

RESEARCH REPORT

A Transitional Justice Approach to Foreign Fighters

December 2021



Cover Image: Children look through holes in a tent at al-Hol displacement camp in Hasaka governorate, Syria, on April 2, 2019. Al-Hol hosts some 62,000 family members of Islamic State fighters and others, including women and children, detained during the collapse of its self-declared caliphate. Tens of thousand are foreign nationals representing at least 60 countries. A comprehensive solution requires not only repatriating these individuals, but upholding the rights of all those affected by the conflict. (Ali Hashisho/Reuters)

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About ICTJ

The International Center for Transitional Justice works across society and borders to challenge the causes and address the consequences of massive human rights violations. We affirm victims' dignity, fight impunity, and promote responsive institutions in societies emerging from repressive rule or armed conflict as well as in established democracies where historical injustices or systemic abuse remain unresolved. ICTJ envisions a world where societies break the cycle of massive human rights violations and lay the foundations for peace, justice, and inclusion. For more information, visit www.ictj.org

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Executive Summary

People have long traveled to other countries to participate in armed conflicts, but it is only in recent decades that the issue of foreign fighters has become prominent on the international agenda. In contexts such as Afghanistan, Bosnia, Chechnya, Somalia, Iraq, and Syria, significant numbers of people have crossed national borders to become affiliated with armed groups during wars in which multiple parties have committed serious and often massive international crimes. Iraq and Syria, in particular, have seen unprecedented numbers of foreigners travel to their territory in order to join the Islamic State (ISIS) during conflicts characterized by shocking levels of brutality and violence. Some of those who travel to engage in violent conflict go on to commit acts of violence in their countries of origin or elsewhere, making the issue a prominent security matter. Usually referred to collectively as “foreign fighters” or “foreign terrorist fighters,” despite their diverse identities and roles in conflict, many of these individuals have committed abuses and suffered harms themselves. Victim populations and affected communities are typically given far less attention than the foreigners who travel to engage in violence. The issue of foreign fighters is a complex challenge for achieving justice and peace.

The armed groups that foreigners join, support, or are associated with, sometimes under coercion, often employ political violence that can be characterized as terrorism or motivated by violent extremism, and can represent a threat to national and global security. As a result, the predominant international frameworks for responding to the issue of foreign fighters are those of counterterrorism and countering violent extremism. Marked by a virtually exclusive focus on radical Islamic armed groups since the launch of the so-called war on terror, these frameworks are problematic from a human rights and rule-of-law perspective because they are based on notions lacking legally agreed definitions and overly broad discourse, focus on securitized and punitive measures, prioritize short-term nation-state interests over sustainable collective peace, disregard the consequences and victims of violations, and frequently lead to other human rights violations and further undermine the rule of law.

A transitional justice approach to the issue of foreign fighters requires addressing the serious human rights violations committed in violent conflicts where significant numbers of foreign fighters are present. It means developing justice responses to the causes and consequences of those violations, with a particular focus on the situation of victims. It is based on the common responsibility of states to meet their obligations derived from international human rights law, international humanitarian law, refugee law, and international criminal law. Transitional justice can help to center human rights obligations in responses to foreign fighters—shifting the focus from security and punishment to justice and the rule of law. It can also help to create a more comprehensive and coordinated set of responses that account for the roles and

responsibilities of not just individuals, but a range of actors. Finally, by offering a broader notion of justice and societal reform, transitional justice can contribute to long-term prevention of violence and abuse.

The interventions that constitute a transitional justice approach include those that promote accountability, truth, reparation, rehabilitation, reintegration, memorialization, and reform, which can be implemented in foreign fighters' countries of origin, the countries where violations were committed, and third countries exercising universal jurisdiction. The forms of justice that are appropriate in either context should be determined according to local and national needs, priorities, concerns, and dynamics and through processes of consultation and meaningful participation by victims and affected communities. From a preventive standpoint, in both contexts, reforms at the institutional and structural levels can be important to reducing the exclusion and discrimination that can make people vulnerable to both harm and recruitment by violent actors, including the negative effects of repressive policies. The transitional justice processes that are determined to be appropriate should be implemented and led by bodies and institutions that are independent of political interference and committed to the protection of human rights, in partnership with civil society and human rights actors. In the context of foreign fighters, this can help to prevent their misuse for purposes of securitization or abusive governance and to ensure that justice policies are trusted among affected communities, and, as such, are more effective in contributing to long-term prevention and security.

For countries of origin, justice requires repatriating citizens, pursuing accountability against those allegedly involved in serious crimes, and developing reintegration and rehabilitation strategies. The prosecution of returned fighters (whether repatriated, extradited, or returned by their own means) who may bear criminal responsibility for crimes that constitute grave breaches of international humanitarian law or serious violations of human rights must be conducted in full adherence with due process of law and based on human-rights-compliant criminal and procedural law. Screening processes should help identify those involved in serious crimes, making sure that those who had no involvement in criminal activity are not placed on surveillance lists, particularly children or those forced to travel. Reintegration programs should distinguish between different levels of involvement in the commission of serious crimes and focus on preventing future engagement in political violence or violent crime. Institutional and societal reforms at the community and national levels in countries of origin, including security and justice sector reform and, at a broader level, social and economic inclusion and equality measures, can reduce the grievances that contributed to citizens' decisions to engage in violence.

In countries where foreign fighters participated in armed conflict, justice requires addressing the consequences of the violations that they committed, in particular, the situation of victims. Victims and affected communities have the right to know about the violations they suffered, receive reparations for the harm caused by those violations, and see that perpetrators face the consequences of their wrongdoing. In this sense, a transitional justice approach requires dealing not just with foreign fighters themselves but with the broader violent conflict in which those fighters engaged as well as the abuses committed by the groups with which they were associated and by other state forces or armed groups. This should include cooperation with repatriation or extradition efforts, in full compliance with the prohibition of refoulment or of practices like rendition or other transnational transfers. It should also include responding to states' obligation to provide effective remedies, including but not limited to criminal justice, to the violations committed by the different armed actors involved in the conflict. Additionally, it should involve community-level truth seeking and reintegration processes, reparations and property restitution, and inclusive reconstruction.

The issue of foreign fighters presents particular challenges for transitional justice, including transnational dynamics and the association of foreign fighters with terrorism and violent extremism. The term itself does not distinguish between those whose association with an armed group was voluntary and consenting and those whose association was coerced. The notions of terrorism and violent extremism, especially when translated into broadly defined norms, create obstacles for both seeking justice for all violations committed in a conflict and attaining justice-related goals, such as reconciliation and long-term prevention. The transnational element of the issue complicates the process of determining the responsibilities of different states for crimes that happen abroad when their ramifications are perceived to affect national security at home and in repatriating, holding accountable when appropriate, and reintegrating those who traveled to conflict areas but also experienced discrimination or exclusion in their countries of origin, often as members of immigrant communities, including second and third generations.

The international community can promote justice by supporting the reconstruction of areas affected by conflict involving foreign fighters in inclusive ways and by promoting transitional justice principles and participatory processes in countries of origin and conflict-affected countries as well as their collaboration. It can also encourage and provide assistance for the voluntary repatriation of citizens, especially children and women, to their countries of origin and investigate the involvement of states' own agents in violations, particularly states that intervened in an armed conflict in which foreign fighters engaged or provided direct assistance to any parties.

Despite efforts to include a human-rights and rule-of-law-approach in the existing counterterrorism and countering violent extremism framework, it remains based on an overemphasis on repression and securitization. To fully ground responses to foreign fighters in human rights and the rule of law, in compliance with existing legal obligations, the focus should be on guaranteeing the rights of all stakeholders involved and creating conditions for long-term security and peace. This requires policies to be defined in open forums with the participation of national and international civil society actors from the human rights and peacebuilding fields, among others. It is critical that transitional justice principles, discourse, tools, and actors are not co-opted under current frameworks to justify and expand securitized and repressive policies. On the contrary, security needs to be understood as dependent on the provision of justice for all those involved: victims of serious human rights or international humanitarian law violations, individuals responsible for such crimes, communities affected by the armed conflict, individuals seeking to return, those interned in camps despite not bearing criminal responsibility, governments in countries of origin, and the communities where those who traveled belong in their countries of origin.

Recommendations

Transitional justice involves building inclusive democratic societies and accountable institutions to prevent future abuses and conflict. As such, it is based on compliance with human rights obligations. The following recommendations, therefore, do not offer alternatives to human rights compliance but rather potential mechanisms to ensure compliance. The recommendations are articulated in general terms. As with any transitional justice processes, they should be adapted to the particular context of each relevant country. This is particularly important regarding countries where the violations occurred or are occurring, for example, where the lack of a clearly established and legitimate government may affect the feasibility of the proposals.

For countries of origin

- Repatriate citizens and those with a legitimate claim of citizenship in full compliance with human rights obligations, providing for the immediate reintegration of those who bear no responsibility in serious violations of human rights law or international humanitarian law, while holding accountable and reintegrating those who are found responsible for such crimes.
- Immediately repatriate children, in compliance with the Convention on the Rights of the Child, consistent with the obligation to proceed based on their best interest, respectful of their right to not be separated from their parents, and mindful that they should be presumed as victims of a situation of abuse and illegal detention while interned in camps.
- Immediately repatriate women, mindful that a high proportion of them are likely to not be responsible for crimes under international law nor to represent a serious threat to commit acts of violence, and mindful of the risk of serious harm they face while interned in camps.
- Implement a screening process of those adults who were repatriated or who have returned, identifying those for whom there is credible evidence that they may be responsible for crimes under international law or that they represent a serious threat to commit acts of violence. Avoid subjecting all those not identified to any form of surveillance or security records.
- Adopt a discourse that facilitates reintegration and reduces stigmatization of those who returned by rejecting the inappropriate application of terms like “foreigners,” “terrorists,” and “fighters.”
- Develop national frameworks and institutional settings to address the challenges of return, justice, and reintegration, in full compliance with human rights obligations and with the integration of human rights institutions and civil society actors into the processes.
- Implement outreach and consultations to articulate the need for a long-term, human rights-based approach to foreign fighters that addresses the needs of communities of origin or return.
- Proactively provide consular and other services to expeditiously repatriate citizens and individuals with legitimate claims to citizenship.
- Implement reintegration programs for those not involved in crimes under international law, focusing on preventing their involvement in violence, engaging with their families or communities of origin to prepare for their reintegration, including those repatriated as well as those returning voluntarily. Draw on reintegration lessons from economic programs, psychosocial support, health care, skills development, and social cohesion, with the participation of communities where they will be reintegrated.
- Implement truth seeking to identify the factors that led citizens to engage in violence abroad, including possible grievances resulting from police misconduct and broader social exclusion and structural discrimination.
- Implement institutional and structural reform at the community and national levels to address the factors that contributed to the problem of foreign fighters, including reforms that promote inclusion and equality.

- Avoid using counterterrorism legislation or powers to interfere with or repress legitimate political engagement aimed at the betterment of communities of origin or at reducing discrimination and exclusion against religious- or ethnic-minority or immigrant communities.
- Implement prosecutorial strategies for returnees who may bear criminal responsibility for crimes under international law, with mechanisms in place for victims' participation, in full compliance with due process of law.
- Develop systems for reduced or alternative sentencing as incentives for collaboration, provision of information, reparations, acknowledgment, and apologies, in full compliance with human rights obligations.
- Identify mechanisms through which the convicted can provide material or symbolic reparations and information to help the search for the missing and forcibly disappeared.
- Implement a reintegration process for those being investigated, tried, and sentenced for their involvement in the commission of crimes under international law, including after completing a prison term.
- Promote and support efforts in countries where returnees engaged in conflict to address the consequences of human rights violations through accountability, reparation, truth seeking, and reform, based on obligations under international human rights law and international humanitarian law, and implemented and led by bodies and institutions that are independent of political interference and committed to the protection of human rights, in partnership with civil society and human rights actors.

For countries where violations were committed

- Cooperate in the immediate human rights and international law compliant repatriation of women and children internees to their countries of origin, if they can be guaranteed due process of law and full compliance with human rights norms.
- Cooperate with the countries of origin of persons detained in camps or prisons who were involved in crimes under international law, to ensure their conditions of imprisonment meet human rights standards, screen and conduct investigations, share information, cooperate on legal and judicial matters, and help victims and affected communities to participate in these efforts.
- Implement consultations with victims and affected communities about justice measures and coexistence under conditions that respect and guarantee human rights, as safety and conditions allow.
- Screen internees to identify their possible involvement in crimes under international law, based on the identification of specific evidence of such involvement, with the participation of affected communities and victims, as security allows, and resettle those for whom there is no evidence of criminal involvement.
- Redefine existing criminal justice approaches to guarantee due process of law and respect for human rights, and focus criminal investigations on determining responsibilities for crimes under international law.

- Collaborate with international human rights bodies and civil society groups to help introduce reforms, monitor trial and detention conditions, and search for the missing and forcibly disappeared.
- Implement a comprehensive transitional justice process in areas affected by armed conflict, based on the protection of human rights, the rule of law, and the promotion of sustainable peace. This process should be implemented and led by bodies and institutions that are independent of political interference and committed to the protection of human rights, in partnership with civil society and human rights actors, and respond to victims' needs and the specific characteristics of the context, paying special attention to the following:
 - reintegrating those in camps who cannot be repatriated, consulting with receiving communities to help reduce stigmatization or threats of revenge, minimizing the likelihood of future engagement in violence, and facilitating peaceful and safe coexistence;
 - remedies for victims of abuses committed by actors engaged in combat or operations under a counterterrorism or countering-violent-extremism framework;
 - reforms to prevent the abuse of power, corruption, and forms of exclusion that contributed to fighters engaging in or supporting certain communities in armed conflict.

For the international community

- Adopt a comprehensive, rights-based, rule-of-law approach to the phenomenon of foreign fighters as an integral element of peace and security.
- Ensure that the international approach to foreign fighters is defined by transparency and civil society participation, including human rights actors.
- Critically assess the role played by the United Nations (UN) Security Council on the issue of foreign fighters and its decisions under Chapter VII of the UN Charter, including the effects on human rights protections by an independent panel that could make recommendations to the council.
- Revise the discourse on foreign fighters to reduce their association with terrorism and violent extremism and emphasize state obligations to their own citizens in regard to repatriation, reintegration, and justice.
- Commit to exercising jurisdiction over citizens responsible for serious crimes, with full respect for the rights of victims and due process of law and the repatriation of those in conflict zones.
- Promote the expeditious voluntary repatriation of children and women associated with foreign fighters to their countries of origin, based on the best interest of each child.
- Avoid undermining states' ability to define legislation under democratic and constitutionally defined processes, respectful of existing constitutional checks and human rights obligations, through the imposition of norms and obligations primarily focused on security.
- Support the reconstruction of areas affected by conflict involving foreign fighters, to help to improve living conditions, reduce corruption, facilitate inclusion, and address grievances, with a special focus on victims and affected communities.

- Promote and support transitional justice, including criminal justice, reparations, truth seeking, reintegration, and reform, in countries in conflict and foreign fighters' countries of origin, encouraging collaboration among those countries.
- Investigate all crimes under international law committed in conflict by all parties, including those attributed to state agents and paramilitary groups or militias that supported any of the parties (whether state or nonstate entities)—supporting and strengthening the International, Impartial and Independent Mechanism established by the UN General Assembly—and implement corresponding reforms for the prevention of recurrence.

Overview

This research study examines the value of a transitional justice approach to the issue of foreign fighters in violent conflict. Transitional justice offers a comprehensive approach for addressing the causes and consequences of massive human rights violations from a human rights and a prevention-and-sustainable-peace perspective. Current strategies for dealing with foreign fighters, which mostly focus on the national security of individual states, are often neither effective nor rights based. The overemphasis on security threatens the values on which the United Nations (UN) is based, while nation-state-centered policies miss important elements of effective collaboration and prevention. Approaches based on the short-term security interests of individual states are part of a broader response to transnational terrorism or violent extremism that contributes to the erosion of international and national human rights structures. The great advance of human rights as a pillar of the international global order is being eroded by blunt responses to transnational terrorism threats.

The need for a transitional justice approach to foreign fighters has been highlighted by experts working to address the phenomenon with greater adherence to the rule of law and human rights. Fionnuala Ní Aoláin, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism,¹ for example, stated that tools beyond criminal justice are needed: “This is not a compromise on accountability, but it means that transitional justice measures where appropriate must be an equal partner in the accountability space, including truth processes, amnesty, reparations, acknowledgment, memorialization, and rehabilitation.”² Similarly, the Criminal Justice and Rule of Law Working Group of the Global Counter Terrorism Forum stressed that in situations where terrorism and mass atrocities intersect: “States are recommended to consider transitional justice strategies that will help find the truth, provide reparations, address non-recurrence, and facilitate reconciliation between victim communities and the offenders.”³

Transitional justice does not offer a magic solution to the difficult problems of foreign fighters or transnational terrorism or violent extremism. However, by embracing the complex dilemmas between peace and justice and security and rights, national and local efforts to address the lega-

¹ Hereinafter, Special Rapporteur on human rights and counterterrorism. Established by the Commission on Human Rights, Resolution 2005/80 (April 21, 2005). Ní Aoláin and her team were interviewed for this project and, drawing from the reports and public statements published as part of her mandate as Special Rapporteur, made important contributions to its findings.

² Fionnuala Ní Aoláin, Just Security, “The Challenges of a New UN Security Council Resolution on Foreign Fighters,” (August 17, 2020), www.justsecurity.org/72052/the-challenges-of-a-new-un-security-council-resolution-on-foreign-fighters/

³ Criminal Justice and the Rule of Law Working Group, “Memorandum on Criminal Justice Approaches to the Linkages between Terrorism and Core International Crimes, Sexual and Gender-based Violence Crimes, Human Trafficking, Migrant Smuggling, Slavery, and Crimes against Children” (September 2021), para 139.

cies of the past offer insights, lessons, and tools that can help states to develop better policies for responding to them. Additionally, transitional justice provides instruments for fulfilling the obligations of states to comply with international human rights law, and need to be strongly based on them, instead of being used for purposes of security or crime prevention devoid of those obligations.

