**Joint Regional High-level Conference convened by the OSCE, UNOCT and Switzerland, in cooperation with the Albanian OSCE Chairmanship on “Foreign Terrorist Fighters – Addressing Current Challenges” (11-12 February 2020)**

**Statement of the mandate of the United Nations Special Rapporteur on the promotion and protection of human rights while countering terrorism**

Excellencies,

Distinguished delegates,

Ladies and gentlemen,

The mandate is very grateful to be invited to take part in this very important discussion on the current challenges posed by the prosecution of foreign fighters, and we would like to thank the organisers, the OSCE, UNOCT and Switzerland, as well as the Albanian OSCE Chairman.

The mandate of the Special Rapporteur has already publicly addressed the issue of Foreign Fighters on a number of occasions. Not least during the Special Rapporteur’s last country visit, in Kazakhstan, where we were able to visit a camp in which women and children from conflict sites in Syria had just returned, in May 2019. On this occasion, the mandate commended the government of Kazakhstan for being one of the countries to have shown great leadership and returned 516 mostly women and children from both Iraq and Syria. We are continuing to meet with returnees in country visit contexts, primarily in prison contexts, which gives us significant practical insight into the thematic discussion today.

In the view of the mandate, the urgent return and repatriation of foreign fighters and their families from conflict zones is the only international law-compliant response to the complex and precarious human rights, humanitarian and security situation faced by those women, men and children who are detained in inhumane conditions in overcrowded camps, prisons, or elsewhere in Syria and Iraq. Such return is a comprehensive response that amounts to a positive implementation Security Council resolutions 2178 (2014) and 2396 (2017) and is considerate of a State’s long-term security interests.

States have a positive obligation to take necessary and reasonable steps to intervene in favour of their nationals abroad, should there be reasonable grounds to believe that they face treatment in flagrant violation of international human rights law.

This includes flagrant denial of justice, the imposition of the death penalty, torture or cruel, inhuman or degrading treatment, sexual violence, or deprivation of liberty in grave violation of human rights standards and most basic standards of humanity.

This positive obligation is rendered particularly active when States have the necessary capacity and jurisdictional influence through consular access, the deployment of specialist civilian support teams, deep and meaningful engagement with a host State, lines of active communication with non-State actors who detain their nationals and the capacity to augment or limit humanitarian support which directly shapes the access to the core minimal of basic entitlements enabling or *de facto* extinguishing the right to life.

The mandate is aware that, despite public positions of non-access, many national authorities maintain sustained contact with detaining State and non-State actors, which in turn undermines the premise of a lack of capacity to impact on the outcomes and treatment of their nationals.

In light of the well-documented inhumane and dangerous situations of detention, the mandate cannot accept that practical challenges faced by States in the return process, including the lack of consular representation in areas where nationals are present or the shortage of information on the whereabouts of nationals in conflict zones where armed groups are active, be used as excuses to obstruct returns.

The mandate has seen first-hand that partnerships can be optimized to extract individuals and ensure their safe return to home countries. Steps can be taken to ascertain nationality, obtain assistance from state and non-state actors to move individuals from camps, assist in air transport, and provide humanitarian assistance and medical care.

Effective consular assistance has been applied over many decades by numerous States in innovative and flexible ways in situations where the scale or complexity of returning nationals demands special expertise, medical support, or has security dimensions. The mandate does not accept that such innovation and flexibility cannot be exercised in these dire circumstances in Iraq and Syria where it is most needed.

An effective return process includes holding individuals accountable for the serious and systematic crimes committed in Syria and Iraq. It is, in fact, the only way to close the gaping impunity gap for which the inadequate and dysfunctional judicial systems in both Iraq and Syria are not an answer.

While there are some advantages to trials occurring near evidence, victims and witnesses, the reality is that in the absence of fair and thorough procedures, there will not be effective justice in the region, most particularly for the victims of such crimes. UN reports, issued last month, find that basic fair trial standards were not respected in terrorism-related trials in Iraq, thus placing defendants at a serious disadvantage and compromising the trial outcomes and the justice process as a whole.[[1]](#footnote-1)

Moreover, the mandate voices its deep concern at the fair trial and rule of law implications of trials being conducted by a non-State actor for serious violations of international law with the apparent acquiescence of other States in the region.

There is no substitute for fair trial and meaningful accountability. Those lessons painfully learnt in other regions should not be jettisoned in Iraq and Syria for the sake of expediency. The mandate takes this opportunity to remind States that these issues are not abstract. First, because weak and compromised accountability undermines the rights of victims and contributes to further instability. Second, because there is an absolute obligation on States whose nationals are subject to the mandatory death penalty in patently unfair trial settings to vindicate and protect their legal rights. Governments also have a duty to protect the absolute prohibition of torture and of refoulement.

There is an urgent need for justice, truth and reparation for all of the victims of the very serious violations of human rights and humanitarian law that have occurred in the region.

States that can deliver justice in accordance with international human rights law therefore have a responsibility to prosecute individuals against whom there is sufficient evidence of criminal behaviour, and sanction them appropriately through fair trials that comply with due process.

This includes ensuring a case-by-case assessment of each individual’s responsibility prior to proceedings being commenced.

Those currently held in these war zones have different profiles, and varying levels of involvement and responsibility in the crimes and of adherence to violence.

In this context, those individuals who have committed or aided in the commission crimes that shock our collective conscience, including genocide, crimes against humanity, war crimes, and egregious acts of torture, must be held accountable for these acts.

National authorities should work closely with existing mechanisms, including:

* the UN Investigative Team to Promote Accountability for Crimes Committed by Da’esh/Islamic State in Iraq and the Levant, and
* the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011.

Similarly, the fundamental vulnerability of children caught up in armed conflict, through a range of circumstances almost always not of their own making, or from contexts which have no meaningful exit, must be recognised.

Children must always be treated primarily as victims, while the best interest of the child must always be a primary consideration, in accordance to their special protection afforded by the Convention on the Rights of the Child and international humanitarian law.

The argument that children should not be returned or are not deserving of protection constitutes a moral failure by their home countries, particularly those who have ample resources.

Further, States have obligations to undertake individualized assessments for each child to determine their integration needs and prevent discrimination and stigmatization.

Returning States must also disaggregate the experience of women and girls and recognize the complexity of birthing, violence and gendered realities under what has been known as the Caliphate. An analysis of mobilization is necessary to understand the complexities of each situation.

Particular attention must be paid to women and girls who have been forcibly kidnapped, coerced into slavery, subjected to sexual exploitation and harm on joining or being associated with non-state armed groups, groomed on-line and recruited to marry, provide sexual or household services to their husband or labour for the organization.

States must also bear in mind that the distinction between victims and perpetrators can be complex, with returnees being victims of terrorism, trafficking, slavery or sexual violence as well as perpetrators of criminal offences. In the Special Rapporteur’s view, maternal responsibilities should on their own never qualify as ‘material support’ to terrorism.

1. <https://news.un.org/en/story/2020/01/1056142>; [↑](#footnote-ref-1)