From Conflict to Courtroom: Indonesia's Legal Response to Terrorism and Core International Crimes

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International Centre for Counter-Terrorism

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International Centre for Counter-Terrorism

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Introduction

According to UNSC 1373(2001), States should bring alleged terrorists to justice, reflecting the seriousness of the crimes they have committed, which forms a vital aspect of an effective counter-terrorism strategy. Consequently, States need to ensure that any person who participates in the financing, planning, preparation, or perpetration of terrorist acts or in supporting terrorist acts is brought to justice. States must similarly ensure that such terrorist acts are established as serious criminal offences under domestic law and that the punishment duly reflects the seriousness of such terrorist acts.

When committed during armed conflict, some terrorist acts can constitute war crimes, and where terrorist acts are conducted as part of a widespread or systematic attack directed against a civilian population, they can constitute crimes against humanity. In some situations, terrorist acts may also constitute genocide if they are committed with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group.

While several terrorist groups such as the Islamic State of Iraq and Syria (ISIS), Boko Horam, Taliban, or the Maute Group are engaged in an armed conflict, one conflict stands out: the conflict in Syria and Iraq. The rise of ISIS resulted in an unprecedented flow of foreigners who travelled to the conflict zone. In response, several United Nations Security Council Resolutions (UNSCRs), in particular 2178(2014) and 2396(2017), oblige States to take measures to prevent such travel and criminalise a range of activities related thereto. Several international independent organisations have documented how ISIS committed attacks against civilians, in particular minorities, pillaged houses, in addition to multiple crimes other crimes such as murder, persecution, enslavement, sexual slavery, and rape. Several of these crimes amount to so-called core international crimes, namely war crimes, crimes against humanity or genocide.

Hence, in recent years, several countries have started to prosecute members of ISIS for both terrorist offences and core international crimes. Examples include the prosecution for the war crime of pillaging, where members of a terrorist organisation occupied an estate after the original inhabitants were forced to flee, or for the war crime of outrage upon personal dignity for posting a picture of a mutilated body with degrading comments on social media. By prosecuting terrorist-related acts as core international crimes, perpetrators are being held accountable for the full range of crimes they have committed. This may lead to high(er) sentences and provide justice to victims. Ultimately, prosecuting terrorist-related offences with linkages to core international crimes can strengthen efforts to end impunity.

Indonesia has seen a considerable number of its citizens travel to Syria and Iraq to join ISIS and other organisations and, like many other countries, is concerned with the security risks that are involved but also how to adopt effective prosecution, rehabilitation, and reintegration approaches. This report looks at the challenges and opportunities to prosecute alleged terrorists for both terrorism and core international crimes in Indonesia. This report reflects the findings of the project 'Interlinkages Indonesia' which was conducted by the International Centre for Counter-Terrorism – The Hague (ICCT) together with the Indonesian Badan Nasional Penanggulangan Terrorisme (BNPT) from 15 June 2023 to 31 March 2025.

During this project, two workshops, a closed-door expert meeting ,and a public panel were held. This report reflects the main findings on how cumulative charging for terrorism and core international crimes can be implemented in Indonesia for the so-called foreign terrorist fighters (FTFs), especially in light of the new Indonesian criminal code that will enter into force on 1 January 2026.

This report provides a short overview of the status quo concerning Indonesian foreign terrorist fighters and the approach taken thus on prosecuting those that have returned. After discussing some of the legal, institutional, and evidentiary challenges, this report provides an overview of the opportunities for Indonesia to adopt cumulative charging for terrorist offences and core international crimes.

Indonesian 'Foreign Terrorist Fighters'

As illustrated below, so-called foreign terrorist fighters (FTFs) travelling from Indonesia and other countries to support armed groups, including terrorist organisations, in conflicts abroad are not a one conflict-specific phenomenon. Indonesian citizens have travelled abroad to support terrorist organisations in at least three different conflicts in the past. Similar travel movements could be triggered by future conflicts. Not only the return of alleged FTFs but also their placement in camps, detention facilities, and prisons abroad poses significant challenges to Indonesia, as outlined above.

The Conflict in Syria and Iraq

As tracked by the International Centre for Counter Terrorism (ICCT's) Foreign Terrorist Fighters Knowledge Hub, as of January 2025, around 1,250 Indonesian citizens have not yet returned from Syria and Iraq. While 127 of them are presumed dead, up to 545 Indonesians remain in camps in Northeast Syria. Between 200 and 300 Indonesians have returned to their home country voluntarily, with another 500 having been deported, mostly from third countries.

As Syrian security forces tried to violently quash demonstrations in March 2011, protests started to spread across several Syrian cities. As a result of the government's coordinated violent response to demonstrations, detention facilities run by Syrian government services were notoriously overcrowded with detainees being subjected to arbitrary violence and torture in dire hygienic conditions with insufficient water and food supplies, often leading to deaths. As government violence against demonstrations increased, the first protestors started to take up arms. In the summer of 2011, defectors of the Syrian armed forces founded the Free Syrian Army (FSA). First clashes between this group and Syrian government forces were reported in late 2011. Following a failed UN-negotiated ceasefire between Syrian government forces and militias, fighting intensified and continued to spread. In July 2012, the International Committee of the Red Cross (ICRC) classified the Syrian conflict as a non-international armed conflict.

A variety of armed groups and other actors have been involved in hostilities throughout Syria. Since the beginning of the conflict, new groups have emerged while others disappeared or merged. Armed conflicts have thus been taking place between armed groups and the Syrian government, between different armed groups, and at times also involving international actors. One of the key actors involved in the non-international armed conflict in Syria is the Islamic State of Iraq and al-Sham (ISIS), a militant Salafi-Jihadist group seeking the establishment of a state governed by the rule of Shariah. The group started operating in Syria in 2012 as part of an umbrella organisation led by Al-Qaeda, aiming to establish the Al-Qaeda affiliate Jabhat al-Nusra (JaN) in Syria. Early in 2014, ISIS and Al-Qaeda officially split up following ongoing friction. After territorial gains, ISIS proclaimed its "Caliphate" on 29 June 2014 and established an extensive bureaucratic system to govern its population and controlled territories in Syria and Iraq. However, in 2016, the group began losing territorial control. In October 2017, the US-backed Syrian Democratic Forces (SDF) captured Raqqa, ISIS's former stronghold. By the end of 2018, the group controlled only a small enclave near the Syrian-Iraqi border, which it ultimately lost on 23 March 2019.

In March 2025, the Independent International Commission of Inquiry on the Syrian Arab Republic (CoI) reported that more than 40,000 alleged ISIS affiliates and their families, including 25,000 children, remain in the Al-Roj and Al-Hawl camps in Northeast Syria controlled by Kurdish forces. Additionally, thousands of ISIS affiliates remain detained in prisons across Northeast Syria.

On 8 December 2024, the government of Bashar al-Assad was overthrown by armed groups, notably Hay'at Tahrir al-Sham (HTS) and the Syrian National Army (SNA) backed by Turkey. These armed forces were led by Ahmad al-Sharaa, formerly known as Abu Mohammed al-Golani, the leader of HTS. Syria remains affected by ongoing clashes among armed groups, with significant confrontations occurring in the Northeast between the Kurdish-led Syrian Democratic Forces (SDF) and SNA, as well as in the South involving the Druze community and HTS. Although HTS does not control all the Syrian territory, Ahmad al-Sharaa has emerged as Syria's new leader, bringing an end to over fifty years of governance by the Assad family. International engagement with this new de facto government has commenced despite HTS remaining listed as a terrorist organisation by the United Nations (UN).

On an individual level, the conflicts in Syria and Iraq have mobilised an unprecedented number of so-called foreign terrorist fighters (FTFs). More than 50,000 individuals from all over the world travelled to the Levant to join Islamist groups. As tracked by the International Centre for Counter Terrorism (ICCT's) Foreign Terrorist Fighters Knowledge Hub, as of January 2025, around 1,250 Indonesian citizens have not yet returned from Syria and Iraq. While 127 of them are presumed dead, up to 545 Indonesians remain in camps in Northeast Syria. Between 200 and 300 Indonesians have returned to their home country voluntarily with another 500 having been deported, mostly from third countries.

The Conflict in Afghanistan

Indonesian citizens have also travelled to other conflict zones and joined terrorist groups there. One of the conflict zones that has strong and deep ties with Indonesian fighters is Afghanistan. Indonesian extremists, particularly the Jamaah Islamiyah (JI) group, had sent many of their members to Afghanistan since the 1980s to join the mujahideen group in the Afghan-Soviet War.