A number of core elements of transitional justice underscore its relevance to foreign fighters:

1. Addressing massive violations requires identifying responses that are adequate to their scale and nature as violations committed by organized structures for political purposes;
2. Confronting the different dimensions of such violations and violent phenomena (institutional, political, social, economic, cultural) requires a comprehensive and coordinated response;
3. Crafting justice measures in such complex contexts requires acknowledging and assessing the contributions and roles of a range of stakeholders, including victims, perpetrators, women, children and youth, those providing different forms of support or funds, civil society, and state and international institutions; and
4. Achieving a fundamental objective of transitional justice requires designing responses that help to prevent the recurrence of injustice, interrupt cycles of violence, and contribute to sustainable peace and development, which necessarily needs to be based on strict adherence to international human rights law.⁴

A transitional justice approach to foreign fighters would be aimed at addressing the legacies of massive and serious human rights violations committed in contexts in which significant numbers of people travel to another state to engage in violent conflict, but also including those who traveled for other reasons or were coerced to do so, as well as children born in conflict areas to those who traveled. Such an approach is based on the common responsibility of states to meet their obligations derived from international human rights law and international humanitarian law to the best of their capacities. It can help to center human rights considerations into responses to the issue, on the understanding that prevention of terrorism and violent extremism need to be based on a long-term approach built on the respect for human rights, thereby shifting the focus of responses from security and punishment to justice and prevention. Transitional justice is relevant to the issue of foreign fighters because it can help to create a more comprehensive and coordinated set of responses to violations of the most serious nature committed on a massive scale in a way that accounts for the roles and responsibilities of a range of actors. In addition to providing a broader notion of justice to victims, transitional justice can also contribute to the long-term nonrecurrence of the violence and abuses that foreign fighters are often involved in.

The types of interventions that constitute a transitional justice approach include those that promote accountability, truth, reparation, rehabilitation, reintegration, memorialization, and

4 This understanding of prevention is different from the one derived from a simplistic interpretation of transitional justice as either based only on criminal justice or on a transaction between justice and amnesty. Over its 30 years of evolution, transitional justice has been understood in some contexts in a reductionistic and mechanistic way as a toolbox that can guarantee nonrepetition or reconciliation. See, for example, Roger Duthie, ICTJ, “Transitional Justice and Prevention: Summary Findings from Five Country Case Studies” (2021), www.ictj.org/publication/transitional-justice-and-prevention-summary-findings-five-country-case-studies; Working Group on Transitional Justice and SDG16+, “On Solid Ground: Building Sustainable Peace and Development After Massive Human Rights Violations” (2019), www.ictj.org/publication/solid-ground-building-sustainable-peace-and-development-after-massive-human-rights; and Naomi Roht-Arriaza and Javier Mariezcurrena, eds., *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice* (Cambridge: Cambridge University Press, 2006).

reform; and they can be implemented in countries of origin and countries in or emerging from conflict. This study emphasizes that such an approach to foreign fighters requires addressing the consequences of the violations committed during the conflicts in which they took part. That conclusion is grounded not only in a basic notion of justice, which demands responding to victims, but also in a sound prevention approach, which seeks to prevent the repetition of new cycles of violence.

While this study articulates the value of transitional justice in contexts of foreign fighters, it also acknowledges the challenges that it faces in such contexts, in particular those related to the association of foreign fighters with notions of terrorism and violent extremism as well as the phenomenon's transnational dynamic. Notions of terrorism and violent extremism in both political discourse and applicable legal frameworks pose obstacles for seeking justice for all of the serious violations committed in a particular conflict and the attainment of justice-related goals, such as reconciliation and long-term prevention. The transnational nature of the phenomenon adds additional obstacles, including determining the responsibility of different states for crimes that happen abroad when the ramifications of which are perceived to affect national security at home and reintegrating those who travel to conflict areas as foreigners but also experience discrimination or exclusion in their countries of origin, often as members of immigrant communities.

Although the study focuses on the specific issue of foreign fighters, its scope extends to the wider issue of transnational terrorism and violent extremism. Addressing the problem of foreign fighters cannot be disentangled from current responses that are based on counterterrorism and countering-violent-extremism frameworks. This requires examining policies implemented by countries facing the threat of such violence without excluding the domestic components of foreign fighters for home countries. It also involves examining the domestic grievances that motivate or lure disaffected citizens or residents to engage in political violence either at home or by traveling abroad, including the potential grievances that counterterrorism and countering-violent-extremism policies can cause among certain communities inside the country, particularly their use to curtail dissidence and the work of human rights defenders and civil society more generally. Finally, it means that those advocating for transitional justice in contexts involving foreign fighters take steps to encourage greater transparency and participation in counterterrorism and countering-violent-extremism frameworks and to prevent their own discourse and practices from being co-opted to expand securitized and repressive state policies.⁵

This study provides an overview of the problematic nature, from a human rights and justice standpoint, of current approaches to foreign fighters. It then examines the value and content of a transitional justice approach to foreign fighters. After exploring the broad implications of the core elements of a transitional justice lens, the report draws on the experiences of different countries and communities to identify the types of national and local initiatives that could be incorporated into a transitional justice approach. While the study focuses on foreign fighters engaged with ISIS in Syria and Iraq, the research covers the responses and obligations of countries of origin and the lessons learned from other relevant contexts to propose a comprehensive strategy that combines local and national responses with international cooperation.

5 "Governments see civil society actors as a vehicle for advancing policy aimed at countering violent extremism and have co-opted the efforts of civil society into a top-down agenda for preventing and countering violent extremism for political or security objectives," UN Human Rights Council, "Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism," A/HRC/43/46, February 21, 2020, 16. See also UN General Assembly, "Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism," A/74/335, August 29, 2019, 18; Saferworld, "Generation of Law through Silence: The Global Counterterrorism Forum and Its Good Practices" (July 2021).

Existing Approaches to Foreign Fighters

The phenomenon of people traveling abroad to take part in an armed conflict for which they do not have a national connection has occurred throughout history without drawing significant negative attention until recently. It is only in recent decades that it has acquired particular notoriety due to its association with radicalism and the perceived threat of returning fighters continuing to perpetrate violence in their home countries. The rhetoric of the United States-led “global war on terror” and the UN Security Council’s use of its powers under Chapter VII of the UN Charter have created a framework for addressing the issue from a counterterrorism perspective.⁶ The lack of a precise definition of the notion of terrorism makes it malleable and a potential source of abuse. And while the notion of countering violent extremism offers a broader and more nuanced understanding of the causes and factors that lead to recruitment,⁷ at the policy and discourse levels, a narrow focus on short-term security and counterterrorism prevails.

The specific phenomenon of foreign fighters is referenced in many policy documents as involving “foreign terrorist fighters” and described as an additional form of threat to international security, because they “increase the intensity, duration and intractability of conflicts, and also may pose a serious threat to their States of origin.”⁸ Acting under Chapter VII, the UN Security Council expanded the overarching criminalization mandate of Resolution 1373 to include “the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts.” This included a mandate for member states to “penalize in a manner duly reflecting the seriousness of the offense” a series of preparatory actions such as traveling, helping to fund, or providing in any way support to travel or for recruiting of travel, “to a State other than their States 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.”⁹

The current framework explicitly calls for the prevention and suppression of such conduct through policy and legislation that is “consistent with international human rights law, international refugee law, and international humanitarian law.”¹⁰ This has been complemented by increased collaboration among bodies implementing the framework and human rights norms.¹¹

6 As defined by UNSC Resolution 2178, S/2178 (September 24, 2014).

7 UN General Assembly, “Plan of Action to Prevent Violent Extremism: Report of the Secretary General,” December 24, 2015 (A/70/674), and UN General Assembly, “A World against Violence and Violent Extremism: Report of the Secretary General,” A/72/621 (December 1, 2017).

8 UN Security Council, Resolution 2178, S/2178 (September 24, 2014), preamble.

9 *Ibid.*, para. 6.

10 *Ibid.*, para. 5.

11 See, for example, UN Counter-Terrorism Implementation Task Force Working Group on Promoting and Protecting Human Rights and the Rule of Law while Countering Terrorism, “Guidance to States on Human Rights-Compliant Responses to the Threat Posed by Foreign Fighters” (2018). The document was prepared through a collaborative effort, with OHCHR’s active participation.

Nevertheless, the approaches that this framework fosters suffer from a series of problems, including: 1) a serious definitional problem and questionable discourse; 2) an emphasis on punitive and security measures and corresponding neglect of victims' rights and underlying causes; 3) nation-state centeredness; and 4) violent consequences, such as human rights violations, repression, and collective punishment.

Problems of Definition and Discourse

The lack of an accepted definition of “terrorism” leads to several forms of abuse and risks, including broad definitions of criminal conduct and its overuse by autocratic regimes to justify political repression. The problem was identified in early attempts to warn about the consequences of confusing terrorism with violations of international humanitarian law.¹² It is not just a problem of discourse, narratives, or labels, as when those protesting oppression are called “terrorists,” but one that often translates into the use of special repressive powers, harsh conditions of detention, restrictions on due process of law, and stricter penalties. Some of these repressive measures are the result of new legislation passed by several countries in response to or under the umbrella of UN Security Council or other international bodies' resolutions, in what has been called by some commentators as a “legislative fever.”¹³ One of the earliest reports by the first Special Rapporteur on human rights and counterterrorism warned that “[c]alls by the international community to combat terrorism, without defining the term, can be understood as leaving it to individual States to define what is meant by the term . . . [which could] result in the unintentional international legitimization of conduct undertaken by oppressive regimes.”¹⁴ The breadth of conduct that can be labeled as terrorism increases when other types of conduct are associated to terrorist acts, such as forms of support, incitement, aiding and abetting, or conspiracy. The broad language of the provisions can lead to legislation that, in not precisely defining prohibited conduct, offers people little guidance about how to act.¹⁵

The discourse on countering and preventing violent extremism is also problematic because it can lead to stigmatization, confusion between addressing ideas and behavioral tendencies, and disempowerment of communities, especially minorities. To the extent that such discourse is used to justify interventions centered on security, it can further alienate people who have legitimate grievances and demanded change in how their communities are portrayed and treated. Its lack of definition by an international authoritative body makes it even more malleable to manipulation or misunderstanding. The inability or unwillingness of mainstream society to address racism, prejudices, or other grievances affecting migrant communities or second-generation citizens can create a sense of dissonance among those expected to assimilate in ways that do not respect their diversity.¹⁶ According to one critical analysis, countering-violent-extremism discourse and policies have expanded the range of methods used under the counterterrorism framework to include such measures as surveillance and censorship and “shifted their target from terrorist organisation to religious ideology and identity.”¹⁷

12 See UN Commission on Human Rights, “Specific Human Rights Issues: New Priorities, in Particular Terrorism and Counter-Terrorism,” Final Report of the Special Rapporteur, Kalliopi K. Koufa, E/CN.4/Sub.2/2004/40 (June 25, 2004).

13 Romyana van Ark, International Centre for Counter-Terrorism, “Incitement to Terrorism: Treating the Symptoms or Addressing the Causal Malady?” (2018), <https://icct.nl/publication/incitement-to-terrorism-treating-the-symptoms-or-addressing-the-causal-malady/>.

14 UN Commission on Human Rights, “Promotion and Protection of Human Rights,” E/CN.4/2006/98 (December 28, 2005), para. 27.

15 See UN Security Council resolutions under chapter VII compelling state to criminalize certain actions, for example, Resolution 2178 (S/RES/2178), September 24, 2014, para. 6, recalling S/RES/1373 (2001), para. 2(e).

16 William Stephens, Stijn Sieckelinck, and Hans Boutellier, “Preventing Violent Extremism: A Review of the Literature,” *Studies in Conflict & Terrorism* 44:4 (2021): 346–361, DOI: 10.1080/1057610X.2018.1543144.

17 Arun Kundnani and Ben Hayes, The Transnational Institute, “The Globalisation of Countering Violent Extremism Policies: Undermining Human Rights, Instrumentalising Civil Society” (2018), 3.

From a transitional justice perspective, where the end goal is long-term prevention of violence and peacebuilding by addressing the causes and consequences of serious human rights violations, the emotional charge connected to the notions of terrorism and violent extremism limits the possibilities for effective action. The construction or reinforcement of those identities make it difficult for those trying to change their lives, including by assuming their responsibility for involvement in past harms. This stigmatization is difficult to overcome in specific communities and the broader public, increasing resistance to any type of rehabilitation or reintegration of returnees.¹⁸ It also makes it difficult for actors playing important roles in this process to be aligned in common objectives, including immigration and consular officers, prison guards and parole officers, judges and prosecutors, municipal social workers, and even employers and neighbors. For these reasons, this report uses terms such as crimes under international criminal law, violations of international humanitarian law, political violence, and other types of violence to refer to the crimes committed by foreign fighters because, while not completely neutral, such terms do not have the same connotations as terrorism and violent extremism. This is not a mere technical issue but a substantive element of a transitional justice approach. In addition, transitional justice requires addressing crimes and human rights violations committed by all other actors, including state actors.

Punitive and Security Approach

The policies implemented under the existing framework for responding to foreign fighters have emphasized a security and punitive approach and empowered counterterrorism actors at the expense of other interlocutors. These responses have neglected victims, underlying causes, and prevention. The UN Security Council, acting under Chapter VII of the UN Charter and according to the premise of “a threat to the peace,” does not consider all dimensions of the phenomenon, nor does it engage in broad and transparent discussion about how to address it. To do so, the Security Council would need to listen to and include in its considerations other actors. A brief examination of the UN Security Council and other UN resolutions and state policies that address foreign fighters reveals how much attention is given to criminalizing international terrorism, including broad forms of collaboration or support, and sanctioning an approach that focuses mostly on immediate prevention through enhanced security. This understanding of prevention only rarely includes addressing the sometimes legitimate grievances of members of communities vulnerable to recruitment, demonstrating a lack of awareness of the potential unintended effects of counterterrorism measures in strengthening the appeal of militant groups or the loyalty that they may inspire among people under occupation or foreign influence.¹⁹

References to respect for human rights, present in every resolution addressing foreign fighters, do not have much practical effect. The current and past Special Rapporteurs on human rights and counter terrorism have emphasized that human rights protections should not be merely balanced with security, calling for a “positive interplay” between the two.²⁰ A human rights approach requires understanding prevention in ways that take into account the effects of repressive

¹⁸ For a short description of the power of language in this particular context, see Chris Bosley, *Peacework/USIP, “Violent Extremism, Disengagement and Reconciliation: A Peacebuilding Approach,”* No. 163 (July 2020), 25–26.

¹⁹ In Kenya, for example, interviewees for this study reported that security agents have often abused some national security measures put in place by the state, mostly targeting young Muslim males living in the coastal or eastern regions of the country and community and religious leaders and human rights defenders in those regions, and the families of those who traveled to Somalia or elsewhere to join armed struggles. As a result, some youth, especially from poor, rural, and informal settlements, have resorted to violent responses to avenge the ruthlessness of security agents and to get the attention of the executive government to the abuses and air their grievances. Interviewees added, this unfortunately only brings more wrath. Interviews of three Kenyan former fighters returning from Somalia, August 2021.

²⁰ UN General Assembly, “Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism,” Report to the UN General Assembly, A/75/337 (September 3, 2020), para. 18.

tactics or security measures on those directly and indirectly affected by them. It also requires addressing the rights of victims of acts labelled terrorism, victims of human rights violations committed during counterterrorism efforts, and those affected by conflict who need humanitarian assistance and reconstruction. A long-term prevention approach should also examine and address the causes of radicalization, distinguishing between the expression of legitimate grievances and the decision to engage in violent political action.

There is certainly an important role for criminal justice, accountability, and security to play in addressing the foreign fighters phenomenon, and transitional justice does not shy away from that role. Holding responsible those who commit serious human rights violations and crimes is a state obligation and a measure for preventing recurrence, as long as it is done with strict adherence of the rule of law and human rights compliant legislation. This should include avoiding unprecise definitions of criminal conducts; abusive criminalization of preparatory actions or mere affiliation with groups; deprivation of liberty based solely on suspicion or on attributing risk factors to individuals not charged with any crime; accepting evidence not properly obtained or not shared on time with the defense; and other practices sometimes admitted through counterterrorist legislation,²¹ in addition to the most egregious forms of human rights violations and violations of due process of law also sometimes used by governments, like extraordinary rendition or illegal transfers of detainees.

Moreover, accountability is not just the imposition of punishment or neutralizing threats through incarceration but involves investigating violations and responding to victims' rights and the need to know and see that perpetrators must face the consequences of their actions. As this report tries to explain, accountability can take different forms, to serve the rights of victims and the broader society, and can be compatible with efforts aimed at the reintegration of those who committed violations. Similarly, security can be even better guaranteed when all of those who can be repatriated are reintegrated. Instead of calling them pariahs or letting them be exposed to harsh or even inhuman conditions or even escape, reintegrating them can offer better conditions for long-term security.

Another relevant criticism has been the departure from the rule of law, particularly of legislatures adopting legal frameworks "ordered" by international bodies without enough critical examination, transparency, or public participation. The nature of some international bodies such as the UN Security Council, which are led by government representatives, distorts the separation of powers when those bodies order or excessively influence domestic legislation. This results in a trickle-down effect of legislative adoption, where legislators simply adopt standards defined by bodies governed by the executive as norms.²²

A Focus on Short-Term Nation-State Security

Notwithstanding all of the calls for international cooperation, including those made by UN Security Council resolutions under Chapter VII, most policies adopted by states privilege their own security over the collective prevention of violence. Perhaps where this is most visible is in states' failure to assume their responsibilities regarding the accountability or rehabilitation of their own citizens who are associated with ISIS or other groups—opting, instead, to deny citi-

²¹ For a comprehensive examination of how the principle of legality and due process of law should guide the interpretation of legislation regarding foreign fighters, see International Commission of Jurists, "Counter-Terrorism and Human Rights in the Courts: Guidance for Judges, Prosecutors and Lawyers on Application of EU Directive 2017/541 on Combatting Terrorism" (2020).

²² Valsamis Mitsilegas, "Counterterrorism and the Rule of Law in an Evolving European Union: Plus Ça Change?" *New Journal of European Criminal Law* 12(1) (2021): 36–51.

zanship, consular support, or establishment or recognition of citizenship for children of foreign fighters or taking other such measures to prevent their return or repatriation. These policies have been characterized as outsourcing the responsibilities of wealthy states to countries with limited capacity or even to armed groups that control territories, like the Autonomous Administration of North and East Syria (AANES, also known as Rojava).²³

The shortsightedness of these approaches could not be more evident, particularly regarding Iraq and northeast Syria, which have been affected by armed conflict and suffer the legacies of recent conflicts, hampering their ability to provide fair trials, implement effective rehabilitation or deradicalization services, or guarantee that those detained do not escape. Even those convicted of crimes may be returned to society one day, under limited conditions, to prevent their future engagement in violent actions. Furthermore, abandoning those citizens, who are treated as pariahs by their governments or by those who exercise control over those areas, and stigmatized by their communities, could become an effective recruiting tool for the same or future armed groups.²⁴ Members of the same social groups as those excluded from protection, who share the same faith or ethnic background, may see these policies as confirmation of their perception of discrimination or other injustices, adding to their grievances.²⁵

These approaches may be the byproduct of efforts by elected governments to mitigate the publicly perceived risk of terrorist attacks that could involve returnees, but also racism, xenophobia, and other forms of discrimination and exclusion. Despite the low rates of such involvement,²⁶ it is understandable that authorities seek to minimize such risk. Nevertheless, this is one reason why democracies are based not only on the election of authorities and their periodic accounting to the people, but also on human rights, rule of law, and checks and balances implemented by other authorities, especially courts, ombudspersons, and international human rights mechanisms. In addition, citizens in those countries should be made aware of the increased risk posed by governments not assuming their responsibilities and leaving foreign fighters in limbo (in terms of security, accountability, and human rights protections), which may contribute to further violence.

