

Mandate of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

The Death Penalty, Extended Detention, Fair Trial and Foreign Fighters

Since the Syrian conflict began in 2011, thousands of foreign nationals have travelled or attempted to travel to conflict zones in Iraq and Syria to join armed groups. It is estimated that between 2011 and 2017, between 30,000 and 42,000 individuals from some 120 countries have travelled to Iraq and Syria to join the so-called Islamic State in Iraq and the Levant (ISIL/Da'esh) or other extremist armed groups. There are currently a large number of “foreign fighters”, also referred to as “foreign terrorist fighters” (FTFs)¹ in the context of relevant Security Council Resolutions, and accompanying family members in Iraq and Syria and the status and capacity of these individuals continues to provoke debate over the scope and scale of the threat they pose.

Despite these debates, the contours of the threat, at least in the terms of the number of persons who joined terrorist groups but specifically “Islamic State” in Iraq and the Levant (ISIL) and suspected associated groups in Iraq, Syria and other countries are now more accurately known than was the case some years ago.² Particularly, for countries collecting robust data fairly

¹ In its resolution 2178 (2014), the UN Security Council defines “foreign terrorist fighters” (FTFs) as “...individuals who travel to a State other than their State of residence or nationality for the purpose of 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.” S.C. Res. 2178 (Sept. 24, 2014).

² See RADICALISATION AWARENESS NETWORK, RAN MANUAL: RESPONSES TO RETURNEES: FOREIGN TERRORIST FIGHTERS AND THEIR FAMILIES. (July 2017), https://ec.europa.eu/home-affairs/sites/homeaffairs/files/ran_br_a4_m10_en.pdf; INTERNATIONAL CENTRE FOR THE STUDY OF RADICALISATION, FROM DAESH TO ‘DIASPORA’: TRACING THE WOMEN AND MINORS OF ISLAMIC STATE (2018),

effectively on inwards and outward travel,³ the numbers of those men and women who departed to join non-state actor groups is broadly established, we have more accurate data on the numbers of fighters traveling,⁴ data on deaths and casualties,⁵ better analysis on movement between conflict sites, and better statistics on returnees (particularly to European states).⁶ Greater disaggregated data on women and girls is notable,⁷ and increased attention is being paid to children including disaggregation by sex and age.⁸ Detention, charging, trial and imprisonment data is also emerging. By November 2017, nearly 7,000 F(T)Fs were believed to have died on the battlefield, and at least 14,910 were reported to have left the conflict

<https://icsr.info/wp-content/uploads/2018/07/ICSR-Report-From-Daesh-to-%E2%80%98Diaspora%E2%80%99-Tracing-the-Women-and-Minors-of-Islamic-State.pdf>.

³ See EUROPEAN PARLIAMENTARY RESEARCH SERVICE, THE RETURN OF FOREIGN FIGHTERS TO EU SOIL (2018), [http://www.europarl.europa.eu/RegData/etudes/STUD/2018/621811/EPRS_STU\(2018\)621811_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/621811/EPRS_STU(2018)621811_EN.pdf).

⁴ U.S. intelligence assessments suggested that the number of foreign fighters crossing the border from Turkey fell from 2000 each month to about 50 in September 2016.

⁵ With the obvious emergence of a bulge occurrence to be explained as well as having more consistent methodology on baseline data and honesty about data gaps and extrapolation of results from poor or limited data or making conclusions based on poor to limited data. A key point for competent data analysis is the use of mixed methods and systematic integration of quantitative and qualitative methodologies and methods at all stages of an evaluation, a feature notably missing from the data production we are seeing in the FF field. See e.g., GREET PEERSMAN, OVERVIEW, DATA COLLECTION AND ANALYSIS METHODS IN IMPACT EVALUATION (2014) https://www.unicef-irc.org/publications/pdf/brief_10_data_collection_analysis_eng.pdf.

