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An ISIS Tribunal – A Legitimate and Appropriate Instrument to Counter Terrorism within International Law?

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Abstract: *The aim of this research is to emphasize whether an ISIS Tribunal – an ad-hoc tribunal to prosecute ISIS fighters would be a legitimate and appropriate instrument to counter the terrorism phenomenon through international legal means, by also taking into consideration the other options of holding the ISIS perpetrators accountable for their acts, such as bringing them in front of national courts in their home countries, before the courts of Iraq and Syria or the prosecution of the ISIS offenders by the International Criminal Court. When analysing the feasibility of the creation of such a tribunal, also the set-up options will be taken into account, as well as the applicable law. Discussing the possibility of establishing a tribunal aimed to judge terrorism acts is relevant and will bring advantages to the international community since it might lead to the development of the international law regarding terrorism. Having a tribunal judging terrorism-related crimes might play a role in outlining a definition of terrorism, which is very much needed in the international law, taking into consideration the growth in amplitude and frequency of the terrorism phenomenon and the current international impasse regarding consensus on a common global concept of terrorism, in spite of almost 100 years of international efforts.*

Key-words: *international crime, international tribunal, counter-terrorism law, applicable criminal law, Iraqi criminal law.*

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1. Introduction

The establishment of an Islamic State in Iraq and Syria (ISIS) Tribunal – an ad-hoc tribunal for ISIS fighters represents an important initiative of fighting terrorism through international legal means within the international law, in addition to the initiative of developing an International Court against Terrorism.¹ The tribunal's mission will be to analyze and prosecute the terrorist acts committed by the armed group the Islamic State of Iraq and al-Sham / the Levant (ISIS or ISIL).

Even if terrorism offences have grave consequences and shock the consciousness of humanity, they have been left outside of the international law, despite almost 100 years of sustained efforts because the international community did not succeed so far in agreeing on a common notion of terrorism. Consequently, the international law does not have a central judicial body to cover all the aspects of the crime of terrorism. The international community has still a lot of work to do on this field, to reach a common agreed concept of terrorism and establish an international court to prosecute the terrorism offence, but also to deter perpetrators from committing terrorism acts.

Developing an ISIS tribunal would play an important role, on one side, in deterring perpetrators from committing terrorism offences and, on the other, in preventing impunity, even if it would not cover all the terrorism offences committed by all the terrorist perpetrators, but it will only analyze and prosecute the terrorist acts committed by the armed group the Islamic State of Iraq and al-Sham / the Levant (ISIS or ISIL). Its existence might represent a first step in prosecuting the crime of terrorism and its findings might lead to the agreement regarding a common concept of the crime of terrorism, which is very much needed in international law.

The idea to set-up an ISIS tribunal is new in the sense that its personal jurisdiction would be restricted to the members of a specific armed group, ISIS. Bringing each individual part of ISIS to judgment will mean bringing the whole terrorist organization to justice.

This paper sheds light on the relevance of the creation of an ISIS Tribunal for the development of the international criminal law, but it also highlights the issues that come into discussion when creating such a tribunal. Furthermore, it argues why the members of the ISIS terrorist group cannot be judged by the International Criminal Court and also why other ways of holding the ISIS perpetrators accountable for their acts, such as the prosecution before the

¹ Bogdan Aurescu and Ion Gâlea, *Establishing an International Court against Terrorism*, Constitutional Law Review, 2015.

courts of Syria and Iraq or before national courts, are not an appropriate and efficient solution.

Developing an ad-hoc tribunal to prosecute the ISIS fighters brings with it a lot of legal challenges, such as the way of setting-up the Tribunal or its applicable law. This article focuses on the possibilities to create the Tribunal and discusses their feasibility. Also, taking into consideration the fact that the foreign fighters are nationals of “50 different States”,¹ the applicable criminal law represents a challenge. When setting-up such a tribunal, the states need to agree upon the applicable law. In this regard, there are many options and this paper will analyse the feasibility of each.

2. The relation of the ISIS Tribunal with the International Criminal Court and why the latter could not judge the ISIS perpetrators

Another aspect that needs to be discussed would be the relation of the ISIS Tribunal with the International Criminal Court. In this sense, it has been questioned whether the perpetrators of ISIS terrorist armed group cannot be judged by the ICC. To do so, there would be two options, but none of them is feasible.