Human Rights Consequences

The counterterrorism framework, despite its pro forma call for respecting human rights and the provision of humanitarian support to conflict zones, has been devastating for the protection of human rights. The countering-and-prevention-of-violent-extremism approach, even if presented

23 Romyana van Ark, Asser Institute, "Outsourcing the Management of Terrorism Suspects to Other Countries (2019), <https://www.asser.nl/about-the-institute/news-asser-today/blog-post-outsourcing-the-management-of-terrorism-suspects-to-other-countries/>; Ian Acheson and Amanda Paul, European Policy Center, "Marching Home? Why Repatriating Foreign Terrorist Fighters Is a Pan-European Priority" (discussion paper) (2020); Matteo Pugliese, Italian Institute for International Political Studies, "France and Foreign Fighters: The Controversial Outsourcing of Prosecution" (2020); Hannes Jöbstl, "Outsourcing Justice: State Obligations and the Prosecution of Foreign Fighters by Armed Groups in Syria," *Armed Groups and International Law*, April 6, 2020, <https://armedgroups-internationalallaw.org/2020/04/06/outourcing-justice-state-obligations-and-the-prosecution-of-foreign-fighters-by-armed-groups-in-syria/>.

24 A youth returnee in Kenya interviewed for this report in August 2021 confirmed this: "We are treated as outcasts including by our extended family members, even though we returned from the front willingly. This just tempts us to go back. We joined the group for various reasons. I did it to avenge the discrimination by the police, especially the arbitrary police killings of boys while the state does nothing about it. Even now police hunt us down and kill us."

25 Muslim youth in Kenya have persistently decried discrimination on the basis of their faith, pointing out, "We, Muslim youth, undergo rigorous vetting before we are issued an identity card. Getting a passport is worse. Non-Muslim youth don't get the same treatment. This discrimination is an injustice and makes us very bitter." Interviewee of Kenyan returnees, August 2021.

26 Studies of recidivism of returnees show rates lower than 5 percent. In the case of people interned in camps in Syria and Iraq, which involves high proportions of women and children, the threat of their future engagement in violent political action is even lower. The motivation they had for traveling should also be considered, as very few of them traveled for the purpose of receiving training and return to their countries of origin. Thomas Renard, "Overblown: Exploring the Gap Between the Fear of Terrorist Recidivism and the Evidence," *CTC Sentinel* 13 (4) (2020): 19–29, <https://ctc.usma.edu/overblown-exploring-the-gap-between-the-fear-of-terrorist-recidivism-and-the-evidence/>.

as more comprehensive in addressing the situation of foreign fighters, is still strongly associated with security policies and often misused, with negative consequences for human rights, particularly for certain vulnerable groups. The risks of defining cultural, religious, educational, or community interventions through a primary lens of security and surveillance include less civic engagement and legitimate political action, lower levels of social trust, greater exclusion and alienation, and, particularly in recent decades, the stigmatization of Muslim communities.

Since 2003, several UN bodies and civil society organizations have addressed the human rights effects of antiterrorist legislation.²⁷ Reports by the Special Rapporteur on human rights and counterterrorism summarize these problems well,²⁸ illustrating how the risks mentioned above translate into actual violations, repression, and collective punishment. The imposition of severe sentences, including the death penalty, for mere group membership without evidence of commission of serious crimes and by summary judicial proceedings lacking independence or supported by confessions obtained under torture or duress, as reported in Iraq, Somalia, and other contexts, is absolutely unacceptable. Any framework that can be used to justify or support such gross violations of nonderogable rights requires careful assessment.

Broad scopes of crimes, including preparatory acts and other forms of collaboration or support, have also been legislated in European countries and the European Parliament,²⁹ while legislation authorizing administrative measures that impose severe restrictions on human rights has been passed or are being proposed in countries such as France and the United Kingdom.³⁰

Successive reports by the special rapporteurs have warned about different risks associated with the global counterterrorism agenda and UN Security Council responses to international terrorism and related issues, including the impact on women, children, and family members of foreign fighters,³¹ and the closing of civic space and the use of counterterrorism language in UN Security Council resolutions to repress dissent and curtail the work of human rights defenders.³² In general, these involve states using the framework of counterterrorism to strengthen autocratic policies or implement different forms of discriminatory measures that reveal racism or nativism.³³

27 International Helsinki Federation for Human Rights, “Anti-terrorism Measures, Security and Human Rights: Developments in Europe, Central Asia and North America in the Aftermath of September 11” (2003), www.refworld.org/docid/46963adfo.html.

28 See, for example, UN General Assembly, “Promotion and Protection of Human Rights.”

29 Mitsilegas, “Counterterrorism and the Rule of Law,” 36–51.

30 Government of France, Law on Internal Security of France, October 30, 2017 (Loi renforçant la sécurité intérieure et la lutte contre le terrorisme) and UNHCHR, “Preliminary Findings of the Visit: UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism Concludes Visit to France,” October 23, 2018. See also the joint report by the Special Rapporteur on counterterrorism, the Special Rapporteur on freedom of expression, and the Special Rapporteur on freedom of association, of 12 November 2020, on bill No. 3452 on global security proposed to the National Assembly on 20 October 2020 (OL FRA 4/2020). The bill was subjected to a series of amendments, and several of its provisions were declared unconstitutional by the Constitutional Council (decision No. 2021-817 DC of 20 May 2021), before it was signed into Law No. 2021-646 of 25 May 2021. Counter-Terrorism and Sentencing Act of 2021. See the observations made by the joint report from the Special Rapporteur on counterterrorism, the Special Rapporteur on arbitrary detention, the Special Rapporteur on arbitrary execution, the Special Rapporteur on the right to privacy, and the Special Rapporteur on torture, of 22 July 2020, during the discussion of Bill 129 (OL-GBR 7/2020). On deprivation of citizenship, see the amendment of the Nationality Act of 1981, section 40(4A), inserted (28.7.2014) by Immigration Act 2014 (c. 22), ss. 66(1), 75(3); S.I. 2014/1820, art. 3(t) as amended by SI 2014/2771 art. 14. For a general analysis of EU counterterrorism legislation and laws adopted by countries in western Europe, see Christophe Paulussen, International Centre for Counter-Terrorism, “Repressing the Foreign Fighters Phenomenon and Terrorism in Western Europe: Towards an Effective Response Based on Human Rights” (November 2016).

31 UN General Assembly, “Human Rights Impact of Counter-Terrorism and Countering (Violent) Extremism Policies and Practices on the Rights of Women, Girls and the Family,” A/HRC/46/36 (January 22, 2021).

32 UN General Assembly, “Impact of Measures to Address Terrorism and Violent Extremism on Civic Space and the Rights of Civil Society Actors and Human Rights Defenders,” A/HRC/40/52 (March 1, 2019).

33 This happened in Kenya despite the constitutional control of the High Court. In 2016, the court ruled that some amendments to the Security Laws (Amendment) Act, of 2014, made by the Kenyan Parliament were unconstitutional, because they broadened state powers in relation to antiterror operations that ended up shrinking civic space and curtailing the work of human rights organizations and defenders related to counterterrorism and violent extremism.

Following warnings about the counterproductive effect of policies to fight terrorism when they erode human rights or the rule of law,³⁴ the UN Counter-Terrorism Implementation Task Force brought different views together to address these risks through the establishment of a Working Group on Promoting and Protecting Human Rights and the Rule of Law while Countering Terrorism. The working group produced a series of reference guides on human rights to be followed by states adopting or implementing counterterrorism legislation or policies,³⁵ including guidelines on human rights and border security, conditions of detention, searches, and prosecutions. While those guidelines may help to specify certain conditions, however, they cannot replace obligations established by international human rights law, developed through open negotiations among state parties, constitutionally based processes of domestication of international law, and the development of customary international law through well-grounded practice and *opinio juris*. Moreover, other documents and guidelines have been developed by the Security Council Counter-Terrorism Committee with less consideration given to states' obligations under human rights law and less involvement or collaboration of human rights bodies, creating a confusing patchwork of policy recommendations.³⁶

In recent years, the emphasis on criminalization and security has been lessened by emphasizing more comprehensive approaches to prevention. Of particular importance has been expanding the discussion to include the prevention of violent extremism. According to the UN General Assembly's Plan of Action to Prevent Violent Extremism, for example:

Nothing can justify violent extremism but we must also acknowledge that it does not arise in a vacuum. Narratives of grievance, actual or perceived injustice, promised empowerment and sweeping change become attractive where human rights are being violated, good governance is being ignored and aspirations are being crushed.³⁷

A preventive approach requires addressing such grievances, particularly in communities to which some foreign fighters belonged. Some of those who legitimately share these grievances, growing in frustration and seeing no other ways to address them, could be attracted to violent action. Understanding prevention from this perspective helps to center human rights protections in the overall response to the issue. It affirms that respect for human rights and the rule of law should be seen not as obstacles to effective counterterrorism, but as one of the most important tools for reducing different types of political violence.

Despite the mentioned warnings about the contradictions within these frameworks and the risk of their manipulation by some governments to justify repression, the adoption of stronger human rights and prevention approaches has been limited and slow. Moreover, when short-term fears of insecurity arise, governments and even national courts have tended to sacrifice human rights protections in favor of problematic security measures. This has been particularly true for countries dealing with foreign fighters. Western countries, usually the ones promoting human rights at home and abroad, have often adopted nativist policies that would likely have been considered unacceptable if adopted in response to domestic political violence. They have also rejected Chapter VII mandates for international cooperation in favor of their national security,

Other provisions went into effect, however, that have been used for the surveillance and persecution of civil society organizations and activists, particularly in Muslim-majority coastal and northeastern regions. Interview with civil society actors, August 2021.

³⁴ Affirmed by, among other sources, UN General Assembly, Resolution 70/291, July 19, 2016, para. 16.

³⁵ United Nations Counter-Terrorism Implementation Task Force, CTITF Working Group on Protecting Human Rights While Countering Terrorism, "Human Rights Reference Guide: Security Infrastructure" (March 2014), www.un.org/counterterrorism/sites/www.un.org.counterterrorism/files/basic-human-rights-reference-security-infrastructure2014.pdf

³⁶ The 2015 Madrid Guiding Principles + 2018 Addendum, adopted by UNSC resolutions S/2015/939 and S/2018/1177.

³⁷ UN General Assembly, "Plan of Action to Prevent Violent Extremism," para. 3.

permeated by a logic based on “the balance between, on one hand, the defence of the institutions and of democracy, for the common interest, and, on the other hand, the protection of individual rights.”³⁸ The Council of Europe has even applied this logic by selectively referencing a European Court of Human Rights decision that found that restrictions on the right to privacy were justified by the need for security,³⁹ while failing to mention substantial considerations made by the same court in rejecting such a balancing act when addressing the risk of torture in assessing a refolement decision.⁴⁰ Instead of understanding human rights protections as a mere limit to the exercise of power, a preventive framework would be explicit in seeing them as a positive obligation, where protection and promotion can strengthen security by reducing the likelihood of creating new grievances among people and communities that are affected by security restrictions or who have experienced only empty promises from those espousing the importance of human rights.

38 Council of Europe, “Guidelines of the Committee of Ministers of the Council of Europe on Human Rights and the Fight against Terrorism,” adopted by the Committee of Ministers at its 804th meeting (July 11, 2002), 9.

39 European Court of Human Rights, *Klass and Others v. Germany*, Judgement, September 6, 1978, para. 49.

40 European Court of Human Rights, *Saadi v. Italy*, Judgement, February 28, 2008.

The Relevance of Transitional Justice to Foreign Fighters

Transitional justice offers a number of insights and strategies that are both relevant to the complex problem of foreign fighters and capable of shifting its focus towards respecting human rights. First, addressing massive violations requires identifying interventions that are adequate to their scale and their nature as acts committed by organized structures for political purposes. Second, confronting the different dimensions of such violations (institutional, political, social, economic, and cultural) requires a comprehensive and coordinated response. Third, crafting justice measures in complex contexts requires acknowledging and assessing the contributions and roles of a range of stakeholders, such as victims, perpetrators, women, children and youth, those providing different forms of support or funds, civil society, and state and international institutions. And fourth, achieving a fundamental objective of transitional justice requires designing measures that help to prevent the recurrence of injustice, interrupt cycles of violence, and contribute to sustainable peace and development.

Determining Interventions Adequate to the Scale and Nature of the Violations

Transitional justice deals with human rights violations committed on a massive scale by political actors that respond to hierarchies and organizations. The extent and nature of these violations render inadequate piecemeal approaches that examine one crime or one single perpetrator without further connections. Instead, they require a more comprehensive examination of causes, consequences, and responsibilities in which criminal justice can play a role but is an inadequate response on its own. Transitional justice addresses the widespread consequences of violations. It helps to determine the kinds of events and truth that need to be investigated, clarified, and acknowledged. It can direct criminal prosecutions to the most relevant cases and perpetrators, with the purpose of dismantling criminal structures and reducing the likelihood of recurrence. It can respond to the needs and expectations of victims, including by finding the forcibly disappeared and providing forms of reparations that are adequate and accessible to large numbers of victims and affected communities.

Responding to the nature of the conflict also requires understanding that violations were not committed in isolation from a broader confrontation or in a vacuum or by one party. Experiences in post-transition Peru and Guatemala, for example, illustrate the potential complementarity between truth seeking and criminal justice in determining responsibility and guiding

prosecutions;⁴¹ they also demonstrate the need to apply criminal investigations, truth-seeking efforts, and reparations measures to violations committed by all groups, rather than certain actors, as will be discussed below.

In contexts of ongoing conflict, these approaches are also relevant because they help to create conditions conducive to accountability, affirming the right of victims, and advancing peace processes that are based on respect for human rights. Responding to victims of violations committed by all the different actors helps to affirm their common dignity, while rejecting the use of political violence and abuse. It shows political actors that violence is not the only way to advance their interests. This is why transitional justice initiatives are developed in countries like Syria, Libya, Yemen, or Ukraine.

In terms of criminal justice, transitional justice experiences offer several lessons about the selection of crimes to be investigated, the organization of investigations, the assessment of evidence, the role of victims, and the determination of sentences. In the context of foreign fighters, given the serious nature of the crimes they may be involved in, limiting investigations to foreign fighters' mere preparatory acts, such as traveling, receiving training, or solely becoming a member, can be a disservice to victims.

The purposes of criminal justice in this context should be twofold: to respond to the rights of victims to justice and truth, affirming the rule of law; and to provide a security and conditionality framework for implementing reintegration policies for those returnees who may pose a legitimate threat. Limiting prosecutions to preparatory or membership offenses would neither offer a sense of justice to communities that suffered heinous crimes nor respond to reasonable expectations for justice in the countries of origin. The number of returnees who should be tried for violations of international humanitarian law does not represent an impossible burden for capable prosecutors who can rely on evidence from different sources, including what is collected by actors such as the International Impartial and Independent Mechanism on Syria and the UN Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL (UNITAD).⁴²

In addition, charging individuals for serious crimes can lead to sentences that are more likely to obtain further truth and cooperation and the development of rehabilitation and reintegration processes that more effectively address the conditions of those who have shown actual capability of committing serious crimes. The potential application of lengthy sentences, which correspond to the nature of the actual crimes attributed to ex fighters, and not their membership or roles in armed groups, could help actors to reach agreements for conditional cooperation. Such a conditionality regime could facilitate forms of reparation, acknowledgment of wrongdoing, expressions of remorse to victims, and the provision of information about the fate of the forcibly disappeared and missing. If there is not enough evidence to charge or convict for serious crimes, prosecuting individuals for group membership or preliminary conduct could still provide some degree of accountability or cooperation and help to establish security conditions for reintegration programs, but only as a second-best option. Ultimately, whatever the sentence, the purpose of criminal justice proceedings should include the participation of the defendant in a rehabilitation and reintegration program, which could start even during pretrial detention.

41 Key elements of the work of truth commissions in both countries was mapping violations and making a general attribution of responsibility. The attribution made by the Peruvian truth commission of 54 percent of violations to the Shining Path guerrilla and 37 percent to state security forces or self-defense committees reduced the tendency by different political actors to deny the responsibility of one side, while directing criminal investigations into the unresolved cases of state responsibility. In Guatemala, the attribution of 93 percent of violations to the state and their sponsored patrols has also helped to reduce the possibility of false equivalence, while directing prosecutions toward state agents for different types of crimes, including massacres, the massive use of sexual violence against women, and even for genocide against a former president and head of the Army.

42 As recommended by Tanya Mehra, of the International Center for Counter Terrorism, in an interview in August 2021.

Transitional justice consists precisely in addressing massive violations of human rights through diverse efforts that complement each other. In addition to criminal justice, efforts are needed to understand what happened, provide clarity to victims, listen to and acknowledge their suffering, and respond to the material and symbolic needs of those who suffered the most. These nonjudicial ways of addressing the legacies of violations, such as community dialogues, reconciliation ceremonies, and acknowledgment of responsibility, can also help returnees to reintegrate. In contexts of foreign fighters, these efforts can take place either in countries of origin or conflict zones; they are particularly appropriate to the acceptance and destigmatization of returnees, while also providing some degree of truth about the violations that were committed. They could both help to humanize returnees and address the needs of affected communities. Community reconciliation and reintegration programs have been implemented in Timor-Leste,⁴³ Sierra Leone,⁴⁴ and elsewhere.

Finally, transitional justice experiences warn about the use of the term “terrorist” as a label for certain actors or “terrorism” as a defining criterion for measures like prosecution. Even if some of the crimes committed during a conflict can be correctly categorized as terrorism, other criminal law definitions may not only be more appropriate but also easier to establish if, for example, they do not contain specific requirements about criminal intent. For instance, in Peru, despite the overuse of the term “terrorism” in narratives and even for prosecution purposes during the internal armed conflict, the Peruvian truth commission stated that:

The criminal offenses committed by terrorist groups involved in the internal armed conflict must be considered in light of the standards of international criminal law and in accordance with the norms of international humanitarian law.⁴⁵

Nevertheless, when the courts sentenced leaders of the armed insurgent group Shining Path after the democratic restoration and the annulment of sentences rendered during the Fujimori regime, they used both antiterrorist legislation and international criminal law, relying particularly on establishing defendants’ criminal liability through control of an organization. This notion of criminal liability was later used to prosecute former President Alberto Fujimori. In these particular cases, the parallel usage strengthened the legitimacy and legal authority of both sets of prosecutions.

