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"NOBODY'S CHILD": REFLECTIONS ON FOUR POSSIBLE APPROACHES FOR THE REPATRIATION OF FTFS

Abstract

In the 21st century the rise of numerous Non-state Armed Groups (NSAGs) such as the Islamic State of Iraq and the Levant (ISIS), and Al Qaeda has been experienced. With the height of the "smart" generation and the ubiquity of social media platforms, numerous individuals from across all corners of the globe have been recruited by such groups online and have gone on to join them in the Middle East and Northern Africa. However, a prominent legal hurdle arises when they wish to return to their nation of birth.

This article aims to analyse numerous instruments of international law, recent decisions by the European Court of Human Rights (ECtHR), diplomatic policies adopted by EU member nations, and Milanovic's concept of the "personal model of extraterritorial jurisdiction" to answer one primary question – are States under an "erga omnes" obligation to repatriate Foreign Terrorist Fighters?

Annotasiya

21-ci əsrdə İraq və Şam İslam Dövləti (İŞİD) və Əl-Qaidə kimi çoxsaylı qeyri-dövlət silahlı qruplarının yüksəlişi baş vermişdir. "Ağıllı" nəslin artımı və sosial media platformalarının geniş yayılması ilə dünyanın hər yerindən saysız-hesabsız insan bu cür qruplar tərəfindən onlayn olaraq işə götürülmüş və Yaxın Şərqdə və Şimali Afrikada onlara qoşulmağa davam etmişdirlər. Bununla belə, əsas hüquqi maneə onların doğulduqları ölkəyə geri qayıtmaq istədikləri zaman yaranır.

Bu məqalə beynəlxalq hüququn çoxsaylı sənədləri, Avropa İnsan Hüquqları Məhkəməsinin (AİHM) son qərarları, Aİ-yə üzv dövlətlər tərəfindən qəbul edilmiş diplomatik siyasətlər və Milanoviçin "ekstraterritorial yurisdiksiyanın şəxsi modeli" konsepsiyasını mühüm bir sualı cavablandırmaq üçün təhlil etmək məqsədi daşıyır – dövlətlər xarici terrorçuları repatriasiya etmək üçün "erga omnes" öhdəliyi daşıyırlarmı?

CONTENTS

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Special thanks to my research supervisor Dr Heather Katharine Allansdottir (DPhil, Oxon), Dr. Ruchi Anand (DPhil, Punjab University), Dr GS Bajpai (Vice Chancellor, Rajiv Gandhi National University of Law), and Library Staff, Rajiv Gandhi National University of Law.

Introduction

The ongoing problem of Foreign Terrorist Fighters (hereinafter FTFs) raises numerous perplexing questions, primarily under the United Nations' Conventions and Treaties, that States seem ill-equipped or unwilling to address. Diplomatic stances over the topic have also been erratic and lacked clarity. For example, Former President Donald Trump's tweet in February 2019[1] urging European Union (hereinafter EU) Member States to repatriate Islamic State (hence IS) fighters and the subsequent veto of a proposed UNSC Resolution[2] calling for the rehabilitation of FTFs.

The legal situation in States currently battling Non-State Armed Groups (hence NSAGs) on their territories, particularly in the Middle East, seems quite disingenuous. Iraq, for example, has relied on its sovereign right to prosecute FTFs but has also refused to charge them on a few occasions, citing a lack of jurisdiction and has urged states of nationality to repatriate them instead.[3]

The Member States of the EU have also distinct, and some might even say, antagonistic stances over the matter. While some states declared that FTFs should not possess any right to return and must face criminal law enforcement mechanisms locally, others have decided to repatriate them. The States favoring repatriation have cited "humanitarian grounds" and "national security concerns" as reasons to support their decision. However, these concerted measures, which have received approbation as "efforts undertaken to safeguard humanity", face the risk of being subject to aspersion if the international community views them as occasional acts of comity and amity. Instead, we must understand and perceive them as acts undertaken to comply with international legal obligations emanating from soft law treaties.

There is also a separate debate over the concept of extraterritorial

[1] BBC, Trump tells European Countries to Take Back Islamic State Fighters (2019), https://www.bbc.com/news/world-middle-east-47269887 (last visited Dec. 10, 2021).
[2] Edith M. Lederer, US Vetoes UN Resolution over Islamic State Fighters' Return (2020), https://www.washingtonpost.com/world/europe/diplomats-say-us-veto-likely-on-un-anti-terrorism-resolution/2020/08/31/0a11e308-ebb7-11ea-bd08-1b10132b458f_story.html (last visited Dec. 10, 2021).
[3] *See generally* UN, Report of the Special Representative of the Secretary-General for Children and Armed Conflict, A/HRC/49/58 (2018).

obligations,[4] which emanates from the personal model of extraterritorial jurisdiction or "ratione personae".[5] However, this article shall not delve into that concept in detail. While some scholars such as Spadaro have argued that the obligation to repatriate one's citizens of nationality might be an *erga omnes* one,[6] others such as Milanovic have debunked the theory, calling it impracticable as it would render the concept of Jurisdiction under International Law *"essentially limitless"*[7] and thus, redundant.

As this article shall focus solely on the ongoing situation of FTFs, it shall steer clear of the ongoing debate on the rights of the children of FTFs and their mothers and how their rights are intertwined since it demands separate consideration. However, it is incumbent upon the author to notify the readers that numerous issues covered in this article, for example, the rehabilitation of FTFs into civil society upon repatriation and the defence of "sovereign decision(s)" taken by States to refuse repatriation, are also relevant for the children of FTFs.