Firstly, one option would be the prosecution of the ISIS perpetrators based on the Art 12.2 of the Rome Statute² that stipulates the territoriality and personality principles, but the Iraq and Syria, the countries of whom the senior members of ISIS are citizens, are not part of the Rome Statute.³ Judging only the foreign fighters that have the nationality of a contracting party is not an appropriate solution.

Secondly, the ISIS perpetrators might be prosecuted by the ICC through the United Nations Security Council referral-mechanism, but this option is blocked by the exercise of the veto right of the permanent members of the UNSC such as China or Russia. In this sense, the two countries have already vetoed the adoption of a United Nations Security Council’s Resolution⁴ to refer the situation in the Syrian Arab Republic to the Prosecutor of the ICC:

¹ See <https://www.justsecurity.org/75544/a-tribunal-for-isis-fighters-a-national-security-and-human-rights-emergency/>.

² Rome Statute, United Nations, 1998.

³ Ibidem.

⁴ United Nations Security Council, *Draft resolution S/2014/348*, 22 May 2014.

„In 2014, this presumption was substantiated by both Russia and China who vetoed the adoption of a resolution, initiated under Chapter VII of the United Nations (UN) Charter, referring the Syrian situation to the ICC.”¹

This precedent regarding the refusal from China and Russia to refer to the ICC the situation in Syria represents a proof that prosecuting the ISIS offenders by the ICC through the UNSC referral-mechanism is not a feasible alternative.

3. The legitimacy of an ISIS Tribunal

When it comes to the development of such a tribunal, there are more issues to be discussed regarding its legitimacy.

Firstly, it has been argued that the creation of a tribunal whose personal jurisdiction is restricted to a specific group of persons, in this case the ISIS armed group, might not be a legitimate option to hold the ISIS perpetrators accountable for their terrorism-related offences:

„In general, international tribunals are organized in such a way that they can exercise jurisdiction over all persons who are suspected of crimes in a certain conflict or situation, independent of the party to which they belong. That applies for example to the ICC, the ICTY and the SCSL. With the decision to prosecute members of ISIS only, [...] a tribunal would follow the example of the Nuremberg Tribunal. [...] this limitation and the selectivity that comes with it could have adverse effects for the legitimacy of a tribunal.”²

It might be argued that bringing to justice only persons belonging to a specific group is not in accordance with the principles of international law, namely with the non-discriminatory principle of international law. After a detailed analysis, the conclusion is that within the international law there is no principle that might prohibit the creation of a criminal tribunal aimed at prosecuting only the members of a specific group. Consequently, establishing an ISIS Tribunal to prosecute the ISIS terrorist offenders is a legitimate way to bring the perpetrators into justice and prevent impunity within the international law.

Consequently, taking into consideration the fact that within the international law there is no principle that might prohibit the creation of a criminal tribunal aimed at prosecuting only the members of a specific group and also the fact

¹ Bulan Institute for Peace Innovations, *Establishing an Ad Hoc Tribunal to Bring ISIS Fighters into Justice: Prospects, Limits and National Alternatives*, Policy Paper, April 2021.

² André Nollkaemper, *Legal advice International Tribunal ISIS*, Law Faculty, University of Amsterdam, 22 July 2019.

ISIS perpetrators cannot be prosecuted by the ICC through the UNSC referral-mechanism since this solution is blocked by the exercise of the veto right of some of the permanent members of the UNSC, prosecuting the terrorist acts committed by the armed group the Islamic State of Iraq and al-Sham / the Levant (ISIS or ISIL) through an ISIS tribunal is a legitimate instrument to bring to justice the ISIS perpetrators, prevent impunity and counter terrorism within the international law.¹

4. The options for the establishment of an ISIS Tribunal within the international law

4.1. The creation of the Tribunal by the United Nations Security Council acting under the Chapter VII, Art. 41 of the UN Charter²

Within a Resolution³ adopted by the UNSC in 2015, it has been stipulated that ISIS represents “*a global and unprecedented threat to international peace and security*”⁴ and, consequently, the UNSC could act under the Chapter VII of the UN Charter and create a new ad-hoc international criminal tribunal.