⁶ At least 5,6000 citizens or residents from 33 countries are estimated to have returned to countries of origin. THE SOUFAN CENTER, BEYOND THE CALIPHATE: FOREIGN FIGHTERS AND THE THREAT OF RETURNEES (2017), <http://thesoufancenter.org/wp-content/uploads/2017/11/Beyond-the-Caliphate-Foreign-Fighters-and-the-Threat-of-Returnees-TSC-Report-October-2017-v3.pdf>. It is worth noting data addressing the complex roles that returnees may play on return. Data of direct participation in violence shows a small but deadly reengagement cycle. In parallel, however evidence suggests that a sizeable number may remain engaged in extremist or Salafist environments and/or that they return as high-status bridge-builders to external networks and hey may continue to pose a threat by upholding and performing secondary functions within extremist networks. Also worth noting that despite the strong emphasis on threat in European countries, the regions with the highest number of fighters are estimated to be Former Soviet Republics (8717), the Middle East (7054), Western Europe (5778), The Maghreb (5,356) and S and SE Asia (1568). *Id.* at 11.

⁷ CTED TRENDS REPORT, THE CHALLENGE OF RETURNING AND RELOCATING FOREIGN TERRORIST FIGHTERS: RESEARCH PERSPECTIVES 4 (Mar. 2018), <https://www.un.org/sc/ctc/wp-content/uploads/2018/04/CTED-Trends-Report-March-2018.pdf>.

⁸ Towards the end of 2017, it was estimated that over 2,000 foreign individuals under the age of 18, representing about twenty different nationalities, were present in the conflict zones of Iraq and the Syrian Arab Republic. Half of those individuals may have been under the age of five, at the time. Some of those children had travelled to the conflict zones whereas others were born there. General Intelligence and Security Service of the Ministry of the Interior and Kingdom Relations of the Netherlands; VLADO AZINOVIC & EDINA BECIREVIC A WAITING GAME: ASSESSING AND RESPONDING TO THE THREAT FROM RETURNING FOREIGN FIGHTERS IN THE WESTERN BALKANS, REGIONAL COOPERATION COUNCIL (Nov. 30, 2017), <https://www.rcc.int/pubs/54/a-waiting-game-assessing-and-responding-to-the-threat-from-returning-foreign-fighters-in-the-western-balkans>; GENERAL INTELLIGENCE AND SECURITY SERVICE: MINISTRY OF THE INTERIOR AND KINGDOM RELATIONS, LIFE WITH ISIS: THE MYTH UNRAVELLED, (Jan. 2016), https://english.nctv.nl/binaries/Life%20with%20ISIS%20-%20the%20Myth%20Unravelled_tcm32-90366.pdf; RICHARD BARRETT. BEYOND THE CALIPHATE: FOREIGN FIGHTERS AND THE THREAT OF RETURNEES, THE SOUFAN CENTER (2017), <http://thesoufancenter.org/wp-content/uploads/2017/11/Beyond-the-Caliphate-Foreign-Fighters-and-the-Threat-of-Returnees-TSC-Report-October-2017-v3.pdf>; and ICRC *Position paper on the treatment of “foreign fighters” and their families in the Middle East and beyond*.

zones, with some 6,800 returning to their home countries.⁹ This indicates that some ‘known-knowns’ are established, and by corollary, this information should have effects on management, legality and regulatory consequences. It is also true that better information allows us to clarify the extent of States’ international law obligations and to discern with clarity what human rights issues are triggered by size and dimensions of the group. Yet, despite greater data and greater accuracy in that data, there is still a rather hyperbolic tone to much of the discourse, which occludes a more fact-based, intentional and pragmatic approach to the challenges. It has also detracted attention from addressing the human rights obligations of States, including the consequences that follow from the threat or application of the death penalty.

Protecting the Right to Life in Complex Contexts

My mandate and that of the Special Rapporteur on the Summary and Arbitrary Executions has communicated with a number of governments concerning individuals and/or their families being detained as Foreign Fighters in Iraqi and/or in territories controlled by non-state actors in Syria. These States include but are not limited to Azerbaijan, Belgium, the United Kingdom, Germany, Kyrgyzstan, France, Russia, and Turkey. The States or territories in which fighters and their dependants are being held present complex features. They are fragile or post-conflict contexts, they have poor rule of law capacity, they have limited institutional ability to manage a multifaceted prison population, they are challenged by resource constraints, and the State does not have full and effective control of its territory.