I. Defining and distinguishing FFs and FTFs

At the very outset, it is interesting to note that being a FF/FTF does not constitute a crime as per international law.[8] Moreover, partaking in hostilities with an armed group on foreign territory constitutes a *prima facie* violation of criminal law either, as per the domestic legal systems of most nations.[9] Nonetheless, ever since the beginning of the FTF problem, when numerous overseas citizens emigrated to various conflict zones across the Middle East and Northern Africa (hence MENA) region to join NSAGs, there have been a host of legal responses. The most significant one of those, possibly, is UNSC Resolution 2178, which defines Foreign Trained Fighters (FTFs) as *"individuals who travel to a State other than their States of residence or nationality for the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed*

[4] *See generally* Sanna Mustasaari, *Finnish Children or "Cubs of the Caliphate"?: Jurisdiction and State "Response-ability" in Human Rights Law, Private International Law, and the Finnish Child Welfare Act*, 7 Oslo Law Review (2020).
[5] *See generally* Marko Milanovic, *Al-Skeini and Al-Jedda in Strasbourg*, 23 European Journal of International Law (2012); *See also* Marko Milanovic, Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy (2011).
[6] *See* Alessandra Spadaro, *Repatriation of Family Members of Foreign Fighters: Individual Right of State Prerogative?*, 70 International and Comparative Law Quarterly (2020).
[7] Marko Milanovic, *The Murder of Jamal Khashoggi: Immunities, Inviolability and the Human Right to Life*, 20 Human Rights Law Review 1, 21 (2020).
[8] Robert Heinsch, Foreign Fighters and International Criminal Law *in* A. de Guttry, F. Capone and C. Paulussen (eds.), 165 (2016); Chiara Ragni, *International Legal Implications Concerning Foreign Terrorist Fighters*, 101 Rivista di Diritto Internazionale 1052, 1062-1063 (2018).
[9] Sandra Krähenmann, The Obligations under International Law of the Foreign Fighter's State of Nationality or Habitual Residence, State of Transit and State of Destination *in* A. de Guttry, F. Capone and C. Paulussen (eds.), 241 (2016).

conflict".[10]

Sadly, these responses have further erased the fine line between Foreign Fighters (hence FFs) and Foreign Trained Fighters (hence FTFs). Moreover, definitions of the terminologies mentioned above are inconsistent[11] and vary from scholar to scholar.

A. An analysis of 3 scholarly definitions of the phrase "Foreign Fighter" and "Foreign Trained Fighter"

1. Hegghammer's four elements (2013)

Hegghammer's definition of the terms *"Foreign Fighter"* and *"Foreign Trained Fighter"* lists four quintessential requirements before classifying a person as an FF or FTF, which Hegghammer seemingly considers being the same thing:[12]

1. who has joined and conducts operations within the confines of an insurgency;
2. is not a citizen of the conflict state and does not have kinship links to its warring factions;
3. is not affiliated with or to a military organization, and;
4. is unpaid.

2. David Malet

Malet defines Foreign Fighters as *"noncitizens of conflict states who join insurgencies during civil conflicts"*.[13]

3. Francesca Capone

Capone has defined FFs as *"individuals, driven mainly by ideology, religion or kinship, who leave their country of origin or their country of habitual residence to join a party engaged in an armed conflict"*.[14] On the other hand, Capone has defined FTFs as *"individuals who travel to a State other than their States of residence or nationality for the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict"*.[15]

B. Critique

Although the earlier definitions may seem comprehensive, they also lead to new legal questions. Hegghammer and Malet's definitions are highly

[10] *See generally* United Nations Security Council Resolution 2178 on Foreign Terrorist Fighters (2014).
[11] David Malet, *Foreign Fighter Mobilization and Persistence in a Global Context*, 27 Terrorism and Political Violence 454, 455-459 (2015).
[12] Thomas Hegghammer, *The Rise of Muslim Foreign Fighters: Islam and the Globalization of Jihad*, 35 International Security 53, 57-58 (2011).
[13] David Malet, Foreign Fighters: Transnational Identity in Civil Conflicts, 9 (2015).
[14] *See* Andrea de Guttry, Francesca Capone and Christophe Paulussen, Introduction *in* A. de Guttry, F. Capone and C. Paulussen (eds.) (2016).
[15] *Id*., 2.

problematic on numerous grounds. They are ubiquitous and fail to distinguish between an FF and FTF, thus blurring the essential difference between the two. The mere location of a fighter abroad does not necessarily mean that they received training to partake in armed hostilities there or vice versa. Moreover, international law has no legal definition of "insurgency", although the Max Planck Encyclopedia provides a vague description by utilizing the term "armed group".[16]

Although Capone's definition is far more structured and inclusive and makes a reasoned distinction between the two terms, it does not consider numerous factors such as the willingness of the FF/FTF and thoroughly neglects deceitful recruitment, which is a result of fraud, coercion, or brainwashing – which is also the case with other two definitions.

C. Conclusion: the three core elements that define FFs and FTFs

From the definitions mentioned earlier, it becomes clear that two central distinguishing factors discern an FF and FTF:[17]

1. Moving from one location to another is not their *usual* place of residence. Certain scholars such as Hegghammer have argued that the concerned individual(s) must possess a relationship of foreignness to the location where they are engaged as FFs or FTFs and have identified foreignness based on numerous factors, including citizenship, ethnicity, and habitual place of residence.[18] However, this presumption falls in light of the recent trend of multiple members of overseas diaspora communities going back *home* and engaging in armed conflict in an armed or support capacity.[19] Interestingly, scholars such as Hegghammer have not classified such cases as FFs or FTFs, choosing to address them as "returning diaspora members" instead.[20]
2. The concerned person is a "fighter" and fights for a particular cause, organization, some form of reward, or even under duress or coercion.