Furthermore, the UN Syria Commission of Inquiry has presented a report⁵ in 2021, in which it stated the need for the international community and especially for the Security Council to come up with innovative solutions “*to also address broader justice needs of Syrians*”⁶ taking into consideration the commission of “*the most heinous of violations of international humanitarian and human rights law perpetrated against the civilian population in Syria since March 2011*”.⁷ Also, the Autonomous Administration of North and East Syria (AANES) has asked again the international community (after doing so as well in 2019), through a letter in 2021,⁸ to create a tribunal for ISIS perpetrators and to cooperate in solving this issue that they cannot solve themselves since there is an “*exacerbation of the situation*”⁹ in the camps where there is “*radical atmosphere*”.¹⁰ They ask support from the

¹ Bogdan Aurescu, Ion Gălea, Elena Lazăr, Ioana Oltean, *Drept Internațional Public, Scurta culegere de jurisprudență pentru seminar*, Hamangiu, Bucharest, 2018, p. 213

² United Nations, *Charter of the United Nations*, 24 October 1945.

³ UNSC, Resolution 2249, S/RES/2249, 2015.

⁴ *Ibidem*.

⁵ UN HRC, UN Syria Commission of Inquiry report, 18 February 2021.

⁶ *Ibidem*.

⁷ *Ibidem*.

⁸ Autonomous Administration of North and East Syria (AANES), Executive Council, Press Release, 18 March 2021.

⁹ *Ibidem*.

¹⁰ *Ibidem*.

international community especially for the cases of foreign fighters who belong to other countries than Syria.

For the Tribunal to become reality, one option would be its creation by the United Nations Security Council acting under the Chapter VII, Art. 41 of the UN Charter¹ as it has been done in the cases of other ad-hoc international tribunals, International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda.

The issue is that the creation of such a tribunal through the UNSC acting under Chapter VII of the UN Charter² can be as well blocked by the veto exercise of some of the permanent members, as in the case of the referral-mechanism of the situation in Syria to the ICC, when both China and Russia have exercise opposition to this initiative, as emphasized above within this paper. If the Russian Federation and China blocked already the referral-mechanism of the situation in Syria to the ICC, there are high chances that they would do the same regarding the creation of the Tribunal through the UNSC acting under Chapter VII of the UN Charter.³ For example, it is well known that Russia supports the Bashar al-Asaad regime in Syria and, consequently, it might oppose the initiative of developing an ISIS Tribunal, to avoid the risk that Assad's regime in Syria will also be prosecuted. Like in the case of Syria, Russia might also prefer other options of prosecuting the ISIS perpetrators like their prosecution in front of the Syrian courts. In this way, they will make sure that Assad regime does not need to respond in front of law because of its criminal acts:

„Russia and Syria would probably prefer a military conquest over ISIS so that Syrian courts could try and sentence ISIS war criminals while the Assad regime enjoys impunity for its crimes.”⁴

Just like Syria, the Russian Federation might be reluctant in regard to the United Nations's interference in Syria and, accordingly, might exercise its veto right to block the creation of an ISIS Tribunal.

Nevertheless, the international community shall take more steps, work on the creation of such a Tribunal and try to find a solution to overcome the challenges the creation of an ISIS Tribunal comes with.

¹ United Nations, *Charter of the United Nations*, 24 October 1945.

² Ibidem.

³ Ibidem.

⁴ Andrew Solis, *Analyzing which courts have jurisdiction over ISIS*, Southern Illinois University Law Journal, vol. 40., p.88.

4.2. The establishment of the Tribunal through a treaty agreed by the international community and the Kurdistan Regional Government in Iraq (KRG)

Since the creation of an ISIS Tribunal through the UNSC acting under Chapter VII of the UN Charter¹ meets the big challenge of the veto exercise by the five UNSC permanent members, the Tribunal might be set-up through a treaty agreed by the international community and the Kurdistan Regional Government in Iraq (KRG).