Many received proper military training there and returned home with a strong support of *jihad* and enhanced military capability. The most lethal terrorist attack in Indonesia, the 2002 Bali Bombing, was planned and executed by affiliates of JI, many of whom had participated in the Afghan-Soviet War. This group is also responsible for several other deadly terrorist attacks in Indonesia in the early 2000s, including the 2000 Philippines consulate bombing in Jakarta, the 2000 Christmas Eve bombings, the 2003 Kuningan bombing in Jakarta, and the 2004 Australian Embassy bombing in Jakarta.

Afghanistan has experienced decades of international and non-international armed conflicts. With the support of the United States (US), the Afghan National Security Forces (ANSF) engaged in military operations against both the Taliban and the Islamic State Khorasan Province (ISKP). In August 2021, following the withdrawal of US forces, the Taliban rapidly gained control over the majority of the country, including Kabul and eventually established themselves as the de facto government. This Taliban administration is now engaged in armed conflicts both against the National Resistance Front and ISKP.

ISKP, established in 2015, has remained one of the most violent groups in Afghanistan throughout the last decade. Notably, ISKP has engaged in hostilities with the (now former) Afghan government and the Taliban, orchestrating numerous attacks that have resulted in significant casualties. For example, in April 2019, prolonged clashes occurred between ISKP and the Taliban in Nangarhar

Province, prompting Afghan forces to intervene with coordinated strikes against both factions. The group continued to carry out significant attacks, such as the Kabul University assault on 2 November 2020, causing over 20 deaths. Following the Taliban's takeover in August 2021, clashes between ISKP and the now de facto Taliban-led government continued. Notably, an ISKP attack on the airport in Kabul in August 2021, which killed at least 100 people, thirteen of them US service staff, led to US strikes against an ISKP operative several days later. Until the end of 2021, ISKP is reported to have carried out 152 attacks in Afghanistan. Despite variations in the intensity of violence, armed hostilities between ISKP and the Taliban de facto government in Afghanistan continue.

In today's context, Indonesian extremists continue to view Afghanistan as a battleground. However, their support is divided. Pro Al-Qaeda groups, such as JI, tend to align with the Taliban, citing their shared history during the Afghan-Soviet War. In contrast, pro-ISIS groups support the ISKP because they consider the Taliban to be apostates. This perception stems from differences in religious interpretation, the nationalist character of the Taliban's administration, and the Taliban's attitudes toward the Shia community, which are viewed as 'too nice'.

According to the Jakarta-based Institute for Policy Analysis of Conflict, there were 23 Indonesian ISKP fighters known to be in Afghanistan as of June 2021. Eleven of them were in prison at the time. Seven of them were reported to have been among the 5,000 prisoners that were freed by the Taliban shortly after their takeover. Court proceedings related to terrorism cases in Indonesia indicate that Afghanistan is viewed by several ISIS supporters in Indonesia as either a final destination or a transit point to Syria. In 2019, at least 10 Indonesian citizens were deported by Thai authorities while attempting to join the ISKP.[1] That same year, an ISIS supporter was apprehended by Indonesian immigration authorities when trying to fly to Syria via Khorasan.[2]

Pro Al-Qaeda groups in Indonesia, such as Jamaah Islamiyah, welcomed the Taliban's takeover in Afghanistan, with some individuals already expressing willingness to travel to Afghanistan to receive military training. However, some Afghan-Soviet War veterans assured the public that the Taliban's victory won't trigger terrorism in Indonesia. A similar stance is also expressed by several JI members serving their time in prisons, saying that the Taliban victory cannot be copied to Indonesia, as they do not have enough support from the public, lack human resources, and are short of weapons.

The Conflict in Mindanao

Furthermore, the Philippines has also attracted foreign fighters from the region, notably Malaysia, Singapore, and Indonesia. The Southern Philippines is regarded as a crucial battleground in the region. Similar to Afghanistan, Indonesian extremists have a long history of involvement in the conflict in this area. JI, once the largest terrorist group in Southeast Asia, established a close partnership with the Moro Islamic Liberation Front (MILF) until the late 2000s. Several notorious Indonesian extremists, such as Hisyam aka Umar Patek, Dulmatin, Imam Samudera, and Iwan Darmawan aka Rois, fought in the Southern Philippines at various points. The 2000 bombing of the Philippines consulate in Jakarta was a response from JI to the military attack that resulted in the fall of a MILF camp known as Camp Abu Bakar.

Since the emergence of ISIS, the pro-ISIS Indonesian extremists have reignited their interest in the conflict in the Philippines. Mainly, they considered the Philippines a promising battleground due to its location, which is closer to home than Afghanistan, Iraq, or Syria. Additionally, the

1 East Jakarta District Court, decision number 269/Pid.Sus/2020/PN Jkt.Tim verdict of Muhammad Aulia, S.Pd.I. alias Abu Kholid alias Aulia bin Nurdin Abdullah.
2 East Jakarta District Court, decision number 937/Pid.Sus/2019/PN.Jkt.Tim verdict of Harry Kuncoro alias Uceng alias Wahyu Nugroho.

more experienced extremists utilise their old contacts in the Philippines to acquire weapons and ammunition in preparation for terrorist attacks in Indonesia.

According to Indonesian officials, by June 2017, there were 1,200 ISIS supporters in the Philippines, of whom 40 were Indonesian citizens. Between 2014 and 2017, 21 alleged Indonesian terrorists are said to have been killed or arrested in the Philippines. Following the Abu Sayyaf Group (ASG) allegiance to ISIS in 2014, a considerable number of foreign fighters joined the group in the Philippines, notably in the May 2017 battle of Marawi. Nevertheless, their presence did not significantly improve the capacities of the Islamist groups that eventually lost the battle after five months.

Despite the low number of Indonesians in the current conflict in the Philippines, several Indonesians played a very significant role in ISIS activities in the area. In 2019, an Indonesian couple executed a suicide attack that killed 23 people at the Cathedral of Our Lady of Mount Carmel in Jolo. The couple was previously expelled from Turkey, returned to Indonesia, and underwent a one-month deradicalisation programme before returning to their hometown in South Sulawesi and then going to Mindanao. Their involvement in the suicide attack was facilitated by Andi Baso, an Indonesian foreign fighter in the Philippines who fled from Indonesia in 2018 to escape prosecution for a series of terrorism offences.

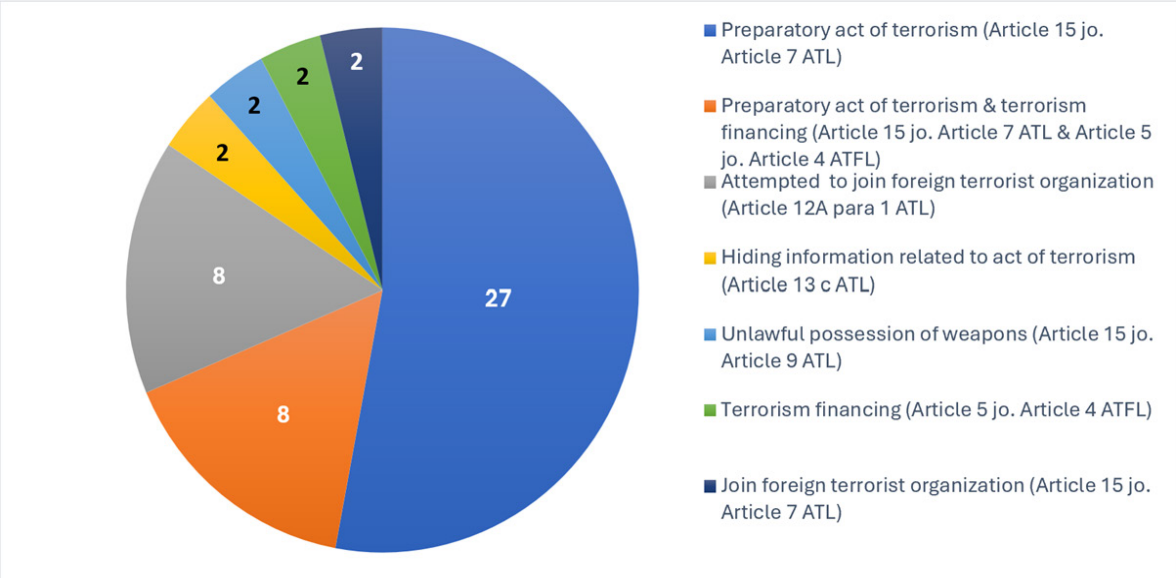
This illustrates that foreign terrorist fighters are not confined to one conflict and pose significant challenges to Indonesia once they return. Other conflicts in the future could similarly attract so-called FTFs from Indonesia and other countries.