1. UNSC 2178 (contd.)

The Security Council Resolution specifically mentioned acting against individuals with a *"terrorist intent"*, which makes the entire situation boil down to state practice and risks putting many vulnerable individuals, such as

[16] *See generally* Emily Crawford, Insurgency (2015). Available at: https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e308?prd=EPIL (last visited Dec. 10, 2021).
[17] John Ip., *Reconceptualizing the Legal Response to Foreign Fighters*, 69 International & Comparative Law Quarterly 103, 105 (2019).
[18] Hegghammer, *supra* note 12.
[19] Sandra Kraehenmann, *Foreign Fighters Under International Law*, 7 Academy Briefing, 49-53 (2014).
[20] Guttry, Capone and Paulussen, *supra* note 14, 58.

non-combatants or sexually enslaved people,[21] within this bracket.

As it is tough to determine whether the concerned person(s) has/have committed any violations on NSAG – occupied territory, most nation-states base their categorization on a loose interpretation of the word *"affiliated"*. This policy vagueness has resulted in more than 20 EU Member States blanketly outlawing yet another vague term – *"involvement"* – in the *"affairs"* of any NSAG.[22] Some common law nations, such as Australia, have explicitly outlawed entering a *"declared terrorist area"*, as notified by its Ministry of Foreign Affairs.[23]

2. UNSC Resolution 2368 & 2396

The United Nations reiterated its commitment towards repatriation in UNSC Resolutions 2368[24] and 2396.[25] In comparison, the former resolution focuses on FTFs departing from conflict-ridden areas, returning to their *"home countries"* (although there is a lack of clarity over whether this phrase means their place of origin or the place where they are ordinarily resident).[26]

II. The repatriation of FTFs under the international law regime: obligation or discretion?

With the collapse of ISIS, countless FTFs (including children) remain stranded in refugee camps. The 2019 United Nations Security Council Counter-Terrorism Enforcement Directorate Brief[27] observes that these campsites are ill-equipped to meet even the most basic healthcare and nutritional standards. The situation has created a lot of pressure on States to repatriate their citizens.[28] The case has also snowballed into a diplomatic spat, with certain States asking others to repatriate their citizens. Numerous human rights advocates have argued in favor of and against[29] repatriating and prosecuting FTFs.

This situation raises the question – of whether the existing Public International Law framework considers the repatriation of FTFs by their

[21] Samar El Masri, *Prosecuting ISIS for the Sexual Slavery of the Yazidi Women and Girls*, 22 The International Journal of Human Rights 1047, 1052-1054 (2018).
[22] Bibi van Ginkel, Eva Entenmann, The Foreign Fighters Phenomenon in the European Union Profiles, Threats and Policies, 6 (2016).
[23] *See* UN Doc. S/2015/358, para. 54 (2015); Similarly, France has broadly criminalized "having been abroad in a theatre of operations of terrorist groups". *See* Ginkel, Entenmann, *supra* note 23, 32.
[24] *See generally* United Nations Security Council Resolution 2368 (2017).
[25] *See generally* United Nations Security Council Resolution 2396 (2017).
[26] *Supra* note 12.
[27] United Nations Security Council Counter-Terrorism Enforcement Directorate, The Repatriation of ISIL – Associated Children, 5 (2019).
[28] Margherita Stevoli, UN Report Should Pressure Countries to Repatriate Foreign Fighters (2020), https://www.justsecurity.org/68405/un-report-should-pressure-countries-to-repatriate-foreign-fighters/ (last visited Dec. 10, 2021).
[29] Kilian Roithmaier, Germany and Its Returning Foreign Terrorist Fighters: New Loss of Citizenship Law and the Broader German Repatriation Landscape (2019), https://icct.nl/publication/germany-and-its-returning-foreign-terrorist-fighters-new-loss-of-citizenship-law-and-the-broader-german-repatriation-landscape/ (last visited Dec. 10, 2021).

States of origin as an obligation or a discretion?

A. The present framework

Although numerous international humanitarian law (hence IHL) provisions widely recognize the duty of States to repatriate persons subjected to detention during an armed conflict immediately after the cessation of hostilities,[30] there is no specific answer regarding the situation of FTFs. Apart from a few unique cases such as the ICCPR, there is no requirement on States to repatriate fugitives held in their custody.[31] However, there are numerous legal instruments in favor of considering repatriation as a mandatory obligation under international law.[32]

Certain scholars like Widagdo argue that state practice in the field of IHL mandates *"states to investigate and prosecute war crimes committed by their nationals"*.[33] They primarily utilize the provisions of UNSC Resolution 1373,[34] which emphasizes the legal obligation of States to repatriate and prosecute individuals accused of war crimes and terrorist activities to put forth their case. However, it is interesting to note here that many States have refuted this argument on numerous grounds, including national security and have also sought refuge in the idea of virtual trials.[35]

With the specific context of FTFs in mind, UNSC Resolution 2178[36] elucidates the obligation to repatriate, elaborated above, which stresses that it is unjust to subject FTFs to desertion in the hope that other States might assist them. Civil Society Organizations have also insisted upon using the Integrated Disarmament Demobilization and Reintegration Standards (IDDRS) approach[37] to facilitate the re-inclusion of FTFs and their children into civil society – which has also found support from the families of victims of crimes perpetrated by NSAGs.[38]