The Tribunal's location might be the Kurdistan Region of northern Iraq since this region was once controlled as well by the ISIS perpetrators:

“The most appropriate locus for the tribunal would be in KRG-Iraq as it was also part of the territory controlled by ISIS.”²

Besides Syria, also Iraq has been a territorial base for the ISIS perpetrators. Furthermore, the Kurdistan Region of northern Iraq is a quite stable region, at least at this moment and also, the support of the Iraqi Government could represent an important aspect when considering the development of the ISIS Tribunal in the Kurdistan Region of northern Iraq. Regarding the position of Iraq in relation to hosting the Tribunal, Marco Sassoli, the director of the Geneva Academy of International Humanitarian Law and Human Rights, has stated that Iraq would agree with both hosting such a tribunal:

“Iraq wants to have and has started to have trials of local fighters and also some foreign ones and they would be happy, if they get enough money, to establish a mixed tribunal like we did for Lebanon.”³

A treaty agreed between the international community and the Syrian Democratic Forces (SDF) might not be feasible since the SDF do not have legal personality and, therefore, cannot enter into international agreements. Furthermore, an agreement between the international community and the Syrian government is also not a feasible option since the attitude of the latter towards the cooperation in general and the judicial cooperation with the international community is rather reluctant. Furthermore, the situation in Syria is still unstable and the establishment and functioning of a tribunal involves also international judges and their lives might be threatened if such

¹ Ibidem.

²<https://www.justsecurity.org/75544/a-tribunal-for-isis-fighters-a-national-security-and-human-rights-emergency/>.

³<https://www.justiceinfo.net/en/42224-do-we-need-an-international-tribunal-for-islamic-state.html>.

a tribunal will be set-up in Syria, even if it is also true that the Tribunal shall be located in the areas where the crimes took place and where the ISIS perpetrators are currently located. Even if the political relations between the KRG and SDF are not currently good, the scope of solving an issue of common interest might bring them together, especially that this case involves the international community as well, the international community from which the SDF have asked support in managing the situations with the foreign fighters' detainees in the camps in Syria.

In the light of the above, the most feasible option to create the ISIS Tribunal is through a treaty agreed by the international community and the Kurdistan Regional Government in Iraq (KRG).

5. The applicable criminal law of a future ISIS Tribunal

The Tribunal would have jurisdiction to prosecute the terrorism-related offences committed by ISIS perpetrators in Iraq, Syria, but also in other places in the world. Taking into consideration the fact that the foreign fighters are nationals of “50 different States”,¹ the applicable criminal law represents a challenge for the Tribunal. When setting-up such a tribunal, the states need to agree upon the applicable law and there are, prima facie, many options in this regard.

Firstly, the perpetrators could be prosecuted under the law of one of the states where terrorism offences have been committed, for example, under the Syrian counter-terrorism law. But this is not an appropriate choice since it does not fully correspond to the international standards: the Syrian counter-terrorism law “adopts a broadly worded definition and has been used to prosecute peaceful dissent and human rights activity”² and, as stated by the the Office of the United Nations High Commissioner for Human Rights,³ “Too wide or vague a definition may lead to the criminalization of groups whose aim is to peacefully protect, inter alia, labour, minority or human rights”.⁴ This standard set-up by the Office of the UNHCHR has not been respected by the Syrian counter-terrorism law. Within the Syrian counter-terrorism law, terrorism offence is defined as:

¹ Ibidem.

² <https://timep.org/reports-briefings/timep-brief-law-no-19-of-2012-counter-terrorism-law/>.

³ Office of the United Nations High Commissioner for Human Rights, Human Rights Fact Sheet No 32, Geneva, 2008.

⁴ Ibidem.

“Every act intended to create panic among people, disturb public security, damage the infrastructural or institutional foundations of the state, that is committed via the use of weapons, ammunition, explosives, flammable materials, poisonous products, or epidemiological or microbial instruments ... or via the use of any tool that achieves the same purpose.”¹

The fact that the Syrian counter-terrorism law incriminates every act to disturb public security or damage the infrastructural or institutional foundations of the state raises a lot of questions. This way broadly formulation gives space to the Assad regime in Syria to prosecute as terrorists the regime opponents and peaceful dissents and human rights activities as terrorism offences, instead of prosecuting the real perpetrators that commit serious grave crimes.

Moreover, prosecuting the ISIS perpetrators under the Syrian counter-terrorism law might not be the most suitable solution since the ISIS terrorist offenders did not commit terrorism acts only on the Syrian territory.

Consequently, prosecuting the ISIS perpetrators under the Syrian law is not an appropriate and legitimate alternative, but also not a feasible one since *“is not possible without the participation of the Syrian government”²* and the Syrian government has already showed its reluctance towards judicial cooperation with the international community, as mentioned earlier within this paper.

A second option would be to prosecute the terrorism-related offences according to the criminal law of Iraq. In this case, the crimes need to have a connection with the Iraqi territory, but some terrorist acts do not have a direct link to the territory of Iraq. In this case, if there is no connection between the terrorist offence and the territory of Iraq, the crimes could still be prosecuted under the universal jurisdiction which is stipulated within the Iraqi Penal Code.³

The universal jurisdiction is a principle based on which trials have already been conducted in international law. It represents an important legal tool to prosecute offences where there is no link between the crimes against international law and the country that prosecutes them. An example in this sense is the case of Taha al-J.,⁴ a former Islamic State fighter, which is judged by the Higher Regional Court in Frankfurt, Germany, for genocide committed

¹ *Syria's Counter-Terrorism Law*, no. 19, 2012.

² <https://www.justsecurity.org/75544/a-tribunal-for-isis-fighters-a-national-security-and-human-rights-emergency/>.

³ Iraqi Penal Code, Translation made by the UN from Arabic into English, Art. 13, Act No. 111, 1969.

⁴ *Taha al-J Case*, Higher Regional Court in Frankfurt, Germany, 2020.

against Iraq's Yazidi minority.¹ Even if there is no link between Germany and the acts committed by the former ISIS perpetrator, German authorities can still prosecute the crimes committed based on the principle of universal jurisdiction.

The criminal law of Iraq stipulates the universal jurisdiction,² but the universal jurisdiction laws of Iraq do not currently include the crime of terrorism, but other types of crimes such as "*sabotage or disruption of international means of communication and transportation*".³ Consequently, for this option to be a feasible one, these laws need to be extended to also include the crime of terrorism.

Moreover, an important aspect when talking about the Iraqi penal law is the fact that the death penalty is still legal in this country. In this case, the international community needs an agreement with the Iraqi government to establish the conditions of setting-up the Tribunal – one of which will be the abolition of the death penalty.

Another option is judging the perpetrator according to the national law of the specific country he/she belongs to. Besides the fact that it is complicated and the judges need to be provided with the domestic applicable law for terrorism acts of each country, the law will not be applied uniformly. For the same offences, the perpetrators might get different punishments. Consequently, this alternative is not appropriate and legitimate.

The fourth option will be the creation and improvement of own new rules of procedure for the Tribunal. This might take a lot of time and divergent opinions on different points, such as the definition of terrorism, might block the creation of such a tribunal.

To sum up the options regarding the applicable law discussed above, prosecuting the terrorism-related crimes committed by ISIS offenders under the Syrian counter-terrorism law is not a feasible possibility since the international community will need the support of the Syrian government and most probably will not have it and, also, the Syrian counter-terrorism law does not fully correspond to the international standards; judging the ISIS perpetrators according to the national law of the specific country of origin of the offender might lead to the non-uniform application of law and different punishments for most probably the same terrorist acts. Accordingly, the most appropriate, legitimate and feasible options to prosecute the offenders of

¹ Ibidem.

² *Iraqi Penal Code*, Translation made by the UN from Arabic into English, Art. 13, Act No. 111, 1969.

³ Ibidem., Art. 13.

terrorism-related crimes might be the prosecution under the Iraqi penal law or the development of a unique set of rules for the new tribunal. While the first option might be more efficient and not as time-consuming as the other, the creation of an own unique set of rules for the Tribunal might contribute to the development of international criminal law if the states will succeed in agreeing on a common concept of terrorism. On the other hand, the discussions on the definition of terrorism might lead to the blocking of the creation of such a Tribunal.

Consequently, the most efficient option to prosecute terrorism-related crimes committed by the ISIS offenders is under both the Iraqi criminal law (with the exclusion of the death penalty) and the international standards. Accordingly, the judges of the ISIS Tribunal could prosecute the terrorism offences by primarily applying national Iraqi criminal law, but also by taking into consideration the international standards of justice since it would be a Tribunal of an international character. In this sense, the Tribunal would bear a close resemblance to the Special Tribunal for Lebanon, where the Appeals Chamber of the Tribunal has “*observed that [...] it is also a tribunal of an international character and thus is obliged to take into account international standards of justice*”¹ and it did so even if in its Interlocutory Decision on the Applicable Law² was stipulated that the Tribunal shall primarily apply national Lebanese law. The judges of the ISIS Tribunal should also analyse the international criminal law against terrorism, such as the UN Resolutions against terrorism³ or the UN counter-terrorism treaties.⁴

¹Agata Kleczkowsk, “Why There Is a Need for an International Organ to Try the Crime of Terrorism – Past Experiences and Future Opportunities”, *Hungarian Journal of Legal Studies*, vol. 60, no. 1/2019, p. 54.

² STL, *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, STL-11-O1/I, 16 February 2011, para. 33.

³UNSC Resolution 1373, 2001. Resolution 1377 (2001); Resolution 1368 (2001); Resolution 1438 (2002); resolution 1440 (2002); Resolution 1450 (2002); Resolution 1456, 2003; resolution 1516 (2003); resolution 1530 (2004); resolution 1611 (2005); resolution 1618 (2005); Resolution 1390 (2002); Resolution 1452 (2002); Resolution 1455 (2003); Resolution 1456 (2003); Resolution 1526 (2004); Resolution 1535 (2004); Resolution 1540 (2004); Resolution 1617 (2005);47 Resolution 1624 (2005);48 Resolution 1735 (2006).

⁴ United Nations, Treaty Series, vol. 704, p. 219, Convention on Offences and Certain other Acts Committed on Board Aircraft, Tokyo, 4 September 1963;

United Nations, Treaty Series, vol. 1670, p. 343, *Convention for the Suppression of Unlawful Seizure of Aircraft*, Hague, 16 December 1970.

United Nations, Treaty Series, vol. 1035, p. 167, *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*, New York, 14 December 1973.

United Nations, Treaty Series, vol. 1316, p. 205, *International Convention Against the Taking of Hostages*, New York, 17 December 1979;

United Nations, Treaty Series, vol. 1456, p. 101, *Convention on the Physical Protection of Nuclear Material*, New York, 8 February 1980.

6. Other possibilities to bring ISIS fighters to justice, apart from an ISIS Tribunal, and their limitations

The alternatives to the ISIS Tribunal will be the prosecution of the ISIS perpetrators before the courts of Iraq and Syria and, in this regard, the French government has expressed its wish “*to have French ISIS fighters prosecuted in Iraq.*”¹ But there are some issues that need to be addressed when it comes to prosecuting ISIS perpetrators in Iraq. First of all, the courts in Iraq lack of the necessary resources to prosecute so many foreign fighters. Furthermore, a trial conducted by the Iraqi courts might bring human rights issues. For example, the death penalty is still legal in Iraq.² Moreover, by prosecuting the offenders by the Iraqi courts, the right to a fair trial is not guaranteed. The Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI) has prepared a report with the name “*Human Rights and freedom*

United Nations, Treaty Series, vol. 1589, p. 474, *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, Montreal, 24 February 1988.

United Nations, Treaty Series, vol. 1678, p. 222, *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, Rome, 10 March 1988.

United Nations, Treaty Series, vol. 1678, p. 304, *Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf*, 1988.

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¹<https://www.justsecurity.org/75544/a-tribunal-for-isis-fighters-a-national-security-and-human-rights-emergency/>.

² Iraqi Penal Code, Translation made by the UN from Arabic into English, Art. 13, Act no. 111, 1969.

*of expression: trials in the Kurdistan Region of Iraq*¹ according to its mandate under Security Council Resolution 2576,² together with the Office of the United Nations High Commissioner for Human Rights (OHCHR). The aim of the report³ was to analyse criminal justice proceedings in the Erbil Criminal Court in four cases.⁴ These particular cases have been chosen because they all concern individuals who are known for publicly criticize the Iraqi authorities. The idea behind the examination was to follow the conducting of proceedings, without establishing whether the accused have been guilty or not. According to the findings of the UNAMI and OHCHR, there was „a consistent lack of respect for the legal conditions and procedural safeguards necessary to guarantee fair judicial proceedings before an independent and impartial tribunal”⁵ since „the prosecution did not, at any stage of the proceedings, sufficiently describe the underlying acts carried out by the individuals which constituted the alleged crimes. While the prosecution [...] presented generalized accusations during the trial hearings, the prosecution mostly failed to identify or substantiate any specific acts by each of the accused to support the charges.”⁶

The report⁷ highlights the fact that the right to a safe trial has not been guaranteed by the Erbil Criminal Court which makes us doubt about the fairness and the legality of the proceedings before Iraqi courts.

Taking into consideration all the aspects mentioned above, the prosecution of the ISIS offenders by an ad-hoc international criminal tribunal is a more efficient solution since it can bring more international expertise and the perpetrators might be judged according to international standards.

Another option of prosecuting the ISIS perpetrators, at least the ones outside Iraq and Syria, might be to bring them to their home countries and judge them before the national courts. But the issue regarding this alternative is the reluctance of European states towards bringing back such persons to Europe, since they fear for the population. The radicalisation in prison is an issue with

¹ United Nations Assistance Mission for Iraq Office of the United Nations High, Commissioner for Human Rights, *Human Rights and Freedom of Expression: Trials in the Kurdistan Region of Iraq*, Baghdad, Iraq, December 2021.

² Security Council Resolution 2576, 2021.

³ United Nations Assistance Mission for Iraq Office of the United Nations High, Commissioner for Human Rights, *Human Rights and Freedom of Expression: Trials in the Kurdistan Region of Iraq*, Baghdad, Iraq, December 2021.

⁴ Ibidem, pp. 7-8.

⁵ United Nations Assistance Mission for Iraq Office of the United Nations High, Commissioner for Human Rights, *Human Rights and Freedom of Expression: Trials in the Kurdistan Region of Iraq*, Baghdad, Iraq, December 2021, p.3.

⁶Ibidem, p. 9.

⁷Ibidem.

which Europe is confronting nowadays and the states prefer to avoid the possible radicalization by the ISIS perpetrators towards other prisoners. These persons might then become a threat for that specific country and also for Europe when they leave the prison. Even if the EU Counter-Terrorism Agenda¹ for the EU already encompassed the issue of radicalisation in prison, rehabilitation and reintegration and the Commission intends to develop mechanisms to prevent this radicalisation, it might take some time until these mechanisms become effective.

Consequently, neither the prosecution before the courts of Iraq and Syria, nor the judgment of the ISIS offenders in front of the national courts of their home countries are an appropriate, legitimate and feasible solution to hold the ISIS perpetrators accountable for their terrorism-related acts.

7. Conclusion

Even if the establishment of an ISIS Tribunal comes up with a range of challenges for the international community, its creation is a legitimate and appropriate instrument to counter terrorism in the international law.

The most appropriate option to create the ISIS Tribunal is through a treaty agreed by the international community and the Kurdistan Regional Government in Iraq (KRG). Regarding the applicable law, the most efficient way of prosecuting terrorism-related crimes committed by the ISIS offenders might be under both the Iraqi criminal law (with the exclusion of the death penalty and the universal jurisdiction laws extended to also include the crime of terrorism) and the international standards since all the perpetrators, no matter what their country of origin might be, could be brought in front of justice. The Tribunal's location might be the Kurdistan Region of northern Iraq since it is a quite stable region, at least at this moment, it has been once controlled as well by the ISIS perpetrators which gives a connection between the country where the crimes are prosecuted and the terrorism offences. Furthermore, the international community enjoys the support of the Iraqi Government.

The international community should continue the discussions on the development of this Tribunal and start working on its creation since it might bring many advantages. Firstly, the prosecution of the ISIS offenders will prevent impunity for grave crimes under the international law. Secondly, the existence of such a tribunal might play a deterrence role: it might prevent

¹ European Commission, *A Counter-Terrorism Agenda for the EU: Anticipate, Prevent, Protect, Respond*, Brussels, 2020.

further grave crimes from taking place by deterring the perpetrators from committing such acts.

Last, but not least, the findings of the Tribunal might lead to the development of the international criminal law and the establishment of a Tribunal to judge the terrorism-related offences of the ISIS fighters represents another chance for the international community to agree on a common notion of the crime of terrorism. The 100 years of international impasse regarding a common global concept of terrorism despite huge international efforts needs to come to an end, taking into consideration the threat that terrorism poses globally and irrespective of the international context.

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