⁹ Kim Cragin, *Foreign Fighter ‘Hot Potato’*, LAWFARE (Nov. 26, 2017, 10:00 AM), <https://bit.ly/2iXW1nV>. According to figures published by the *Soufan Group* in October 2017 for 33 countries impacted by the FTF phenomenon, the number of FTFs who had returned to their country of citizenship or residence was 5,600. See, Richard Barrett, Soufan Group, *Beyond the Caliphate: Foreign Fighters and the Threat of Returnees*, 24 October 2017, <http://thesoufancenter.org/research/beyond-caliphate/>.

In respect of Iraq, prosecutions of most foreign fighters fall under Iraq's Anti-Terrorism Law.¹⁰ The death penalty is applicable to crimes contained in that law. My mandate has taken the position that the law's definition of terrorism is overly broad and ambiguous. As Special Rapporteur I have consistently affirmed that the definition of terrorism must be confined to acts that are 'genuinely' terrorist in nature. This is the only way to ensure that the principles of legality, necessity and proportionality under international human rights law are complied with in assessing the permissibility of any restriction on human rights. To this end, my predecessor Martin Scheinin provided a model definition of terrorism to enable States to advance precision in their domestic regulation.¹¹ The definition of terrorism in national legislation should also be guided by the model definition proposed in Security Council resolution 1566 (2004) and also by the Declaration on Measures to Eliminate International Terrorism and the Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, which were approved by the General Assembly. Under the existent Iraqi law, even petty crimes such as vandalism may be considered a terrorist act. Furthermore, the Law does not require proof of terrorist intent. Thus, an individual can be subject to the death penalty for a non-violent crime without intent to terrorize the population.¹² The penalties detailed in article 4 of the law are also of concern. Those who "incite[], plan[], finance[], or assist[] terrorists . . . shall face the same penalty as the main perpetrator".¹³ Given the broad and ambiguous definition of terrorism, this article fails to distinguish the level of involvement and severity of the act when rendering the death penalty.

A range of examples brought to the attention of the mandate are worth noting in this context:

¹⁰ No. 13 of 2005.

¹¹ A/HRC/26/51

¹² https://www.americanbar.org/content/dam/aba/administrative/human_rights/ABA%20Center%20for%20Human%20Rights%20Analysis%20of%20Iraq%20CT%20Law.authcheckdam.pdf

¹³ http://www.vertic.org/media/National%20Legislation/Iraq/IQ_Anti-Terrorism_Law.pdf

- In September 2017, it was reported that a Russian man had been sentenced to death in Baghdad;¹⁴
- On January 21, 2018, it was reported that a German woman was sentenced to death by hanging;¹⁵
- In February 2018, it was reported that at least 17 Turkish citizens had been sentenced to death¹⁶;
- In April 2018, it was reported that three Kyrgyz and two Azerbaijani women had been sentenced to death.¹⁷
- It is reported that a number of Belgian ISIL fighters have been prosecuted in Iraq.¹⁸

A key aspect of the detention context for these individuals is that few states are actively pursuing consular access or consular protection for their nationals. Abolitionist states have argued that if a national is being subjected to the death penalty, strenuous efforts will be made on their behalf. But, in my view, the “minute to midnight” approach seems woefully inadequate to protect the fundamental rights that are engaged. The large number of detainees in Iraq charged with terrorist offences is a profound challenge to the efficacy and capacity of the Iraqi legal system, but also challenges the rhetorical commitment of abolitionist states to fully protect their citizens who may be subject to the death penalty. It also bears reminding that many of these individuals are being held in conditions that engage the prohibition on torture, inhuman and degrading treatment – a preemptory norm of international law. All to say that there is an immediate and compelling case, consistently made by this mandate for the repatriation of individuals to their home countries, the activation of trial as the evidence allows for persons who have committed serious breaches of international human rights and humanitarian law and positive interventions to support the rehabilitation and reintegration of children back to their countries of citizenship.

