2023, p. 12f., <https://syriaaccountability.org/content/files/2023/06/UJ-Report-EN.pdf>.

100 The randomised dataset relates to 84 (50 men and 34 women) individuals who were sentenced in the Netherlands and Germany after having faced only terrorism charges in the context of the conflicts in Iraq and Syria. The dataset is based on a quick search of relevant online jurisprudence databases identified by the author in researching the topic of this paper. This dataset includes cases completed between December 2014 and November 2022. It is not exhaustive and was compiled for general comparative reasons only.

101 Geneva Conventions I-IV, articles 49, 50, 129 and 146, respectively; and Genocide Convention, article 5; See: UNSC 1373(2001), article 2(e), UNSC 2178(2014), para 6, UNSC 2396(2017), para 1.

102 If we look at the eight countries in the database, the maximum sentences for leading a terrorist organisation could be 30 years or life imprisonment in France, Netherlands, Hungary and Latvia. Nonetheless, these sentences are rarely given. A rare exception is Salah Abdeslam, the only surviving attacker of the 2015 attacks in Paris, who was sentenced to life imprisonment. France24, “Salah Abdeslam sentenced to life in prison as Paris attacks trial winds up”, 29 June 2022, available at <https://www.france24.com/en/france/20220629-live-french-court-to-issue-verdicts-in-landmark-2015-paris-attacks-trial>.

103 See: Article 140a(1), Dutch Criminal Code; Section 129a(1), StGB (German Criminal Code); Article 421-5, French Penal Code.

104 S. Weill, “French foreign fighters: The engagement of administrative and criminal justice in France”, *International Review of the Red Cross* 100, no. 1-2-3 (2018): 230, available at [https://international-review.icrc.org/sites/default/files/reviews-pdf/2019-10/100\\_12.pdf](https://international-review.icrc.org/sites/default/files/reviews-pdf/2019-10/100_12.pdf).

105 In fact, according to the Council of Judiciary in the 85 cases dealing with membership offences, 27 are terrorist offences only and in 58 cases the perpetrators was charged for multiple offences leading to a sentence reflecting the combination of offences; See: Raad voor de rechtspraak [Council of the Judiciary], “Advies wetsvoorstel verhoging strafmaximum deelname terroristische organisatie [Advisory bill increasing the maximum sentence for participation in terrorist organisations]”, Letter, 19 January 2023, available at <https://www.rechtspraak.nl/SiteCollectionDocuments/2023-03-advies-verhoging-strafmaximum-deelname-terroristische-organisatie.pdf>.

106 Raad van State [Council of State], “Wijziging van het Wetboek van Strafrecht in verband met de verhoging van het strafmaximum voor deelneming aan een terroristische organisatie [Amendment of the Criminal Code in connection with the increase of the maximum sentence for participation in a terrorist organization]”, W.16.23.00080/II, 22 May 2023, available at <https://www.raadvanstate.nl/adviezen/@136706/w16-23-00080-ii/>.

107 On Covid-related detention conditions see: Case (1) 2StE2/21-4 (1/21), *Khaled A.*, Judgement, Kammergericht Berlin, 4 May 2021; and Case 5-3 StE 1/20-4-1/20, *Taha Al J.*, Judgement, OLG Frankfurt 30 November 2021; On Al Hol camp detention conditions see: Case 7 StS 2/20, *Nurten J.*, Judgement, OLG Düsseldorf, 21 April 2021; and Case 4 StS 3/21, *Romiena S.*, Judgement, OLG Celle, 1 June 2022; On detention conditions in Turkey or Iraq see: Case 2 StS 2/19, *Mine K.*, Judgement, OLG Düsseldorf, 4 December 2019; and Case 5-2 StE 11/18, *Sabine Ulrike S.*, Judgement, OLG Stuttgart, 5 July 2019.

108 Over-exposure to the media was considered a mitigating factor in some cases the large-scale media reporting caused stress (Abdelkarim el B.), the broad media coverage that also included personal details of the defendant and in fact also violates the right to privacy (Suliman al S.), and because of stigmatization through the reporting (Sarah O.) See: Case 5-3 StE 4/16-4-3/16, *Abdelkarim el B.*, Judgement, OLG Frankfurt, 8 November 2016; and Case 7 StS 3/19, *Sarah O.*, Judgement, OLG Düsseldorf, 16 June 2021;

109 The fact that a person does not have the Dutch nationality nor a legal status to stay in the Netherlands and very unlikely to obtain permit to stay is taken into account as a mitigating factor in Case 09-748011-19, *Ahmad Al Y.*, Judgement, Hague Court of Appeal, 6 December 2022 See also on risk of expulsion see: Case 6-3 StE 5/16, *Suliman Al-S.*, Judgement, OLG Stuttgart, 23 January 2019; and Case 3 StR 16/22, *Sami al-S.*, Judgement, Federal Court of Justice, 5 April 2022.

