



JANNAH OR JAHANNAM OPTIONS FOR DEALING WITH ISIS DETAINEES

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CONTENTS

- * 1 INTRODUCTION
- * 1 WINNING OUR WAY TO THE CURRENT MORASS
- * 1 LINGERING COSTS OF SUCCESS: INCARCERATED FIGHTERS & REFUGEES
- * 2 US PROSECUTION OF TERRORISTS: THE CASE OF AHMED ABDULKADIR WARSAME
- * 3 CURRENT CONDITIONS FOR PRISONERS, IDPS & REFUGEES
- * 5 REPATRIATION: A BALANCE OF RISK & RESOURCES
- * 5 ASSUAGING GOVERNMENT CONCERNS: LESSONS FROM REENGAGEMENT CASES
- * 6 PROSECUTION WITHIN THE IRAQI COURTS
- * 8 A ROLE FOR THE INTERNATIONAL COMMUNITY IN IRAQI COURTS



- * 9 INTERNATIONAL GUIDELINES, LEGAL FRAMEWORKS & COURTS
- * 10 HYBRID SOLUTION
- * 11 HOW DOES THIS END?

Cover photo: Members of the SDF stand guard as a woman walks with a child after they left ISIS's last holdout of Baghouz, in Syria's northern Deir ez-Zor Province on February 27, 2019. *(Photo by BULENT KILIC/AFP via Getty Images)*

Contents photo: Women walk with children in the Kurdish-run al-Hol camp for the displaced in northeastern Syria on January 14, 2020. *(Photo by DELIL SOULEIMAN/AFP via Getty Images)*

INTRODUCTION

Similar to Christians, Muslims believe that a life well-lived leads to *Jannah* (heaven), while a life of laziness and misdeeds leads to *Jahannam* (hell). For many of the thousands of ISIS detainees held in camps in Syria and Iraq, including both former ISIS fighters and their families, they are stuck in between, with no official legal process to decide their earthly path to Jannah or Jahannam. This paper explores options for international action to deal with the detention of ISIS members from Iraq and Syria and the foreign terrorist fighters (FTFs) who joined ISIS from around the globe. These individuals are currently held in detention by the government of Iraq and the Syrian Democratic Forces (SDF), a non-state entity with limited resources that is currently bearing the burden of process and potential ultimate disposition for the larger international community.

WINNING OUR WAY TO THE CURRENT MORASS

ISIS unleashed horrific violence on the people of Iraq and Syria between 2014 and 2019. At its peak, ISIS represented the culmination of post-9/11 terrorist violence. It was a de facto state dedicated to domination, enslavement, torture, and murder. As ISIS ground units pressed closer toward Baghdad in September 2014, the United States and its allies formed a coalition and launched large-scale counter-ISIS military operations. Over the next few years, these operations significantly

depleted its ranks and ended the physical hold of the so-called caliphate. However, this tactical success did not eliminate ISIS or lessen the destabilization it helped to create.

LINGERING COSTS OF SUCCESS: INCARCERATED FIGHTERS & REFUGEES

In the wake of the effort by the international community and its key partners — the Iraqi security services and the SDF — several new pressing issues arose. Thousands of former ISIS fighters and tens of thousands of civilians indoctrinated in the group's extremist ideology now sit idly in prisons and refugee camps across Iraq and Syria. Harboring resentment and anger and in many cases having practiced violence, these detainees may grow into the next version of ISIS, just as ISIS itself grew out of Jama'at al-Tawhid wa al-Jihad and its many post-9/11 incarnations.

The international community must help to transition these people from their present, dire circumstances back into a semblance of normal life. The alternative — leaving them in camps and cells — is dangerous for stability and peace. Nevertheless, transitioning these detainees will require some type of accountability for the many crimes committed by ISIS fighters. But how should the international community hold them to account for these crimes, and what would the judicial process for incarcerated jihadis and terrorists look like?

US PROSECUTION OF TERRORISTS: THE CASE OF AHMED ABDULKADIR WARSAME

Since the al-Qaeda attacks on 9/11, the United States has explored several different legal processes for terrorists caught during military and intelligence operations. In one example, nine years after the attack in New York, an al-Qaeda/al-Shabaab operative was tried in the U.S. District Court of New York, just blocks away from where the World Trade Center once stood. His name was Ahmed Abdulkadir Warsame and although recognized as a Somali national, he was actually a man of no nation.