In Colombia, a narrative of terrorism was widely employed by the Colombian government, military, and public in relation to the Revolutionary Armed Forces of Colombia (FARC), particularly with regard to methods of violence such as the bombing of a prominent social club in Bogotá associated with political and entrepreneurial elites and the kidnapping of civilians for ransom. The Colombian judiciary, for example, used criminal definitions of terrorism to prosecute and sentence many captured FARC members. However, there is no reference to terrorism in the 2016 Colombian Peace Accords, and the criminal justice structure built for investigating and prosecuting those responsible for serious crimes—the Special Jurisdiction for Peace—is based on international humanitarian law and international criminal law. A carefully worded definition of political crimes, and the crimes connected to them, was developed by national legislation and jurisprudence. This has allowed the new judicial structure to revise prior convic-

43 “Chega! Report of the Commission of Reception, Truth, and Reconciliation in Timor-Leste,” Executive Summary, 22.

44 Spearheaded by local NGO Fambul Tok (<https://fambultok.org/>) and replicated in forty communities by the interim reparations program implemented by the government and the International Organization of Migration (UN Peacebuilding Fund, “Support to the Implementation of the Reparations Program as part of the Recommendations of the Truth and Reconciliation Commission” PBF/SLE/A-4, September 2010). See also Gearoid Millar, “Assessing Local Experiences of Truth-Telling in Sierra Leone: Getting to ‘Why’ through a Qualitative Case Study Analysis” *International Journal for Transitional Justice* 4 (2010), 477–496, doi: 10.1093/ijtj/ijq017.

45 Hatun Willakuy: *Abbreviated Version of the Final Report of the Truth and Reconciliation Commission* (Lima, 2003), 23.

tions against FARC members for terrorist offenses, while a general amnesty for rebellion and political crimes has included FARC members sentenced for terrorism, based on the provision contained in article 6 of Protocol II of the Geneva Conventions.⁴⁶

In sum, by determining responses that are more appropriate to the different dimensions of armed conflicts involving those who traveled abroad to join or support them, transitional justice can help states to move away from a punitive and security approach without diminishing the importance of accountability and prevention. Moreover, it can make accountability efforts more effective by targeting the most serious offenses and responding to victims' rights, while also promoting acknowledgment, reparations, and rehabilitation. Transitional justice offers insights on how to contribute to security and prevention via a broad range of measures that can help to address grievances and foster a sense of inclusion among people and communities who feel disempowered or wronged.

Coordinated Responses for Addressing Different Phenomena

In examining the different dimensions of human rights violations, the importance of the complementarity of truth, justice, reparations, and guarantees of nonrecurrence cannot be overstressed. This complementarity can involve, for example, carefully designed systems for assessing during criminal procedures the value and relevance of defendants' collaboration in other transitional justice mechanisms. In Colombia, for example, efforts in relation to truth, reparations, apologies, finding the missing and forcibly disappeared, and clearing minefields have all been considered within the legal framework and initial prosecutions of the Special Jurisdiction for Peace against accused members of both the military and FARC. In the same vein, certain firewalls have been established prohibiting the use of information received by the body responsible for finding the forcibly disappeared to attribute criminal responsibility to the person who provided it.⁴⁷

There are additional forms of coordinated responses that a complex situation like foreign fighters requires. In an analogous way, as international criminal justice coordinates with domestic prosecutions, guided by the principle of complementarity and by norms like non-refoulement, similar forms of coordination are required by the UN Security Council mandate on international cooperation. This could involve agreements to prevent *ne bis in idem* ("no one shall be twice tried for the same offence") on decisions rendered in one country for providing some form of recognition of sentences in other countries and, in the interests of justice, for preventing trials for lesser crimes, such as traveling or group membership, of those who have already been sentenced for a more serious crime, repatriated to fulfill that sentence, and/or participated in a rehabilitation program. Such forms of coordination and cooperation may require a significant dose of creativity, because there may be few, if any, precedents in transitional justice efforts dealing with issues connected to foreign fighters.

Acknowledging and Assessing the Contributions and Roles of Different Stakeholders

In contrast to policies that focus primarily on the security of countries of origin and/or punishing only members of certain groups like ISIS, transitional justice highlights the importance of addressing the responsibilities, contributions, and interests of a wide range of actors. In a context where foreign fighters are involved, this includes victims of human rights violations—such as

⁴⁶ See, for example, Amnesty or Pardon Chamber, Special Jurisdiction for Peace, case No. 20181510086352, res. SAI-AOI-D-003-2020, February 12, 2020.

⁴⁷ Government of Colombia, Decree 589 of 2017, article 3.

victims of counterterrorism measures, communities affected by conflict, perpetrators of serious crimes (from all sides of the conflict), and people associated with groups like ISIS who were not engaged in the commission of serious crimes (or were not criminally liable because of their age at the time). Special consideration should be given to the voices and agency of women and youth.⁴⁸ Assessing such a range of stakeholders naturally expands the objectives of justice measures beyond accountability to include, for example, the reintegration not only of those sentenced but also those who voluntarily joined groups like ISIS or were subjected to radicalizing environments during or after ISIS rule.

A comprehensive and long-term approach distinguishes transitional justice from “victors’ justice.” Criminal justice directed at exclusively one group constitutes political weaponizing and offers little prospect for reconciliation or peacebuilding in cases of armed conflict where violations have been committed by different sides. When prosecutions or internment are directed only against members of subversive or separatist groups or those defeated, while violations committed by state agents in fighting those insurgencies or under counterterrorism pretexts are unaddressed, they constitute direct violations of the obligation to provide effective remedies to victims of state violence, as occurred in Sri Lanka, Côte d’Ivoire, and Fujimori’s Peru with negative consequences. Affirming human rights requires prosecuting crimes affecting all types of victims, not based on the identity or group affiliation of the perpetrator. Determining the responsibilities of the different parties in a conflict is an essential aspect of a transitional justice approach. In this light, addressing violations attributed to foreign fighters without addressing violations committed by other actors in contexts such as Syria and Iraq can undermine justice, peace, and security. This does not mean making no distinctions in how different actors are treated, but it does require examining the conflict more broadly, including the criminal and other forms of responsibility of all groups, including members of US-led coalitions.

Seeking accountability for all of the serious crimes committed, however, is often very difficult, particularly considering the political tensions created by local power dynamics, the presence of different armed groups in the territory, and a history of armed conflict and political violence. In the case of foreign fighters the use of antiterrorist legislation and narratives can further limit the scope of justice. In Nigeria, for example, the government and the armed forces have ignored calls for accountability for human rights violations committed by the military and other militias fighting Boko Haram, despite the frequent practice of mass arrests in areas liberated from Boko Haram occupation or in public places which have led to the denial of due process and created room for forced confessions.⁴⁹

Beyond the conflict zone are the responsibilities and interests of other stakeholders, including: states playing a role in the conflict by, for instance, supporting armed groups or directly engaging in military operations; foreign fighters’ countries of origin; and countries with the capacity to contribute to setting up a comprehensive framework or individual mechanisms for the resettlement of people bearing no criminal responsibility. Within countries of origin, the interests of the broader national community need to be considered along with the role of communities of origin of those who traveled to take part in a conflict and the communities where they could be resettled, along with their families. The latter communities could be essential for reintegration processes that help to prevent returnees from engaging in criminal activity or inciting others in those communities to do so.

48 As encouraged by UN Security Council Resolutions 1325 (October 31, 2001) and 2250 (December 9, 2015) as well as follow-up resolutions on both issues.

49 Vanda Felbab-Brown, Institute for Integrated Transitions, “The Limits of Punishment; Transitional Justice and Violent Extremism,” Nigeria Case Study (2018); and Allan Ngari, of the Regional Organised Crime Observatory Coordinator for West Africa, interviewed in August 2021.

The experiences of states that have confronted legacies of serious human rights violations offer useful guidance in examining the responsibilities and possible contributions of a range of stakeholders in contexts of foreign fighters. They also can offer lessons about dealing with the differentiated consequences of conflict, particularly for women, children, and youth. Such differentiation allows for the identification of violations that may otherwise be neglected by a limited focus on group membership or an outdated understanding of armed conflict limited to those killed or wounded in combat operations. Investigating or providing reparations for sexual violence committed during occupation or armed conflict, for example, which has only recently been acknowledged in accountability efforts, requires overcoming obstacles due to stigma, fear, and lack of evidence. Efforts that integrate accountability, demobilization, reintegration, and reparation for the forced recruitment of children can offer lessons in how to address young people affiliated with foreign fighters whose situation combines elements of responsibility, victimhood, and reintegration.

Experiences across states show the importance of involving victims and other stakeholders in defining and implementing policies to address serious violations. Outreach is needed to inform affected individuals and communities about plans and actions on criminal investigations, truth seeking, and reparations policies beyond the initial inception stage, not to merely informing affected communities of policies that were designed without their involvement. Communities and other stakeholders have important roles to play during implementation, including as agents of implementation or by providing feedback. Consultations, monitoring, and implementation have proven more effective when they involve diverse stakeholders in terms of gender, age, location, and social and political identity or affiliation, which often depends on the involvement of trusted civil society organizations.

Understanding the needs, demands, and expectations of diverse victims should help to define how the accountability and reintegration process is designed and implemented in countries of origin. If foreign fighters are asked to provide statements to victims of crimes they are found responsible for or to provide information about the location of the missing, consultations with victims could help to define effective ways for doing so. Beyond justice for direct victims, providing acknowledgment of broader violations to affected communities could help to affirm the dignity of those who suffered during the war. Consultations could also help to identify other needs and demands, including those related to reconstruction, which countries of origin could implement.

Similarly, conducting consultations with communities where returnees belonged or where they would be reintegrated could help to address community members' anxieties, objections, and expectations and identify the conditions needed for acceptance and building trust. More broadly, consultation with and messaging to the broader public can help to address resistance, incorporate measures to respond to objections, and prevent serious political backlash in case any violent activity could later be associated, even remotely, with the government's policy to receive foreign fighters. All of these measures could strengthen society's buy-in and the policy's legitimacy.

The participation of affected communities can be complex. With diverse populations of victims, for example, it is difficult to determine legitimate representation. Bodies that try to represent all victims of a conflict usually fall short, and while outreach efforts must include representatives, they cannot rely exclusively on them. A permanent effort to reach out to different groups is needed to sustain legitimacy and gain trust.⁵⁰

50 Cristián Correa, Julie Guillerot, and Lisa Magarrell, "Reparations and Victim Participation: Experiences with the Design and Implementation of Domestic Reparations Programmes," in C. Ferstman, M. Goetz, A. Stephens (eds.), *Reparations for Victims of Genocide, Crimes Against Humanity and War Crimes: Systems in Place and Systems in the Making*, Second Revised Edition, Leiden/Boston: Brill Nijhoff Publishers (2020), 240–270.

Finally, since an important aim of transitional justice is to build trust among the different stakeholders, it matters who implements and leads these processes. Truth commissions, bodies conducting the search of victims, and mechanisms for registering victims and implementing reparations, for example, should be governed by actors and institutions that are committed to the mandate, independent from political influence, and strongly committed to protecting human rights. While some justice-related functions may clearly need to involve the police or other security actors, the processes overall should be governed by bodies and institutions geared toward building trust among different stakeholders, working collaboratively with civil society and human rights protection actors. In contexts where foreign fighters are an issue, this is particularly important in order to prevent transitional justice from contributing to securitized or repressive policies.

A Long-Term Approach to Prevention

The current framework for dealing with foreign fighters and the policies implemented by most countries significantly neglect long-term prevention of violence.⁵¹ Refusing to repatriate foreign fighters, denying them citizenship, and failing to address the grievances that contributed to their recruitment constitute a short-term perspective on prevention. Stories about the limitations of this perspective are often repeated: how the US-led invasion of Iraq increased sectarian divides and the radicalization of certain Sunni groups, contributing to the formation of ISIS, and how, earlier in Afghanistan, Cold-War competition led to increased instability, civil war, and oppressive regimes.

Prevention of the violence labelled terrorism and violent extremism is never fully guaranteed, but the dilemma that authorities face in this regard is similar to that of criminality more generally. Established democracies commonly apply harsh criminal sentences and increase the duration of pretrial detentions for certain security-related crimes when they feel threatened or when fear drives public opinion. While tough responses to security threats may look appealing, the question is how effective they are. When persons who commit such crimes are seen as outsiders due to nativism, racism, or xenophobia, it is even more difficult to affirm the value of human rights, the presumption of innocence, due process of law, rehabilitation, and long-term conflict prevention. Moreover, the tendency to generalize fear and mistrust to all members of a community can increase their sense of exclusion and even contribute to further violent political action. A comparative study on experiences of reconciliation after terrorism precisely warns about how difficult it is when those individuals who are considered “perpetrators” and those who are considered “victims” do not share membership in the same political community and the tendency for addressing terrorism is not inclusion but exclusion and raising defensive barriers. One example used in this study is of the Muslim immigrant community in Australia, considered in this case as a transnational security risk partly because of cultural differences but also attitudes and policies developed in Western countries based on the notion of the “clash of civilizations” and later the “war on global terror.”⁵² The lessons could indicate that extra efforts are needed for addressing the particular challenge that foreign fighters represent when they, and even their communities of origin, are not perceived as sharing membership in the dominant political community.

51 For a comprehensive vision of long-term prevention, accountability and peacebuilding, see Working Group on Transitional Justice and SDG16+, “On Solid Ground.”

52 Michael Humprey, “Marginalizing ‘Victims’ and ‘Terrorists’: Modes of Exclusion in the Reconciliation Process,” in Judith Renner and Alexander Spencer (eds.), *Reconciliation after Terrorism: Strategy, Possibility, or Absurdity?* (Routledge, Abingdon, 2012), 48–67.

Long-term prevention of violence depends in part on the consideration of different stakeholders' responsibilities and interests, as discussed above. Taking collective responsibility for such prevention should translate into policies implemented by countries of origin to ensure that their citizens who became foreign fighters and their families are involved in processes of accountability and reintegration, thereby possibly decreasing the likelihood of their future engagement in violence in those countries or elsewhere. It should also lead to policies that help to defuse grievances in communities of origin or promote the belonging of former foreign fighters, possibly reducing the likelihood that overly harsh treatment could provoke new cases of recruitment or engagement with violent groups.⁵³

A long-term prevention approach should also respond to the consequences of the violence and abuse committed in conflicts involving foreign fighters, such as the wars in Syria and Iraq. Above all, this means addressing the rights and needs of those harmed or killed by groups such as ISIS as well as victims of violations perpetrated by other armed actors. It also requires providing protection and basic conditions of human dignity to members of communities targeted because of their apparent association with extremist groups. The conditions those populations experience can resemble forms of collective punishment that may contribute to a possible resurgence of such groups.⁵⁴ Regions affected by ISIS, for example, need a form of security that supports the ability of inhabitants to live together in peace, maybe not as friends but certainly as neighbors who tolerate the presence of other groups without attempting to eliminate or subjugate them. The starting point for creating this type of security is a process of consultation to define how populations want to peaceably coexist and what they need in order to do so.⁵⁵

Approaches to accountability that reserve retribution for offenders responsible for the most serious crimes who refuse to cooperate or express repentance can also contribute to long-term prevention. This can be done through a combination of the following: truth seeking; listening to victims and acknowledging their suffering; determining certain forms of political or moral responsibility beyond a strict criminal one; engagements between some of those responsible and victims, acknowledging harm and offering some forms of modest reparation; other forms of reparations and reconstruction that can be directed to the most affected victims and communities, through mechanisms that guarantee accessibility and nondiscriminatory coverage; efforts to find the missing and forcibly disappeared; and rehabilitation and reintegration processes that favor reintegration by communities of origin over punishment.⁵⁶ The following sections offer ideas from other experiences that can be adapted to the particular situation of foreign fighters returning or being repatriated to their countries of origin, as well as to Syria and Iraq. Further consultation is needed to define how these measures can be relevant and effective in specific local contexts.

53 A returnee in Kenya interviewed in August 2021 for this report believed that they should also be consulted when defining or even amending existing policies to counter violent extremism, including proposing punitive or other measures for deterrence. To him, those who still want to engage in terrorism and or violent extremism would not blame the authorities for applying these measures because they were proposed by fellow/former foreign fighters and would not use the measures as a reason for further radicalization.

54 According to a Kenyan returnee interviewed for this report in August 2021, foreign fighters in Somalia spoke of communities caught in the conflict being victimized twice, that is, by the military forces fighting the Al-Shabaab and the Al-Shabaab fighters, with violations resembling collective punishment from both sides.

55 See, for example, the nuanced results of a consultation process implemented in Mosul among displaced populations in areas formerly occupied by ISIS in northwestern Iraq, in Abdulrazzaq Al-Saiedi, Kevin Coughlin, Muslih Irwani, Waad Ibrahim Khalil, Phuang N Pham, Patrick Vinck, Harvard Humanitarian Initiative, "Never Forget: Views on Peace and Justice within Conflict-Affected Communities in Northern Iraq," December 2019.

56 Some scholars and practitioners have made similar recommendations. See, for example, Haid Haid, "Breaking the Cycle of Violence: Transitional Justice for the Victims of ISIS in Syria," Chatham House Research Paper (2020); Institute for Integrated Transitions, "Transitional Justice and Violent Extremism" (2020); Institute for Integrated Transitions, "The Limits of Punishment: Transitional Justice and Violent Extremism" (2018); Bosley, "Violent Extremist Disengagement and Reconciliation;" and Leanne Erdberg Steadman, USIP, "Disengagement and Reconciliation in Conflict-Affected Settings" (August 2020).

A Transitional Justice Approach to Foreign Fighters

Given the broad and mostly conceptual insights discussed above, this section examines specific ways in which transitional justice can address the issue of foreign fighters in practice. The set of interventions examined here is meant to be illustrative, not exhaustive, because the issue requires further research and consultation with relevant stakeholders. Using Iraq and Syria as primary case studies, this section draws on experiences with foreign fighters and violence characterized as terrorism or violent extremism in other states.

Proposals are organized into two sections: one focusing on foreign fighters' countries of origin and one examining conflict-affected states to which foreign fighters traveled and the role of the international community in those situations. While Iraq and Syria have had significantly different experiences with conflict and foreign fighters, they also share enough commonalities to be discussed jointly, with distinctions made as to what challenges each country needs to address.

By proposing strategies at these two levels, the report tries to encourage states to take a comprehensive approach to foreign fighters based on their shared and compatible responsibility to provide security and respect for human rights. It relies on the mandates for international collaboration provided by the UN Security Council, while stressing the responsibilities of each state to contribute to global peace within the scope of its situation and resources.