¹⁴ <https://www.novayagazeta.ru/news/2017/09/12/135206-rossiyana-prigovorili-k-smertnoy-kazni-v-irake>

¹⁵ <https://www.reuters.com/article/us-mideast-crisis-iraq-germany/iraqi-court-sentences-to-death-german-woman-who-joined-islamic-state-idUSKBN1FA0EF>

¹⁶ <https://www.reuters.com/article/us-mideast-crISISIL-syria-camp/syrian-army-tightens-noose-around-palestinian-camp-idUSKBN1I00KG> ; <https://www.aljazeera.com/news/2018/02/12-isil-widows-sentenced-death-life-iraqi-court-180218172230088.html>

¹⁷ http://www.xinhuanet.com/english/2018-04/26/c_137139154.htm

¹⁸ <https://www.independent.co.uk/news/world/middle-east/ISIL-foreign-fighters-iraq-prosecuted-death-penalty-families-mosul-a7987831.html>

The issues of vulnerability to the death penalty are pressing in territories held by non-State actors (or *de facto* authorities) in Syria. States have argued that the lack of consular representation in such areas, the shortage of information on the whereabouts and conditions faced by nationals in armed conflict zones who find themselves in the power of *de facto* authorities constrain their interventions. I recognize these difficulties. Yet, I am very concerned that States are failing to take the measures they might reasonably take to ensure the due process rights of nationals in situations of extremism. For example, we are seeing modifications to Consular codes¹⁹ resulting in a loss of the right to claim consular assistance for persons who have travelled to an area of armed conflict or to a region for which authorities have issued a notice discouraging travel, or are deemed to take “disproportionate risks” without adequate insurance arrangements.²⁰ I continue to emphasize the important role that effective consular assistance plays as a preventive tool when faced with a risk of flagrant violations or abuses of human rights, while also noting that the remedial nature of diplomatic protection proceedings²¹ frequently means that they cannot effectively prevent an irreparable harm (including but not limited to the death penalty) being committed.

Another emergent issue in respect of persons under the control of *de facto* authorities is the sharing of intelligence information to third States who will not provide any assurances with respect to the application of the death penalty. This matter has been brought into sharp relief by the decision in *Maha El Gizouli*,²² which addresses whether it was lawful for the UK Home Secretary to authorize mutual legal assistance (“MLA”) to a foreign state in support of

¹⁹ Belgium: L [2018-05-09/06](#).

²⁰ Belgium: L [013-12-21/52](#), Art. 83.

²¹ Art. 1, International Law Commission, Draft Articles on diplomatic protection, A/61/10.

²² *The Queen on the Application of MAHA EL GIZOULI* 12/01/2019, QBD. claimant is the mother of Shafee El Sheikh. Mr El Sheikh is believed to be detained by Kurdish forces in northern Syria. Mr El Sheikh, along with Alexandra Kotey, have been accused of involvement in acts of barbaric terrorism in Syria (including the murder of American nationals) and of participating in the conflict there as fighters on behalf of ISIS (the two men are also colloquially known with others as “The Beatles”).

a criminal investigation which might lead to prosecution of offences carrying the death penalty.²³ The Queens' Bench Division found that the information sharing was lawful and not barred by exercise of the prerogative, the British common law or European Human Rights law. While acknowledging the independence of the Courts decision, I am particularly concerned about the information gleaned from this decision, that affirms the pressure being placed on abolitionist States by third countries, in ways that appear to undermine the broader international consensus on the abolition of the death penalty by political stealth.²⁴ As Special Rapporteur I urge that the procedure of mutual information shared be meaningfully "death penalty proof," given the prescient danger that the unique but narrow challenge of Foreign Fighters be used to undo broader progress on the abolition of the death penalty. Counter-terrorism must remain a human rights compliant zone of operation for States, not an excuse to avoid their human rights obligations.