[30] The Geneva Convention relative to the Treatment of Prisoners of War, art. 109 (3) (1949).
[31] Dan E. Stigall, Repatriating Foreign Fighters from Syria: International Law and Political Will (Part 1) (2020), https://www.justsecurity.org/69244/repatriating-foreign-fighters-from-syria-international-law-and-political-will-part-1/ (last visited Dec. 10, 2021).
[32] *See generally* Vincent Chetail, *Introduction: Voluntary Repatriation in Public International Law: Concepts and Contents*, 23 Voluntary Repatriation: Achievements & Prospects (2004).
[33] Setyo Widagdo, Kadek Wiwik Indrayanti, and A. A. A. N. Saraswati, *Repatriation as a Human Rights Approach to State Options in Dealing with Returning ISIS Foreign Terrorist Fighters*, 11 SAGE Open July-September 2021, 9 (2021).
[34] *See generally* United Nations Security Council Resolution 1373 (2001).
[35] *See* Liz White, Towards a New Normal: Virtual Proceedings under International Criminal Law in the Age of COVID-19 (2021). Available at: https://www.jtl.columbia.edu/bulletin-blog/towards-a-new-normal-virtual-proceedings-under-international-criminal-law-in-the-age-of-covid-19 (last visited Dec. 6, 2021).
[36] *See generally* United Nations Security Council Resolution 2178 (2014).
[37] *See* the IDDRS. Available at: https://www.unddr.org/the-iddrs/ (last visited Dec. 6, 2021).
[38] Ian Cobain, Vikram Dodd, Put "Beatles" ISIS Fighters on Trial, Victims' Families say, The Guardian (2018), https://www.theguardian.com/world/2018/feb/09/victims-relatives-welcome-capture-of-british-isis-fighters-the-beatles (last visited Dec. 6, 2021).

B. Approaches for the repatriation of FTFs

The issue of FTFs lodged in prisons, and refugee camps worldwide presents an unprecedented challenge. EU Member States have formulated numerous policies and methodologies in response to the current conundrum. Although it is clear that there is no "one size fits all" solution to the current problem, any prospective solution must respect the benchmarks set by the existing international human rights law (hence IHRL) framework. This conundrum leads us to the raging debate regarding the choices the Member States possess and must opt for regarding FTFs. Making this choice is easier said than done, as the solution must be long-lasting and compliant with the IHRL framework.

1. The first choice: prosecution by national courts

The first choice is to ensure the trial and subsequent prosecution of FTFs by the national courts or other juridical authorities, such as those enshrined under Islamic law.[39] A well-entrenched principle of international law is that the sovereign states only control people and objects situated "within the(ir) territory".[40] Thus, each Member State has the authority to try and prosecute breaches of criminal law within its jurisdiction. It is important to note that the concept relies upon the actual location of the perpetration of the crime, the "territorial principle"[41] - supported by the *Ta'zir* branch of Sharia law.[42] According to this principle, it is best to try individuals in the national courts of the territory where the crime has occurred on account of more accessible witnesses and evidence.[43] The success of this principle is contingent upon a strong government and stable judicial structure.[44] Therefore, if we rely upon this principle, Iraqi and Syrian Courts possess the primary jurisdiction to try and prosecute FTFs related to ISIS and Al Qaeda – as has also been claimed by a UNGA report.[45]

Although this theory might sound *prima facie* reasonable, it is still vital to underscore that the trial procedure must be fair, just, and reasonable. A proper judicial and criminal law enforcement system is essential in promoting

[39] Rudolph Peters and Peri Bearman, The Judge and the Mufti, *in* Ashgate Research Companion to Islamic Law, 83-102 (2014).
[40] *See generally* Johan D. Van Der Vyver, Sovereignty *in* D. Shelton (eds.) (2013).
[41] Berge Wendell, *Criminal Jurisdiction and the Territorial Principle*, 30 Michigan Law Review 238, 238-269 (1931).
[42] *See generally* Hasan Pourbaferani, *Foundations and Evolution of Nationality-Based Jurisdiction*, 4 Criminal Law Research (2017).
[43] *Ibid.*
[44] *See generally* Tanya Mehta, Bringing (Foreign) Terrorist Fighters to Justice in a Post ISIS Landscape Part I: Prosecution by Iraqi and Syrian Courts (2017). Available at: https://icct.nl/publication/bringing-foreign-terrorist-fighters-to-justice-in-a-post-isis-landscape-part-i-prosecution-by-iraqi-and-syrian-courts/ (last visited Dec. 6, 2021).
[45] United Nations General Assembly, Report of the United Nations High Commissioner for Human Rights on the Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, para. 44 (2014). Available at: https://undocs.org/A/HRC/28/28 (last visited Nov. 25, 2021).

a democratic way of life,[46] building trust and legitimacy in the institutions of governance, and protecting human rights.[47] Sadly, the case regarding trials of FTFs in Iraq shows otherwise, according to a 2019 UN-OHCHR report.[48]

When a state claims jurisdiction to a crime, it implies that it is able and willing to prosecute suspects as per the IHRL regime effectively.

However, scholars[49] and courts have also liberally construed the meaning of this phrase to include the concept of extraterritorial jurisdiction,[50] mainly where human rights violations are involved – which scholars of Islamic law have also acknowledged.[51] Moreover, the idea of a place of perpetration has received criticism from scholars on account of being ill-suited for the jurisdictional determination of transnational crimes and cybercrimes.[52] Thus, it is crucial to distinguish between the right to prosecute and the State's willingness to do so.

Widagdo very rightly notes that there can be three main reasons behind a State's unwillingness to exercise its right to prosecute, which we can sum up as follows:[53]

(i) It is willingly protecting the concerned person(s) by making sure that they do not have to face the criminal law enforcement mechanism;
(ii) The State does not intend to bring the concerned individuals to justice (this can also be the case because the State inherently believes that no cause for action, even though it possesses the right to intervene), or;
(iii) The proceedings are improper or impartial.