Immediately after his detention in a U.S. counterterrorism operation in the Gulf of Aden, Warsame was read his Miranda rights by FBI agents for processing in the U.S. court system. Warsame was an unlawful enemy combatant without U.S. citizenship. Yet to be prosecuted in a U.S. court, the only option was to grant him the same legal rights as a U.S. citizen.

At the time of Warsame's trial, some argued that his prosecution would be more appropriately handled by the military tribunal in Guantanamo Bay, Cuba. These critics viewed the military tribunal as a better alternative process for dealing with incarcerated terrorists.¹ However, others view Guantanamo Bay as a failure. In many cases, the United States incarcerates individuals there suspected of committing crimes without providing the basic due process of a trial entitled to all individuals

prosecuted in U.S. courts. Indeed, the stagnant tribunal process at Guantanamo Bay may have been a precursor to the current problem of how to handle ISIS prisoners, as identifying a legitimate U.S. legal process for incarcerated terrorists remains an issue.

The costs and complexities of Warsame's case bring into question not just the ethical practices of the courts, but also the cost and strategic effectiveness of the formal legal approach. Individual court cases in the United States can take years to adjudicate and cost hundreds of thousands of taxpayer dollars. Recently, the United States dropped the potential death penalty prosecution for two ISIS members in U.S. custody known as the "ISIS-Beatles" in order to receive evidence from the U.K. on their alleged crimes.²

The scope of this issue doesn't end with these two high-profile ISIS detainees, however. As of July 2020, anywhere between 10,000 and 20,000 male ISIS fighters are being held in Syrian prisons, or at large.³ In Syria alone, more than 2,000 of these men are foreigners who traveled from around the world to join ISIS.⁴ The other 8,000 or more are native Iraqi and Syrian fighters. The United States and its allies must include increased funding to effectively and judiciously tackle the issue of former ISIS fighters before prison breaks increase, ISIS regains strength, and disillusioned fighters reengage in the violent ideology.



A member of the SDF walks past damaged vehicles on the side of a road in the village of Baghouz in Syria's eastern Deir Ez-Zor Province near the Iraqi border on March 24, 2019, a day after ISIS's "caliphate" was declared defeated by the SDF. (Photo by DELIL SOULEIMAN/AFP via Getty Images)

CURRENT CONDITIONS FOR PRISONERS, IDPs & REFUGEES

Despite the coherent and collaborative response that the international community demonstrated in the effort to militarily defeat ISIS, the response toward extraditing ISIS men and repatriating women and children has been inconsistent and arbitrary. In total, roughly 80,000 former ISIS men, women, and children are detained in nearly two dozen detention centers and internally displaced person (IDP) camps in Syria,⁵ while an unknown number of men are being held in undisclosed Iraqi prisons.⁶ Their wives, children, widows, and orphans have been turned into refugees.⁷ These families account for a large majority of the population in the numerous IDP camps in

northeast Syria, where they live among other displaced Syrian civilians not affiliated with ISIS. The al-Hol Camp in Syria contains about 68,000 people, including 43,000 children who are particularly vulnerable to radicalization; they will learn hard lessons from their time in the camp and potentially a violent philosophy.⁸ The radicalization of children is a significant problem that the international community must also deal with, but it is beyond the scope of this paper.⁹

For detained male ISIS fighters, the lack of a proven criminal prosecution in Iraq and Syria and the unwillingness of countries to repatriate and prosecute their citizens — *Aut dedere aut judicare* (either extradite or prosecute) — is effectively turning the prisons into academies for the next generation of violent extremists. Under-

resourced SDF soldiers guarding the Syrian detention centers are already struggling to maintain security; they should not be solely responsible for the problems of the international community.¹⁰