Transitional Justice Approaches for Countries of Origin

Countries of origin cannot avoid their responsibility to address human rights violations connected to foreign fighters. This is not so much because countries of origin should be held accountable for the actions of their citizens, but because they are best positioned, with the legal capacity and resources to address violations and to prevent recurrence. Certainly, this duty is grounded in the legal obligations of states to safeguard their citizens, particularly children,⁵⁷

57 Committee of the Rights of the Child, Decision on Communications Under Optional Protocol regarding France, 2 November 2020, CRC/C/85/D/79/2019–CRC/C/85/D/109/2019. “Extra-territorial Jurisdiction of States Over Children and Their Guardians in Camps, Prisons, or Elsewhere in the Northern Syrian Arab Republic: Legal Analysis, Special Rapporteur on the Promotion and Protection of Human Rights While Countering Terrorism and the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions,” <https://www.ohchr.org/Documents/Issues/Terrorism/UNSRsPublicJurisdictionAnalysis2020.pdf>. Open Society Justice Initiative, “European States’ Obligations to Repatriate the Children Detained in Camps in North-east Syria” (July 2021), www.justiceinitiative.org/publications/european-states-obligations-to-repatriate-the-children-detained-in-camps-in-northeast-syria; Chrisje Sandelowsky-Bosman and Ton Liefwaard, “Children Trapped in Camps in Syria, Iraq and Turkey: Reflections on Jurisdiction and State Obligations under the

when serious consequences can derive from inaction. Given the high probability that those interned face imminent and serious human rights violations and the considerable material resources and political influence at governments' disposal, states should bear a responsibility to act. But, the obligation is also a general one of cooperation among states under a notion of common security and commitment to contribute to the protection of human rights. On issues like citizenship, access to consular services, and other measures for the return or repatriation of citizens or people entitled to citizenship, there are strong arguments for affirming positive obligations of states, as these issues are clearly under the control of the state.⁵⁸ Responding to those obligations through acknowledgment, accountability, reintegration, and inclusion can also strengthen the capacity of their short- and long-term prevention measures and their likelihood of being effective.⁵⁹

From the perspective of countries of origin, the challenge includes managing public discourse, not only in terms of associating foreign fighters with terrorism but also in terms of their perceived "foreignness." Indeed, "the term foreign fighters perpetuates the notion that foreign fighters are not part of our society, but nothing can be further away from the truth. These foreign fighters are foreigners in Iraq and Syria, but they are our own citizens."⁶⁰ This notion was affirmed by former Dutch Ministry of Foreign Affairs Bert Koenders:

We keep referring to these people as foreign terrorist fighters. The uncomfortable truth is that they are not foreign at all. They may be foreigners in the countries where they are going to. But in reality they are our compatriots, our acquaintances, the classmates of our kids, the guys and girls we see in our supermarkets. They are part of our societies. Perhaps the only thing that's foreign to us is their mentality.⁶¹

In countries of origin, a first step toward addressing the perhaps natural angst some may experience about foreign fighters, then, would be to discuss these labels—not to just start using a different term, but to openly address the misrepresentation done by incorrect and politically motivated naming of the phenomenon and other labels, as in the examples of "ISIS brides" or "ISIS children."

United Nations Convention on the Rights of the Child," *Nordic Journal of Human Rights* 38:2 (2020): 141–158, //doi.org/10.1080/18918131.2020.1792090; UN General Assembly, "Impact of the Arbitrary Deprivation of Nationality on the Enjoyment of the Rights of Children Concerned, and Existing Laws and Practices on Accessibility for Children to Acquire Nationality, Inter Alia, of the Country in Which They Are Born, If They Otherwise Would Be Stateless," Report of the Secretary-General (A/HRC/31/29), December 16, 2015. UN Office of Counter-Terrorism, *Handbook on Children Affected by the Foreign-Fighter Phenomenon: Ensuring a Child Rights-Based Approach* (2020), www.un.org/counterterrorism/handbook-children-affected-foreign-fighter-phenomenon-ensuring-child-rights-based-approach. For a critical analysis on the use of nationality for triggering functional jurisdiction under CRC see Marko Milanovic, "Repatriating the Children of Foreign Terrorist Fighters and the Extraterritorial Application of Human Rights" (EJIL:Talk! November 10, 2020).

58 "Extra-territorial Jurisdiction of States Over Children and Their Guardians in Camps, Prisons, or Elsewhere in the Northern Syrian Arab Republic: Legal Analysis, Special Rapporteur on the Promotion and Protection of Human Rights While Countering Terrorism and the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions," para. 12.

59 The literature around the legal obligations of different aspects, including access to consular protection, prevention of statelessness, prevention of torture and possible consequences from the prohibition of refoulement, etc., is ample and not possible to detail without committing serious omissions and injustices. The different reports and statements by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism offer a great breadth of analysis in a synthetic and comprehensive form. See, in particular, her statement at the Joint Regional High-level Conference convened by the Organization for Security and Co-operation in Europe (OSCE), UNOCT and Switzerland, in cooperation with the Albanian OSCE Chairmanship titled "Foreign Terrorist Fighters: Addressing Current Challenges" (February 11-12, 2020). Two comprehensive reviews can be found at Geneva Academy, "Foreign Fighters under International Law," Academy Briefing No. 7 (October 2014); and Human Rights Watch, "'Foreign Terrorist Fighter' Laws: Human Rights Rollbacks Under UN Security Council Resolution 2178" (December 2016).

60 Tanya Mehra and Christophe Paulussen, International Centre for Counter-Terrorism, "The Repatriation of Foreign Fighters and Their Families: Options, Obligations, Morality and Long-Term Thinking" (March 6, 2019), <https://icct.nl/publication/the-repatriation-of-foreign-fighters-and-their-families-options-obligations-morality-and-long-term-thinking/#>

61 Speech at the Global Counterterrorism Forum and Global Coalition against ISIL/Daesh on the Matter of Foreign terrorist fighters, January 11, 2016.

Repatriation and Citizenship

The refusal of some countries of origin to repatriate those labeled foreign fighters has been condemned in different forms by analysts, human rights defenders, and UN special rapporteurs, affirming that return and repatriation is not only a state obligation under human rights law, but also entails “a comprehensive response that amounts to a positive implementation of Security Council resolutions 2178 (2014) and 2396 (2017) and is considerate of a State’s long-term security interests.”⁶² In a 2020 statement, the UN Special Rapporteur on the promotion and protection of human rights while countering terrorism addressed the different aspects of these obligations, emphasizing the obligation to prioritize children and consider them primarily as victims and to provide special considerations for women, especially given their large numbers and the likelihood that few have been involved in serious crimes or pose serious security risks. More recently, several human rights protection working groups and special mandate holders directed a letter to 57 countries urging them to repatriate their citizens, with the reminder:

States have a primary responsibility to act with due diligence and take positive steps and effective measures to protect individuals in vulnerable situations, notably women and children, located outside of their territory where they are at risk of serious human rights violations or abuses, where States’ actions or omissions can positively impact on these individuals’ human rights.⁶³

These positive obligations require states to go beyond strictly defined security or consular policies. The risk of those suffering serious human rights violations in camps and prisons—or those sentenced to harsh penalties and even death without basic due process—in Syria and Iraq gives rise to positive obligations to protect, given a country’s resources to do so. Furthermore, the possibility that these women and children may further engage with violent groups while interned under squalid conditions justifies the urgency in meeting this obligation, even if it entails some risk.

Finally, the obligation to repatriate derives from UN Security Council resolutions adopted under Chapter VII. Given the limited conditions for justice available in Syria and Iraq, states should assume their responsibility for suspects who fall under their jurisdiction. Even if the obligation for repatriation has not been explicitly agreed to by the UN Security Council, that obligation derives from UN resolutions calling for international cooperation, particularly in “ensur[ing] that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in support of terrorist acts is brought to justice.”⁶⁴ This is clearer in light of the lack of effective remedies or mechanisms for guaranteeing prosecutions in Syria and Iraq for these offenses.⁶⁵

The risk that repatriation could lead to violence in countries of origin should not be dismissed, nor should resistance to repatriation among some segments of the population or statements by political leaders expressing alarm. However, as experts suggest, the appropriate response should be to undertake “a comprehensive assessment [of those risks] before such sweeping statements are made.”⁶⁶ Countries of origin often have more capacity to hold accountable foreign fighters

62 UN Office of the High Commissioner for Human Rights (UN OHCHR), “Statement of the Mandate of the United Nations Special Rapporteur on the promotion and protection of human rights while countering terrorism at the Joint Regional High-level Conference convened by the OSCE, UNOCT and Switzerland, in cooperation with the Albanian OSCE Chairmanship on ‘Foreign Terrorist Fighters – Addressing Current Challenges’” (February 11–12, 2020).

63 UN OHCHR, “Syria: UN Experts Urge 57 States to Repatriate Women and Children from Squalid Camps,” February 8, 2021, www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26730&LangID=E

64 UN Security Council, Resolution 2396 (S/RES/2396), December 21, 2017, para. 17.

65 D.E. Stigall, “Repatriating Foreign Fighters from Syria: International Law and Political Will,” March 18, 2020, www.justsecurity.org/69244/repatriating-foreign-fighters-from-syria-international-law-and-political-will-part-1/

66 Mehra and Paulussen, “The Repatriation of Foreign Fighters and Their Families.”

implicated in crimes and to implement comprehensive measures of reintegration for those who need them. The Special Rapporteur has delineated a comprehensive effort in this regard that includes consular assistance, ascertaining nationality for those who need it, holding accountable those who committed serious crimes, screening individuals and assessing responsibility, and paying special attention to the condition of women and children.⁶⁷ This should apply to even those whose citizenship still needs to be established, particularly minors; children and youth with a genuine claim should be repatriated and held under immigration custody until citizenship is defined. This approach should also favor family reunification, in accordance with the Convention on the Rights of the Child, unless there are concerns about family violence.

Based on all of these factors, any policy action on foreign fighters should include, at a minimum, the immediate repatriation of interned women and children without further screening, to prevent delays and further risks. Their numbers, their likely level of engagement in political violence, and their conditions of internment require prompt action. Their screening could continue under safer, more humane conditions. Repatriation should be carried out to preserve family unity, in full compliance with the Convention on the Rights of the Child, responding to the best interests of the child. In cases where mothers are missing or dead, fathers should be repatriated with their children, even if they need to face prosecution, unless it is not in the best interest of the children.

The experiences of states that have repatriated citizens should inform this process.⁶⁸ In Kosovo, for example, the return of foreign fighters was preceded by preparatory assessments of returnees' needs (in regards to schooling, medical care, psychosocial support, etc.), the ability of families to host returnees, and the identification of further support networks.⁶⁹ Such experiences should be examined to help to define the shortest timeline for preparatory work without causing delays in repatriation that could expose returnees to further traumatization, danger, or radicalization.

Repatriation is often an unpopular policy in countries of origin. It can be strongly resisted by people who are afraid that returnees could engage in violent activities, a fear that is often reinforced by single incidents of violence. However, the issue deserves serious discussion, not just simplistic, yes-or-no questions in opinion polls. A repatriation policy should be discussed with different communities in consultations and focus groups. Because those left behind in conflict zones may become more resentful of their country of origin if it rejects them, implementing a repatriation policy could also be effective in preventing future retaliatory attacks on the respective country if accompanied by screening for the actual threat posed by returnees, conducting criminal investigations when justified, and ensuring an effective reintegration process. It may also reduce the likelihood that a state's refusal to repatriate could be used as a recruitment tool by groups advocating for violent political action.

Screening Returnees and Those Repatriated

While there are no legal bases for the detention of tens of thousands of people in camps in northeast Syria, the registries at those internment facilities may include basic information about internees' identities (age, family composition, places of origin, and so on), that can provide at

67 Ibid.

68 The relevance of the approach is evident even in the way returnees are described, not as "foreign" but as citizens. For recent estimates of children and women repatriated by those few countries that had assumed this responsibility, see UN General Assembly, "Report of the Independent International Commission of Inquiry on the Syrian Arab Republic (A/HRC/48/70), August 13, 2021, annex III.

69 Teuta Avdimetaj and Julie Coleman, Clingendael – the Netherlands Institute of International Relations, "What EU Member States Can Learn from Kosovo's Experience in Repatriating Former Foreign Fighters and Their Families" (May 2020); Ezel Sahinkaya, Rikar Hussein, and Edlira Bilaca, "Why is Kosovo Taking Home Islamic State Members?" *Voice of America* (January 15, 2020).

least a starting point for assessment. In terms of information regarding internees' previous activities, each country of origin should define its own conditions for repatriation and the factors to consider in organizing them into different categories. In the case of Syria, for example, countries of origin should develop a secondary screening process in agreement with the groups that exercise effective control over the northeast region, like the US-supported Syrian Democratic Forces (SDF), determining the accessibility and usability of the security-related information that they have collected, can share, and consider reliable for the repatriating country. However, that information should not be used as evidence for criminal prosecutions if it does not comply with basic procedural law provisions in the countries of origin, nor should it be used to justify surveillance or any form of stigmatization of those who have returned.

While there are no directly comparable experiences,⁷⁰ countries of origin may want to be directly involved in conducting screenings of their citizens in Syria and Iraq for those not immediately repatriated, to help them to define reintegration routes and prepare prosecutions for those who may be responsible for serious crimes. Direct involvement may also help guarantee conditions of security for the people interviewed, given the possibility of intimidation of internees by armed groups or authorities in both countries. In Kazakhstan, during operations Zhusan and Rusafa, the National Security Committee coordinated various ministries and interacted with foreign security agencies (albeit, not the SDF) to identify citizens to be repatriated and verify their possible involvement in violent activities.⁷¹ A first layer of expedient screening could help to identify those who pose no threat and those who require further screening, given the high number of women and children who urgently require protection. Still, if each country of origin implemented their own screenings, the process should involve neither too many people nor too much time. Even if the total number of people to be repatriated is significant, most traveled from just a few states, mainly Tunisia, Saudi Arabia, Morocco, and Jordan (in that order).⁷² Human Rights Watch estimated the number of foreign fighters per European country to be in the hundreds; their figures include not only those who performed fighting duties but also women and children who may require little or no screening.

Lessons on how to implement screening processes can be drawn from humanitarian work with refugees and asylum seekers in the context of armed conflict. While the integration of security aspects and information regarding previous conduct makes this situation different from that work, many of the logistical lessons for screening large numbers of people in dire situations affected by trauma, fear, and mistrust can still offer guidance about expediency, organizing and managing databases, and guaranteeing conditions of security.

70 Screening of members of armed groups are regularly implemented during demobilization processes following peace accords, implemented by the same countries involved in the conflict or where the conflict occurred.

71 William B. Farrell, Rustam Burnashev, Rustam Azizi, Bakhtiyar Babadjanov, US Institute of Peace, "Processes of Reintegrating Central Asian Returnees from Syria and Iraq" (July 2021), www.usip.org/publications/2021/07/processes-reintegrating-central-asian-returnees-syria-and-iraq. For more details on the policy implemented by Kazakhstan, see a post by the country embassy to the United States about a conference that included opinions from different external observers: Government of Kazakhstan, "Zhusan Humanitarian Operation: Kazakhstan's Repatriation of Foreign Fighters and Their Families," January 8, 2021

72 A 2014 study reported estimates of foreign fighters per country of origin for 81 countries. Only Tunisia, Saudi Arabia, Morocco, and Jordan appeared to have more than 1,000, with up to 3,000 estimated from Tunisia. The Russian Federation was estimated to have 800. Among western European countries figures were in the few hundreds, including France (700), UK (500), Germany (400) and Belgium (300), numbers that are manageable for completing substantial assessments of risks and of involvement in atrocities without significant delays. See Jeanine de Roy van Zuijdewijn, "The Foreign Fighters' Threat: What History Can (not) Tell Us," *Perspectives on Terrorism* 8:5 (October 2014): 59–73. The figures are old, however, and their reliability is unclear. A recent news article gives an estimate of 1,200 Germans who may have traveled to support ISIS: Hannah McCarthy, "Is Europe Doing Enough to Prosecute ISIS Fighters for Yazidi Genocide?" *Euronews*, August 10, 2021. According to a more recent report by Human Rights Watch, "nearly 12,000 others – 8,000 children and 4,000 women – are from almost 60 other countries" beyond Syria and Iraq, but no details are given as to the numbers per country of origin: Human Rights Watch, "Thousands of Foreigners Unlawfully Held in NE Syria," March 23, 2021, www.hrw.org/news/2021/03/23/thousands-foreigners-unlawfully-held-ne-syria#

This type of screening process, since it is not governed by basic due process of law or transparent standards of evidence, cannot serve as a basis for applying consequences against those screened that cannot be challenged in court. Screening could serve as an initial classification, to be followed by either immediate release and reintegration or to prosecution, in which any charge and evidence could be disputed. For those not charged, information obtained through the screening process should not be used for surveillance or stigmatization. Screening methods implemented by countries facing political violence and terrorism, like Nigeria, exhibit worrying patterns of secretiveness, lacking clear parameters and external controls as well as consistency and predictability.⁷³ One of the most difficult aspects of screening is likely determining how to balance the need to establish trust with internees and respond in a timely manner to their dire humanitarian situation with the collection of information regarding previous conduct. The screening process should not be excessively slow, given the risks that internees face, particularly women and children. One possible solution could be to define a two-tier process that could rapidly distinguish between those who are very unlikely to pose security concerns and those who still presumably engage with violent groups and those who played combatant roles that need to be further investigated. Some returnees may need to complete a full reintegration program, while others may only need help resettling. Children and most women should be presumed to fall under the first category for expedited and immediate repatriation. Those who actively fought, received fighters' training, or played a role in enforcing ISIS rules during internment should go through a second screening process to assess if they should be investigated for possible involvement in serious crimes or if they should enter a rehabilitation program tailored to former fighters. This second screening could be done in collaboration with SDF or the respective authorities in Iraq through an intelligence-sharing agreement. One relevant experience involves the System of Accompaniment, Monitoring and Evaluation implemented for paramilitary demobilization process in Colombia from 2005–2007, which included questionnaires for demobilized fighters administered at different points in the screening process.⁷⁴

Criminal Prosecutions

Not all returnees need to be investigated for criminal responsibility.⁷⁵ Depending on the numbers of individuals who should be assessed by each country of origin, their profile, and the domestic legal system of those countries, prosecutions can be designed in different ways to determine who to investigate, prosecute, and try.⁷⁶ Criminal justice efforts targeting perpetrators of serious human rights violations may offer relevant guidance on the selection and prioritization of cases, especially when the number of suspects and violations attributed to them is overwhelming. If each country of origin assumed responsibility for their own nationals, the effort would be less burdensome and the need to select or prioritize certain cases over others less necessary. Nevertheless, prosecutors dealing with foreign fighters should have clear strategies for selecting cases and targeting the most serious crimes and the most serious offenders.⁷⁷

73 Vanda Felbab-Brown, Mark Freeman, Mara Revkin, and Ron Slye, Institute for Integrated Transitions, "The Limits of Punishment: Transitional Justice and Violent Extremism" (2018); and Allan Ngari of the Regional Organised Crime Observatory Coordinator for West Africa, interviewed in August 2021.

74 The five successive questionnaires included an initial survey on basic demographics, place of origin, education, activity previous to traveling, extended family, and contact information, as well as questions exploring conditions for reintegration, emotional, or physical needs.