Prosecution of 'Foreign Terrorist Fighters' in Indonesia

In general, Indonesia's approaches to returning alleged 'foreign terrorist fighters' can be divided into two types: immediate rehabilitation and prosecution. Upon their return to Indonesia, returnees from conflict zones will be prosecuted if they are perceived as harbouring security threats or have committed criminal acts of terrorism before their journey abroad or upon their return to Indonesia. As of early 2025, 120 of the Indonesian returnees from Syria and Iraq have been prosecuted in Indonesia, according to officials.

Based on data compiled by the Indonesian Terrorism Cases Database, as of November 2024, seven convicted terrorists have a record of leaving Indonesia to successfully join ISIS abroad, with 44 more having attempted to do so but were deported before arriving at their destination. Among these 51 convicts, only two were convicted for their acts as alleged FTFs on foreign soil. The majority of 27 of them were charged with and convicted for conspiracy, preparation, attempt, or assistance to commit an act of terrorism. A total of eight convicts were sentenced for attempted participation in a foreign terrorist organisation (Article 12A para 1 of Anti-Terrorism Law). However, these eight individuals were deported back to Indonesia before successfully arriving in ISIS' territory. The remaining individuals were convicted for preparatory acts of terrorism and terrorism financing (n=8), hiding information related to acts of terrorism (n=2), unlawful possession of weapons and/or explosives for terrorist purposes (n=2), and terrorism financing (n=2).

Figure 1. Type of Conviction of alleged FTFs in Indonesia (n = 51)



Source: the Indonesian Terrorism Cases Database (database.cds.or.id).

The offence related to participation in a foreign terrorist organisation(Article 12A para 1 of the Anti-Terrorism Law) is not commonly used due to two main reasons. First, there is the issue of the *tempus delicti* and non-retroactivity. Most of the terrorist convicts went to Syria or Iraq between 2014 and 2017, before the New Anti-Terrorism Law that introduced the FTF-related offences was enacted in mid-2018. As a result, the number of terrorists charged with attempting to join terrorist organisations abroad is relatively low, as only a few have left after mid-2018. However, in many cases, prosecutors still rely on details about the defendants' journey to a conflict zone in order to establish other offences, such as attempted use of violence. The other major obstacle to prosecution efforts has been the lack of evidence to demonstrate that the intention behind one's journey to a conflict zone was to commit an act of terrorism. In many cases, prosecutors are unable to provide evidence such as videos, photographs, or any records that could substantiate the defendant's involvement in terrorist activities abroad.

When convicted, the average length of sentence for returnees in Indonesia generally is 49,5 months' imprisonment, while the average length of sentence for the successful travellers is 46 months' imprisonment and 50 months' imprisonment for the failed travellers. As illustrated in *Figure 2* below, failed travellers thus receive higher sentences on average.

Figure 2: Comparison of Length of Sentence in Months Between Successful and Failed Travellers

The most severe sentence for a successful traveller was 60 months' imprisonment, which was given to AR who was involved in a series of armed robberies in 2010 to fund his group. After that, he went below the radar and went to Syria, but returned to Indonesia. Turkish authorities then arrested him on his second trip to Syria via Turkey. After being expelled from Turkey to Indonesia, AR was arrested by the Indonesian Police. He was subsequently convicted for his previous involvement in the armed robberies. Notably, his journey to Syria was not mentioned in the judgement at all and thus not part of the charges. The most lenient sentences of 36 months' imprisonment were received by AHM and SM. Both were convicted for their involvement in ISIS activities in Syria between 2013 and 2014 as an attempt to commit terrorist acts.

The heaviest sentence for a failed traveller is 120 months, meaning ten years' imprisonment. This sentence was received by SM, a veteran of Indonesia's violent extremist movement. SM went to Syria in 2017 and was deported by Turkish authorities in the same year. Before that, SM was instrumental in buying dozens of firearms from the southern Philippines for one of the pro-ISIS networks in Indonesia. SM was convicted of preparatory acts of terrorism and terrorism financing. The lowest criminal sanction of 24 months', meaning two years', imprisonment was received by AA, who went to Syria with her family. She was convicted for preparatory acts of terrorism upon returning to Indonesia from Turkey.

Overview of Cumulative Charging

Several UNSCRes mentioned above expand the toolboxes of States to prosecute members of terrorist organisations and hold them accountable for a wide range of crimes they have committed. However, prosecution for solely membership offences does not always address the full scale of crimes that have been committed by alleged terrorists. Cumulative charging refers to prosecuting an alleged terrorist for more than one offence in one trial, – or, as in some jurisdictions, in simultaneous trials at different courts. While cumulative charging can have an impact on sentencing, it is distinct from the procedure of cumulatively sentencing a convict. When cumulative charging leads to the conviction of a defendant for multiple offences that are interconnected, this must be recognised and considered when determining the sentence pursuant to existing sentencing frameworks that are applicable in cases of multiple convictions.

The most common form of cumulative charging is charging the accused for several terrorist offences in one trial. An example of this are cases of returning FTFs who are being charged for membership of a terrorist group and preparing terrorist offences; a common practice in the Netherlands. This corresponds with data provided by Europol related to the prosecution of jihadi terrorism in 2024. The most commonly convicted offence was membership of a terrorist organisation (30 percent), followed by planning or preparing an attack (14 percent), and financing of terrorism (12 percent). It should be noted, however, that the data provided by Europol is broader than returnees and includes those who failed or never attempted to travel to Syria and Iraq.

In Indonesia, terrorist suspects are also in many cases charged cumulatively. The most common charges are for Article 15 in conjunction with Article 7 of the ATL, which refers to acts of conspiracy, attempt, or assistance to commit criminal acts of terrorism in combination with preparatory actions for terror attacks. This combination of offences indicates that terrorism offences are frequently being committed by more than one person and that the acts with which the accused is charges are not yet fully executed.

In Europe, several of the returnees have already been convicted for membership of a terrorist organisation, but also for violation of weapons laws, child neglect offences, or violent crimes such as arson or murder. One of the challenges in prosecuting domestic offences committed in the conflict zone is that in some countries, courts may not have jurisdiction because the crimes

have to be committed on the territory of a state. One such example is the United Kingdom, where child neglect offences do not trigger extraterritorial jurisdiction. Another problem that might arise is the requirement of double criminality as a condition for mutual legal assistance. If a country were to rely on a very specific national offence in prosecuting a returnee, this offence may not have been criminalised in another country, potentially excluding the possibility to engage in mutual legal assistance in investigating these crimes if the recipient state requires criminalisation of this offence in their own domestic laws.

Finally, terrorist suspects can also be charged cumulatively for terrorist offences and core international crimes. In several European countries, a practice is emerging to investigate and prosecute returnees cumulatively for terrorism-related crimes and for war crimes, crimes against humanity and the crime of genocide.

By prosecuting for terrorism and core international crimes, the alleged terrorists are being held accountable for the full range of crimes they have committed. Furthermore, from a victim's perspective, prosecuting returnees for only membership offences or preparatory offences may not fully reflect the harm that they have suffered. Additionally, it can lead to a higher sentence for the perpetrators. However, a distinction needs to be drawn between charging a person cumulatively for the same facts or for different facts.

When cumulative charging is being applied, it could constitute a violation of the *ne bis in idem* principle (principle of double jeopardy), which prohibits a person from being prosecuted twice for the same crime. To determine whether this principle is applicable, and a person cannot be tried again, one can go through the following questions relating to the different elements of *ne bis in idem:*

- Are both proceedings criminal proceedings?
- Is the previous decision final?
- Do both proceedings concern the same underlying facts?
- Do both proceedings concern the same legal qualifications?
- Do the crimes at heart of both proceedings protect the same interests?

The aim of the *ne bis in idem* principle is to provide protection from continuous prosecution and legal certainty once a decision is final, also referred to *as res judicata.*

A single act can constitute two criminal offences. In such cases, a court will usually convict the person for only one criminal offence with the highest penalty. The same rule also applies if multiple acts are connected and take place consecutively. When multiple acts constitute several criminal offences, the prosecutor can cumulatively charge a person.

However, this does not necessarily lead to cumulative sentencing. In many countries, there are limitations to stacking penalties when the different acts committed by the same person at the same time are interrelated.

Terrorist offences and core international crimes can overlap with respect to the underlying facts, qualifications, and interests, but have different elements of crime that need to be established. By answering the questions regarding the *ne bis in idem* principle and reviewing existing jurisprudence, courts can better assess when there could be a violation of *ne bis in idem*.

Legal Challenges in the Indonesian Context

Cumulative prosecution of so-called FTFs can bring certain legal, institutional, and practical challenges that need to be overcome by practitioners and policymakers to enable for a rule-of-law-based prosecution for the full range of crimes committed by alleged terrorists abroad. This section outlines the legal challenges in the Indonesian context to allow for the development of practicable recommendations and identification of opportunities to overcome them.