If the atrocities of the incarcerated ISIS fighters are not exposed and punished, the principles of justice and human rights will be bypassed. The SDF has already implored countries to repatriate their citizens because the large number of detainees in makeshift camps has severely overburdened their capacity to keep the facilities secure.¹¹ The threat of mass prison breaks is increasing. Especially with long prison terms (or terms without end) in makeshift prisons, former ISIS fighters have more time to radicalize others and plan breakouts.¹² This March, several ISIS detainees escaped from a Syrian facility during a riot using doors they ripped off their hinges to break down the walls.¹³

Even more concerning, ISIS forces remaining at large have vowed to liberate prisoners.¹⁴ In 2013, ISIS militants launched an attack on the Abu Ghraib prison near Baghdad, freeing over 800 inmates.¹⁵ More recently, ISIS militants attacked a prison complex in the eastern Afghan city of Jalalabad holding ISIS and Taliban members in a raid that lasted for 20 hours, giving most of the inmates an opportunity to escape.¹⁶ Although 1,000 of the inmates who escaped were later caught, 400 have gone unaccounted for and have likely rejoined extremist ranks.

The threat of mass breakouts has been exacerbated by the Turkish incursion into northern Syria in 2019, which forced the Kurdish element of the SDF to simultaneously continue the counter-ISIS mission (including detention) and fight Turkish occupation in the Kurdish area of Syria.¹⁷

As the coalition continues military operations against the remaining ISIS threat on the ground, coalition leaders warn that ISIS prisoners pose one of the most serious threats to the group's long-term defeat.¹⁸ In an unstable area, the SDF is a tactical-level band-aid for the problem of dealing with some of the region's most dangerous terrorists. Moreover, due to pressure from Turkey or a strain on resources, the current status of the SDF will inevitably change at some point. It is not unimaginable that SDF guards will be forced to leave the facilities they are guarding and cede their gains to the Assad regime.¹⁹ Before SDF guards can no longer bear the brunt of this effort and more individuals escape, effectively becoming untraceable in the chaos of Syria, the international community needs to develop a comprehensive and funded plan for these camps now.

Even if the threat of a mass escape can be mitigated, conditions in the detention centers provide sufficient reason to pursue a strategy of transition, validating and strengthening the violent ideology of former fighters and threatening to further radicalize them. Many experts warn that camp conditions directly support and inflame the Salafi-jihadist narrative of grievances caused by Western governments. These

perceived grievances continue to motivate ISIS fighters in detention camps, as well as followers and family members in IDP camps.²⁰

REPATRIATION: A BALANCE OF RISK & RESOURCES

The United States, France, the United Kingdom, Australia, Indonesia, Sweden, Canada, Switzerland, Denmark, the Philippines, Serbia, and Albania are all reluctant to extradite and prosecute ISIS foreign fighters who traveled to Syria and Iraq. These same countries also refuse to repatriate women and children associated with ISIS male fighters.²¹ Many of these countries have revoked the citizenship of former fighters and their family members.²² Their reluctance to reabsorb former ISIS members is largely due to fear of responsibility for future attacks, concerns over a potential backlash, as well as an inability to safely monitor those who are extradited or repatriated.²³ While a cautious approach to repatriating former combatants is reasonable, these same countries have not successfully articulated arguments to reject the repatriation of women and children.

Even among countries that have begun to repatriate ISIS-affiliated men, women, and children, concerns abound. For example, even though Finland has recently taken steps to repatriate its citizens (both ISIS fighters and their families) who are detained in Syria, the Finnish Security Intelligence

Service (SUPO) was very critical of this initiative.²⁴ Current options being explored for the rehabilitation of these individuals include long-term monitoring and slowing down the rate of repatriation for non-violent individuals, both women and children.²⁵

The reality is that many governments are unwilling to establish and implement the necessary legal, security, and rehabilitation mechanisms that would keep their citizens safe during repatriation. However, this inaction toward the detained ISIS prisoners in Syria will only result in an even greater global security threat.