I affirm that the ICCPR sets out specific safeguards for ensuring that where national or international legal instruments do not totally prohibit the death penalty, it shall be exercised only in the most exceptional cases and under the strictest limits. The Human Rights Committee specifically stated that excessively vague definitions of crimes for which the death

²³ The request was made pursuant to the 1994 Treaty of Mutual Legal Assistance in Criminal Matters between the US and the UK.

²⁴ The Queen on the Application of MAHA EL GIZOULI 12/01/2019 at para 17: "On 15 May 2018, the British Embassy in Washington was asked about the "likely response from the US Administration if the UK were to seek full or partial assurances on the death penalty" and, in particular, whether the request for such assurances would be critical in Mr Sessions' decision whether or not to prosecute in the US. In answer to the specific question "What if we ask for death penalty assurances?" the Ambassador provided the following response:

"...parts of the US machinery - notably career DOJ officials - would not be surprised if we asked for death penalty assurances. It is what they expect of us. But that doesn't go for the senior political levels of this administration: Cabinet Secretaries like Sessions, Mattis and Pompeo, and senior political appointees in their departments. Their reaction is likely to be something close to outrage. They already feel that we are dumping on them a problem for which we should take responsibility. They have been signalling to us for weeks now that we are in no position to attach any conditions to this. At best they will think we have tin ears. At worst, they will wind the President up to complain to the PM and, potentially, to hold a grudge. We might argue that the UK position on this is well known and that we were simply behaving in a way consistent with our long-term policy. There might be some understanding of this. But I have to warn that there might also be some damage to the bilateral relationship."

penalty may be imposed are inconsistent with article 6, paragraph 2, of the ICCPR which permits use of the death penalty only for “the most serious crimes.”²⁵

Further, article 5 of the United Nations Safeguards Protecting the Rights of those Facing the Death Penalty (1984) provides that capital punishment may only be carried out pursuant to legal procedures which give all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the ICCPR. This is so because only full respect for stringent due process guarantees distinguishes capital punishment as possibly permitted under international law from an arbitrary execution. The trial and detention conditions briefly outlined above demonstrate that the protection of fair trial standards for this group of detainees has not been adequately discharged.

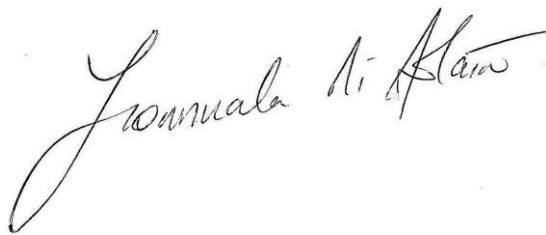
The UN Security Council Resolution 2178 of September 24, 2014, attempts to address the problem of the foreign terrorist fighter threat and explicitly calls on States to ensure that international human rights law is respected in their responses to the threat. Similar calls for the respect for human rights are present in regional anti-terrorism legal instruments. The Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism adopted on May 19, 2015, demands that State parties ensure that “the implementation of this Protocol... is carried out while respecting human rights obligations...as set forth in the [European] Convention for the Protection of Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights and other obligations under international law.” The Declaration of the Organization for Security and Cooperation in Europe on its role in countering the phenomenon of foreign fighters adopted on December 5, 2014, too calls on States to respect their obligations under international law, including

²⁵ CCPR/CO/75/VNM, para 7

international human rights law, international refugee law and international humanitarian law when responding to the phenomenon.

Greater information on this specific and contemporary terrorism challenges ought to provoke an evidence-based approach to regulation, and enable a greater integration of the rights and security discourse in positive ways, especially in relation to the most fundamental of rights – the protection of the right to life from arbitrary deprivation. In the context of foreign fighters, a group which is neither sympathetic nor benevolent, we are obliged to be consistent and forthright about the application of the right to life, and to avoid both the nullification of that right simply because it attaches to a group that has engaged in serious rights violation and/or using foreign fighters as a trojan horse to nullify this right from the inside out.

Yours sincerely,

A handwritten signature in black ink, reading "Fionnuala Ní Aoláin". The signature is written in a cursive, flowing style with a large initial 'F'.

Fionnuala Ní Aoláin (Professor)

Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism