

# Repatriation as a Human Rights Approach to State Options in Dealing with Returning ISIS Foreign Terrorist Fighters

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# Repatriation as a Human Rights Approach to State Options in Dealing with Returning ISIS Foreign Terrorist Fighters

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## Abstract

Since the territorial defeat of the Islamic State of Iraq and Syria (ISIS), debates and questions on what states should do (individually and or collectively) with foreign terrorist fighters (FTFs) from their countries have become more relevant yet controversial. This article critically investigates whether states of origin have an obligation to repatriate ISIS FTFs under international law as well as what options are available for such countries in dealing with returning ISIS fighters based on a human rights approach. This article also highlights that the current international legal framework is generally moving toward the repatriation of FTFs for the purpose of prosecution and rehabilitation. While states have taken diverse and controversial approaches in dealing with fighters who wish to return, the option to repatriate and fairly prosecute them in their countries of origin is seen as the most comprehensive and preferred approach, not only for the countries of origin but also for the international community as a whole in the long term.

## Keywords

repatriation, human rights, foreign terrorist fighters, international law, ISIS

## Introduction

The phenomenon of foreign fighters is nothing new in the global arena (Flores, 2016; Metodieva, 2018; Schmid, 2015; United Nations Office on Drugs and Crime [UNODC], 2017). What is new is the size of the phenomenon as well as the fact that it is increasingly conceptualized from the perspective of terrorism (Bilkova, 2018). This has led to the emergence of the term foreign terrorist fighters (FTFs), which first developed in the mid-2010 due to its global scale. The FTF concept was further introduced in United Nations Security Council Resolutions (UNSCRs) 2170 and 2178, both of which were unanimously adopted in 2014 under the 1945 Charter of the United Nations (UN Charter). FTFs include all individuals who travel to another state (other than their states of nationality or residence to plan, prepare or participate in acts of terrorism). FTFs also include individuals who provide or receive terrorist training. In connection with armed conflicts, the issue of FTFs has for years constituted and posed a major threat to the international peace and security. Through UNSCR 2178, therefore, attempts have been made to address such threat.

Since the territorial defeat of the so-called Islamic State of Iraq and Syria (ISIS) was announced by the United States along with its allies, the influx of FTFs, specifically their

movement to countries of origin, has been intensely debated among the international community. While traveling to take part in foreign conflicts is not a new phenomenon, the extent of reactions for such action at both the international and national levels in recent years, certainly is (Duffy, 2018). Moreover, as the extremist group has lost control and significant ground of its so-called Caliphate since 2014 (The Guardian, 2019; BBC, 2019), the debate on what states should do, both individually and collectively with FTFs from their countries along with their families has become more relevant yet controversial.

Despite a big concern on the issue of repatriation of FTFs, the exact number of ISIS FTFs remains unclear. Various sources report different numbers making the counts and categories vary significantly. The International Center for Counter Terrorism (ICCT), for example, stated that by 2015,

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more than 25,530 foreign recruits from 104 countries were drawn to the conflict in Syria and Iraq alone. Moreover, the Counter Terrorism Committee Executive Directorate (CTED) estimated that around 30,000 FTFs traveled to Iraq and the Syrian Arab Republic (CTED Trends Report, 2018), while Radicalization Awareness Network (RAN) reported a figure of more than 42,000 FTFs from over 120 countries between 2011 and 2016 (RAN Manual, 2017). Meanwhile, the International Center for the Study of Radicalization (ICSR) reported that over 40,000 people from 80 countries became affiliated with ISIS (Cook & Vale, 2018) and another source stated that thousands of people who traveled to Iraq and Syria came from a geographic spread of around 110 states (United Nations Security Council 8116th Meeting, 2017). Furthermore, other reports stated that at least 2,000 suspected FTFs were being detained in Syria (Browne & Hansler, 2019; Warner & Collins, 2019; Youssef & Lubold, 2019). In addition, thousands of women and children from over 45 nationalities are being detained in Iraq and Libya prisons and Syrian camps (Human Rights Watch, 2019a); however, the role played by these women and children are still unknown. Meanwhile, according to UN officials, as per April 18, 2019, the main Syrian Democratic Forces (SDF) camp in Al Hol accommodated around 75,000 people, of these, 43% were Syrians, 42% were Iraqis, and 15% were foreign citizens; where 66% of the total are children (UN News, 2019). A senior official of SDF further stated its prisons held more than 8,000 fighters, including FTFs (Hubbard, 2019). In short, the inaccuracy of the figures from various sources reflects the chaos in the region, meaning that the current situation is still unstable, thus posing risks.

The uncertainty on the number of FTFs figures is exacerbated by the unwillingness and inability of the SDF and the Iraqi government to resolve the situation on their own. The SDF, which exercises governmental functions over parts of the Syrian territory, has declared and warned earlier that it has no capacity or authority to detain such number of FTFs (Aljazeera, 2019a; Dworkin, 2019). Since legal infrastructures are also not recognized in the northern part of Syria, the SDF has asked countries to repatriate their FTFs citizens (Aquire & Hamlo, 2019). At the same time, reports have found serious legal shortcomings that undermine efforts to bring FTFs to justice (Human Rights Watch, 2017, 2019c). Like the SDF, the Iraqi Government also calls states to repatriate FTFs particularly children who are charged and detained for their association with the terrorist group with regards to the national security (United Nations General Assembly, 2018).

This situation has made repatriation of FTFs one of the most pressing issues faced by the international community today (Lopes & Dukin, 2019; Vinopal, 2019). Countries are now facing a challenge on whether they should actively repatriate thousands of ISIS FTFs, who are still being held in prisons and refugee camps in the northeast Syria and Iraq or refuse their return on the grounds of protecting national security. Regarding this matter, only few countries have agreed to

repatriate their FTFs. Others, such as the United Kingdom and France, however, have refused this policy on the basis that their local laws and regulations will prevent a proper judicial system from pursuing charges against them (Dent, 2019). Besides, many governments fear that their action to return citizens who joined ISIS would be politically unpopular. Most importantly, the main reason why countries are reluctant to accept repatriation is the potential threats that FTFs may pose to national security when they return (Beritasatu, 2020; Clingendael, 2020; Madrim Hussein, 2020; Restifo, 2019; Van Wilgenburg, 2019). The training and experience that FTFs have gained while being in Syria are viewed as a big threat to state borders, and their children are considered potential security threats and ticking time bombs (Athie, 2018).

Moreover, although human rights advocates acknowledge that states may have legitimate security, they argue the urgency for states to repatriate their nationals, and those with meaningful links to the state from the camps and provide the necessary support for reintegration and rehabilitation (Charbord et al., 2020). Such statement is based on the argument that it would be unconscionable to just leave foreigners (Ubaldi, 2019), although they are terrorist, in the refugee camps or prisons without an intention of prosecution. So far, states have adopted diverse and even controversial approaches to tackle to issue (European Parliament, 2018), without considering whether their actions are consistent with the current international legal framework (Capone, 2019). For instance, many states have instituted travel bans and canceled the passports of FTFs (Geneva Academy, 2014; Irish Times, 2014; United Nations Security Council Counter-Terrorism Committee Executive Directorate, 2016), which raises a discourse on the legitimacy of freedom of movement. Based on the background above, this article aims to provide states with policy recommendation about the return of FTFs, accompanied with the supporting analysis. The first part of this article analyses whether states of origin have an obligation to repatriate FTFs who were previously associated with ISIS under international law, whereas the second part provides an analysis of the options states of origin have in dealing with ISIS FTFs based on a human rights approach. It must be noted that this article does not analyze the controversy surrounding the departure of citizens who joined ISIS but focuses on their return both in the context of national security and state obligation. In addition, although women and children as FTFs' family members, are also mentioned, the focus of this article is the FTFs themselves.

### State Obligation to Repatriate FTFs under International Law

With the territorial collapse of ISIS, thousands of FTFs and their family members are now stranded in crowded camps or detained in Iraq and Syria with limited medical care and access to food (CTED Analytical Brief, n.d.; United Nations, 2019). While many countries are in a difficult position in deciding on what to do and how to react, pressure has been

made on states to take back their citizens (Stevoli, 2020). The United States, for example, continues to pressure the European governments to repatriate their FTFs (NPR, 2019). Although this repatriation of ISIS members is deeply unpopular, human rights advocates hold the view that governments should repatriate their nationals and prosecute them if necessary. Therefore, an important question arises: do states of origin have an obligation to repatriate their citizens who joined ISIS under the international human rights framework?

International humanitarian law (IHL) widely recognizes state obligation to repatriate persons detained during armed conflicts by releasing and repatriating prisoners of war without delay after the cessation of active hostilities (Levie, n.d.; ICRC, 2010), yet the international legal framework today has not provided a strict direct answer on the existence of the obligation to repatriate FTFs. Besides a few narrow exceptions, international law, specifically ICCPR, does not require states to repatriate a fugitive held in its custody (Stigall, 2020a), since such actions are related to questions of adequate evidence, proper legal process, prosecution considerations, and the supremacy of law. However, although there are no strict obligations to repatriate FTFs, there are several legal instruments favoring repatriation as an obligation under international law.

Based on state practices in the field of IHL, states are required to investigate and prosecute war crimes committed by their nationals (ICRC, n.d.-a). What is highlighted here is the responsibility of states to investigate and prosecute them. On this matter, UNSCR 1373 emphasizes the legal obligation of states to prosecute their nationals for war crimes and terrorist acts. Resolution 1373 declares that all states shall bring justice to anyone participating in the financing, planning, preparation, or perpetration of terrorist acts. This includes people supporting any acts of terrorism. Furthermore, the resolution requires states to ensure that their domestic laws and regulations are established in order for such act be constituted as serious criminal offenses, making any punishments duly reflect the seriousness of the act.

The obligation of repatriation is also reiterated in a more specific context of FTFs in landmark of UNSCR 2178. Such resolution calls upon member states to develop and implement strategies for prosecution, rehabilitation, and reintegration of returning FTFs. It goes against the decision to just leave FTFs and their families in camps in the hope that other states will proactively act or help in any way. In fact, this view is also expressed by the families of victims of ISIS crimes, who highlighted the importance of a fair trial to bring perpetrators to justice (Cobain & Dodd, 2018).

The commitment and responsibility for the return of the FTF are revisited in UNSCRs 2368 and 2396. The former resolution expresses concern over FTFs leaving armed conflict zones; returning to their home countries; and transiting through, traveling to, or relocating to or from other member states. It also focuses on the measures to address the return and relocation of FTFs and transnational terrorist groups. States are to address this phenomenon, and when doing so,

they have to cooperate between one another through sharing information and implementing best practices. Therefore, it creates new obligations to counter the threats posed by FTFs. UNSCR 2396 (a counterpart to Resolution 2178), on the contrary, establishes a legal regime applicable to returning FTFs to their home countries or relocating to third states (returnees and relocators). In other words, UNSCR 2178 focuses on FTFs leaving their states of origin to join and engage in terrorism, whereas UNSCR 2396 focuses on returnees and relocators. Both resolutions should be interpreted by member states to take all necessary lawful measures to investigate, repatriate, prosecute, and rehabilitate their nationals who wish to return. All member states of the United Nations are to ensure such measures are based on the resolutions adopted under Chapter VII of the U.N. Charter.

In addition, states have an obligation to investigate war crimes allegedly committed by their nationals (ICRC, 2005), which applies to both international and noninternational armed conflicts. Furthermore, to deal with those returnees, Resolution 70/291 on the United Nations Global Counter-Terrorism Strategy Review encourages all member states to develop effective strategies, including through repatriation, in accordance with relevant national and international law (United Nations General Assembly Resolution, 2016).

Moreover, the United Nations even developed a document intended to clarify the vital elements for protection, repatriation, prosecution, rehabilitation, and reintegration efforts that must be met by all states (United Nations, 2019). A set of principles was established to increase the assistance of the United Nations in this context. One key principle is the primary responsibility of member states for their respective nationals. Specifically, member states must ensure their nationals suspected of committing crimes in the territory of other member states are treated in accordance with international human rights law. The principle also emphasizes that states must collaborate with humanitarian partners for effective advocacy and engagement to repatriation and that the principles of humanity, neutrality, independence, and impartiality should not be compromised. States should carry out repatriations in line with international law, particularly the principle of nonrefoulement, which has reached the level of customary international law (Research Handbook on International Refugee Law, 2019, p. 192.; UNHCR, n.d.), and even jus cogens (Allain, 2002; Farmer, n.d.). Following the United Nations which has developed key principles on the process of protection, repatriation, prosecution, rehabilitation, and reintegration of women and children linked to ISIS or other terrorist groups, in March 2019, the United Nations Counter-Terrorism Center within the Office of Counter-Terrorism implemented a project with the UNODC and the Counter-Terrorism Committee Executive Directorate to support requesting member states in such process (United Nations Security Council Report, 2020).

Based on several UNSCRs and key principles developed by the United Nations, it could be concluded that international

law is moving toward the establishment of relevant commitments in favor of FTF repatriation. However, with the complexity of the problem, there is no single solution that may solve this situation thoroughly. Therefore, states must take necessary actions, and such actions should be in accordance with international human rights law. The options of necessary actions that could be taken regarding FTF repatriation are discussed below.

### State Options in Dealing with FTFs: A Human Rights Approach

As the issue of FTF who are currently in prisons and refugee camps represents a unique and unprepared challenge, various methods and decisions have been carried out by states in practice to respond to the issue of FTFs (European Parliament, 2018). Although it seems that there is no single strategy that fits all situations, the international human rights framework has standards that must be met by states. This leads to the debate on what options states have and what options states should take in dealing with FTFs. Since the adoption of a comprehensive long-term responses that deal with this threat becomes crucial, any approach chosen and conducted by states must be in accordance with their obligations under the human right's legal framework.

The first human rights option is to ensure that the FTFs are prosecuted by the national courts of countries where they committed their crimes through fair trials. It is well established in international law that each sovereign states have exclusive control over persons and objects within their territory (Van Der Vyver, 2013). In other words, each state has the authority to prosecute suspects for crimes committed in its jurisdiction. This territorial theory is in the position that criminal jurisdiction depends on the place of the perpetration, which is the country whose territory is the site of the crime or offense being committed (Perkins, 1971). Thus, if there is a legitimate and well-functioning government in the aftermath of a conflict, the most obvious option is for the prosecution of suspects to take place in the national courts based on the principle of territoriality (Mehra, 2017), since the witnesses and evidence would be easier to access in the local prosecutions. Therefore, in theory, domestic courts in Iraq and Syria have the primary jurisdiction over crimes committed by nationals and foreign fighters. The government of those two countries may claim jurisdiction over FTFs who joined the Islamic State and should, whenever possible, exercise such jurisdiction (United Nations General Assembly Report (2014a).

Nevertheless, although the theory stating that the most appropriate place for FTFs to be tried is in the country where the crimes are committed (Syria and/or Iraq) sounds reasonable, the legal process and trials must still be held fairly. A fair justice system is a key element, not only to form the democratic way of life but also to build trust and legitimacy as well as to promote and protect human rights (European

Sting, 2020; ReliefWeb, 2020). Claiming jurisdiction to a crime means that the territorial state has the ability and the willingness to effectively prosecute terrorist suspects according to the international human rights law. On this matter, it is crucial to distinguish between the right of the territorial state to prosecute FTFs and to the willingness and ability to exercise the stated right. The unwillingness of the territorial state to take an action implies any of the following reasons: the territorial state is shielding a person from criminal responsibility, there is no real intent to bring the person concerned to justice, or the proceedings are not independent and impartial. Meanwhile, inability is determined in the light of the collapse or unavailability of the relevant national judicial system (Feyer, 2013). In cases where the territorial state is unwilling and or unable to effectively prosecute FTFs, international law recognizes the assistance of the international community. In this situation lies the principle of subsidiarity, which triggers the jurisdiction of other states, or even international courts such as ICC (further explained as the second option) (Corten & Klein, 2011; International Criminal Court [ICC], 2011). This obligation is meant to end impunity (Institute of International Law, 2005), which must be avoided through basic fair trial standards.

Furthermore, the possibility of fair trials and the challenges of prosecuting FTFs in the local courts in both Iraq and Syria have been highlighted. While Iraq and Syria have already prosecuted several ISIS FTFs (The Guardian, 2018; Human Rights Watch, 2017, 2019b), both entities have also shown unwillingness and inability to prosecute them effectively. Iraq, for example, is prosecuting adult FTFs based on sovereign right, but at the same time is asking countries to repatriate children, who are being charged based on national security (United Nations General Assembly, 2018). This act of repatriating children has been conducted before by Canada in the case involving Omar Kadhr where the ex-soldier child had been transferred to Canada for proper reintegration after being held in Guantanamo Bay for 10 years (U.S. News, 2012, 2020). Although the Iraqi constitution does guarantee the right to fair trial and prohibits any acts of degrading treatment or torture, the criminal justice system in Iraq is weak and unable to ensure the necessary safeguards. Therefore, the proceedings in Iraq, including the lack of fair trial, inhuman detention conditions and the imposition of the death penalty, have been widely criticized (Sendadi, 2020). This condition might trigger the reaction of countries that hold a strong and principled position against the use of death penalty, as many of those convicted were sentenced to death.

In addition, although human rights law imposes the obligation to conduct fair trials and treat detainees humanly (ICR n.d.-b), the investigations by the United Nations have found evidence of overreliance on confessions with frequent allegations of torture that are inadequately addressed (OHCHR, 2020a; UN News, 2020). Between May 1, 2018 and October 31, 2019, after monitoring nearly 800 trials, the investigation concluded that violations of fair trial standards,

ineffective legal representation, and limited access to present or challenge evidence placed defendants at a serious disadvantage compared with the execution (Hall, 2020; OHCHR, 2020b). Therefore, a legal obligation is placed on states to take all necessary measures to ensure that their citizens do not confront or face the death penalty.

With respect to Syria, the SDF currently has neither international legitimacy nor diplomatic recognition (Cebrian, 2019), so it does not have the capacity to undertake fair trials. The administration affiliated to the Kurdish-led SDF has stepped up its warnings, claiming inability to hold thousands of prisoners and family members in camps with limited resources. It has declared its inability to guard its jails once the United States troops leave. Admittedly unwilling and unable to prosecute FTFs, the SDF called on the international community to establish a special international tribunal to provide justice (Aljazeera, 2019a). The SDF, though the United States, has also called on states of origin to repatriate and prosecute their citizens detained by them (France 24, 2019). In terms of repatriation, the act of transferring terrorists from onstate custody to the custody of state authorities is not prohibited under the international human rights framework. For the purposes of investigation, prosecution, and reintegration, international law also does not prevent the irregular transfer of a subject to state authorities (Stigall, 2020b).

The lack of transparency in courts, limited access to defense counsel, and the imposition of death penalty in Iraq as well as the lack of a properly functioning judiciary and the practice of torture in Syria indicate that FTFs and their families are far from receiving a fair criminal justice trial. Given this in conducive situation, apart from acknowledging that each territorial state has a sovereign right to prosecute suspects for crimes committed in its territory, states of origin must still ensure that their citizens are given a fair trial. In other words, in the condition where the sovereign state is willing and able to prosecute FTFs, states of origin still must take necessary measures to intervene in favor of their nationals abroad if there are any reasonable grounds to believe that they face treatment that is in flagrant violation of human rights law.

Apart from the fair trials of prosecution of FTFs by the national courts of countries where they committed their crimes, another option which is requested by the SDF, is for the role of prosecution to be taken over by the ICC or an international tribunal that would be established for that purpose. Nevertheless, although such trials are believed able to be conducted in accordance with international human rights law, in practice, this option may encounter several obstacles. On one hand, the ICC does not have a clear mandate and capacity to prosecute the vast majority of detained FTFs. Jurisdictional obstacles prevent ISIS members from being tried by the ICC (The Guardian, 2015; Kenny, 2017). It is argued that if it is likely that traditional routes are closed, unconventional methods should be conducted by the ICC to avoid appearing entirely impotent in the face of brazen crimes against humanity (Elkin, n.d.). On the other hand, as there is no existing

international facility that can detain thousands of foreign fighters who might be prosecuted, an international tribunal would face difficulty in this aspect. Thus, the creation of a separate tribunal could ensure that justice is done. In this regard, Sweden is seeking support from European countries for the possibility of prosecuting ISIS fighters in a new international tribunal (Financial Times, 2019). In an expert meeting with the representatives of the European Union and United Nations, Sweden stated that the conditions for establishing such a tribunal or other legal mechanisms must be thoroughly investigated (Government Offices of Sweden, 2019). Moreover, it should be noted that even if an international tribunal for ISIS FTFs is created, it would only prosecute a very small percentage of ISIS members. Tribunals created in the past, such as ICTY and ICTR, focused on only a limited number of perpetrators (UNICTR, 2019; UNICTY, 2019).

Another option, which is taken by many states but viewed by many others as not solving the problem, is to actively prevent foreign fighters from returning home through different measures, either legislative, administrative, or operational measures. This has been conducted either by stripping the foreign fighters of their nationalities as an effort to prevent their entry back to their states of origin or by using technical arguments to contest the existence of their initial citizenship (Hoffman & Furlan, 2020). All aforementioned measures have serious impacts on fundamental human rights, such as the freedom of movement. Not only is it against the current international law, such measures are viewed inefficient and even counter-productive as a counter-terrorism measure. Concerns will raise if decisions are taken following secretive proceedings, in absentia or on the basis of vaguely defined criteria without adequate safeguards to prevent statelessness (United Nations General Assembly Report, 2014b, 2016). No judicial process in revoking citizenship may erode due-process rights recognized under international law, including the presumption of innocence, the right to a fair trial, and the right to appeal (Tayler, 2016).

In principle, while each state has the right to determine the rules that regulate acquisition and deprivation of its nationality (ICJ, 1955), human rights law that are applicable prevent and counter terrorism may limit state discretion. As affirmed in the Universal Declaration of Human Rights, nationality is a right for everyone, and that no nationality shall be arbitrarily deprived (United Nations General Assembly, 1948). This is also emphasized in the 1961 Convention on the Reduction of Statelessness (UNHCR, 1961), which prohibits situations in which a person may be lawfully deprived of nationality if such deprivation results in statelessness.

Furthermore, the prohibition of arbitrarily banning people from returning to their country is stated the International Covenant on Civil and Political Rights (ICCPR) (OHCHR, 1976). The terminology "arbitrary" is understood to have much more meaning than just "illegal." If it is conducted in a discriminatory manner, deprivation can be arbitrary. Any actions which result in statelessness or are carried out to

avoid conferral of rights that according to international human rights law are enjoyed only by citizens can also mean arbitrary (Mantu, 2015, 2018). Related to the rights of each person to enter his or her country, UN Human Rights Council stated that to not be arbitrary, measures of citizenship deprivation must meet the standards of necessity, proportionality, and reasonableness (UN Human Rights Council, 2011; UN Human Rights Council, 2013). Thus, besides being provided by law, the purpose must be legitimate and proportional, be the least intrusive measure possible to achieve a legitimate aim, and respect procedural standards of justice that allow for it to be challenged. On this matter, the Human Rights Committee holds the opinion that there are very few circumstances in which deprivation of the right to enter one's own country could be reasonable. No state should arbitrarily prevent a person from returning to his or her own country, by stripping of nationality or expulsion to a third country (OHCHR, 1999).

In addition, national security is increasingly used by states as grounds to deprive nationality (Baker, 2019; Boutine, 2016; Vaas & Jagjai, 2018). Here, the consideration should be whether the danger posed by repatriated fighters is greater than that posed by a floating population of rootless jihadis (Jenkins, 2019). For national security threats to be justified as necessary and proportionate for restrictions, such threats must at least involve a reasonable risk of serious disturbance, and not an abstract, hypothetical, or remote danger down the line (Duffy, 2018).

Furthermore, there is yet a clear human rights dimension in the development of counter-terrorism policies. States, for example, have been criticized for introducing vague and broad definitions of what constitutes a terrorist act (Golder & Williams, 2004; Greed, 2017; OHCHR, n.d.; Simeon, 2019), thus broadening the type of behaviors that may lead to the loss of nationality. States need to be reminded that their obligations with respect to nationality and statelessness serve as the outer limits of their powers to undo citizenship, no matter how disloyal their citizens have been. In facing such difficult circumstances, all measures and policies must never lead to statelessness (UNHCR, 2014; United Nations, 2011). Thus, in spite of the fact that terrorism continues to be a threat to international peace and security, having no unilateral and single solution, stripping of citizenship or removing nationality does not only create a greater problem but may go against international law (Jenkins, 2019).

This condition makes the creation of a comprehensive approach in dealing with thousands of FTFs becomes challenging. Therefore, the last and most preferred approach is to repatriate FTFs and subject them to a fair prosecution in their states of origin (Paulussen, 2019). A number of countries did express an emphasis to only repatriate children from the conflict zones as they are viewed as victims, yet several other countries such as the United States, the United Kingdom, Germany, Tajikistan, and Australia, have shown their willingness to repatriate and prosecute their citizens. Countries

which have a history of conflict, like Uzbekistan, are very much aware of the risk and treats of not quickly addressing this issue and recognize that the mismanagement of the problem might cause harm to the government when FTFs return. As a result, these countries have repatriated and reintegrated their citizens them into society.

Regarding this scenario, as mentioned earlier, in cases where the territorial state is unable and/or unwilling to prosecute FTFs, they must extradite them. On this matter, the Special Rapporteur on the promotion and protection of human rights while countering terrorism stated that the urgent return and repatriation of FTF from conflict zones is the only international law-compliant response to the increasingly complex and precarious human rights, humanitarian, and security. This situation is being faced by those who are detained in inhumane conditions in overcrowded prisons and refugee camps in the northern Syrian and Iraq. Such return is an implementation of a comprehensive response of UNSCRs 2178 and 2396 explained above. This approach is taken to ensure that there is no sanctuary for acts that are universally condemned and proscribed (Herik & Schrijver, 2013). However, it must be noted that states must distinguish the FTFs from their family members who might not be engaged in such crimes and offenses (Resolution 2178). Family members of suspected FTFs who are not facing serious charges should be repatriated for an appropriate protection, rehabilitation, and/or reintegration process (United Nations Security Council Counter-Terrorism Committee, 2018).

Moreover, repatriation and prosecution are considered as a state's long-term security interest. As have been mentioned previously, the states of origin face several obstacles, usually security and legal problems, which make it difficult for them to accept the FTF's return. This situation and the fact that the SDF have signaled their inability to continue detaining captured fighters have increased the risk of the release of dangerous individuals. The existence of the potential of the escape of thousands of ISIS prisoners could eventually pose immediate threats to the international community as many of these fighters could carry out terror attacks in their home countries (European Council on Foreign Relations, 2019). In fact, such incidents have already occurred when hundreds of ISIS soldiers reportedly escaped from prisons in Syria (Aljazeera, 2017; Turak, 2019; Yeung et al., 2020). Thus, there is a need for security officials around the world now to work together to protect their borders to prevent any terrorist attacks in the future (Carrega, 2019). A hands-off stance in this situation will only create the further possible danger. Leaving foreign fighters in Syria poses security risks, so repatriation, along with possible prosecution and rehabilitation, is the only a legal, moral, and (long-term) security option (Cuyckens & Paulussen, 2009). In other words, reducing the number of detainees through repatriation is the best way to alleviate this problem.

Nevertheless, undeniably, bringing back FTFs who have spent time with ISIS is not without risks and it is impossible

to guarantee 100% security. If not properly monitored, returnees may carry out attacks, using their combat skills and prior experiences (Jenkins, n.d.). Nonetheless, if no actions are done, the risks are arguably even greater. Therefore, rather than allowing the release of FTFs, their escape from prisons or their joining of other terrorist groups in the future, a controlled return with their families is more desirable and preferable in the long term (Mehra & Paulussen, 2019).

In terms of the prosecution process, counter-terrorism efforts, which involve sharing information and materials among international partners, become crucial as battlefield evidence is critical to the priorities of a broad range of national security (U.S. Department of State, 2018). On this matter, the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh/Islamic State in Iraq and the Levant (UNITAD), established by UNSCR 2379, has engaged in important work under U.N. auspices to support the domestic efforts of states to hold ISIS accountable for its terrorist activities. In fact, information-sharing can help countries have the evidence needed in their national courts for investigations and successful prosecutions of repatriated FTFs. In addition, guidelines on the effective use of battlefield evidence to help guide countries seeking to use such materials to interdict, investigate, arrest, try, and prosecute terrorists in civilian criminal justice proceedings have been developed by international organizations such as the U.N. Counter-Terrorism Committee Executive Directorate (CTED) and the International Institute for Justice and the Rule of Law (IJ) (United Nations, n.d.).

Based on the above discussion, from a human right and a long-term security perspective for the international community and for the people involved, a controlled and monitored repatriation, prosecution, rehabilitation, and reintegration would be a wise approach. Moreover, since the return of FTF is an international problem, all international actors should respond equally through a shared responsibility to manage this situation (Marone, 2019).

## Conclusion

While the defeat of the ISIS is clearly a victory for the international community, the situation still raises human rights problems and challenges in the context of FTFs. Thousands of FTFs detainees from many countries are still being held in refugee camps and prisons under the custody of the SDF and Iraqi authorities, posing national and international security threats. Therefore, discussions on the obligations of states in dealing with FTFs from their countries, although controversial, are becoming more relevant.

Repatriation is one of the highlighted options in the discussion of FTF in the international arena. The option on whether states have an obligation to repatriate their citizens who joined ISIS is still open for debate, and this repatriation issue remains a daunting task. While the current international law does not provide a direct answer, several

legal instruments seem to be in favor of such obligation. By highlighting the obligation of states to investigate and prosecute FTFs, a number of UNSCRs (such as UNSCRs 2178 and 2396) have called on states to take all necessary measures to investigate, repatriate, prosecute, and rehabilitate their citizen who wish to return home. Those resolutions, adopted under Chapter VII of the U.N. Charter, indicate that states have an obligation to ensure appropriate prosecution, rehabilitation, and reintegration of returning FTFs.

However, despite such obligation, states have in practice adopted diverse and even controversial approaches in dealing with fighters who wish to return home. Although not all options might serve each state's national interest, some options are preferable in the context of human rights. The first option is to ensure that FTFs are prosecuted with fair trials in national courts in Syria and Iraq. This option is reasonable, given the fact that access to evidence and witnesses are easier to provide in both jurisdictions. However, both entities have exhibited unwillingness and inability to effectively prosecute the thousands of ISIS fighters detained by them, raising the question of whether FTFs will receive fair trials. If the answer to this question is "no," then the positive obligation to ensure fair trials falls within the international community, especially the states of origin through repatriation. Second, an international tribunal and the ICC are also options to prevent impunity and provide fair trials. Yet, both methods have their own obstacles. There are jurisdictional obstacles to try FTFs before the ICC, and the possibility of forming an international tribunal also creates challenges, taking into consideration the small percentage of FTFs that would be prosecuted. This leaves us with the last approach which is to actively prosecute FTFs in their home countries after repatriation. This approach is seen as the best option because it is in accordance with the international human rights framework. Not only does this option ensure that such crimes are prosecuted through fair trials, but this option also considers the legal, moral, and long-term security interest of individual states and the international community collectively. Through sharing of information such as evidence and cooperation between states, a controlled repatriation, prosecution, rehabilitation, and reintegration would be in accordance with international human rights instruments and provide a comprehensive long-term security interest.


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