ASSUAGING GOVERNMENT CONCERNS: LESSONS FROM REENGAGEMENT CASES

Ultimately, the reluctance of states to accept former ISIS fighters and families is one of the biggest obstacles to alleviating the growing security crisis. However, a review of the evidence from existing reintegration programs suggests that many fears are unfounded. Terrorist *reengagement* refers to an individual who returns to terrorism after a period of disengagement regardless of whether it was voluntary or involuntary, while terrorist *recidivism* is defined as two or more distinct convictions for terrorism-related offenses over a period of time.²⁶ Numerous studies reveal that the fear of recidivism and reengagement, which often dictates policy decisions, is much greater than the reality.²⁷



Men, suspected of being affiliated with ISIS gather in a prison cell in the northeastern Syrian city of Hasakeh on October 26, 2019. (Photo by FADEL SENNA/AFP via Getty Images)

Thomas Renard, counter-terrorism and counter-radicalization expert at the Egmont Institute, also concludes that the “blowback rate” — the proportion of fighters who return to plot attacks in their countries of origin — is very low.²⁸ Although it only takes one individual to carry out an atrocious attack in the U.S., security monitoring, deradicalization, rehabilitation, and legal prosecution will alleviate the threat of blowback.

In the end, arguments opposing the repatriation of men, women, and children are far outweighed by the risks of inaction. Neglecting the issue will simply buy detained ISIS members time to plan breakouts and enable ISIS leadership to regroup and launch more attacks on weakly established prisons.

PROSECUTION WITHIN THE IRAQI COURTS

The failure of capable foreign governments to effectively and judiciously deal with their citizens who have joined ISIS has contributed to an ineffective judicial process in Iraq. Although Western countries are the most well-equipped to criminally prosecute ISIS detainees, the French government, among many others, is instead relying on local Iraqi criminal courts to prosecute its citizens.²⁹ Even though the French constitution prohibits French citizens from being prosecuted where the death penalty could potentially be applied, France has allowed citizens to be tried in Iraqi courts.

Fears that the Iraqi judicial system would ineffectively and unfairly prosecute ISIS members (and those that have been

accused of being members) have become a reality. Failures in the Iraqi courts run the risk of inflaming tensions to the brink of creating a new violent Sunni Islamist group. The number of foreign combatants being held in Iraqi prisons is difficult to determine due to the fact that a third of prisons are secret and researchers and journalists are not allowed access to them. It is clear, however, that Iraqi prisons are much worse than the Syrian facilities due to rampant torture, overcrowding, and the denial or limitation of medical treatment.³⁰

When it comes down to a judicial decision for earthly Jannah or Jahannam, trials in Iraq last no more than 15 minutes, and the ISIS suspects are convicted based on confessions. In conjunction with widespread torture, there is little evidence of due process.³¹ Furthermore, the sentences are extremely harsh. The punishment for an ISIS fighter who is convicted of involvement in combat is death, while a conviction for non-combatant assistance results in life-long imprisonment.³²

Most Western countries' sentencing guidelines on terrorism-related crimes recommend long sentences for incarceration. This creates an atmosphere within Iraq that is ripe for corruption and mismanagement as Western countries provide funding for the system based on the number of people imprisoned.

The Iraqi judicial system also negatively affects local Sunni Arab Iraqis much more than foreigners. Innocent Iraqis are sometimes accused of participating in or

assisting ISIS as part of personal vendettas against neighbors and community members.³³

There are other reasons to be concerned about the lack of integrity in the Iraqi courts as well. First, foreign countries incentivize the Iraqi judicial system to make money from ISIS prosecutions. While the defer-to-Iraq strategy is relieving these governments of responsibility, it has created a system that is more interested in making money than seeking justice. The Iraqi Parliament authorized foreign governments to have their citizens prosecuted in Iraqi courts in exchange for funding and other concessions in international affairs, a move that Iraqi judges strongly opposed.³⁴

Second, this cash-for-prosecution system has encouraged leaders in Iraq to detain more people. Aside from per-person fees from foreign governments for taking their citizens, the Iraqi government is also making substantial profits by incarcerating Iraqi Sunni Arabs who are forced to confess and sentenced to life or death.³⁵ Dr. Vera Mironova of the Middle East Institute cited instances of people who were never affiliated with ISIS being prosecuted and sentenced to life in prison.³⁶ In addition, the Iraqi courts are also likely receiving bribes from wealthy, well-placed ISIS members to be released while sentencing lower-level individuals to death or life in prison.³⁷

Lastly, the Iraqi justice system fails to advance security goals in the region because it does not facilitate reconciliation. A large number of ISIS fighters remain disillusioned, and fear of death at the hands

of the Iraqi judicial system incentivizes them to remain part of the group.³⁸ While the disdain for ISIS among Iraqis is stronger than in other countries, the severity of punishment — either life in prison or death — is creating long-term problems that run the risk of further destabilizing the region, especially when Iraqi Sunni Arabs are being arrested on false or ambiguous accusations of ISIS affiliation.

All of this suggests that the Iraqi judicial system is rife with corruption. Financially motivated prosecutions, tyrannical sentences, and detention of prisoners in undisclosed locations risk sustaining and inflaming the root cause conditions that led to the growth of ISIS in the first place. The targeting of low-level Sunnis, and even innocent civilians, in combination with high-level ISIS officials buying their release, is creating the foundation for an ISIS comeback. Dr. Mironova, who followed Iraqi Special Forces in the Battle of Mosul for nine months, emphasized that “researching the Iraqi courts right now is more dangerous than following the Battle of Mosul.” She predicts the abuses of the Iraqi judicial system will give rise to the rebirth of ISIS.³⁹

A ROLE FOR THE INTERNATIONAL COMMUNITY IN IRAQI COURTS

Should countries want to have their citizens prosecuted and incarcerated in Iraq, they must take on a more active role

in the judicial process to ensure fair and legal treatment in accordance with basic human rights and international law. There are common practices that would help with this, such as when countries share derogatory information and intelligence during judicial proceedings, a move that could transition the prosecution to a fact-based method versus an interrogation-based one, or having a senior legal advisor confer with judges during proceedings. This was the case when the U.S. sent representatives to Uganda when courts there prosecuted al-Shabaab operatives found guilty of bombing a cafe showing a World Cup match in 2010.⁴⁰

As countries take on a more active role in the adjudication of their citizens in Iraq, governments must also emphasize the need to prosecute ISIS leadership to the fullest extent. Lastly, countries should encourage the reassessment of implementing the death penalty in Iraqi courts. While the case for death may be warranted for high-level ISIS officials and ISIS militants known for committing atrocities, handing out death sentences in 15-minute trials is not acceptable by any standard of due process.

Implementing these and other legal practices would benefit Iraqi courts and bring them closer in line with the investigative and prosecutorial standards in other countries. This approach will strengthen their internal system of governance, gain the trust of their citizens, and prove that they are capable of fostering a prosperous country.

INTERNATIONAL GUIDELINES, LEGAL FRAMEWORKS & COURTS

The rise of ISIS galvanized the international community, but the aftermath of the war against it has seen reduced international attention. ISIS initially became an international issue for two reasons: Attacks were happening far beyond Iraq and Syria, and people from all over the world were flocking to support and join the so-called caliphate. Though the threat of attacks abroad has significantly decreased and foreign fighters no longer head to Syria and Iraq to join the group in droves, countries must continue to collaborate against the threat of ISIS, pursue justice for its victims, and prevent the rise of the next major terrorist group.

The U.N. Security Council has developed a number of frameworks with comprehensive guidelines for member states to counter and prevent terrorism. U.N. Security Council Resolution (UNSCR) 2396 urges members to establish and reinforce appropriate actions for prosecuting, rehabilitating, and reintegrating fighters and their families.⁴¹ The Security Council and the Counter-Terrorism Committee Executive Directorate (CTED) provide guidelines for members to investigate in the most efficient and quickest possible manner through effective judicial and international cooperation.⁴² While UNSCR 2396 emphasizes the need for countries to prosecute and monitor fighters who have already returned home from Iraq and Syria, it does not touch on

the need for countries to take legal action toward fighters or their families who remain in camps there.

Regardless, some countries have repatriated significant numbers of people from Iraq and Syria. Kosovo, Russia, Turkey, Uzbekistan, Kazakhstan, and more recently Finland have repatriated more than a hundred women and children each.⁴³

Most notably, Kosovo conducted the largest repatriation of its kind in April 2019 of 110 individuals — 74 children, 32 women, and four men.⁴⁴ Beyond its repatriation efforts, Kosovo has been very successful in convicting FTFs: Six of every 10 returnees receive convictions, compared to one of 10 in the United Kingdom.⁴⁵ While Kosovo has demonstrated success, it is important to note that many western Balkan countries, which had a very high rate of FTFs, continue to struggle with effective convictions and rehabilitation. Given the limited capacity of their courts and the reluctance of more capable countries like the U.S. and European nations to assist in prosecuting and repatriating FTFs and their families, international legal cooperation and assistance is necessary.