The concept of an *inability to prosecute* under international criminal law[54] (although the inability to prosecute, itself, has been subjected to heated academic debate),[55] in contrast, can be determined by two factors[56] – by a

[46] White, *supra* note 35.
[47] *See generally* United Nations, Iraq: UN Report on ISIL Trials Recognises Efforts and Raises Concerns (2020). Available at: https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25504&LangID=E/ (last visited Nov. 25, 2021).
[48] *Ibid*.
[49] Francesca Capone, Children in Conflicts as Victims and Perpetrators? Reassessing the Debate on Child Soldiers in light of the Involvement of Children with Terrorist Groups (2019), http://www.qil-qdi.org/the-children-and-wives-of-foreign-isis-fighters-which-obligations-upon-the-states-of-nationality/ (last visited Nov. 25, 2021).
[50] Hugh King, *The Extraterritorial Human Rights Obligations of States*, 9 Human Rights Law Review 521, 526 (2009).
[51] *See generally* Saber Nivarani, Ehsan Javed, *Extraterritorial Applicability of International Obligations of States in the Field of Economic, Social and Cultural Rights*, 18 Pizhūhish-i ḥuqūq-i ʻumūmī (2017).
[52] *See generally* Mireille Hildebrandt, *Extraterritorial Jurisdiction to Enforce in Cyberspace? Bodin, Schmitt, Grotius in Cyberspace*, 63 University of Toronto Law Journal (2013).
[53] *Supra* note 35.
[54] Rome Statute, art. 17 (1998).
[55] *See generally* Simon M. Meisenberg, *Complying with Complementarity? The Cambodian Interpretation of the Rome Statute of the International Criminal Court*, 5 Asian Journal of International Law (2015).
[56] *See generally* Koen D. Feyter, Globalisation and Common Responsibilities of States (2013).

substantial collapse of,[57] or the unavailability of a free and fair trial[58] under the national jurisdiction. International criminal law, by design, allows the international community to play a role in case the territorial State is not willing or able to prosecute the FTFs by applying the principle of subsidiarity (although that too may come with its perils).[59] The principle allows for triggering the jurisdiction of other States, or even international courts such as the ICC, which can avoid judicial impunity by following universally accepted minimum standards of a free trial.

2. Prosecution by national courts in Iraq and Syria: a brief overview

Iraq

Numerous reports[60] have previously highlighted the extent to which fair trials are possible in Iraq and Syria, along with the challenges that come along with it. Although Iraq and Syria have previously prosecuted numerous FTFs, it has shown an unwillingness to do so effectively.[61] According to a 2018 UN Special Representative Report,[62] Iraq prosecutes adults under the garb of sovereignty. However, it asks nations to repatriate children, classified as a "threat to national security", similar to Canada's conduct in the Omar Khadr case.[63]

Although Article 19 of the Iraqi Constitution and Articles 123 and 126 (b) of the Iraqi Code of Criminal Procedure guarantee a fair trial to all accused,[64] reports show[65] that the Iraqi State has failed to provide the requisite safeguards. Iraq's trial proceedings, inhumane detention conditions, and the regular usage of the death penalty[66] have all received criticism from the international community. These criticisms are in addition to the numerous testimonies of torture in criminal law enforcement institutions in the

[57] *See generally* Spencer Thomas, *A Complementarity Conundrum: International Criminal Enforcement in the Mexican Drug War*, 45 Vanderbilt Journal of Transnational Law (2012).
[58] *See generally* Yvonne McDermott, *The Admissibility and Weight of Written Witness Testimony in International Criminal Law: A Socio-Legal Analysis*, 26 Leiden Journal of International Law (2013).
[59] *See generally* Theresa Reinold, *The Promises and Perils of Subsidiarity in Global Governance: Evidence from Africa*, 40 Third World Quarterly (2019).
[60] Human Rights Watch, Iraq: Key Courts Improve Trial Procedures but changes needed in Laws, Response to Torture (2019), https://www.hrw.org/node/327851/printable/print/ (last visited Dec. 6, 2021).
[61] Martin Chulov, Nadia Al-Falour, "They Deserve No Mercy': Iraq Deals Briskly with accused 'Women of ISIS" (2018), https://www.theguardian.com/world/2018/may/22/they-deserve-no-mercy-iraq-deals-briskly-with-accused-women-of-isis/ (last visited Dec. 6, 2021).
[62] United Nations General Assembly, Children and Armed Conflict: Report of the Special Representative of the Secretary-general for Children and Armed Conflict, para. 18 (2021).
[63] *See generally* Ryan Liss, *The Abuse of Ambiguity: The Uncertain Status of Omar Khadr under International Law*, 50 Canadian Yearbook of International Law (2013).
[64] *See generally* Dr. BJH Almusawi, *The Right to a Fair Trial under Iraqi Law*, 17 PalArch's Journal of Archaeology of Egypt/Egyptology (2020).
[65] UN, *supra* note 62.
[66] OHCHR, Iraq: Wave of Mass Executions Must Stop, Trials are Unfair – UN Experts (2020), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26526&LangID=E/ (last visited Dec. 25, 2021).

country,[67] which is against the principles of IHRL. An OHCHR investigation[68] that analyzed 800 trial proceedings between May 2018 and October 2019 concluded that breaches of fair trial standards created immensely disadvantageous situations for defendants compared to the prosecution, which led to biased trials.

Syria

The Syrian Democratic Forces (SDF) does not possess international legitimacy or recognition and is thus incapable of administering a fair trial – creating numerous concerns under the IHL framework.[69] The Kurdish-led administration has long expressed its inability to host prisoners and their family members in camps, where resources are limited and conditions are dire. In 2019, it also pushed forth to create an international tribunal for judicial redressal,[70] a suggestion that received criticism from scholars (more on this below).[71] In 2021 Masloum Abdi, the Head of the SDF, even called upon States to repatriate their citizens.

Scholars rightly note that the principle of *aut dedere aut judiciare* exists as a general norm of Customary IHL[72] and would thus, bind non-state parties.[73] Thus, the rights of states to prosecute individuals must be analysed in light of their ability to do so effectively and reasonably. Scholars such as Hautala have also the ECtHR Case of *Öcalan v Turkey*[74] *to* support their case that transferring terrorists from non-state to state custody is permissible as per the IHRL framework.

3. The second choice: prosecution by the ICC or an international criminal tribunal

As previously requested by the SDF, the second option is for the ICC, or

[67] OHCHR, Human Rights in the Administration of Justice in Iraq: Trials under the Anti-Terrorism Laws and Implications for Justice, Accountability and Social Cohesion in the Aftermath of ISIL. Available at: https://www.ohchr.org/Documents/Countries/IQ/UNAMI_Report_HRAdministrationJustice_Iraq_28January2020.pdf/ (last visited Dec. 25, 2021).

[68] Nivarani, Javed, *supra* note 51.

[69] *See generally* H. Cuckyens, C. Paulussen, *The Prosecution of Foreign Fighters in Western Europe: The Difficult Relationship between Counter-Terrorism and International Humanitarian Law*, 24 Journal of Security and Conflict Law (2019).

[70] BBC, Islamic State Group: Syria's Kurds call for International Tribunal (2019), https://www.bbc.com/news/world-middle-east-47704464 (last visited Dec. 25, 2021).

[71] The WSJ Editorial Board, Europe's ISIS Abdication: An International Tribunal is the Wrong Way to Punish Terrorists (2019), https://www.wsj.com/articles/europes-isis-abdication-11560553041 (last visited Dec. 25, 2021).

[72] *See generally* Tilman Rodenhauser, *International Legal Obligations of Armed Opposition Groups in Syria*,11 International Review of Law (2015); *See also* Michael J. Kelly, *Cheating Justice by Cheating Death: The Doctrinal Collusion for Prosecuting Foreign Terrorists – Passage of Aut Dedere Aut Judicare into Customary Law & Refusal to Extradite Based on the Death Penalty*, 20 Arizona Journal of International and Comperative Law 491, 500 (2003).

[73] *See generally* Dan E. Stigall, *The Syrian Detention Conundrum: International and Comparative Legal Complexities*, 11 Harvard National Security Journal (2020).

[74] Öcalan v. Turkey, 46221/99 (2005). Available at: http://hudoc.echr.coe.int/eng?i=001-69022 (last visited Dec. 24, 2021).

any other international tribunal explicitly established for this purpose, to take over the prosecution and try the FTFs per international law. Although this option seems *prima facie* amenable under the provisions of IHRL, it may face a plethora of hurdles.

Kenny very rightly notes that all 3 routes of exercising jurisdiction:[75]

i) Via an SC Resolution;

ii) Based upon the alleged perpetrator's nationality;

iii) Territory where the offence occurred (mainly Iraq and Syria, who are not parties to the Rome Statute) presents a host of insurmountable political and legal challenges.

The Rome Statute does not explicitly confer the ICC jurisdiction to prosecute FTFs, and thus jurisdictional hurdles may prevent FTFs from being tried by the ICC.[76] Scholars such as Hautala have also raised concerns about the violation of the *nullum crimen sine lege, nulla poena sine lege* principle (known as the principle of complementarity), which is also recognised by Articles 22 and 23 of the Rome Statute - arguing that the principle may thwart the ICC from exercising jurisdiction over EU nationals.[77] Another major hurdle would be the safe and humane judicial custody of the thousands of FTFs who might be prosecuted.

In this regard, the Government of Sweden thought that the creating a new international tribunal could do the job and has time and again sought support from fellow EU member nations to do so, with the Interior Minister of the country labelling it as *"a moral and symbolic issue"*. In 2019, it held an Expert Meeting with representatives from 4 other nations and the EU in this regard. However, this plan seems to have failed because any international tribunal focuses on the "big fish",[78] and would consequently prosecute only a minuscule number of ISIS members in comparison to those who could be held culpable – similar to ICTR[79] and ICTY,[80] which prosecuted merely 254

[75] *Ibid.*

[76] *See generally* Coman Kenny, *Prosecuting Crimes of International Concern: Islamic State at the ICC?*, 33 Utrecht Journal of International and European Law (2017).

[77] *See generally* Kaisa Hautala, There and Back Again? Prosecuting the Foreign Terrorist Fighters of ISIS (2020). Available at: https://helda.helsinki.fi/bitstream/handle/10138/324581/Hautala_Kaisa_Tutkielma_2020.pdf?sequence=2&isAllowed=y (last visited Dec. 24, 2021).

[78] United Nations Security Council Counter-Terrorism Committee, Security Council Guiding Principles in Foreign Terrorist Fighter: The 2015 Madrid Guiding Principles + 2018 Addendum, Guiding Principle 46, 36 (2018). Available at: https://www.un.org/sc/ctc/wp-content/uploads/2019/09/Security-Council-Guiding-Principles-on-Foreign-Terrorist-Fighters.pdf (last visited Dec. 24, 2021).

[79] UNICTR, The ICTR Indicted 93 Individuals for Genocide and Other Serious Violations of International Humanitarian Law Committed in 1994 (2019). Available at: https://unictr.irmct.org/sites/ unictr.org/files/publications/ictr-key-figures-en.pdf (last visited Dec. 24, 2021).

[80] UNICTY, The ICTY Indicted 161 Individuals for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia (2019). Available at: https://www.icty.org/en/cases/key-figures-cases (last visited Dec. 24, 2021).

individuals combined (respectively, 93 and 161) for genocides that impacted well over 1 million innocent individuals. Thus, both options seem unfeasible.

4. The third choice: active prevention

The most common way of doing is to pass blanket measures stripping the citizenship of the FTFs under the garb of "national security", as seen in Indonesia. The second-most common method is to utilize sophisticated legal arguments to contest the existence of the FTFs' citizenship in the first place,[81] as seen in a host of EU jurisdictions – most notably in the case of ECtHR case of *Ghoumid & Ors v France*.[82] The third choice, employed by numerous States, but criticized by many as shirking of liability rather than a solution, is to actively prevent the re-entry of FTFs through legislative, administrative, and other logistical means. The suicidal human rights ramifications of such measures and their impact on the most fundamental constituents of the human rights framework, such as the Freedom of Movement, have been studied in great detail by scholars like Paulussen.[83] They argue that the same is in violation of common Article 3 of the Geneva Conventions and is counter-productive to the prevention of terrorism.[84] The UNGA has also acknowledged that the rise of counter-terrorism measures based on loose and vague criteria is alarming and must be avoided to prevent statelessness[85] and uphold the 2015 Madrid Guiding Principles and the 2018 Addendum.[86] It is important to note that no judicial process can erode the *erga omnes* due-process obligations imposed by International Law and Natural Law which include but is not limited to the presumption of innocence and the right to a free and fair trial and appeal.[87]

Although the *Nottebohm*[88] judgement of the ICJ stipulated that each State possesses the right to formulate and regulate the acquisition and deprivation

[81] Adam Hoffman, Marta Furlan, Challenges Posed by Returning Foreign Fighters (2020). Available at: https://extremism.gwu.edu/sites/g/files/zaxdzs2191/f/Challenges%20Posed%20by%20Returning%20Foreign%20Fighters.pdf (last visited Dec. 25, 2021).

[82] *See* Ghoumid and Ors v. France, 52273/16 (2007).

[83] *See generally* Christophe Paulussen, *Stripping Foreign Fighters of their Citizenship: International Human Rights and Humanitarian Law Considerations*, 103 International Review of the Red Cross (2021).

[84] Christophe Paulussen, Countering Terrorism through the Stripping of Citizenship: Ineffective and Counterproductive (2018), https://icct.nl/publication/countering-terrorism-through-the-stripping-of-citizenship-ineffective-and-counterproductive/ (last visited Dec. 24, 2021).

[85] United Nations, Report of the United Nations High Commissioner for Human Rights on the Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, para. 50 (2010). Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/107/07/PDF/G1110707.pdf?OpenElement (last visited Dec. 10, 2021).

[86] *Supra* note 78.

[87] *See generally* Marisse Hill, *No Due Process, No Asylum, and No Accountability: The Dissonance between Refugee Due Process and International Obligations in the United States*, 31 American University International Law Review (2016).

[88] Liechtenstein v. Guatemala, ICJ 1, 20 (1956).

of citizenship and nationality through domestic legislative means, the IHRL framework may place reasonable restrictions[89] on the same to prevent the spread of terrorism. Moreover, the Universal Declaration of Human Rights (UDHR) and 1961 Convention on the Reduction of Statelessness stipulate that no person shall be deprived of their nationality if it leads to statelessness. These instruments are further supplemented by the International Covenant on Civil and Political Rights, 1976, which prohibits arbitrarily denying the right to return to a person's own country. Scholars also agree that any actions that end up in Stateless or the non-conferral of rights that, as per International Law, can only be enjoyed by citizens can only be arbitrary.[90] The UNHRC has also noted on numerous occasions that any actions related to the deprivation of citizenship must be necessary, proportional, and reasonable.[91] The UNHRC has also stated that there are very few cases where the denial of entry would be considered appropriate.

An alarming new trend is the increasing use of the "national security" defence by States to strip FTFs of their nationality or deny them their citizenship.[92] The primary consideration in such a case should be whether the threat posed by repatriated fighters is greater than that of a floating population of radicalised individuals. For National Security threats to be legitimate, the threat of harm must be discernible and not abstract.[93]

It is crucial to study and consider the IHRL regime while formulating policies to combat terrorism. States worldwide have been criticised for developing vague or archaic definitions of terrorism and what constitutes a terrorist act, which consequently leads to policy decisions and administrative actions that are perverse to International Law and broaden the scope of activities that can lead to statelessness.[94] As harsh as it may seem to the humble policymaker – States must be mindful that the contours of their administrative actions ought to lie within the limits of International Law, regardless of disloyal their citizens have been. Thus, irrespective of the fact that terrorism continues to pose a constant threat to international peace and security, arbitrary stripping of citizenship not only creates additional hurdles but is, without question – a violation of International Law.

Thus, the above-mentioned conditions make dealing with FTFs under the

[89] *See generally* Dai Tamada, *Applicability of the Excess of Power Doctrine to the ICJ and Arbitral Tribunals*, 18 The Law and Practice of International Courts and Tribunals (2018).
[90] Sandra Mantu, Contingent citizenship: The Law and Practice of Citizenship Deprivation in International, European and National Perspective, 31 (2015).
[91] *See generally* UNHRC, Human Rights and Arbitrary Deprivation of Nationality: Report of the Secretary-General, A/HRC/19/43 (2011). Available at: https://www.refworld.org/docid/4f181ef92.html (last visited Dec. 24, 2021).
[92] *See generally* Lucia Zedner, *Citizenship Deprivation, Security, and Human Rights*, 18 European Journal of Migration and Law (2016).
[93] *See generally* Helen Duffy, *"Foreign Terrorist Fighters": A Human Rights Approach?*, 29 Security and Human Rights Journal (2019).
[94] *See generally* Rumyana Grozdanova, *"Terrorism" – Too Elusive a Term for an International Legal Definition?*, 61 Netherlands International Law Review (2014).

Active Prevention approach immensely challenging and highly problematic.

5. The fourth choice: prosecution by the State of origin

Thus, the fourth and final choice is to subject the FTFs to a free and fair trial and appeal in their states of origin. Although there are differing opinions on what the term encompasses,[95] the authors shall presume that the term is analogous to the phrase *"country of his nationality"* as contained in Article 1 A (2) of the Refugee Convention, 1951.[96]

Although numerous states have expressed their willingness to only repatriate children by classifying them as victims, numerous other countries such as Australia, Germany, Tajikistan, the United States, and the United Kingdom have expressed their willingness to repatriate and prosecute all their citizens. Countries such as Uzbekistan, which have previously faced conflict situations, have recognized the risk of not repatriating FTFs and have chosen to repatriate, prosecute, and subsequently integrate them into society – a model which the UN has hailed. In the context of this scenario, as explained above, it is imperative to note the UNSR's observation that the current approach is possibly the only one compliant with the provisions of international law and befits the increasingly perilous situation faced by FTFs. This approach, along with the concerns mentioned above, has also been echoed in UNSC Resolutions 2178 and 2396. The UNCTC has also underscored that we must distinguish between the FTFs and their family members who might be facing severe criminal charges and has favoured this approach.[97] An open letter by the European Council on Foreign Relations urges adopting the current system as a long-term solution for state security since rehabilitation may reduce the risk of terrorist activities by such individuals – which have already occurred, such as the 2021 Auckland Countdown Stabbing. There is also a need for Border Forces to work together through data sharing to prevent any future terrorist attacks of a similar nature and collect battlefield evidence – although the assessment of the same by Courts of the State of Origin still remains up for debate. It is also essential to delve into the extent to which the 2021 UNCTED Guidelines[98] regarding battlefield evidence will be followed and how adherence to those guidelines

[95] *See generally* Eric Fripp, *Deprivation of Nationality, "The Country of his Nationality" in Article 1A (2) of the Refugee Convention, and Non-Recognition in International Law*, 28 International Journal of Refugee Law (2016); *See also* T. Mehra, C. Paulussen, The Repatriation of Foreign Fighters and Their Families: Options, Obligation, Morality and Long Term Thinking (2019), https://icct.nl/publication/theirepatriation-of-foreign-fighters-and-their-families-options-obligations-morality-and-long-term-thinking (last visited Dec. 24, 2021).

[96] *Ibid.*

[97] *Supra* note 78.

[98] *See* UNCTAD, Guidelines to Facilitate the Use and Admissibility as Evidence in National Criminal Courts of Information Collected, Handled, Preserved and Shared by the Military to Prosecute Terrorist Offences (2021). Available at: https://www.un.org/securitycouncil/ctc/sites/www.un.org.securitycouncil.ctc/files/files/documents/2021/Jan/cted_military_evidence_guidelines.pdf (last visited Dec. 24, 2021).

will be monitored in a situation of armed conflict. Nonetheless, avoiding such the FTF situation may only aggravate it further and reducing the number of detainees through repatriation might be the only possible solution to alleviate this crisis.

Of course, repatriation of such FTFs comes with its own risks, and it is impossible to guarantee a 100% success rate at rehabilitating them. However, not repatriating them possesses more significant risks. They may still engage in terrorist activities by utilising the skills gained during their stints with ISIS or any other NSAG. Thus, prosecuting them and subsequently rehabilitating them while focusing on rekindling their relationship with their families is a desirable option.[99]

Although this model seems to be the most feasible, it may also create a host of new issues when the concerned individual possesses more than one nationality. In a worst-case scenario, such a situation may lead to a buzzer-round like a situation where all states take arbitrary measures to deny citizenship and consequently shirk liability, whereas the last State left will to eat the hot potato.

Conclusion

Although the defeat of ISIS is a cause for celebration for the international community, the consequent terrorist attacks, which continue into 2022, coupled with the worsening FTF situation, must be seen as a cause for alarm. Thousands of FTFs are detained and tortured in inhumane conditions with no food, sanitation, or healthcare provisions – especially neo-natal. Thus, any discussion regarding the obligations of States pertaining to FTFs must be encouraged, regardless of how controversial or divisive they may be perceived.

Although the choice of repatriation is undoubtedly finding consensus in the international community, the means and methods for doing so, along with the risk mitigation strategies in light of employing this decision, remain up for debate. Although it is true that International Law provides no clear answer, the existence of legal instruments such as UNSC Resolutions 2178 and 2396, which fall within the binding ambit of Chapter VII of the UN Charter, provide hope and underscore the need for expeditious resolution of the current crisis.

However, it is sad to see that many States have shunned their obligations under International Law and have adopted divergent and, according to some opinions, even illegal approaches[100] to deny FTFs of their rights – as evidenced by the host of measures taken under the third choice. Although it is understandable that there is no "one size fits all" solution for all States, all options seem more favourable than the third choice.

[99] Mehra, Paulussen, *supra* note 95.
[100] *Supra* note 79.

The first option, prosecution of the FTFs in Iraqi or Syrian national courts, seemed *prima facie* reasonable. However, unfair judicial processes and inhumane detention conditions mean that this option should be avoided. The second option, prosecution ICC or International tribunal, also faces legal issues on account of the complementarity principle, added by political allegations of prosecuting "big fish" only. If a State chooses to avoid this approach, it should be presumed that the State implicitly acknowledges that the international community must take responsibility for the situation.

This leaves us with the fourth and final choice – prosecution by the States of Origin. Although the approach faces serious issues related to evidence and dual nationality, it is the best possible one as it can comply with the IHRL regime – at least in principle.