75 Of the estimated 10,000 to 11,000 foreigners detained in Syria, 2,000 are thought to have played combat roles, according to one source. See Roger Lu Phillips, Just Security, "The 'Beatles' on Trial: Obtaining Justice for Victims of Foreign ISIS Fighters" (August 24, 2020).

76 The registration process implemented in the camps by SDF in northeast Syria may offer estimates of the number of detainees who should be investigated and their countries of origin, of the 81 countries that were identified in previous studies.

77 For criteria on the determination of crimes to charge suspects in ways that fulfill human rights obligations to investigate and try serious violation of international humanitarian law, see International Commission of Jurists, "Counter-Terrorism and Human Rights in the Courts: Guidance for Judges, Prosecutors and Lawyers on Application of EU Directive 2017/541 on Combatting Terrorism" (2020), 8–9.

Prosecutions in transitional justice contexts often focus on dismantling criminal organizations and networks responsible for a series of crimes committed by armed actors. Investigations in these cases try to identify patterns of crimes that have similar *modus operandi* and connect them to a criminal structure. This allows for the attribution of responsibility to members of those structures, particularly their leaders, planners, decision makers, financiers, and others making operational decisions. Prosecution efforts need not focus on group members who played less decisive roles in the commission of violations, in order to concentrate judicial resources on those who bear the most responsibility and may be key to the potential resurgence of a group. Clearly, they should not include those who played no roles in committing atrocities, like children and most women, who are the bulk of those interned.

The approach of prosecuting returnees by countries of origin may involve organizing investigations focused on several defendants who were part of a pattern of crimes or operations that involved serious violations of international humanitarian law. However, in many cases the defendants may have taken part in crimes committed with other fighters who, not being nationals of the same countries, cannot be tried together in the country of repatriation. In some cases, prosecutions of returnees have advanced with strong political support, in part due to pressure from a large community of conflict-affected refugees living in the country, as is true for prosecutions in Germany of ISIS members for crimes committed against the Yazidi.⁷⁸

Investigations of foreign fighters may require significant collaboration between investigators and intelligence services operating on the ground in conflict-affected areas, which may be difficult to achieve or result in evidence of questionable credibility or limited use in courts. Nevertheless, if possible, such collaboration would likely better clarify the responsibility of the accused and better serve victims' expectations of justice, instead of merely securing convictions against returnees for group membership or playing supportive roles, even if the trials happen far from where they live, in a foreign language. Nevertheless, the acceptance of evidence from those intelligence services should be carefully vetted and subjected to strict admissibility requirements and scrutinized by the cross examination of the defense, if the trials are to conform with basic due process of law provisions. If needed, special protection mechanisms should be devised for the defense's examination of evidence considered as classified information, without affecting the defense's right to challenge the evidence and the presumption of innocence.

Efforts have been made to expand the availability of evidence for such criminal investigations. They include guidelines developed for the admissibility of evidence by the Counter-Terrorism Committee Executive Directorate,⁷⁹ which has published reports on some of the international efforts made in the matter.⁸⁰ The Global Counterterrorism Forum published comprehensive recommendations that include improving investigations and prosecutions.⁸¹ Individual states have also begun addressing this challenge.⁸² Nevertheless, these guidelines cannot in any way be understood as giving license to reduce the protection of basic human rights and due process

78 See the conviction of Sarah O. for a wide range of crimes associated with her participation in the enslavement of several Yazidi women and girls and the subsequent death of one of the girls. She was convicted of "membership in a foreign terrorist organization, i.e., ISIS, assault, deprivation of liberty, aiding and abetting rape, enslavement and religious and gender-based persecution as crimes against humanity." McCarthy, "Is Europe Doing Enough."

79 UN Security Council Counter-Terrorism Committee Executive Directorate (CTED), "Guidelines to Facilitate the Use and Admissibility as Evidence in National Criminal Courts of Information Collected, Handled, Preserved and Shared by the Military to Prosecute Terrorist Offences" (December 9, 2019).

80 UN Security Council, "Eighth Report by the Secretary General on the Threat Posed by ISIL (Da'esh) to International Peace and Security and the Range of United Nations Efforts in Support of Member States in Countering the Threat" S/2019/103 (February 1, 2019).

81 Global Counterterrorism Forum, "Addendum to The Hague Good Practices on the Nexus between Transnational Organized Crime and Terrorism: Focus on Criminal Justice" (2020).

82 Mehra and Paulussen, "The Repatriation of Foreign Fighters and Their Families."

of law, including the prohibition of illegal detention, equality of arms, and basic tenets of fair trials. Any prosecution needs to rest on principles of legitimacy, necessity, and proportionality. When examined, these guidelines should be read in tandem with the detailed overview that the Special Rapporteur on human rights while countering terrorism has written about them.⁸³

Prosecutors with a limited capacity to gather evidence to prosecute serious crimes may be forced to charge some defendants suspected of involvement in atrocities with lesser crimes, even minor ones, compared with direct participation in massacres or ordering summary executions of detainees. Crimes based on membership in what the respective laws define as a terrorist organization or supporting, financing, or traveling to join or receive training from a terrorist group could be used as back-up strategies, if those crimes existed in the respective legislation at the time of membership and they are not applied beyond a well-established interpretation of a vague description of criminal conduct and if they are based on clear evidence, according to the due process of the law. A limitation of this approach is that it would not provide truth and justice for victims in Syria or Iraq. Nevertheless, it would help states to pursue penal measures to minimize the possible security risk posed by returning combatants who are strongly suspected of involvement in serious crimes when such involvement cannot be proven. Sentences from such cases could secure returnees' participation in reintegration activities. The relevant restrictive measures would be based on criminal convictions obtained in full respect of due process of law, not preventive or security measures of questionable legality, given states' obligations to guarantee human rights.

For those who are unlikely to have been involved in serious violations, prosecutions for minor crimes would be of little significance. However, they could make important contributions to security and truth seeking by providing information to help investigators and others understand what life was like during the conflict under nonstate control (like ISIS), its structure of government, and the conditions of those playing low-level roles, and sharing information relevant to the search for missing persons and the forcibly disappeared. This could be of significant help for victims of the conflict in Syria or Iraq who may fear that repatriation could result in their being denied justice or truth if prosecutions focus on low-level offenses, such as group membership, traveling to a conflict state, or supporting armed groups.

Transitional justice emphasizes the value of clarification and acknowledgment of truth beyond criminal prosecution. Understanding noncriminal aspects of how and why a conflict was waged and what life was like for different populations can be important in coming to terms with a traumatic past. It can offer lessons for how communities could live peaceably side-by-side in the future, without resorting to oppression justified by religious or ethnic discrimination or national security. Nevertheless, such approaches may require refraining from using information gathered in nonjudicial settings (truth commissions, reparations programs, etc.) to prosecute those who provided it if obtaining truth in these cases is deemed more important than court sentences. Two experiences from Colombia could serve as precedence for such policies. The first is the mechanism implemented for evaluating demobilized, low-ranking illegal combatants—mostly paramilitaries—to provide truth and commit to a reintegration process in exchange for a suspension of prosecutions or a conditional suspension of a sentence,⁸⁴ which included a prohibition

83 UN OHCHR, "Position of the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism on the Use of 'Battlefield' or Military Produced Evidence in the Context of Investigations or Trials Involving Terrorism Offences" (April 2021), https://www.ohchr.org/Documents/Issues/Terrorism/SR/UNSRCT_Position_Battlefield-evidence-2021.pdf.

84 Government of Colombia, Law 1424 of 2010. While the implementation of the law suffered several problems, it is still an experience that can offer lessons to be adapted to a context where the number of people involved would be significantly lower and many of whom were not engaged in the commission of serious crimes. See Maria Consuelo Ramirez Giraldo, "Balance de la Implementación de la Ley 1424 de 2010," Internal Report Contracted by ICTJ (February 2016), on file with the author.

on using information provided by the demobilized as evidence against them.⁸⁵ A mechanism was also created to receive and systematize testimonies, which could be coordinated with a search mechanism, in case information about the forcibly disappeared is collected. And it could be designed to provide information and truth to affected communities, for example, by organizing a remote meeting between one or more returnees and the community.

In addition to the massive process of collecting and systematizing testimonies from demobilized combatants to help to establish the truth about the conflict, Colombia added other innovations to prosecutions against those responsible for serious crimes. Proceedings were based on defendants' full confession of all of the crimes they committed as well as thorough investigations that acted as a deterrent to those unwilling to cooperate. Later, they began holding judicial hearings where perpetrators were confronted by victims and asked to offer explanations. This led to cases where perpetrators acknowledged wrongdoing and offered sincere apologies. This idea was further developed in the Colombian Peace Accords, which established a criminal system and procedure that included benefits for those who provided full information and contributed to truth and reparations. The procedure explicitly allows the court to order a hearing where the defendant recognizes their responsibility for crimes in front of victims.⁸⁶ Implementation of these hearings have started. A study of the perceptions of defense lawyers and other professionals involved in these hearings shows that defendants' degree of empathy expressed towards victims has improved over time, partly as a result of increased familiarity with the procedure and the psychosocial support they receive to help reduce their anxiety about admitting their crimes publicly.⁸⁷ All of these experiences, however, are only possible once the criminal liability of the defendant and the sentence have already been clearly defined, creating a context where they have certainty about their legal condition, making it possible for defendants to talk without further self-incrimination.

A similar provision regarding the use of information provided by defendants has been established by the law that regulates the body responsible for the search for the forcibly disappeared in Colombia. The provision does not shield defendants from prosecution but ensures that their statements will not be used against them in court. It does allow for defendants' contribution to be considered as a factor for leniency. The humanitarian approach that characterizes the search process cannot substitute or obstruct criminal investigations, but forensic and other technical analysis or evidence recovered at a burial site or from remains can be used as evidence in judicial proceedings.⁸⁸ The distinction can be relevant in finding a balance between prosecution and the search for the missing and forcibly disappeared.

Granting benefits to those who collaborate with criminal investigations is a common practice in cases aimed at dismantling criminal organizations. It is a strategy being used in Somalia, where high-value defectors from Al-Shabaab are offered protection through ad hoc political deals, as long as they and their followers defect, to avoid accountability or scrutiny for past acts of terrorism. Low-level former Al-Shabaab combatants undergo disarmament, demobilization, and reintegration processes through traditional justice mechanisms involving clan and community reconciliation along with completing nongovernmental programs. However, these mechanisms,

85 Ibid., article 4, section 2.

86 Government of Colombia, Law 1957 of 2019. This has led to exploring possible ways to use restorative justice approaches in cases in which defendants have acknowledged their responsibility for serious crimes. See Anna Myriam Roccatello and Gabriel Rojas, ICTJ, "A Mixed Approach to International Crimes: The Retributive and Restorative Justice Procedures of Colombia's Special Jurisdiction for Peace" (2020), www.ictj.org/publication/mixed-approach-international-crimes-retributive-and-restorative-justice-procedures.

87 ICTJ and Corporación Solidaridad Jurídica, "Percepción de la Participación de los Comparecientes de las FARC-EP ante la JEP," Internal Report (2021), on file with the author.

88 Government of Colombia, Decree Law 589 of 2017, article 3.

which are usually controlled by prosecutors, could be very helpful for addressing the justice priorities expressed by victims and affected communities, particularly in finding the missing and forcibly disappeared.

These kinds of measures do not constitute impunity or general blanket amnesties. They offer a careful balance between the different interests of justice, truth, and finding the missing and forcibly disappeared. Blanket amnesties that sacrifice the clarification of the truth or limit investigations may not only be contrary to international law when applied to genocide and some war crimes or crimes against humanity, but they can also lead to acts of revenge or further repression, as security services may feel compelled to obtain that information despite the immunity provided by such amnesties. For example, the 2015 amnesty in Kenya has been used to target returnees. Even though provisions granted immunity to returnees who willingly abandoned violent extremism, they complain that the mechanism is frequently used to detain them—“[Returnees] are questioned and sometimes tortured to gather information on those responsible for our recruitment, the identities of those still in the ‘front,’ and to confirm that we are not back to undertake domestic terrorism acts. [Many] have been disappeared after taking up the amnesty offer.”⁸⁹

Experiences in transitional justice contexts could offer additional guidance in the sentencing regime. If the end goal is not just retribution but also nonrepetition, sentencing should be geared towards guaranteeing defendants’ effective participation in a rehabilitation program. Two ethics scholars offer an interesting analysis of the alternatives to ignoring the issue or keeping foreign fighters in detention camps in Iraq or Syria: “Reintegration is not incompatible with a legal response,” as it might be needed following the completion of a sentence.⁹⁰ In addition, reintegration followed by rule-of-law responses might better respond to the interest of all stakeholders, particularly the communities where returnees belonged, as transitional justice experiences suggest.

Conditions for pretrial detention, post-sentencing imprisonment, and parole or other forms of post-imprisonment control should all seek to ensure that defendants complete and engage in a process of reintegration into society. If a returning foreign fighter is found guilty of a serious crime that can result in a lengthy sentence, it may be appropriate to consider offering a reduced sentence or other conditions in exchange for collaboration, provision of information about the location of the missing and forcibly disappeared, statements of apology directed to victims, or even forms of material reparations.

In Colombia, for example, the sentencing regime defined in the legal framework for the Special Jurisdiction for Peace includes flexible punishment based on a defendant’s degree of responsibility and collaboration. Harsh sentences are reserved for those responsible for serious crimes who refuse to confess their crimes or collaborate, while those who cooperate with procedures after being charged receive shorter prison terms and additional benefits. Those who voluntarily approach the Special Jurisdiction to provide full acknowledgment and collaborate with the investigations and engage with victims can receive sanctions that do not involve imprisonment under a conditionality regime that includes implementing a collective reparations project for victims and conditions for nonrecurrence.⁹¹ A sentencing regime for foreign fighters, adapted to the specific context, should be flexible enough to obtain the end goals of the process, including reintegration, without sacrificing the interests of justice.

89 Interview of a Kenyan returnee, August 2021.

90 Trudy Govier and David Boutland, “Dilemmas Regarding Returning ISIS Fighters,” *Ethics @ Global Politics* 13:2 (2020): 93–107, DOI: 10.1080/16544951.2020.1756562, 105.

91 This framework was defined by the peace accord and established through a series of laws, including Law 1820 of 2016, which defined a broad but conditional amnesty, and Law 1957 of 2019, which established the Special Jurisdiction for Peace.

Rehabilitation, Reintegration, and Reform

Transitional justice offers a wealth of lessons for designing interventions aimed at the rehabilitation and reintegration of those engaged in and affected by violence and the reform of the institutional and societal contexts that led people to engage in violence in the first place. These measures include some of the traditional demobilization, disarmament, and reintegration programs, but can go beyond them. At the most basic level, intervention responds to individual needs through economic stabilization, skills development, access to formal and informal education, psychosocial support and trauma recovery, and health care. A second level brings in a community dimension, with interventions aimed at community acceptance, working with family and community members. A third level, less frequently explored, responds to the needs of the broader society, beyond the community of origin or resettlement, such as the need for truth, acknowledgment of wrongdoing, and building community trust in returnees. It can include victims learning the truth about certain violations, returnees rejecting the use of violence and/or expressing remorse for involvement in it, and institutional and other reforms aimed at reducing exclusion and discrimination.

Reintegration might be the most complex part of a strategy to address the foreign fighter phenomenon because it requires the consideration of different stakeholders, the adaptation of interventions to different individuals and communities, and different degrees of commitment to the use of violence among returnees and their levels of trauma. Nevertheless, there is a huge set of useful experiences in different fields, particularly disengagement from gang violence and groups, reintegration of child victims of forced recruitment, and community-based peacebuilding. While this suggests that reintegration is a difficult process requiring significant expertise and resources, the modalities of intervention will vary according to the resources of the respective communities, and not only those brought by state bodies or other external sources. Reintegration being a relational notion, a significant factor is the resources provided by individual returnees and receiving communities themselves, including families.

One significant lesson that emerges from contexts of transitional justice is the importance of distinguishing among reintegration modalities based on the conditions of recruitment. While this is most salient in cases of child recruitment, it can be applied to forms of recruitment affecting women and other people who traveled to conflict zones. Despite the overall framework that sees children recruited into armed groups primarily as victims, which is undeniable, there are also considerations about how former child soldiers deal with what they witnessed and what they did. This is relevant in situations where people traveled with different degrees of agency and did not directly engage in violence or abuse but still need to acknowledge some degree of responsibility in order to be accepted by their communities. The main lesson is that the condition of foreign fighters, as with child soldiers, cannot be reduced to a binary equation of victim versus perpetrator. It is better represented by a continuum of responsibility and agency.

Motivations for engaging with illegal armed groups is another relevant factor, even among those who did so voluntarily. Those who travelled to provide support to fellow combatants, providing medical care to the injured, for instance, may be more willing to engage in nonjudicial mechanisms, to “clear the air on the roles played by different actors and emphasize the need for commensurate levels and measures of accountability.”⁹²

Experiences of reintegration are diverse. Some particularly appropriate lessons, based on the different social and political dimensions of reintegration in cases of armed conflict, include

92 Interview with Zaina Kmobo, of Haki Kenya, a nongovernmental organization that works in Muslim-majority coastal regions (August 2021).

considering individual motivations for involvement and skills and desires, addressing differentiated needs and experiences for women and children, responding to the effects of trauma, guaranteeing a minimum threshold of security, and creating conditions for mutual trust. Social reintegration, in particular, depends on addressing stigmatization and local and national acceptance and ownership.⁹³ In Kazakhstan, for instance, the repatriation policy included a public outreach campaign to guarantee national support, briefings by the National Security Committee and the foreign ministry, and informational videos.⁹⁴ However, repressive characteristics of the policy and the use of broad definitions of criminal conduct for prosecution represent significant problems.⁹⁵

Holistic interventions that go beyond an individual understanding of reintegration favor disengagement from violence or from violent groups, not deradicalization. The objection to deradicalization derives from its disempowering effect, which could deny members the right to confront injustices affecting their communities. One important condition for disengagement from violence is to validate and support the political engagement of returnees for the betterment of their communities through civic involvement. Moreover, from a long-term prevention perspective, addressing injustices and discrimination faced by communities could reduce grievances among their members, diminishing the likelihood that some members could turn to violence to express their frustration and need for empowerment. Often that is precisely the type of objective pursued in the reintegration of politically motivated guerrillas who sought social change through the use of violence, as in the case of FARC members in Colombia and FMLN members in El Salvador. The goal is not for individuals to renounce their vision of society but to agree to pursue their political goals through democratic means.