Not every country has criminalised the same terrorist offences and core international crimes in the same manner. Criminalisation of individual offences and the structure of criminal codes and codes of criminal procedures largely depend on the legal traditions of the country. Nevertheless, lessons learned at an international level or in other countries can provide guidance on how to apply existing laws to prosecute alleged terrorists cumulatively.

Material Criminal Law

Indonesia has criminalised a range of terrorist offences and certain core international crimes. Nonetheless, their scope and placement in the criminal code or specific laws raised uncertainty about the characterisation of these offences and thus, applicable sentencing regimes and differing competencies in investigating, prosecuting, and adjudicating these offences.

Terrorist Offences

Pursuant to Law No. 5 of 2018 amending the Terrorism Law No. 15 of 2003, terrorist offences are considered "serious crimes [...] which endanger the national security and sovereignty, territorial integrity, peace, human welfare, and security; nationally, regionally, and internationally." As such, they are being investigated and prosecuted by specialised counter-terrorism investigators and prosecution offices and adjudicated before counter-terrorism courts. According to Law 5/2018, sentences for terrorist offences range from four years' imprisonment up to the death penalty, depending on the precise offence. However, the note on crimes against humanity included in Law 5/2018 can lead to confusion about whether terrorist offences are considered core international crimes under Indonesian law and thus fall under Law No. 26 of 2000 establishing the Ad Hoc Human Rights Court. This would mean that such cases are being tried before the Human Rights Court.

While terrorism as such does not constitute a distinct core international crime, many of the underlying criminal acts committed by terrorists – such as murder, rape, and enslavement – could be prosecuted as core international crimes when the elements of the respective crime are met. Despite there being no universal definition of terrorism, it is commonly understood that one element of terrorism is to spread fear among a civilian population. Although the act of spreading fear among a civilian population is not explicitly listed as a crime against humanity, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) concluded that terrorising a civilian population with discriminatory intent is indeed an underlying act of persecution as a crime against humanity. Many of the acts committed by terrorist groups could thus constitute crimes against humanity, provided they are part of a systematic or widespread attack directed against a civilian population and conducted with the knowledge of the attack. However, these attacks against the civilian population must also be carried out as part of a state or organisational policy, which is more difficult to prove.

Hence, despite ISIS using the spread of fear amongst the civilian population as their modus operandi, to date, no alleged FTF has been prosecuted for that as crimes against humanity in Indonesia or elsewhere.

Core International Crimes

Out of the four core international crimes, war crimes, genocide, crimes against humanity, and crime of aggression, Indonesia has criminalised two, crimes against humanity (article 9) and genocide (article 8) under Law No. 26 of 2000 Establishing the Ad Hoc Human Rights Court. This means that alleged FTFs who travelled to Syria and Iraq cannot be prosecuted for war crimes, even if war crimes were to be criminalised at a later stage, due to the principle of non-retroactivity.

While core international crimes are not criminalised in the exact same manner in every country, the individual offences often follow the structure of the Rome Statute of the International Criminal Court. Indonesia has not ratified the Rome Statute, but Articles 8 and 9 of Law 26/2000 largely follow the structure of Articles 6 and 7 of the Rome Statute. Thus, under Indonesian law, following the international standard, one needs to prove three elements of core international crimes: the contextual element, the material element (*actus reus*), and the mental element (*mens rea*). The material element (*actus reus*) of crimes against humanity under Indonesian law can include murder, extermination, rape and other forms of sexual violence, enslavement, torture, enforced disappearances, forced displacement, deprivation of liberty, persecution, and the crime of apartheid. The mental and contextual elements of crimes against humanity are linked. The contextual element requires the existence of 'a widespread or systematic attack against a civilian population.' The mental element (*mens rea*) requires that the perpetrators knew that their conduct was or was intended to be part of a widespread or systematic attack. The material element (*actus reus*) of genocide under Indonesian law can include any of the following acts: murder, causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction, imposing measures intended to prevent births, and forcibly transferring children of the group to another group. The mental and contextual elements of genocide are also linked, with the 'intent to destroy in whole or in part' a specific group constituting both the mental element (*mens rea*) and the contextual element that qualifies a crime as genocide.

Although Indonesia has ratified the Geneva Conventions, it has not criminalised war crimes in domestic legislation. War crimes are neither included in the jurisdiction of the Human Rights Court. In the new Criminal Code, war crimes are also not included.

This is due to several reasons. Firstly, the elements of war crimes are perceived as already encompassed within the framework of crimes against humanity in Law No. 26 of 2000.[3] Therefore, as long as Indonesia has criminalised crimes against humanity, the absence of specific war crimes legislation is not seen as a significant issue by many, despite the different contextual elements of both crimes. Secondly, another obstacle to criminalising war crimes in Indonesia is the lack of political will. Several prominent political figures, especially those with military and police backgrounds, are believed to have been involved in human rights violations during Indonesia's occupation of Timor Leste. As a result, the push to criminalise war crimes is viewed as too politically charged, as it is argued that it could potentially target certain influential political figures, although, due to the principle of non-retroactivity, war crimes legislation cannot be applied to past incidents before the law entered into force.

3 Yustina Trihoni Nalesti Dewi, Kejahatan Perang dalam Hukum Internasional dan Hukum Nasional (Jakarta: Rajawali Press, 2013).

Considering that many of the terrorist groups operate during an armed conflict, as noted earlier, the ability to prosecute alleged terrorists for possible war crimes is crucial to ensure full accountability. During an armed conflict not all acts of violence are prohibited, whereas under counter-terrorism laws all acts of violence are prohibited. Thus, several terrorism conventions contain an exclusion clause, excluding the application of the convention to certain acts occurring during an armed conflict, which are then solely governed by international humanitarian law (IHL) and other applicable international laws. Although Indonesia has not criminalised war crimes, it would be relevant to ensure that, when and where applicable, Indonesia would implement the exclusion clause as well.

Statute of Limitations

The statute of limitations describes the time limit within which criminal prosecution of a specific offence is permitted, and when an alleged offender can no longer be prosecuted. Pursuant to Article 78 (1) No.4 of the current Indonesian Criminal Code, the statute of limitations for most terrorist offences is eighteen years, given that capital punishment or life imprisonment is applicable for most offences under the Anti-Terrorism Law. In case no. 86/PUU-XX/2022, the Indonesian Constitutional Court in January 2023, confirmed that the current regulations on statute of limitations as detailed in Article 78 of the Criminal Court are constitutional. Following the petition of an Indonesian citizen whose father had been murdered in 2002, with the cases of the two suspects being terminated in 2021 due to the expiry of the statute of limitations, the Court ruled that a statute of limitations is crucial to provide legal certainty to alleged offenders and protect them from endless prosecution. At the same time, the court, however, encouraged legislators to lower the thresholds of civil claims for victims of serious crime, to allow them to obtain compensation and acknowledgement even after the statute of limitations renders criminal proceedings impossible. For genocide and crimes humanity on the other hand, article 46 of Law 26/2000 provides that no statute of limitations is applicable.

In early 2025, President Trump announced his plans to evacuate the detention facility in Guantanamo Bay, where fifteen men remain without charges. One of them is an Indonesian citizen, Encep Nurjaman, better known as Hambali - the alleged mastermind of the Bali bombings in 2002. Hambali was arrested in 2003 in Bali at a time when his nationality was unclear. After he was handed over to US authorities, he was moved to Guantanamo Bay. Under the Indonesian current legislation, Indonesia is unable to charge him for terrorist offences as the statute of limitations has expired.

> Given the gravity of the crime, many other countries have higher statutes of limitations for terrorist offences, or none at all. In the Netherlands, for example, offences with a highest applicable penalty of twelve or more years do not have a statute of limitations. Considering that ISIS declared its so-called caliphate in 2014 and had its peak in territorial control in Syria and Iraq in 2015, a statute of limitation of eighteen years could bar prosecution of some related terrorist offences in Indonesia by 2032.

Case Study: Arif Sunarso – Zulkarnaen

Arif Sunarso, commonly known as Zulkarnaen, is an Indonesian national, who is a founding member and active participant in Jemaah Islamiyah (JI). He also contributed to the development of *PUPJI* which is the "Guidelines for the Struggle of JI".

Eventually, he served as the Head of the Military Training/Tadrib Division under the Tajnit/Askary Field and participated in military training in Afghanistan from 1985 to 1988. He also held the position of military trainer in Pakistan for seven years until 1993 and was one of the pioneers in the establishment of a training camp, Camp Hudaebiyah, in Moro, Philippines. Since 1998 he assumed the role of the Chairman of the Khos Team (Special Team), which was created to prepare a team to carry out jihad at any time in Indonesia and to accelerate the training of JI members.

Following accusations of participating in several terrorist attacks in Indonesia, notably, the 2002 Bali bombings attack which led to the killing of a total of 202 people. Arif Sunarso was a fugitive in connection with the bombing of Paddy's café club and Sari Club in Bali. Subsequently, in 2005, he was listed by the United Nations as a terrorist under the UN Security Council's sanctions regime, owing to his involvement with global terrorist networks and his associations with Osama bin Laden and the Taliban.

After evading capture for eighteen years, during which time he married and resided in Bekasi before relocating to Lampung with the assistance of JI, Arif Sunarso was apprehended by Indonesian counter-terrorism authorities on 30 December 2020. He faced charges relating to his involvement in terrorist activities, including conspiracy to commit bombings or assaults, as well as his role in concealing the whereabouts of other terrorists.

On 18 January 2022, the East Jakarta District Court convicted Arif Sunarso of withholding information and sheltering an extremist figure and sentenced him to fifteen years imprisonment. However, his involvement in the Bali attacks, which occurred on 12 October 2002, was precluded from prosecution by the expiration of the statute of limitation, as outlined in Article 78, paragraph (1), point 4 of the Indonesian Penal Code, which sets an eighteen-year time bar for such charges.

Although Arif Sunarso has been charged for his affiliation with the JI group, he could not be prosecuted for his involvement in the Bali bombings. The statute of limitations for offences punishable by the death penalty or life imprisonment, such as terrorism-related crimes, is eighteen years, which precludes the Court from bringing charges against him for this particular offence.

Source: *Case 759/Pid.Sus/2021/PN Jkt.Tim, Arif Sunarso Alias Zulkarnaen Alias Daud Alias Pak Ud Alias Abdullah Abdurrohman Alias Abdurrohman Alias Durrohman Alias Mbah Rohman Alias Pak Rohman Alias Zaenal Arifin Bin Hadi Sholeh, Decision of the District Court of East Jakarta.*

Extraterritorial Jurisdiction

Prescriptive or legislative jurisdiction refers to the power to make laws that are applicable to crimes committed in a state's territory (*territoriality principle)*, by its nationals (*active personality principle*), against its nationals (*passive personality principle)* or against the security of a state (protective or security principle). It also includes *universal jurisdiction,* which allows states to assert jurisdiction over serious crimes against international law regardless of where, by whom, or against whom they were committed. In the context of the conflicts in Syria and Iraq, and the crimes committed by affiliates of terrorist organisations there, the active personality principle and universal jurisdiction are of particular relevance for third states to prosecute their own and foreign nationals for crimes committed in the conflict zone.

However, recently, the decision of the Indonesian Constitutional Court of 14 April 2024 in case no. 89/PUU-XX/2022, which in conclusion denied the existence of universal jurisdiction under Indonesian law, has effectively erased the grounds on which foreign nationals could be held accountable for grave violations of international law, such as crimes against humanity and genocide in Indonesia. As a result of the Constitutional Court's decision, no foreign national can be prosecuted before the Court of Human Rights for any of these crimes. In relation to acts of terrorism committed in Syria and Iraq, as well as other conflicts further abroad, this effectively limits cumulative charging in Indonesia to Indonesian nationals only (*active personality*), as it is unlikely that any Indonesians are involved as victims of terrorism or core international crimes in these countries.

Nonetheless, Article 6 of Law No. 1 of 2023, the new Indonesian criminal code, provides that any crime prescribed in domestic law or offences pursuant to international treaties can be prosecuted by Indonesian authorities regardless of where, by whom, and against whom these crime shave been committed. This indicates that the legislator has now recognised *universal jurisdiction* as a ground of extraterritorial jurisdiction and provided prosecution authorities with the possibility to prosecute foreigners for genocide and crimes against humanity when committed outside of Indonesia against non-Indonesian citizens.

Institutional Challenges

In addition to legal challenges, several countries also face institutional problems when prosecuting terrorism and core international crimes. Different agencies and courts may be involved, and differences in expertise, staffing, and funding can determine whether alleged terrorists can be tried for both terrorism and core international crimes.

Several European countries have created specialised units to facilitate the prosecution of core international crimes. Some countries have such units only at the investigation stage, others for prosecution or adjudication, or all three. For example, Belgium has specialised units for investigation and prosecution, but different courts have jurisdiction over terrorism and core international crimes cases. In Sweden and Germany all courts of a certain instance have jurisdiction to hear these cases. By creating specialised units, it can be easier to build and rely on specific knowledge, prioritise cases, and potentially see linkages between different cases.

However, not all countries have adopted such specialised units, among others due to factors such as financial resources, the importance given to pursuing accountability for core international crimes, and the sheer number of potential core international crimes cases.

Due to their placement in Law 26/2000 and the sole jurisdiction of the Human Rights Court over the crimes of genocide and crimes against humanity, other judges, prosecutors, and investigators in Indonesia might not be sufficiently familiar with the elements of these crimes and how to prove them. This could hinder the prosecution of alleged terrorists for these crimes.

Prosecutorial Strategies

To successfully prosecute alleged terrorists for terrorist offences and core international crimes, it is not only vital to have a proper legal framework in place, sufficient human and financial resources for investigation and adjudication, and access to information and admissible evidence located abroad, but also a comprehensive prosecutorial strategy. Notably, an explicit legal mandate to conduct cumulative charging is not required.

In Indonesia, terrorist offences and core international crimes are being prosecuted separately by different investigators, prosecutors, courts, and judges. According to the existing law, the investigation of core international crimes is a responsibility of the Indonesian National Commission on Human Rights, while the investigation of terrorist offences is led by Densus 88, an anti-terror special unit of the National Police.

The prosecution of both terrorist offences and core international crimes is led by the Attorney General's Office. However, terrorism cases are being handled by career prosecutors within the directorate handling terrorism and transnational crime. When prosecuting core international crimes, the Attorney General can appoint *ad hoc* prosecutors from within the government or civil society.

The trial proceedings in terrorism cases are conducted in the district courts of East Jakarta, West Jakarta, and North Jakarta, based on appointment by the Chief Justice. Meanwhile, only the Human Rights Court in the District Court of Central Jakarta has the authority to adjudicate trials on core international crimes. Consequently, in holding alleged FTFs accountable for the full range of crimes they have committed through cumulative charging, these different actors must closely work together and align their competencies.

Prosecutorial Discretion

The obligation to prosecute derives from the principle *aut dedere aut judicare* – to extradite or to prosecute. Universal jurisdiction, which is discussed in more detail in the factsheet on jurisdiction, and the obligation to extradite or prosecute are two distinct tools that both seek to reduce impunity for the most serious crimes, such as war crimes, crimes against humanity, and genocide.

According to the Geneva Conventions (Arts. 49, 50, 129, and 146 Geneva Conventions I-IV), States have the obligation to extradite or prosecute grave breaches of the Conventions. Similarly, through its prosecute-or-extradite provision, the Convention on Torture provides for an equivalent of universal jurisdiction and state obligation over torture. However, there appears to be no conventional basis for the obligation to prosecute or extradite for crimes against humanity, genocide, war crimes other than grave breaches of the Geneva Conventions, and war crimes committed in non-international armed conflict.

In practice, the obligation to extradite or prosecute means there is an obligation for states to initiate investigations and submit the case to the prosecuting authorities. It does not mean that states are obliged to actually prosecute in the sense of taking a case to court. In many countries, prosecutors have a broad discretion in deciding whether to prosecute a case.

The scope of prosecutorial discretion varies when it comes to the prosecution of core international crimes. Whilst in some states the prosecutors have an obligation to initiate criminal proceedings for ordinary crimes, prosecutors can exercise discretion with respect to core international crimes, for example, when there is no nexus with the country. In other states, there is no prosecutorial discretion for specific core international crimes committed in specific countries. Considering how complex core international crimes can be, prosecutors take a broad range of factors into account when making a decision on whether or not to prosecute a case relating to core international crimes.

Some of the factors that can be taken into consideration when determining whether to open investigations are:

- gravity and scale of the crimes;
- chances of a successful conviction;
- access to evidence located abroad;
- public interest;
- whether the identity of the perpetrators is known;
- location and nationality of perpetrators;
- location and nationality of victims;
- the impact on victims and their willingness to cooperate with the proceedings;
- applicable immunities;
- or the need and availability of mutual legal assistance.

States could consider developing guidelines for prosecutors to assist in determining whether prosecutions should be initiated with respect to core international crimes, particularly under the *universal jurisdiction* principle.