The SDF has long supported the idea of an international tribunal to prosecute ISIS fighters held in Syria, but member states have not seriously considered this.⁴⁶ While official international tribunals are difficult because of the time and cost involved, the international community must collaborate on effectively processing ISIS fighters from around the world in some form, just as they collaborated militarily to defeat ISIS.



U.S. President Barack Obama speaks at the 69th United Nations General Assembly at United Nations Headquarters on September 24, 2014 in New York City. (Photo by Andrew Burton/Getty Images)

HYBRID SOLUTION

The difficulty in the process of repatriation versus prosecution is differentiating between those who still support ISIS and those who are disillusioned by their experience with the group. This question is relevant to both men who played a more active role in the fighting and women who were less active or inactive, and has consequences for their children who need to be cared for and educated to become members of society.

Some men who previously returned home have been threatened for speaking out against ISIS. Others in detention still hope for an ISIS-led prison-break from the outside. Many women in the IDP camps are carefully scrutinized and even attacked by

female ISIS supporters, who also believe the group will liberate them from the camps.⁴⁷

To effectively separate these groups, there must be a mechanism that can distinguish between the truly radicalized and the disillusioned. Within the refugee camps, there is one potential mechanism that might help. Currently, refugees and ISIS sympathizers are assigned tents in the camps. If detainees, women and men, are given freedom to group and configure their own living spaces, distinct patterns will emerge.

This freedom of choice and process of self-selection will create a clear distinction between the hardcore ISIS supporters and the disillusioned and non-supporters, who pose a limited threat to society. This approach could be one data point in a larger



Women look after children in al-Hol camp, where families of ISIS foreign fighters are held, in al-Hasakeh governorate in northeastern Syria, on October 17, 2019. (Photo by DELIL SOULEIMAN/AFP via Getty Images)

overall assessment to distinguish people who support ISIS from those that no longer buy into the ideology, as part of a vetting process for repatriation. Nevertheless, even those who do not support ISIS will still require monitoring, rehabilitation, and reconciliation if repatriated.

The men and women who emphatically still support ISIS should go through deradicalization and reintegration programs. If they continue to aspire to carry out attacks against the international community, they need to be incarcerated. Considering that roughly 20 percent of the men and women detained in Iraq and Syria still support ISIS, this will be more feasible in an international setting.⁴⁸ Convicted foreign criminals should also be incarcerated in their home countries. Barring that, their government should be responsible for

providing financial compensation to the entity holding their citizens as well as ensuring their fair treatment.

Rehabilitating individuals is the most promising option for long-term success and avoiding terrorist reengagement. Children, especially, need attentive psychological counseling to overcome trauma. Although there is limited research when it comes to the efficacy of large-scale deradicalization and rehabilitation programs, the need for well-informed counter-terrorism policy that avoids fueling new insurgencies is of vital importance.

HOW DOES THIS END?

As tens of thousands of men, women, and children wait in limbo, the battle to ensure standards of due process is being lost due

to the active negligence of the international community. Prolonging the confinement of disillusioned men and women in miserable conditions threatens to refocus their grievances toward the West, catalyzing the next iteration of ISIS. Moreover, the children growing up in such difficult conditions, with mental and physical health issues, could well become the next generation of violent extremists.

The international community has an ethical, moral, and practical security obligation to fully resolve the ISIS problem. Steps must be taken to address the question of what to do with the detainees still held in Iraq and Syria, to help those most affected by the destruction of ISIS, and to prevent the re-emergence of similar groups. More worrying still, the trend is toward greater radicalization over time. Just as ISIS is more radical than its predecessors, we should expect ISIS 2.0 to be more radical still. Failure to follow through and address the current situation will only ensure that the problem will endure for generations to come.

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