Such engagement and agency are related to another important dimension: assuming responsibility. Experiences with reintegration of illegally recruited youth show how some need to acknowledge their role in violence, in order to achieve well-being. One demobilized youth in Colombia, for example, spoke about how providing information about the whereabouts of the forcibly disappeared could “cease the pain of the families, but also their own pain.”⁹⁶ Another participant of the same program criticized its exclusive individualistic and socioeconomic approach, alleging that “there is no room to reflect about our own stories, there is no mourning process. The focus is just on preparing us to fit into society, its norms, without understanding why at some point we left it.”⁹⁷

Peacebuilding approaches often stress the importance of addressing not only the needs of returnees but also the needs of the broader society and a range of stakeholders, including victims and the communities that demobilized members return to. In most cases, the fears, trauma, and experiences of those returning exist alongside the fears and anger of victims, including refugee communities, and society.⁹⁸ This is where truth-seeking processes could help societies to accept and trust returnees.

93 Mary Beth Altier, “Violent Extremist Disengagement & Reintegration: Lessons from Over 30 Years of DDR,” *Resolve Network* (March 2021), doi.org/10.37805/vedr2021.1.

94 William B. Farrell, Rustam Burnashev, Rustam Azizi, and Bakhtiyar Babadjanov, US Institute of Peace, “Processes of Reintegrating Central Asian Returnees from Syria and Iraq” (July 21, 2021), www.usip.org/publications/2021/07/processes-reintegrating-central-asian-returnees-syria-and-iraq

95 UN General Assembly, “Visit to Kazakhstan.”

96 As reported by an NGO staff member working with demobilized youth in Colombia. See also Cristián Correa, Ana María Jiménez, Virginie Ladisch, Gustavo Salazar, ICTJ, “Reparación integradora para niños, niñas y jóvenes víctimas de reclutamiento ilícito en Colombia” (2014), 38, www.ictj.org/sites/default/files/ICTJ-Informe-Colombia-Reparacion-reclutamiento-illegal-2014.pdf

97 Ibid. A similar sentiment was shared by a young Kenyan returnee to his mother. Interview of Kenyan returnee, August 2021.

98 Bosley, “Violent Extremist Disengagement and Reconciliation.”

Before applying such lessons across contexts, however, it is crucial to evaluate the relevant factors in each society, including through an assessment of the dominant perceptions about those returning or being repatriated and their communities of origin. For those returning to Australia, Canada, European countries, or the United States, prejudices and discrimination against Muslim and immigrant communities cannot be overlooked; similar prejudices exist in Kenya and Nigeria—and in Iraq towards the Sunni. This may help to explain why Muslim-majority countries such as Kosovo and Bosnia have been more open to repatriating their Muslim and immigrant citizens, calling them citizens, not “foreign terrorist fighters.” Addressing such discrimination requires a careful outreach policy towards society and communities of origin or resettling, including forming alliances to sustain the process and preparing for possible backlash should returnees engage in acts of violence at some point.

As in other transitional justice contexts, inclusive truth-seeking processes that identify the factors that contributed to armed conflict can help to define reforms needed for guaranteeing nonrepetition. In this case, investigations should try to identify the factors that contributed to persons engaging with ISIS and other groups and in extremist violence—and to what degree those factors persist or have even increased. Kenya’s Truth, Justice and Reconciliation Commission, for example, acknowledged that abuses by the country’s security sector, mainly the military and police, were a major cause of grievance among returning defectors, which many named as a primary reason for joining Al-Shabab and other groups. In response, it recommended a range of reforms to guarantee nonrecurrence. Limited research on ISIS defectors has shown that the testimonies and narratives of former foreign fighters can shed light on crimes, methods of recruitment, and motivations for joining, which could be incorporated into broader truth-telling processes.⁹⁹ In general, the result of such truth telling should not be a series of community-level actions but strategies and reforms that address wider societal problems.

Building Trust through Community and National Involvement

As with any attempt to confront past injustices, a policy for addressing the phenomenon of foreign fighters through accountability, reintegration, and long-term prevention of violence requires society’s buy-in. Policies that need to be sustained over time to achieve results rely on the continuous support and trust of a range of actors. Addressing resistance, criticisms, and fears are therefore essential components of effectiveness.

Transitional justice policies are always contested. The strong emotions that follow the use of political violence and perceived threats and vulnerability often translate into a demand for retaliation. After years of carefully drafting a comprehensive peace accord in Colombia that included an accountability and truth-seeking process, its ratification referendum was lost due to a combination of fear of an unknown situation, a complex agreement insufficiently explained, distrust of government, and political manipulation and misinformation by the opposition. Public debate in transitional scenarios is often defined by binary approaches, stressing either retribution or turning the page. This reality requires implementing public outreach programs to resistance.

In the case of foreign fighters, strategies should start with revising the labels used to describe them and their extensive portrayal as “terrorists.” They should involve dialogue and engagement in the public space that are not limited to those directly affected by the policy. The discussion should be shifted from one based on fear to one based on human rights, national integration, and a concept of citizenship that is open to anyone who adheres to these values, even if they are from a different cultural tradition.

⁹⁹ Peter R. Neumann, The International Center for the Study of Radicalisation and Political Violence, King’s College London, “Victims, Perpetrators, Assets: The Narratives of Islamic State Defectors” (2015).

One relevant lesson from the field of transitional justice is the need to understand public outreach beyond mere dissemination of information or one-time consultations. Buy-in is most often achieved when justice measures are able to establish a collaborative relationship among the different actors and communities. Such collaboration does not mean a lack of conflict or disagreement but, rather, the ability to engage in dialogue and address conflicting interests.

An outreach and engagement process needs to specifically focus on communities of return. The reintegration of returnees requires community trust. The community needs to feel safe with the person who is returning, without fearing retribution from the fighter groups they have disengaged from (which is a frequent concern in the coastal region of Kenya) or state security services that may distrust any reintegration effort.¹⁰⁰ Community engagement can also help to reduce stigmatization of those returning by involving them in consultations aimed at trauma healing, forgiveness, and reconciliation with returnees, which have proven impactful in contexts like Kenya, especially when spearheaded by nongovernmental organizations.

Transitional Justice Approaches for Countries in Conflict: Syria and Iraq

Addressing the foreign fighter phenomenon in isolation from other dimensions of the armed conflict would risk the resurgence of the conflict. It would send a dangerous message that countries of origin care little for victims or detainees who remain in camps or those convicted in summary trials. In fact, the foreign fighter phenomenon clearly illustrates the interrelatedness of perceptions of injustice that happen abroad and those happening domestically, particularly among groups that share a common identity. Moreover, addressing the entirety of the situation in Iraq and northeast Syria is an imperative deriving from the notion of the universality of human rights and shared responsibility. It is argued here that a transitional justice approach to foreign fighters requires addressing the consequences of the violations committed in the communities affected by a conflict involving foreign fighters, whether or not foreign fighters are part of that process.

One common element in both Iraq and Syria, however, is the internment of foreigners who were engaged in the conflict. In both contexts, institutional settings and practices show the inability or unwillingness of national and international powers to provide solutions based on the rule of law and the respect for basic human rights. Those conditions affect not only foreigners, but all internees who experience prolonged, illegal detention under dire conditions that constitute human rights violations. Under those conditions, the imperative of countries of origin that have the capacity and willingness to provide rights-based remedies for their citizens cannot be clearer. Under a universal commitment to protect human rights and prevent torture and ill treatment, states that have the capacity to save people from those conditions need to act. If nonderogable human rights are inalienable, then prior conduct cannot be used as an excuse to expose individuals to ill treatment. It would also be a clumsy way to prevent internees from engaging in political violence or terrorist acts once they obtain their freedom, a condition that may affect thousands of children who cannot be blamed for being interned.

Experiences with partial solutions can be a source of new grievances and intercommunity division, as when court rulings provide justice or reparations for certain violations and conflict-affected communities while ignoring others. In contexts involving foreign fighters, it could

¹⁰⁰ Efforts in Kenya to decentralize counterterrorism policies through county programs face serious obstacles, because families and communities where young men returning from Somalia are threatened by security services that perceive them as involved in terrorist networks and community members who consider them to be collaborators with the security services. Interview with Zaina Kombo (August 2021).

reinforce the perception of the radical injustice of the international framework, despite its lofty goals of universalism and human rights. In more practical terms, if countries of origin are determined to hold returning combatants accountable, they will need to conduct investigations requiring some degree of engagement and collaboration with victims, affected communities, and civil society groups on the ground in Syria and Iraq.

Additionally, less punitive approaches based on the conditions of those interned, their motivations for surrendering, and their level of engagement and commitment to violent conflict could offer more effective responses than mere punishment. This requires distinguishing among internees based on their level of commitment to violence in the present and offering conditions for accountability and reintegration that will be respected. Fulfilling promises for humane treatment and clear pathways for reintegration of those who surrender can help to build trust and contribute to the ongoing dismantling of armed groups and prevent their resurgence, as testimonies of recently defected members of Boko Haram in Nigeria attest.¹⁰¹

It is important to acknowledge that Iraq and Syria have not pursued transitional justice as a way to address the widespread crimes committed by state and nonstate actors in their territories, the harms suffered by hundreds of thousands of victims, and the local, national, regional, and international dynamics that caused and contributed to these conflicts. While individuals, groups, and communities most affected by the violence continue to demand justice, peace, dignity, and equality, the challenges that actors face in attempting to address past wrongs are immense, in terms of security, access, capacity, and politics. At the same time, however, experiences in other contexts such as Colombia demonstrate the value of discussing and even implementing limited transitional justice processes while conflict and abuse are ongoing. While a more comprehensive transitional justice program may depend on a political settlement to an armed conflict, pursuing limited efforts before that stage can help to keep the concerns of victims on the agenda and make it more likely that any future settlement makes transitional justice a central aim. Proposals for addressing foreign fighters through a transitional justice lens in these contexts should be considered with this in mind.

Iraq

Both Iraq and Syria are suffering enormously from the meddling of foreign powers. This makes it difficult to determine which conflicts originate from within their own communities and which have been instigated by external interests. The nature of the relationships between Shia, Sunni, Kurds, and other minorities living in these countries makes it even more challenging to distinguish between internal and external dynamics.

The current situation in both countries, however, suggests the strong likelihood of persistent or resurgent armed conflict. In Iraq, some experts warn of the potential for “ISIS 2.0.”¹⁰² In the area formerly controlled by ISIS in Iraq and the Kurdistan Autonomous Region, the persecution experienced by members of the Sunni community is troubling. Under the banner of pursuing justice for crimes committed by ISIS, vast numbers of Sunnis are being prosecuted and sentenced based on little evidence, with total disrespect for basic notions of due process of law.¹⁰³ Others are being held in dire conditions in displacement camps, while their homes and

101 As reported by *The New York Times*, less punitive approaches promised by the Nigerian government are having an effect in massive defection of Boko Haram members, in addition to the death of their leader, but those promises need to be fulfilled. Ruth Maclean and Ismail Alfa, “Thousands of Boko Haram Members Surrendered. They Moved In Next Door,” *New York Times*, September 23, 2021, www.nytimes.com/2021/09/23/world/africa/boko-haram-surrender.html

102 Belkis Wille, “The Fall of Mosul May Not Be the End of ISIS But the Beginning of ISIS 2.0: Iraq’s Abuse of Civilians Will Make it Easy for the Next Version of the Extremist Group to Recruit,” *Human Rights Watch Dispatches*, July 2019.

103 Human Rights Watch, “Flawed Justice: Accountability for ISIS Crimes in Iraq,” December 2017.

cities are taken over by new arrivals. These summary investigations and trials do not necessarily offer a sense of justice to victims, including those living in displacement camps, as they are mostly based on membership in or support for ISIS, not on evidence of participation in serious international humanitarian law violations. Despite some specific efforts to apply basic rule-of-law principles to certain categories of defendants, like children, the overall policy rests on massive incarceration and presumption of guilt, lack of judicial independence, expedient trials under extraordinary powers that violate due process of law, and harsh penalties for minor offenses, like mere membership in ISIS.¹⁰⁴

The few efforts to locate and identify the forcibly disappeared, even if they may provide alleviation to some victims, are limited. Special committees established by the Iraqi government to investigate enforced disappearances allegedly committed by forces in support of or under government control have been characterized as having limited investigative powers and capacity and lack of independence from security services. The recommendations made by these committees remain mostly unimplemented, with few criminal investigations and limited progress in the search for remains.¹⁰⁵

One particular problem frequently reported by different actors interviewed for this study and surveyed in the region is the lack of trust in the government and authorities.¹⁰⁶ Corruption and abuse of power, major factors for the support of ISIS, persist or have worsened, which limits the effectiveness and credibility of the accountability measures being implemented. The overarching narrative of security and counterterrorism that gives authorities unchecked powers creates new opportunities for abuse and provokes new resentment. The reliance on militias for security perpetuates the sectarian use of security and accountability. Under these conditions, security and justice are a guarantee for some and a threat of repression for others, with little hope for justice.

The lack of peaceful channels for addressing injustice and abuse may be seeding grounds for new violence. Reforms implemented to improve human rights protection, like the Iraqi High Commission for Human Rights, have been co-opted by partisan quotas that undermine its independence.¹⁰⁷ The Kurdistan Autonomous Region, which has been more open to collaboration with UNITAD and international organizations and more trusted by local residents,¹⁰⁸ still faces similar challenges. When confronted with allegations of abuse and demands for justice, the Kurdistan Regional Government (KRG) responded with denials, instead of initiating serious and impartial investigations.¹⁰⁹ All of these conditions create fertile ground for what one scholar called more than ten years ago a “global foreign fighter pipeline,”¹¹⁰ making it not only a problem for Iraq or the KRG, but also a global concern.

104 Human Rights Watch, “Iraq: Step Toward Justice for ISIS Child Suspects,” December 13, 2020, www.hrw.org/news/2020/12/13/iraq-step-toward-justice-isis-child-suspects.

105 UNAMI/OHCHR, “Enforced Disappearances from Anbar Governorate 2015-2016: Accountability for Victims and the Right to Truth” (2020).

106 Interviews with Habib Nassar, Frances Topham Smallwood, and Sam van Vliet, from Impunity Watch, August 2021, and Hanny Megally, of the UN Commission of Inquiry on Syria, August 2021; and Al-Saiedi et al., “Never Forget.”

107 MENA Rights Group, “Iraq: Evaluation Report of the Iraqi High Commission for Human Rights. Report submitted to the Sub-Committee on Accreditation of National Human Rights Institutions as Part of the Re-accreditation of the Iraqi High Commission for Human Rights (IHCHR)” (February 19, 2021).

108 Al-Saiedi et al., “Never Forget.”

109 Belkis Willie, “KRG Response to War Crimes Allegations in Iraq Falls Short: KRG Denies Evidence of Mass Execution Despite Evidence,” *Human Rights Watch Dispatches*, April 2018. Lack of responsiveness to allegations of violations committed while fighting terrorism, even when extensively reported by state independent institutions, are frequent in the case of Kenya too, as reported by the Kenya National Commission of Human Rights, “The Error of Fighting Terror with Terror: Preliminary Report of KNCHR Investigations on Human Rights Abuses in the Ongoing Crackdown against Terrorism” (2015), www.knchr.org/Portals/0/CivilAndPoliticalReports/The%20Error%20of%20Fighting%20Terror%20With%20Terror.pdf.

110 Clint Watts, “Countering Terrorism from the Second Foreign Fighters Glut,” *Small Wars Journal* (2009), <https://smallwarsjournal.com/blog/journal/docs-temp/247-watts.pdf>

The 2019 “Never Forget” study of conflict-affected communities in northern Iraq provides relevant insights into the priorities of those living in this difficult situation regarding peace and justice.¹¹¹ Serving as a harsh indictment of the Iraqi government, but also of the international community as complicit and ineffective, the views shared by these populations offer important guidance for designing policies that respond to local needs for security, justice, and fairness. Piecemeal efforts, like expanding initial efforts to find some of the forcibly disappeared from the Yazidi genocide, could provide relief to some people, while leaving many other issues unaddressed. Selective forms of justice, focused only on ISIS or Yazidi victims or sexual or gender-based violence,¹¹² without addressing serious crimes committed by other actors or against other groups, would nurture the perception of injustice and oppression.¹¹³

Different actors have made comprehensive recommendations for justice, some of them based on lessons from transitional justice, but they have been largely ignored because they would threaten the existing balance of power. Specific recommendations for improving prosecutions, like focusing investigations on those most responsible while establishing alternative measures for those found not complicit in the planning or execution of serious crimes,¹¹⁴ could improve the effectiveness of justice efforts. When mere group membership is a punishable crime that can be established without substantial evidence, however, it may seem easier to simply send everybody to jail, just in case. Research pointing to different forms of engagement and collaboration among those who remained in Mosul under ISIS occupation offers a nuanced picture of living conditions and support,¹¹⁵ but those distinctions have not been used to change the situation of thousands who are incarcerated without being charged or without evidence of their involvement in serious violations of international humanitarian law.

Reparation policies based on existing laws can offer some forms of support and opportunities for reconstruction in affected communities. However, Law No. 20 of 2009 has proven to be only partly effective, due to the limited categories of losses it offers that prioritize men and those with documented violations as beneficiaries. Awards are determined on a case-by-case basis, which makes implementation slow and inaccessible to many. The later inclusion of legal entities as “victims” limits accessibility to poor people with limited evidence and ability to make successful claims, particularly in the area occupied by ISIS. A cumbersome application process and significant backlog makes it an ineffective tool for more urgent reconstruction. Recommendations to members of the US-led coalition to assume their responsibility for reparations have gone unaddressed.¹¹⁶

The Yazidi Female Survivors Law has been praised for including conflict-related sexual violence and recognizing additional forms of reparations beyond compensation, particularly rehabilitation, which includes psychosocial support, educational opportunities, employment, and address-

111 Al-Saiedi et al., “Never Forget.”

112 Coalition for Just Reparations, “Towards a Viable Reparations Scheme for Survivors of Conflict Related Sexual Violence In Iraq: Policy paper” (2020); and Global Network of Women Peacebuilders, “Seeking Accountability and Preventing Reoccurrence: Addressing Conflict-Related Sexual Slavery through the Women, Peace, and Security Agenda. Case Study: Conflict-Related Sexual Slavery and the Yazidi Genocide, Iraq” (2020).

113 Impunity Watch, PAX, and Syrian Center for Media and Freedom of Expression, “ISIS-only Tribunal: Selective, Politicised Justice Will Do more Harm Than Good,” Policy Brief (October 2019).

114 Mara Redlich Revkin, Institute for Integrated Transitions, “The Limits of Punishment: Transitional Justice and Violent Extremism,” Iraq case study (2018); Human Rights Watch, “Flawed Justice”; and Kristen Kao and Mara Redlich Revkin, Gothenburg University, “To Punish or to Pardon? Reintegrating Rebel Collaborators After Conflict in Iraq,” Working Paper No. 17 (2018).