Structural Investigations

Structural investigations refer to collecting evidence and to the mapping of structures and overarching crimes without an identified perpetrator. Structural investigations derive from Germany, but are also increasingly being used by other countries such Sweden, France, and Canada. The aim of structural investigations is to secure evidence at an early stage, through actively collecting evidence, for example by reaching out to affected communities to obtain witness statements or by conducting open-source investigations without being barred by time limits under criminal procedure law. This information can then help to swiftly build a case once a single alleged perpetrator has been identified. Structural investigations can help to prove the contextual elements of core international crimes or command structures. By securing evidence at an early stage, structural investigations contribute to saving time, as investigating core international crimes tends to be very complex and time-consuming. Structural investigations do not require amendments to laws, but are a tool that prosecutors can adopt. Evidence collected through structural investigations is 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. Structural investigations have been opened in several countries in relation to crimes committed in Syria and Iraq and more recently in relation to crimes committed in Ukraine.

Trials in Absentia

Whether trials in absentia are permitted can also have an impact on whether alleged terrorists can be held accountable. Several European countries allow for trials in absentia – for example, Sweden, Netherlands, and Belgium – as it is considered to be in the interest of justice to hold perpetrators accountable, even if they are not present at trial. Yet, it could violate the accused's right to a fair trial, specifically their right to be present at trial and the presumption of innocence. Thus, certain procedural safeguards need to be met, including proper notification, the presence of a lawyer, and the possibility for retrial. At the same time, trials in absentia can contribute to achieving accountability. While it may not be possible to enforce the sentence, a conviction can help to establish a historical record, providing justice to victims, and allowing them to seek remedies.

In Germany, trials in absentia are not permitted unless the accused has waived their right to be present or when the court discharges the accused of the obligation to be present at trial. In the Netherlands, trials in absentia are permitted, but the application took an unexpected turn. Several Dutch women in Al-Hol camp were notified of the proceedings against them in the Netherlands and availed their right to be present at trial.

After the court considered terminating their proceedings, the Dutch government decided to repatriate them so they could stand trial. The first of these women, Ilham B., has been convicted for terrorist offences only, and proceedings – not on merit – against twelve female returnees took place before the District Court in the Hague, including charges for both terrorism and core international crimes.

Evidentiary Challenges

Another critical challenge relates to the collection of admissible evidence. In order to bring terrorists to justice within a rule of law framework, prosecutors need to have evidence. In particular, when controlling vast territories, prosecutors faced a number of challenges in securing evidence from Syria and Iraq. It was not safe to travel to conflict-ridden areas to collect evidence, but there are also other difficulties in obtaining evidence. It may also not be possible to collect evidence through mutual legal assistance because there may be no mutual legal assistance (MLA) agreement in place or, even if there is an existing MLA agreement, there could be a lack of capacity or political will to cooperate and respond to a MLA request. Another problem, like during the conflict in Syria and Iraq, is that the respective governments do not have control over the area where the evidence is located, as it is controlled by ISIL. In all these situations, it is very difficult for prosecutors to obtain evidence from the battlefield.

From this point of view, it is understandable that prosecutors focus on membership charges or preparatory offences. The evidence for these crimes often lies in the country of nationality or residence, and it is less resourceful to prove that the alleged offences have been committed. However, from a victim's perspective, it is important that the so-called FTFs are tried for the full range of crimes they have committed. Victims of ISIS, in particular from the Yezidi community, have pleaded for a long time for justice. Yet, other minorities such as Christians, Turkmen, and Shabak have also been the victims of torture, sexual violence, and targeted killings.

Information from the conflict does not constitute a separate category of evidence. Information from the conflict zone can be documents, such as payrolls of ISIS. It is well-known that terrorists and terrorist organisations use the internet and social media for terrorist purposes. This means they also leave digital traces which can potentially be used as evidence in court. Through the use of digital forensics, digital data such as social media postings, videos, photos, or contact details contained in smartphones and computers can be retrieved and used in the investigation and prosecution of terrorist-related offences. Considering the developments in forensic science, in particular in the field of biometrics, fingerprints can be retrieved from physical objects such as weapons and IEDs and provide useful information on how the devices are being handled and therefore provide insights into the modus operandi of terrorist organisations. Finally, statements of victims, witnesses, or alleged perpetrators could be retrieved from the conflict zone. What distinguishes information from the conflict zone from regular evidence is where and by whom it has been collected.

Several United Nations Security Council Resolutions and reports, such UNSC Res. 2322 (2016) and 2396 (2017), reports of the SG on the threat posed by ISIS but also the Addendum to the Madrid Principles clearly recognise the critical role the military can play in collecting evidence and indicate that the efforts to collect information from the battlefield should be strengthened. Because of their presence on the 'battlefield', the military could facilitate the collection of relevant information that can be used as evidence in court in terrorism-related cases. While it is true that the military have other tasks and are not trained in collecting information for criminal justice purposes, they could assist in collecting and preserving some information. The military could be the national army, a foreign army, or UN peacekeeping operations, provided that in the latter two cases, there is an international mandate (such as consent or UN authorisation) that allows the intervention on the territory of the state where the crimes have been committed. The legal and practical constraints, the intensity of the conflict, and operational goals of the military will determine to a large extent how far the military can assist in collecting information and evidence from (post) conflict situations.

In 2013, Operation Gallant Phoenix was launched by the United States and comprises of nearly 25 countries with the purpose of collecting information on so-called FTFs in Syria and Iraq. Spain, New Zealand, but also Europol have deployed staff to Operation Gallant Phoenix. It is a multinational sharing platform involving many agencies from law enforcement, intelligence, and military, which has over the years collected a vast amount of information and intelligence to help identify terrorists who have returned home or to third countries and are still in conflict zone. Due to the somewhat secretive nature of Operation Gallant Phoenix, it is very difficult to trace if, and to what extent, information collected through Operation Gallant Phoenix has been shared and used in court as evidence against alleged terrorists.

There is now an increasing number of cases in which evidence collected by the military has been used to convict so-called FTFs and other terrorist suspects. To give an example, two Iraqi men living in Kentucky have been convicted of terrorist offences in the United States. These men were involved in using improvised explosive devices (IEDs) against US soldiers in Iraq and attempted to send weapons and money to Al-Qaeda in Iraq. The investigations included an undercover agent of the FBI who recorded several conversations with Alwan in which he discussed his involvement in using IEDs against US soldiers. The FBI was able to find Alwan's fingerprints on an unexploded IED found in Iraq. Alwan pleaded guilty to conspiring to kill US soldiers abroad, conspiring to use a weapon of mass destruction (explosives) against US soldiers, and attempting to provide material support. He was sentenced to 40 years in prison.

The use of information from the conflict zone is not without challenges. First of all, it is important to emphasise that not all information from the conflict zone can and is being used as evidence in court. In some cases, it is a lead that can support investigations.

Each stage of collecting, storing, analysing, sharing, and using information from the conflict zone poses a set of challenges. A few of those relating to sharing and using information from the conflict zone relate to the admissibility of the evidence and the impact it can have on the right to a fair trial.

Countries have different approaches to how they can receive information collected by a foreign military from the conflict zone. Notably, the United States is by far the country that has collected vast amounts of information from the conflict zone and has also developed its own guidelines. Australia has amended the Foreign Evidence Act of 1994 to facilitate the direct use of foreign military evidence. Article 27B of the Evidence Act specifically refers to foreign government material that can be used as evidence in court, provided that it includes a written statement by a senior AFP member and is accompanied by a certificate of the Attorney-General. The statement of the senior AFP member must ascertain what the foreign government material consists of, how it has been documented, and that the chain of custody is preserved. Provided that these conditions are met, foreign military evidence can be used in court without a MLA request.

Many European countries, such as Germany, Austria, and the Netherlands, tend to rely on information from the conflict zone through mutual legal assistance (MLA). Often, such information goes through many different departments, as illustrated in the example from Belgium:

> *The material seized by the US military will then digitally transit through many different services before it reaches the Office of the Belgian Federal Prosecutor: it will first be transferred to the FBI; then, to the Belgian military intelligence services which will, in turn, transfer the information to the civil intelligence services; and, finally, it will reach the Federal Prosecutor's Office. It is important to note that Belgium will never possess the original items that were seized on the battlefield. Battlefield evidence is however essential to the prosecutors since it is the only link they have with the conflict zone.*

As long as information from the conflict meets the general requirements of evidence, it is admissible as evidence. However, the defence has raised issues relating to credibility, credibility, integrity, and reliability of evidence. Not all countries use these terms. Furthermore, the use of information collected from the conflict zone can impact the right of the accused to a fair trial, as the defence cannot always examine the evidence from the conflict zone that is being used against a defendant. In such cases, prosecutors may need to look for additional corroborating evidence, conduct their forensic analysis or require testimonies of those involved in collecting the information from the conflict zone. A good example from the Netherlands is the case of a female returnee called Ilham B.. Although an agent of the FBI testified during the case that during an interrogation of her husband, who stated that Ilham B. had joined Khatiba Nusaybah, there was insufficient supporting evidence that Ilham B. had joined Khatiba Nusaybah and was therefore acquitted of this charge.

