# CTED Analytical Brief: The prosecution of ISIL-associated women



# **BACKGROUND**

The present *Analytical Brief* was prepared by CTED in accordance with Security Council resolution 2395 (2017), which directs CTED to conduct analytical work on emerging issues, trends and developments and to make its analytical products available throughout the United Nations system.

CTED Analytical Briefs aim to provide the Security Council Counter-Terrorism Committee, United Nations agencies, and policymakers with a concise analysis of specific issues, trends and developments, as identified through CTED's engagement with Member States on their implementation of the relevant Security Council resolutions. They also include relevant data gathered by CTED, including through engagement with its United Nations partners; international, regional and subregional organizations; civil society organizations; and members of the CTED Global Research Network (GRN).

The present Analytical Brief continues a series of CTED analytical products on the gender dimensions of return from terrorist groups, including the *Trends Report on the Gender Dimensions* of the Response to Returning Foreign Terrorist Fighters and the Analytical Brief on the Repatriation of ISIL-associated Women.

# **INTRODUCTION**

The challenges involved in prosecuting women who return from the Islamic State in Iraq and the Levant (ISIL, also known as Da'esh) have often been cited as a reason for States' reluctance to repatriate their female citizens. Because of that reluctance and the difficulties encountered by women attempting to return independently, women are the demographic group with the lowest overall rate of return from the conflict zone in Iraq and the Syrian Arab Republic.1

Pursuant to Security Council resolution 1373 (2001), Member States have an obligation to bring terrorists to justice, ensure that terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts. Security Council resolution 2396 (2017) recognizes the roles played by women as victims, supporters, facilitators, or perpetrators of terrorist acts and requests Member States to develop comprehensive, tailored and gender-sensitive prosecution, rehabilitation and reintegration (PRR) strategies. Research has significantly advanced our understanding of women's roles in ISIL and the complex set of circumstances that led them to join the group. However, translating that understanding into policy, including with respect to PRR, has proven challenging.

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<sup>&</sup>lt;sup>1</sup> Research has indicated that the global return rate for women is around 9 per cent, compared with 16 per cent for men. Joana Cook and Gina Vale, From Daesh to Diaspora II: The Challenges Posed by Women and Minors After the Fall of the Caliphate, International Centre for the Study of Radicalisation (ICSR), July 2019.

The present Analytical Brief traces the evolution of prosecutorial practice with regard to women who have returned from the conflict zone to their countries of origin.2 It identifies an urgent need to develop more gender-sensitive criminal justice responses, as well as alternative approaches to rehabilitation and reintegration outside the criminal justice system.

#### THE DATA

The present *Analytical Brief* is based on information collected through CTED's engagement with Member States, its other partners, and through its own open-source research on almost 80 States whose nationals are believed to have travelled to Iraq and the Syrian Arab Republic to join ISIL. For many of these Member States, accurate information on the fate of women returnees was either unavailable or only partially available.

The scarcity of data remains a key challenge. Because the systematic collection of gender-disaggregated data is still not the norm, it remains very difficult to track developments; understand the challenges; and implement tailored, gender-sensitive policy responses.

#### MAIN FINDINGS

### Risk assessments and investigations

Risk assessments and preliminary investigations inform PRR decision-making, including with regard to which cases should be prioritized for criminal investigation and potential prosecution and which cases should be diverted from the traditional criminal justice system and subject to administrative measures or alternative rehabilitation and reintegration programmes.<sup>3</sup> It is essential that such assessments be carried out in a gender-sensitive manner, taking into account women's complex roles within ISIL and including screening for potential issues of sexual and gender-based violence and human trafficking. Member States take different approaches to risk assessments and criminal investigations of women returnees: some States routinely investigate all returnees, regardless of gender; some do so on a case-by-case basis; and some do not investigate women, based on the assumptions that they are "victims". In several States, there has been a shift over time: while women were initially not subject to investigation, there are now policies in place to do so more systematically.

Investigations and risk assessments can commence either while the individual is still in the conflict zone or upon his or her return to the country of origin. In several cases, launching investigations and issuing arrest warrants prior to return was a factor facilitating the repatriation of women. In other cases, investigations have led to trials in absentia, which may raise due-process and fair-treatment concerns, including with regard to access to information and effective

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<sup>&</sup>lt;sup>2</sup> The present *Analytical Brief* focuses on third-country nationals. The situation of Iraqi and Syrian women merits separate analysis. <sup>3</sup> In paragraph 29 of its resolution 2396 (2017), the Security Council "*calls upon* Member States to assess and investigate suspected individuals whom they have reasonable grounds to believe are terrorists, including suspected foreign terrorist fighters and their accompanying family members, including spouses and children, entering those Member States' territories, to develop and implement comprehensive risk assessments for those individuals, and to take appropriate action, including by considering appropriate prosecution, rehabilitation and reintegration strategies…".

representation. Trials in absentia have been used in several States where a criminal conviction is necessary to strip the individual of citizenship.

#### Evidence

The collection of sufficient and admissible evidence has been a challenge in prosecuting ISIL returnees. This has led to an evolution in evidentiary tactics to increasingly include, where possible, the collection of digital evidence4 and military evidence.5 The use of these types of evidence involves the handling of highly sensitive data (including biometric data)6 and requires, *inter alia*, that States have in place appropriate safeguards to protect the right to privacy of the individuals involved, as well as independent and effective oversight mechanisms and proper protocols to access and share such data across relevant domestic agencies and internationally.

Such evidence has been used in several cases involving women, including the widely-reported case of a German woman charged with terrorism and war crimes on the basis of evidence obtained from her lost cell phone. 7 Social media evidence was successfully used in several cases against women returnees who were shown to be inciting terrorism online.

However, gender-specific challenges remain with regard to obtaining sufficient evidence, including online. For example, while women are often active as online propagandists and recruiters, their involvement in other types of activities, including violence, was less prominently documented online because of ISIL's restrictive gender norms.8

# Types of offences

# Terrorism offences

The types of criminal offence introduced by a Member State in response to the foreign terrorist fighter (FTF) phenomenon have a direct impact on prosecutorial strategies. Membership of a terrorist organization is to date the most widely used terrorism charge in the prosecution of female returnees and has led to convictions of women in several Member States, including in Europe and the Middle East. Member States that have not criminalized membership have reported particular challenges in prosecuting returnees because specific acts committed while in the conflict zone may be difficult to prove. On the other hand, **broad interpretation of** *membership* has in a number

<sup>&</sup>lt;sup>4</sup> Madrid Guiding Principles (S/2015/939), Guiding Principle 9; UNODC, CTED and IAP, Practical Guide for Requesting Electronic Evidenced Across Borders.

<sup>&</sup>lt;sup>5</sup> Guidelines to facilitate the use and admissibility as evidence in national criminal courts of information collected, handled, preserved and shared by the military to prosecute terrorist offences.

<sup>&</sup>lt;sup>6</sup> Madrid Guiding Principles (S/2015/939), Guiding Principle 38 on the collection, use and sharing of biometrics.

<sup>&</sup>lt;sup>7</sup> https://www.kurdistan24.net/en/news/ffe73a6c-e372-492c-9c18-59f8a5809a00.

<sup>&</sup>lt;sup>8</sup> On ISIL's 'segregated online ecosystem' see Meili Criezis, 'Online Deceptions: Renegotiating Gender Boundaries on ISIS Telegram', Perspectives on Terrorism, February 2020, Vol. 14, No. 1 (February 2020), pp. 67-73.

<sup>&</sup>lt;sup>9</sup> In addition to membership or participation in a terrorist organization, some Member States have criminalized types of acts such as: preparing for terrorist acts; travelling for the purpose of terrorism, recruitment for terrorism, accepting to be recruited to commit a terrorist act, providing and receiving training for terrorism, terrorist financing, (unlawful) participation in an armed conflict abroad, instructing/conspiring to commit a terrorist offence, providing material support to terrorism, money-laundering, and possessing articles for terrorist purposes. Christophe Paulussen, K. Pitcher (2018). See also *Treatment of Foreign Fighters in Selected Jurisdictions*, The Law Library of Congress, December 2014.

of cases allowed courts to convict women for simply being family members of alleged ISIL fighters, or performing basic services and tasks such as household chores. In many of these cases, no account was taken of the extent to which a woman's association with ISIL was voluntary or coerced. 10

A smaller number of female returnees have been convicted of other types of support acts, such as recruitment and financing.

#### International criminal law

A number of Member States, predominantly in Europe, have recently begun to use war-crime charges against returnees from the conflict zone. In many cases, such charges are brought in addition to terrorism charges. 11 The cumulative effect of such charges results in longer sentences in the event of conviction. 12 The war crimes for which women returnees have been charged include, *inter alia*, outrages upon personal dignity (inhumane and degrading treatment of persons); child recruitment into an armed group; and the killing of a protected person under international humanitarian law.

In addition, several women, but no men, have been charged with the war crime of pillage – defined as "extensively appropriating or seizing property of the adverse party contrary to international law without it having been imperatively demanded by the necessities of the armed conflict" – for living with their families in houses previously captured and subsequently allocated to them by ISIL. Some commentators have argued that such a prosecutorial strategy lacks adequate analysis of the degree of women's agency under ISIL's repressive gender norms.13

#### Other criminal offences

Other types of domestic criminal charges have also been used against women returnees in several cases, including in conjunction with terrorism and international crimes. This has notably included cases in which women were charged with parental abduction of minors and neglect of the duty of care and education towards their children. The available data did not include any cases of men being charged with such crimes. The practice of bringing charges relating to parental roles against mothers, but not fathers, reflects a clear gender bias.

#### Sentencing

Sentencing practices vary:

• Initial research suggested that in Western Europe (and North America) women returnees tended to receive more lenient sentences compared to men, based not on an assessment of

<sup>&</sup>lt;sup>10</sup> UNAMI and OHCHR, *Human Rights in the Administration of Justice in Iraq: Trials under the anti-terrorism laws and implications for justice, accountability and social cohesion in the aftermath of ISIL, January 2020*, p. 10.

<sup>&</sup>lt;sup>11</sup> Some countries, such as Belgium, do not allow for cumulative charges where IHL applies.

<sup>&</sup>lt;sup>12</sup> Eurojust, <u>Cumulative Prosecution of Foreign Terrorist Fighters for Core International Crimes and Terrorism-related Offences</u>, The Hague, May 2020.

<sup>&</sup>lt;sup>13</sup> Alexandra Lily Kather and Anne Schroeter, 'Co-Opting Universal Jurisdiction? A Gendered Critique of the Prosecutorial Strategy of the German Federal Public Prosecutor in Response to the Return of Female ISIL Members: Part I', OpinioJuris, 7 March 2019.

any mitigating circumstances, but rather on gender stereotypes relating to the notion of female victimhood. 14 It appears that evolving threat perceptions and a fuller understanding of women's diverse roles in terrorist groups are beginning to influence criminal justice responses to female returnees in some of these States. This has led to more systematic investigations, prosecutions for a range of offences (as detailed above), and corresponding sentences. 15 Where convictions occur on cumulative charges, the sentences are typically longer.

- In some other regions, the tendency to view women as passive followers of their husbands continues to prevail and, together with evidentiary challenges, contributes to low rates of conviction and/or shorter or suspended sentences.16
- However, in certain other jurisdictions, there is evidence of women receiving disproportionately harsh sentences compared to men, including life sentences or the death penalty for mere "association" with ISIL fighters.17

Gender bias can thus cut both ways: it can lead to the infantilization of women, as well as to the vilification of female support for terrorism, which is seen as a supposed transgression of gender norms. It is therefore essential that criminal justice responses, including sentencing practices, take a tailored, case-by-case and gender-sensitive approach. Such an approach must take seriously the different roles that women can play in terrorist groups, including any violent roles, as well as take into account any mitigating circumstances, such as:18

- First-time offenders who were not directly involved in acts of violence;
- Those who became associated with a terrorist group under various forms of duress and the principle of non-punishment in cases of human trafficking;19
- Those who despite having been associated with a terrorist group would pose a low risk to their communities if released;
- Any caretaking responsibilities.

#### Prosecutions of third-country nationals in the conflict zone

The majority of foreign women who remain in the conflict zone are held in camps in north-eastern Syrian Arab Republic, where Kurdish-led authorities, which are not an internationally recognized

<sup>&</sup>lt;sup>14</sup> Ester E. J. Strømmen, *Jihadi Brides or Female Foreign Fighters? Women in Da'esh – from Recruitment to Sentencing*, PRIO Centre on Gender, Peace and Security, Policy Brief, January 2017; Audrey Alexander and Rebecca Turkington. *Treatment of Terrorists: How Does Gender Affect Justice?* CTC Sentinel 11, No. 8 (September 2018).

<sup>&</sup>lt;sup>15</sup> European Parliament Research Service, <u>The Return of Foreign Fighters to EU Soil – Ex-post Evaluation</u>, May 2018, pp. 45-46; Rik Coolsaet and Thomas Renard, <u>The Homecoming of Foreign Fighters in the Netherlands, Germany and Belgium: Policies and Challenges</u>, ICCT, April 2018.

<sup>&</sup>lt;sup>16</sup> See e.g., Crisis Group, *Calibrating the Response: Turkey's ISIS Returnees*, June 2020, p. 19; Teuta Avdimetaj and Julie Coleman, 'What EU Member States can learn from Kosovo's experience in repatriating former foreign fighters and their families', Clingendael/ICCT/KCSS, May 2020, pp. 3-4.

<sup>&</sup>lt;sup>17</sup> For example, according to statistics provided by the Iraqi High Judicial Council on the types of sentence in terrorism-related cases tried in Iraq during the period 1 January 2018 to 31 October 2019, whereas 23 per cent of the male defendants (4,798) received life sentences, the percentage for women is higher, at 42.5 per cent (320). Whereas the combined number of death and life imprisonment sentences for women is even higher, at 62 per cent of all cases (467), 43 per cent of the male defendants (8,950) received either of these sentences.

<sup>&</sup>lt;sup>18</sup> UNODC, *Handbook on Gender Dimensions of Criminal Justice Responses to Terrorism*, chapter 2.; The United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders – The Bangkok Rules.

<sup>&</sup>lt;sup>19</sup> Security Council resolutions 2331 (2016) and 2388 (2017) call on States to ensure that "victims [of trafficking in persons] are treated as victims of crime and line with domestic legislation not penalized" to consider "not prosecuting or punishing victims of trafficking for unlawful activities they committed as a direct result of having been subjected to trafficking".

Government, have not been prosecuting any of the ISIL-associated foreigners in their custody. The absence of judicial accountability mechanisms has been an important argument in favour of repatriating the foreign women held in the camps, though progress in this area remains slow.

Some foreign women have been prosecuted in Iraq amid ongoing challenges relating to fair trial standards, insufficient distinction between the seriousness of different offences, and the lack of a gender-sensitive approach. 20 Such trials have often resulted in long sentences, including life sentences and the death penalty. 21 Recently, the United Nations Assistance Mission for Iraq (UNAMI) and the Iraqi High Judicial Council have agreed to jointly develop guidelines for the conduct of trials in accordance with international human rights standards.

# Access to rehabilitation and reintegration programmes in and outside the criminal justice system

In many Member States, rehabilitation and reintegration programmes are provided through the criminal justice system. Given that overall relatively few women returnees have been prosecuted, their access to rehabilitation and reintegration programmes has consequently been limited. This poses the risk of not attending to returnees' needs for assistance, undermining women's successful reintegration into society and putting them at potentially greater risk of recidivism.

Some Member States provide women with access to rehabilitation and reintegration programmes as an alternative to criminal justice approaches. It is essential that such programmes, as well as any administrative measures, be fully compliant with the rule of law and international human rights standards. Reintegration into families and communities is key to the success and sustainability of such programmes, especially with respect to women, who can experience particular barriers to reintegration (such as stigmatization). Such programmes can be resource-intensive and require long-term engagement. In a number of cases, in different national contexts, States have engaged in a multi-agency process, in partnership with civil society organizations, health and psycho-social care providers, religious counsellors and local communities to provide comprehensive reintegration support to returnees. Some States have proactively engaged with families in preparation for the return of an individual from the conflict zone, an approach that CTED has identified as a good practice in its dialogue with Member States.

However, analysis shows that many programmes fail to adequately address women's rights and needs. Specific examples include programmes where successful "de-radicalization" has been measured by the absence of religious garments and the length of women's clothing 22, or programmes that, in comparison with programmes offered to men, place less emphasis on vocational training and other measures to support socio-economic reintegration. Many initiatives fail to consider women's sometimes simultaneous roles as supporters and victims of ISIL (including victims of various forms of sexual and gender-based violence) and do not sufficiently address issues of stigmatization. A particularly widespread shortcoming is the continued lack

<sup>&</sup>lt;sup>20</sup> UNAMI and OHCHR, Human Rights in the Administration of Justice in Iraq.

<sup>&</sup>lt;sup>21</sup> See footnote 19, above.

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<sup>&</sup>lt;sup>22</sup> Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, <a href="https://undocs.org/en/A/HRC/43/46/Add.1">https://undocs.org/en/A/HRC/43/46/Add.1</a>.

of systematic monitoring and evaluation of rehabilitation and reintegration programmes with respect to their gender and human rights impact.

# **KEY TRENDS AND CHALLENGES**

The prosecution of returnees from ISIL presents unique challenges, some of which apply to both men and women, and some of which are gendered.

The overall picture that emerges from the available data on the prosecution of female returnees is complex. There are notable differences between States, and there has also been an evolution of practices within some States over time:

- At one end of the spectrum are States that do not prosecute women, based on the blanket assumption that they were all victims. At the other end of the spectrum are States that have imposed the death penalty on women for mere "association" with an ISIL member.
- In some States, the initial practice of not prosecuting women has changed over time, based on a growing recognition of women's diverse roles within ISIL. These initially reluctant States now routinely investigate and, where appropriate, prosecute returning women.

However, there is **no uniform progression towards more gender-sensitive investigative and prosecutorial practices** and considerable challenges remain which have the potential to undermine both individual rights and the effectiveness of counter-terrorism efforts:

- There is a need to continue to develop a nuanced understanding of gender roles and motivations, as well as assessments of risks and mitigating circumstances. While research on these issues has advanced, the implementation of findings into policy and practice is lagging behind. Within judicial systems, there is an urgent need for training and capacity-building on gender-sensitive approaches to investigations and prosecutions.
- In order to address evidentiary challenges, cooperation should be strengthened both internationally and across domestic agencies to facilitate the human rights-compliant use of digital and military evidence, including in cases of sexual violence and other gender-based crimes.23
- There is a continued need to improve the design and implementation of tailored, gendersensitive and human rights-compliant rehabilitation and reintegration programmes – both as a complement and an alternative to prosecutions. Greater effort must be made to ensure that such programmes are based on evidence and a thorough assessment of their gender and human rights impact.

 $<sup>^{23}</sup>$  Security Council Guiding Principles on Foreign Terrorist Fighters: the 2015 Madrid Guiding Principles + 2018 Addendum (S/2015/939 and S/2018/117), p. 25.

While this *Analytical Brief* focuses on the situation of foreign women returning to their countries of origin, more attention should be paid to Iraqi and Syrian women associated with ISIL and the specific challenges relating to their rehabilitation and reintegration, including the need for transitional justice approaches in their communities.

Finally, it should be noted that the gender dimensions of prosecutions are not limited to whether and how women are prosecuted.24 Other gender considerations include, *inter alia*, whether the gendered nature of certain crimes is being recognized25 and to what extent there is accountability for gender-based crimes (such as sexual violence committed by ISIL,26 as well as other types of gender-based crimes against men, women and LGBTIQ persons).27 Considerable work remains to be done, both in research and practice, to meaningfully address these gendered factors.

PRR is a priority issue for the Counter-Terrorism Committee and CTED. Through its assessments of Member States and its dialogue with relevant United Nations entities; international, regional and subregional organizations; civil society; and the research community, CTED will continue to monitor trends and developments relating to gender-sensitive PRR with a view to identifying good practices and making recommendations to strengthen Member States' capacity in this area.

# **AVAILABLE GUIDANCE**

Security Council resolutions 1373 (2001), 2178 (2014) and 2396 (2017).

Security Council Guiding Principles on Foreign Terrorist Fighters: the 2015 Madrid Guiding Principles + 2018 Addendum (S/2015/939 and S/2018/117): https://www.un.org/sc/ctc/wp-content/uploads/2019/09/Security-Council-Guiding-Principles-on-Foreign-Terrorist-Fighters.pdf.

Key principles for the protection, repatriation, prosecution, rehabilitation and reintegration of women and children with links to United Nations-listed terrorist groups (April 2019): https://www.un.org/counterterrorism/sites/www.un.org.counterterrorism/files/key\_principles-april\_2019.pdf.

United Nations Office on Drugs and Crime (UNODC), *Handbook on Gender Dimensions of Criminal Justice Responses to Terrorism* (May 2019): https://www.unodc.org/documents/terrorism/Publications/17-08887\_HB\_Gender\_Criminal\_Justice\_E\_ebook.pdf.

United Nations Office on Drugs and Crime (UNODC), Nigeria Training Module on Gender Dimensions of Criminal Justice Responses to Terrorism (August 2019):

<sup>&</sup>lt;sup>24</sup> UNODC, Handbook on Gender Dimensions of Criminal Justice Responses to Terrorism.

<sup>&</sup>lt;sup>25</sup> On the continuing failure to acknowledge and prosecute gender-specific types of genocidal violence, including against the Yazidi community, see: Sareta Ashraph and Akila Radhakrishnan, <u>Beyond Killing: On the Critical Role of Gender in the Recognition</u>, <u>Prevention and Punishment of Genocide</u>, *Just Security*, December 2018.

<sup>&</sup>lt;sup>26</sup> Eurojust, The prosecution at national level of sexual and gender-based violence (SGBV) committed by the Islamic State in Iraq and the Levant (ISIL), The Hague, July 2017.

<sup>&</sup>lt;sup>27</sup> Lisa Davis, 'Reimagining Justice for Gender-Based Crimes at the Margins: New Legal Strategies for Prosecuting ISIS Crimes Against Women and LGBTIQ Persons', William & Mary Journal of Women and the Law, March 2018.

https://www.unodc.org/pdf/terrorism/Web\_stories/UNODC\_Nigeria\_Gender\_Training\_Module.pdf.

Counter-Terrorism Implementation Task Force (CTITF) Working Group on Human Rights, *Guidance to States on human rights-compliant responses to the threat posed by foreign fighters*, https://www.un.org/sc/ctc/wp-content/uploads/2018/08/Human-Rights-Responses-to-Foreign-Fighters-web-final.pdf.

CTED "Technical guide to the implementation of Security Council resolution 1373 (2001) and other relevant resolutions". https://www.undocs.org/en/S/2019/998

CTED, United Nations Office on Drugs and Crime (UNODC), United Nations Counter-Terrorism Centre (UNCCT) and United Nations Global Counter-Terrorism Coordination Compact, *Guidelines to facilitate the use and admissibility as evidence in national criminal courts of information collected, handled, preserved and shared by the military to prosecute terrorist offences* (2019).

United Nations Entity for Gender Equality and the Empowerment of Women (UN-Women), *Guidance note on gender mainstreaming principles, dimensions and priorities for PVE* (which contain a section on "former combatants, returnees, foreign terrorist fighters and their families") (September 2019): https://www.unwomen.org/-

/media/head quarters/attachments/sections/library/publications/2019/gender-main streaming-principles-dimensions-and-priorities-for-pve-en.pdf?la=en&vs=5046.

United Nations Development Programme (UNDP) and International Civil Society Action Network (ICAN), *Invisible Women – Gender Dimensions of Return Rehabilitation and Reintegration from Violent Extremism* (January 2019): https://www.undp.org/content/dam/undp/library/Democratic%20Governance/ICAN\_UNDP\_Invi

sible\_Women\_Report.pdf

CTED Trends Report on the *Gender Dimensions of the Response to Returning Foreign Terrorist Fighters* (February 2019): https://www.un.org/sc/ctc/wp-content/uploads/2019/02/Feb\_2019\_CTED\_Trends\_Report.pdf.