110 R. Basra and P.R. Neumann, “Prisons and Terrorism: Extremist Offender Management in 10 European Countries”, ICSR Report, 22 July 2020, p.44, available at [https://icsr.info/wp-content/uploads/2020/07/ICSR-Report-Prisons-and-Terrorism-Extremist-Offender-Management-in-10-European-Countries\\_V2.pdf](https://icsr.info/wp-content/uploads/2020/07/ICSR-Report-Prisons-and-Terrorism-Extremist-Offender-Management-in-10-European-Countries_V2.pdf); E. Rodermond, “Het leven na een terroristisch misdrijf: Recidive en re-integratie van extremistische ex-gedetineerden [Life after a terrorist crime: Recidivism and reintegration of extremist ex-prisoners]”, *Judicial Explorations* 3 (2022): 68-85, available at [https://repository.wodc.nl/bitstream/handle/20.500.12832/3219/JV202203\\_artikel5.pdf?sequence=7&isAllowed=y](https://repository.wodc.nl/bitstream/handle/20.500.12832/3219/JV202203_artikel5.pdf?sequence=7&isAllowed=y).

111 Usman Khan’s attack at Fishmongers’ Hall in 2019 and Sudesh Amman’s attack in Streatham Hill in 2020 lead to the adop-

tion of the Sentencing Act (2020), both the men were minors when they were convicted for terrorist offences but were treated as adults and not under the juvenile justice system. The Counter Terrorism Sentencing Act (2021) also introduced a new 'Serious Terrorism Sentence' for most dangerous offenders' a sentence of minimum of 14-year imprisonment and up to 25 years spent on licence (probation), ended early release for the most serious terrorist offenders and also increased the maximum penalty from 10 to 14 years for a number of terror offences, including membership of a proscribed organisation.

112 R. Mignot-Mahdavi, "Le Silence des Agneaux: France's War Against 'Jihadist Groups' and Associated Legal Rationale", ICCT Perspective, 15 May 2020, available at <https://www.icct.nl/publication/le-silence-des-agneaux-frances-war-against-jihadist-groups-and-associated-legal>.

113 Art. 706-25-16 Code of Criminal Procedure of France, available at [https://www.legifrance.gouv.fr/codes/section\\_lc/LEGITEXT000006071154/LEGISCTA000006138124/#LEGISCTA000006138124](https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006071154/LEGISCTA000006138124/#LEGISCTA000006138124).

114 Art. 38z(1)(c) Criminal Code of the Netherlands; Dutch Ministry of Justice and Security, "Possibilities and scope of the Long-Term Supervision Act with regard to (convicted) terrorists", Letter to President of the House of Representatives of the States General, 5 June 2020, available at <https://open.overheid.nl/documenten/ronl-f5e57fd2-d811-4447-be5c-fa36667baa10/pdf>.

115 Part 4, Counter-Terrorism Act (2008), available at <https://www.legislation.gov.uk/ukpga/2008/28/part/4>.

116 These offences are preventive in nature as they precede the commission of a terrorist attack. While there are several human rights concerns on moving (too) much into the pre-crime space, the fact remains that in many countries terrorist prosecutions rely on these crimes; See: T. Mehra and J. Coleman, "The Role of the UN Security Council in Countering Terrorism & Violent Extremism: The Limits of Criminalization?", SFI Research Brief, RESOLVE Network, October 2022, available at [https://resolvenet.org/system/files/2022-10/SFI-RESOLVE\\_Mehra%20Coleman%20Brief\\_26%20Oct%202022\\_0.pdf](https://resolvenet.org/system/files/2022-10/SFI-RESOLVE_Mehra%20Coleman%20Brief_26%20Oct%202022_0.pdf).

117 B. Saul, "From conflict to complementarity: Reconciling international counterterrorism law and international humanitarian law".

118 UN CTED, "Analytical Brief: The prosecution of ISIL-associated women", 2020, p. 4, available at [https://www.un.org/securitycouncil/ctc/sites/www.un.org.securitycouncil.ctc/files/files/documents/2021/Jan/cted\\_analytical\\_brief\\_the\\_prosecution\\_of\\_isil-associated\\_women.pdf](https://www.un.org/securitycouncil/ctc/sites/www.un.org.securitycouncil.ctc/files/files/documents/2021/Jan/cted_analytical_brief_the_prosecution_of_isil-associated_women.pdf).

119 G. Vale, "Women in Islamic State: From Caliphate to Camps", ICCT Policy Brief, 17 October 2019, available at <https://www.icct.nl/publication/women-islamic-state-caliphate-camps>.

120 T. Mehra, "Improving the prospects of prosecuting 'terrorists' for core international crimes committed in the context of the conflict in Syria and Iraq", ICCT Report, October 2023, available at <https://www.icct.nl/sites/default/files/2023-10/Improving%20prospects%20of%20prosecuting%20terrorists.pdf>.

121 In 2023 France, Norway, Spain, and Canada have repatriated some of their citizens from North-eastern Syria. 'Global Repatriations Tracker | Rights and Security International', accessed 8 July 2023, available at <https://www.rightsandsecurity.org/action/resources/global-repatriations-tracker>.

# About

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## Perspectives on Terrorism

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