- Admissibility of evidence relates to which evidence can be submitted in court proceedings in the first place. Evidence that is provided with a proper chain of custody could still be inadmissible, for example, confessions obtained through torture, or when the evidence is considered not relevant.

- Credibility of evidence refers to the probative value of evidence. This criterion relates to the question of how likely the evidence is true. It is up to the court to determine the weight it should give to such evidence. A witness to a crime that occurred 20 years ago may be credible, but

the statement may not be reliable because the witness may not precisely recollect all the details anymore.

- Integrity of evidence is about maintaining and ensuring that the evidence is protected and has not been altered, destroyed, or tampered with and relates to the chain of custody.

- Reliability of evidence relates to how trustworthy the evidence is. If, for example, a phone has not been preserved or stored properly, it could have been tampered with and thus be unreliable.

Furthermore, the use of information collected from the conflict zone can impact the right of the accused to a fair trial as the defence cannot always examine the evidence from the conflict zone that is being used against a defendant. In such cases, prosecutors may need to look for additional corroborating evidence, conduct their forensic analysis, or require testimonies of those involved in collecting the information from the conflict zone. A good example from the Netherlands is the case of a female returnee called Ilham B. case. Although an agent of the FBI testified during the case that during an interrogation of her husband who stated that Ilham B. had joined Khatiba Nusaybah, there was insufficient supporting evidence that Ilham B. had joined Khatiba Nusaybah and was therefore acquitted of this charge.

International Initiatives Mandated to Collect Evidence

Other actors on the battlefield can also play a role in collecting information that could be used as evidence in court against alleged terrorists. International Commissions of Inquiry or other mechanisms established by the UN can play a vital role in documenting terrorism-related crimes in on-going and post-conflict situations.

The International Independent Commission of Inquiry (CoI) on Syria, for example, is tasked with investigating all alleged violations of international human rights law committed in Syria since March 2011. In 2016, it reported that ISIS has committed genocide and multiple crimes against humanity and war crimes against the Yazidi community. These kinds of findings can be used to support investigations and prosecutions for the underlying crimes committed by terrorist organisations instead of relying only on terrorist offences.

In the last few years, several international mechanisms have been developed that are specifically tasked to collect, preserve, and share evidence of core international crimes that have been committed in conflict situations. These mechanisms are not able to prosecute the perpetrators themselves, but can provide evidence to national or international tribunals.
The International, Impartial and Independent Mechanism (IIIM) to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes in Syria. This mechanism has been created by UN General Assembly Resolution 71/248 (2016) in response to the failed referral to the ICC of the Security Council. According to the Terms of Reference, the tasks of IIIM are two-fold: to collect, preserve, and analyse evidence of violations of international humanitarian law and human rights violations and abuses. Secondly, to prepare files to facilitate the criminal proceedings in accordance with international law standards in national, regional, or international courts and tribunals. The IIIM focuses on crimes committed by all parties involved in the conflict. The main difference to the CoI on Syria is that the IIIM's focus is on linking the evidence to the persons responsible and establishing criminal liability, including command responsibility, whereas the CoI looks at establishing facts and the circumstances of violations.

Lina I., a Swedish citizen, reportedly committed genocide, crimes against humanity, and war crimes in Raqqa, Syria. She is said to have detained several Yazidi women and children in

her home. According to prosecutors, the women and children faced torture or other inhuman treatment and were persecuted as part of the Yazidi minority, among others by being locked up in Lina I.'s house and being forced to convert to Islam. Through these acts, and in connection with an armed conflict, Lina I. allegedly acted with the intent to destroy, in whole or in part, the Yazidi ethnic group. Lina I. was extradited from Turkey to Sweden in February 2021, and seven months later, was arrested in Sweden on suspicion of committing war crimes in Syria. In March 2022, she was convicted of war crimes of child recruitment and sentenced to six years' imprisonment for taking her 2-year-old son to ISIS-controlled territory. Following this conviction, for which she is currently serving her sentence, Lina I was again indicted for the above-mentioned crimes in September 2024. Large parts of the trial, that lasted from October 2024 to February 2025, were held in camera. Eventually, the Stockholm District Court found Lina I. guilty of genocide, crimes against humanity, and war crimes and sentenced her to twelve years' imprisonment, taking into account the time she had already spent in pre-trial detention and merging her previous sentence. Among the evidence that had been used for this conviction were several witness testimonies which were obtained by UNITAD and shared with the Swedish prosecutors.

Under the UN Security Council 2379 (2017) the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh/Islamic State in Iraq (UNITAD) was established. One of the major drawbacks of the UNITAD is that it only investigates crimes that have been committed by ISIL/Da'esh and not by other parties of the conflict, whereas there has been ample evidence that other terrorist organisations, but also the Iraqi government or the Kurdish authorities, have been involved in human rights violations. The UNITAD collects, preserves, and stores evidence of acts that may amount to war crimes, crimes against humanity, and genocide committed by the terrorist group ISIL (Da'esh) in Iraq. According to the terms of reference the Iraqi authorities shall be the primary recipient of the evidence that has been collected by UNITAD.

Information Collected by Specialised NGOs

Additionally, several non-governmental organisations (NGOs) have been documenting human rights abuses and making their findings publicly available. For example, Syrian NGOs like the Syria Justice and Accountability Centre (SJAC), the Syrian Observatory for Human Rights, the Violations Documentation Center in Syria or the National Institute for Human Rights, and Hammurabi Human Rights Organisation, and other civil society organisations, such as the European Center for Constitutional and Human Rights (ECCHR), are documenting human rights violations committed in Syria. Although information used from NGOs can poses certain challenges with respect to credibility and equality of arms, the overall ability to collect evidence by specialised NGOs has considerably improved. In the Netherlands, the Dutch District Court convicted a Dutch citizen, Maher, for preparatory acts for committing a terrorist crime, membership of a terrorist organisation and for the first time in the Netherlands, for a war crime. Maher was convicted of seven and a half years' prison sentence. Maher posed next to a deceased person who had been crucified and shared this photo via Facebook. The Court concluded that there was sufficient evidence, including a report from the Commission of International Justice Accountability, that Maher violated the personal dignity of the deceased and committed a war crime under common article 3(1)(c) of the Geneva Conventions.

Case Study: Umar Patek-Hisyam

Umar Patek, also known as Hisyam, is an Indonesian national, and a senior member of Jemaah Islamiyah (JI). In the 1990s, Umar Patek went to Pakistan to study at the Mujahideen Military Academy where he learned religion, war strategies, how to assemble bombs, and participated in weapons training. Subsequently, he joined the Moro Islamic Liberation Front (MILF) in the Philippines until 2000.

Umar Patek was involved in several terrorist plans in Indonesia. Notably, he was involved in assembling the van bomb and explosives used in the 2002 Bali bombing. After the Bali attack, he fled to the Philippines, where he stayed until 2009. While in the Philippines, he manufactured bombs for the Abu Sayyaf Group (ASG) and provided training to ASG members in bomb-making techniques. He also prepared his journey to Afghanistan via Indonesia by selling firearms and receiving financial support from ASG.

Once Umar Patek arrived back in Indonesia, JI members assisted him in evading capture by the Indonesian police, helped him conceal his whereabouts, and facilitated the acquisition of new passport documents. He subsequently reached Pakistan in August 2010 to join a mujahideen group but was arrested by the Pakistani Police in January 2011 and repatriated to Indonesia in August of the same year. Also in 2011, he was listed by the United Nations as a terrorist under the U.N. Security Council's sanctions regime for his participation in the activities of JI and the Abu Sayyaf Group.

On 21 June 2012, the East Jakarta District Court convicted Umar Patek of engaging in a terrorist network, assisting in bombing or attacking, participating in military training, possessing, carrying, storing, transporting, concealing, using, or exporting to and/or from Indonesia any firearms, ammunition, or explosives and other dangerous materials with the intent to commit a criminal act of terrorism. He was sentenced to 20 years in prison for these acts in relation to his participation in the terrorist attacks at the Sari Club, Paddy's Pub, and the Consulate General of the United States in Bali, as well as for plotting other terrorist attacks in Indonesia.

While Umar Patek has been prosecuted for his involvement in multiple terrorist attacks in Indonesia following his repatriation from Pakistan, greater international cooperation in the investigation could have facilitated a more timely judicial process. For instance, Umar Patek was placed on the Indonesian Police's wanted list on 26 December 2002, but was only apprehended in August 2011 following extensive negotiations with Pakistani authorities. Several countries, including the United States, Australia, Pakistan, and the Philippines, were investigating Umar Patek at some point. However, authorities such as those in the Philippines, only announced their active support in Indonesian investigations after Umar Patek was already captured, not when he was still on the run abroad.

Source: *219/Pid.Sus/2012/PN.Jkt.Bar, Hisyam bin Alizein alias Umar alias Abu Syekh alias Mike alias Arsalan alias Abdul Karim alias Umar Patek alias Umar Kecil alias Umar Arab alias Umar Syeh alias Zacky alias Anis Alawi Jafar, Decision of the District Court of East JAKARTA.*

Outreach and International Cooperation

In order to prosecute a person for core international crimes, it is important to strengthen interagency coordination within the country and across different countries. This not only applies to investigation and prosecution authorities but also includes migration services and civil society organisations as seen from international context.

At a more informal domestic level, frequent meetings between terrorism prosecutors and core international crimes prosecutors are crucial to exchange valuable sources of information, investigative leads, and ensure alignment in investigations and prosecution of cases that are situated in the same context. Furthermore, outreach to the domestic immigration service is also relevant to obtain evidence and information on crimes committed abroad. In several countries, factsheets in different languages providing information on how to engage in investigations as witnesses and victims, for example by providing testimony, are distributed among the refugee community. Additionally, social workers are trained to detect potential witnesses and support them in providing information to the relevant authorities without causing harm.

Lastly, outreach to civil society organisations that document grave crimes can be beneficial in obtaining information about crimes committed abroad. The work of such organisations is fundamental in international criminal justice, with many organisations committing to ethical guidelines in approaching and working with witnesses and victims of gross human rights violations. Several civil society organisations in Indonesia are also working on supporting witnesses and victims of crimes.

On a formal international level, countries can consider engaging in international cooperation. One option is establishing a Joint Investigation Team (JIT), a legal tool for the investigation of crimes, consisting of a legal agreement between competent authorities such as law enforcement, prosecutors, and sometimes judges. For example, such a JIT agreement in relation to crimes committed against Yazidis in Syria and Iraq was initially signed between Sweden and France in October 2021. In June 2023, Belgium and the Netherlands joined. Additionally, prosecutors could reach out to organisations such as 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 (IIIM) in order to obtain relevant evidence. While the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh/Islamic State in Iraq and the Levant (UNITAD) has closed down in September 2024, many of the materials produced by UNITAD based on documentation from the conflict zone remain available online, providing valuable corroborative information on ISIS' operations in Syria and Iraq.

Opportunities

In January 2023, Indonesia revised its criminal code with the enactment of Law No. 1 of 2023, known as the Indonesian Criminal Law, or *Kitab Undang-Undang Hukum Pidana* (KUHP). This new code will take effect in January 2026. It includes provisions for core international crimes, terrorism, as well as other offences related to corruption, narcotics, and money laundering—all categorised as 'Special Crimes.' The term 'special crimes' in the new code refers to criminal acts that (i) result in a large number of victims; (ii) follow distinct criminal procedures; (iii) are handled by specialised law enforcement institutions, such as the National Commission on Human Rights for core international crimes or the Corruption Eradication Commission (KPK) for corruption; (iv) are stemming from both ratified and non-ratified international conventions; and (v) the are viewed as extremely harmful and widely condemned by society.

Incorporating core international crimes and terrorism into the special crime chapter is essential for raising awareness among law enforcement agencies about the seriousness and magnitude of these offences. Merging these two categories of crime into a single law will help to recognise the interlinkages between core international crimes and terrorism. With the possible return of hundreds of individuals with alleged ties to terrorist organisations from conflict areas like Syria and Iraq, Indonesia will likely encounter cases where a suspect has committed acts that amount to both core international crimes and terrorist offences. This means that individuals can be held accountable for both types of offences they have committed in other countries.

The new Criminal Code does not specifically regulate cumulative charging. However, it includes provisions related to concurrent criminal acts, which can be referenced to ensure that returning FTFs who committed core international crimes and terrorist offences receive sentences that accurately reflect the severity of their offences.[4] In case the court finds that the imposed sentence has failed to achieve the intended punitive objectives, the new Criminal Code enables judges to impose additional penalties. These may include revocation of various rights, such as active and passive election rights.[5]

In the past, Indonesia has experienced a case of a high-ranking official who became a traveller to join ISIS in Syria and a political party figure was affiliated with JI. Hence, the possibility to revoke passive and active election rights is perceived as crucial to prevent individuals from abusing their authorities to obtain access, opportunity, or tools to conduct an act of terrorism. However, additional penalties must be imposed with caution, considering the unique circumstances of every case. Hence, the new Criminal Code has established specific limitations on the imposition of revocation of rights. The revocation of the right to hold certain positions, vote and run in elections, or practice specific professions can only be imposed if the defendant (i) commits an offence related to their position, (ii) violates special obligations associated with that position or (iii) exploits their authority, opportunities, or resources due to that position or profession. Similarly, the revocation of child custody rights may only be imposed on defendants who intentionally commit a crime while having the duty to care for a child or commit an offence against a child in their care. Additionally, limitations on the right to parole can only be invoked if (i) a crime was committed in the course of one's duties or a violation of special obligations pertaining to the position, (ii) there was ab abuse of authority, opportunities, or means provided by certain position or (iii) the defendant faces a potential imprisonment of 15 years or more.

Conclusions and Recommendations

Many of issues concerning collection of evidence and mutual legal assistance are not only a concern for prosecutors and investigators who handle cases of terrorism and/or core international crimes, but also for the relevant ministries. Hence, efforts to reduce these barriers must involve a wide range of stakeholders.

As one can see, the challenges identified above relate to a variety of aspects of the Indonesian legal framework and policies, ranging from material criminal law and jurisdictional matters to division of competencies, evidence collection and mutual legal assistance, as well as the implementation of novel prosecutorial strategies. As such, these challenges have a different impact on the work of different practitioners and policy makers. The recommendations below seek to provide guidance on potential steps that can be taken in different areas to facilitate the cumulative prosecution of alleged terrorists.

4 Articles 125 to 131 of Law No. 1 of 2023.
5 Article 86 of Law No. 1 of 2023.

Legal Recommendations

1. Considering that many of the crimes committed by so-called FTFs occur during an armed conflict and may qualify as war crimes, war crimes, including the concept of command responsibility, should be implemented in national legislation.

2. Consider ratifying The Hague-Ljubljana Convention to facilitate international cooperation and mutual legal assistance in cases related to core international crimes.

3. Extend or remove the statute of limitations for serious crimes, which includes terrorism and core international crimes, to avoid impunity for perpetrators of serious crimes.

4. Considering the principle *aut dedere aut judicare*, embed universal jurisdiction or extend other forms of extraterritorial jurisdiction for serious crimes, including terrorism and core international crimes, to ensure that foreigners can be held accountable for crimes they have committed abroad against non-Indonesian nationals.

Institutional Recommendations

1. Ensure that cases involving linkages between terrorism and core international crimes are transferred to courts with competence to deal with terrorism.

2. Develop mechanisms that allow experts, investigators or prosecutors with experience in core international crimes to share relevant information with their colleagues and strengthen multidisciplinary cooperation, for example by appointing focal points for cooperation or seconding staff to other departments.

3. Consider developing guidelines for prosecutors on how to identify linkages between terrorism and core international crimes, how to use different modes of liability in charging, and what different prosecutorial techniques, such as structural investigations, are available.

4. Invest in training and building expertise in core international crimes, including international humanitarian law.

5. To prove the commission of core international crimes, through establishing all elements of the respective crime, the prosecution should seek to introduce supporting evidence from open sources, reports of UN agencies, and CSO reports.

Evidentiary Recommendations

1. Enhance the use of information from the conflict zone to support investigations and prosecutions of core international law whilst respecting the right to a fair trial.

2. Consult open databases, such as Project Watchmaker from Interpol, to see if there is existing evidence that can be used to prove core international crimes.

3. Consult UN entities such as IIIM and UN CoI for Syria to see if there is supporting evidence available to prove core international crimes.

4. Invest in informal relationships with partners abroad prior to sending out MLA requests.

About the Authors

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In addition to his research work, Iwa has served as an expert for international organizations, including the International Criminal Investigative Training Assistance Program (ICITAP) under the U.S. Department of Justice and the U4 Anti-Corruption Resource Center, as well as local NGOs and the Indonesian National Counter Terrorism Agency. On some occasions, he has also taught courses in criminology and counter-terrorism as a guest lecturer at several universities in Indonesia.

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