115 Kao et. al., “To Punish or to Pardon?”

116 Ceasefire - Centre for Civilian Rights and Minority Rights Group International, “Mosul after the Battle: Reparations for Civilian Harm and the Future of Ninewa” (January 2020); and Ceasefire - Centre for Civilian Rights and Minority Rights Group International, Clara Sandoval and Miriam Puttick, “Reparations for the Victims of Conflict in Iraq: Lessons learned from Comparative Practice” (November 2017).

ing the legal status of children born of rape. This law certainly complements Law 20, adding a missing gender dimension. Recommendations have been made to expand the law to other victims of conflict-related sexual violence committed by ISIS who are not Yazidi, which would be a welcome development.¹¹⁷ Any expansion of the applicability of such a law, though, should also address the acceptance of children born from rape and their mothers by their communities, and guarantee their adequate integration as an essential component of reparations. However, the legal framework for reparations would mark just the beginning of the challenge of effectively providing reparations to all victims without requiring insurmountable burdens of evidence or revictimizing applicants already experiencing trauma and stigmatization. If done correctly, measures facilitating accessibility could also serve to improve the implementation of Law 20.

Fewer recommendations have been made about reintegrating families or those with low-level involvement in atrocities committed by ISIS, even if there is support for the idea of peaceful coexistence.¹¹⁸ The number and consistency of many recommendations could serve as useful guidance for the Iraqi government and KRG, although most have been ignored. The Global Programme on Prosecution, Rehabilitation and Reintegration could assist the implementation of these recommendations, as well as the Global Framework for United Nations Support on Syria/Iraq Third Country National Returnees, managed by UNOCT and UNICEF. Further, if suggested improvements for prosecutions, reparations, or reintegration are adopted but implemented selectively, favoring certain categories of victims or leaving out violations committed by certain groups excluded, they will have limited effect. Moreover, justice and reparations for past violations are undermined if authorities fail to ensure nonrepetition by ignoring government abuse and corruption.

Syria

The situation in Syria is very different but no less challenging than the one in Iraq. Because the conflict with ISIS is part of a broader armed conflict, with different players controlling different regions, policy proposals for Syria are limited to the northeast region, an area now controlled by SDF. The lack of a clear governing structure with legitimacy and international recognition for SDF rule makes it difficult to establish a comprehensive policy for addressing violations attributed to ISIS even for those regions. However, that precariousness can favor collaborative efforts, with states committed to implementing policies that are more firmly rooted in human rights. This should be understood as a responsibility for those states with the capacity to have a positive influence on creating conditions for sustainable peace based on guaranteeing human rights to all the different communities and people who live there. Compared to Iraq, potential interventions in northeast Syria depend much more on the coalition supporting SDF and other western states, with Iraqi Kurdistan in between those two positions. This makes it more feasible to develop a comprehensive policy for addressing the violations committed by ISIS, including establishing conditions for the release of internees who do not bear responsibility for serious crimes, while implementing mechanisms for the investigation and prevention of violations committed by SDF and other groups. Nevertheless, AANES's precarious hold on power and lack of legitimacy requires adopting a flexible approach, working with the provisional administration as a *de facto* ruler, but also with other political or community leaders, so that the process is not perceived as propping up SDF or relying exclusively on its ability to stay in power in a volatile region.

Given the nature and magnitude of the violations committed in Syria, transitional justice can offer lessons that could be adapted specifically for that context. A combination of criminal justice, truth seeking, and reparations designed to address massive violations could offer a sense of

117 Güley Bor, LSE Middle East Centre, "Response to and Reparations for Conflict-Related Sexual Violence in Iraq: The Case of Shi'a Turkmen Survivors in Tel Afar" (October 2019).

118 Al-Saiedi et al., "Never Forget."

accountability and redress, while reducing the likelihood of revenge killings and limiting resentments that could lead to the resurgence of violence. This could include: screenings to determine which internees should be freed and which should join a rehabilitation process or be investigated for possible serious crimes; developing criminal investigations and trials directed at those most responsible; creating rehabilitation and reintegration process for all others; and strategies involving truth seeking, community dialogue, and forms of acknowledgment of responsibility. These efforts should be centered on community involvement and mechanisms that can offer truth and transparency to victims and affected communities. Even more important than handing down sentences would be to give communities a sense of justice. A leading human rights advocate who works in the region and has vast experience on transitional justice affirms:

Beyond criminal accountability, foreign assistance should support justice measures seeking to address the real and immediate needs of affected populations, politically, technically, and financially. These measures may include mechanisms to search for the disappeared, individual and collective reparation for survivors and affected communities, and policies for the protection of property of displaced persons. Furthermore, international assistance should promote and support justice processes that directly associate affected communities, victims, and grassroots actors and allow them to participate meaningfully in defining priorities, as well as designing and implementing corresponding policies.¹¹⁹

A wide range of stakeholders should be involved in examining the needs and priorities of those affected by the conflict in northeast Syria. Consultations should be conducted with communities that tended to support or feel sympathetic to ISIS, those under ISIS occupation who could not escape and needed to provide some kind of collaboration to survive, those who suffered violations committed by other groups, and those interned for being in the wrong place at the wrong time. Communities need to perceive that these efforts are motivated by a need for justice, not revenge.

Based on remote consultations with people in the region, one commentator proposed a “multidimensional justice,” including establishing “truth commissions that could provide more in-depth analysis of the full range of crimes committed by ISIS,” “deepening understanding of the inner working of the group,” and forms of reparations “such as monetary compensation or public apologies” to be defined through extensive consultations.¹²⁰ The proposal includes the creation of “Missing Persons Committees,” which may require technical cooperation from entities with relevant experience, like the commission set up in Iraq to search for and identify missing Yazidi, and “healing programmes,” understood as “platforms for victims and former ISIS members to interact,” which could draw on “traditional or religious practices.”¹²¹ The proposal is based on several conditions, including issues of authority, independence of the mechanisms, transparency, due process, victims’ agency, and civil society participation.¹²²

Incorporating victims and affected communities in the design and implementation of such policies is particularly important to ensure that they are appropriate to the context and have public buy-in,¹²³ especially given the significant influence of the United States and other coalition members that support SDF and the problems of the institutional legitimacy of the SDF author-

119 Habib Nassar, “The Failure of Top-Down Approaches to Transitional Justice: What Iraqis and Syrians Teach Us,” *PeaceLab-Blog*, December 13, 2018, <https://peacelab.blog/2018/12/the-failure-of-top-down-approaches-to-transitional-justice-what-iraqis-and-syrians-teach-us>

120 Haid Haid, Chatham House, “Breaking the Cycle of Violence Transitional Justice for the Victims of ISIS in Syria,” Research Paper (April 2020), 7

121 *Ibid.*

122 *Ibid.*, 9–12.

123 Interviews with Haid Haid, of the Middle East and North Africa Programme at Chatham House; and Habib Nassar, Frances Topham Smallwood, and Sam van Vliet, of Impunity Watch, August 2021.

ity, particularly among Arab communities in the region. The participation of communities most affected by crimes committed by ISIS and communities where most internees will likely end up relocating will be essential to their effectiveness as peacebuilding tools. Involving victims and women is particularly critical in Syria, as they are often sidelined, which explains in part the lack of response to sexual and gender-based violence in Syria.¹²⁴ Beyond criminal investigations, their participation in defining and taking an active role in truth seeking, reintegration, and reparations is essential if the aim is reintegration of those released. The whole population living in the area may have daily interactions with those released, not just community leaders and decision makers. Their legitimate grievances, and their attitudes towards returnees, may seriously affect any reintegration effort. Preventing stigmatization or revenge requires their involvement.

Screening

Given the number and diversity of people interned in camps in Syria, there is a need for a large-scale screening process to identify individuals who were involved in serious crimes, to expedite the release of those who do not need to be held. However, the large number of children among the internees should be presumed innocent and immediately freed, except for the very few who may be responsible for crimes based on specific evidence. The screening process for adults requires transparent assessments, involving victim representatives, SDF security, and other entities. The current screening process, implemented by SDF, needs to be evaluated in order to assess whether and to what degree it goes beyond mere security and criminal justice considerations. In Nigeria, a similar screening process not only lacks transparency, clear standards, and independent controls, but relies on prolonged extrajudicial detention of large numbers of people captured by the army from areas previously controlled by Boko-Haram, including former combatants as well as people who live there and, in most cases, suffer Boko Haram subjugation.¹²⁵

However, current levels of resentment and mistrust, after so much suffering, require a high degree of involvement of community representatives in the screening process for adults. This could prevent stigmatization or revenge against those released. Setting up this process may require careful consultation with affected communities, providing information on the kinds of issues to be considered in the screening, and an institutional framework that addresses the problems of legitimacy that SDF faces. The involvement of the UN Office of the High Commissioner of Human Rights as a third party could help to bolster the legitimacy and fairness of this approach.

Defining Conditions for Freeing Internees

Poor conditions makes living in internment camps an untenable situation. They are breeding grounds for further violence, abuse, and human trafficking as well as further resentment and grievances. The conditions themselves constitute systematic violations of the most basic human rights, which possibly increase recruitment by groups that could reengage in political violence. The initial liberation of thousands of internees by SDF released the pressure to some degree; however, those releases, made under agreement with local leaders, may have been of people with links to those communities. In those cases, it was easier to assess individual involvement in the commission of serious crimes and the degree of threat each represented, as the leader involved may have known them. More can be done to improve the capacity of returnees to integrate into communities and for communities to accept them without fear of reprisal or stigmatization. The acceptance of community leaders provides at least a baseline for working on reintegration.

¹²⁴ This does not mean that only women can be victims of sexual violence. Stigma towards sexual violence could be a bigger factor for male victims.

¹²⁵ Vanda Felbab-Brown, Mark Freeman, Mara Revkin, and Ron Slye, Institute for Integrated Transitions, "The Limits of Punishment: Transitional Justice and Violent Extremism" (2018).

Early release of the majority of children requires measures for guaranteeing their best interests are served. This involves guaranteeing safe conditions for resettlement and family unification and, particularly, release with their mothers. Unless there is strong evidence that mothers of children have been involved in the commission of serious crimes, they should be released as well, through an expedited process.

The main challenge is how to deal with those who do not belong to communities in the areas where internees would be able to return. One group comprises Iraqi nationals or nationals of other countries who are threatened with repression, discrimination, imprisonment, and torture should they return and other foreigners whose countries of origin present similar conditions. They should not be repatriated or expelled to those countries as it would constitute a violation of the prohibition of refoulement. Another group comprises Syrian nationals from areas occupied by the Syrian government or by other forces that would oppose their return. It is also unlikely that Turkey would accept returnees sent by SDF or efforts by SDF to engage in negotiations about them. Finding a resettlement solution for these internees may require further consultations. If no other solutions are found, they may need to be located to displacement camps under some form of management that provides security, conditions of well-being that guarantee the enjoyment of their rights under international human rights law, and an opportunity to make decisions about their future settlement. This may require the involvement of entities with experience working with refugees and displacement, such as the International Organization for Migration and the UN Refugee Agency.

Among those who will need to be relocated, most likely in the region, if security and political conditions allow, are other foreigners who may not be able to return to their countries of origin, some of whom were fighters. Because they have neither roots in communities of return nor cultural proximity to the rest of the population, their integration might prove more difficult. For those who participated in fighting, integration could pose serious challenges. There are no comparative experiences of resettling former foreign combatants. This effort may require careful processes of truth seeking, expressions of repentance, and involvement in community reconstruction to build trust. A more expensive but tenuous alternative would be implementing security measures to assure the safety of the communities and those resettling, to reduce the likelihood of revenge killings.

Community acceptance of the thousands of internees to be released would require both community-based approaches and more general methods to promote acceptance and reduce stigmatization or revenge attacks. This could be done through a combination of community reintegration programs and truth-seeking initiatives, which may require the participation of community leaders, civil society, religious groups, and AANES. Immediate consultations with these actors are needed to define strategies for internees in camps and for when they are freed or relocated. Broad inclusion in these consultations could help give legitimacy to those strategies in a context of political volatility, where AANES's authority cannot be considered a given in the long term. Kenya provides a helpful example of defining policies at the county level and incorporating local leaders. Imams have proven helpful in developing counter-narratives to stigmatization and facilitating deradicalization or disengagement. It is an example that also offers important warnings, though, against the use of security and counterterrorist approaches and police overreach, which have subverted many of the efforts and led to the intimidation and even persecution of some of those involved.¹²⁶

126 Interviews with Zaina Kmobo, from Haki Kenya, and separate interviews with several Kenyan returnees from Somalia, August, 2021.

Community-based approaches could be drawn from experiences of reintegrating child soldiers and other community reconciliation initiatives, mentioned above. These methods combine work with returnees' family members or those closest to them and the broader community. They may depend on the size of the community and degree of cohesion and the grievances that community members may have against returnees. They should include some ceremonial aspects that give voice to victims' complaints and grievances and allow returnees to respond as well as healing aspects, such as those suggested above.¹²⁷ Their design should depend on returnees' level of participation in any form of abuse and their perceived involvement by respective communities. One primary goal could be to better align that public perception of guilt with the specific roles that returnees played, resisting generalizations.

Often reintegration processes are accompanied by economic stabilization for returnees. Although that can be important for guaranteeing reintegration, providing benefits to returnees can be a two-edged sword, especially if they exceed the benefits and treatment that victims receive. This is one of the most serious criticisms of disarmament, demobilization, and reintegration programs in the absence of reparations. Any benefits should not be provided in ways that put returnees in a better condition than that of affected communities and victims. If the goal is to obtain community acceptance of returnees, careful considerations should be made to offer shared benefits. Reintegration of former combatants in Sierra Leone, for example, included school packages for the entire receiving community, not just returnees' direct beneficiaries.¹²⁸

The need for acceptance of returnees through the inclusion of acknowledgment of violations suffered by affected communities and the implementation of certain forms of reparations or other benefits has been included in some reparation efforts for victims of sexual violence and their children. Women abducted by the Lord Resistance Army in Uganda and their children, for example, have been viewed with suspicion by members of their communities of origin for what they consider "introducing extra-community lineage" and being associated with those who caused harm to the community—even if they were clearly victims of the same group. It has been recommended that states design forms of reparation that involve community consultations, to avoid reinforcing stigmatization or resentment against returnees.¹²⁹

One challenge that a community reintegration process might face is timing. Developing an effective program requires holding consultations with returnees' families and the communities to which they will return. However, the need for immediate release may require some short-term measures while further design, preparation, and budgeting are carried out. This is a situation that transitional justice processes often face. Providing immediate assistance to both communities and returnees could be an adaptive mechanism in the same way that assistance is provided when conditions make a reparations policy difficult.¹³⁰ This may require accommodating different needs and being sensitive to the reactions of communities of return, to foster inclusive responses and avoid conflict.

127 Haid, "Breaking the Cycle of Violence," 8.

128 Through the Community Education Investment Program. See UNICEF, "The Disarmament and Demobilization and Reintegration of Children Associated with the Fighting Forces: Lessons Learned in Sierra Leone (1998–2002)" (2005).

129 Virginie Ladisch, ICTJ, "From Rejection to Redress: Overcoming Legacies of Conflict-Related Sexual Violence in Northern Uganda" (2015), www.ictj.org/sites/default/files/ICTJ-Report-Uganda-Children-2015.pdf

130 See, for example, the interim relief program implemented in Nepal and interim reparations implemented in Sierra Leone. Both experiences show that one risk of choosing interim policies is that, with the pressure lowered, the government felt less compelled to implement definitive and more comprehensive measures. On Nepal, see Ruben Carranza, ICTJ, "Relief, Reparations, and the Root Causes of Conflict in Nepal" (2012), <https://www.ictj.org/publication/relief-reparations-and-root-causes-conflict-nepal>; and ICTJ, "From Relief to Reparations: Listening to the Voices of Victims" (January 9, 2012), www.ictj.org/publication/relief-reparations-listening-voices-victims. On Sierra Leone, see Mohamed Suma and Cristián Correa, ICTJ, "Report and Proposals for the Implementation of Reparations in Sierra Leone" (2011), www.ictj.org/publication/report-and-proposals-implementation-reparations-sierra-leone

Truth Seeking

Truth commissions can play a role in general investigations that help to guide prosecutions towards the most serious crimes and those most responsible for violations in the conflict. However, investigative mandates are just one part of what truth commissions can offer, which is closely associated with the work of commissions of inquiry. Investigative methods and standards for truth commissions vary; they are not equal to those required for criminal prosecution. Moreover, the contributions of truth commissions tend to be more significant in understanding the causes and overall consequences of a conflict, giving voice to victims in more flexible ways than judicial proceedings and exploring issues that are relevant to the future peaceful coexistence of communities affected by violence.

In the context of conflicts involving ISIS, a truth-seeking exercise that includes diverse voices and operates independently of power brokers could help to identify the conditions that facilitated the rise of ISIS, which is important for preventing recurrence. According to one interviewee, “Because political and social grievances are the main driver behind local grievances, political and security reforms should be the priority.”¹³¹ A truth-seeking effort could help to identify those grievances and propose reforms to address them, even if part of a longer-term agenda for political reform.

Designing a truth-seeking exercise would require consultations among the different people who inhabit the region about what they wish to know and what should be acknowledged publicly. It would require a mechanism for selecting a group of individuals to serve as commissioners who could be trusted by members of different communities and granting them powers that would keep them remain independent of authorities, including the SDF. It may require examining the issues that provoke resistance from SDF and some states involved in the conflict. It would require resources to reach different communities and hold meetings and dialogue sessions with different actors. Finally, it would need guarantees of security for those speaking out, confidentiality, and in some cases protection from prosecution based on statements given under confidential protection.

Implementing a truth-seeking process, though, requires certain minimal conditions of security and trust. In this case, neither those who were in any way involved or associated with ISIS nor victims of violations committed by ISIS, SDF, or other armed groups or coalition forces may feel safe to talk. Under such circumstances, only small local efforts in communities that offer safe conditions for various actors to speak may be feasible. Another option is to implement a confidential consultation process to identify grievances, needs, and demands among different communities; build trust; and prevent corruption and abuse, as part of a gradual process of reducing intercommunal tensions and improve safety.

Reparations, Assistance, and Reconstruction

In a context like northeast Syria, reparations cannot be fully disconnected from assistance and reconstruction. The urgency of addressing the needs of people in the region, including not only those who lived there before the conflict, but also those who relocated there or were displaced during the conflict, demands an approach to reparations based more on needs than strict *restitutio ad integrum*. This is one of the main lessons for reparations policies drawn from transitional justice experiences, given the irreparable nature of the suffering and damage caused by conflict. This requires an approach very different to the kinds of reparations ordered in judicial settings or even of claims commissions, like the ones implemented in Iraq and elsewhere.

131 Interview with Syrian ICTJ consultant Qutaiba Idlbi, July 2021.

Any discussion about reparations needs to start from a guarantee of basic living conditions for everybody in the region, including basic services, schooling, health care, shelter, and rebuilding the economic output of the population. This requires asking what is needed to live in conditions of dignity or to reconstruct what was lost collectively, rather than understandings of reparation that tend to focus on individualized responses.

Forms of collective reparations or reconstruction efforts that directly involve former fighters, like ISIS members, could have a reparatory effect. They could represent what one observer called “giving back to the community,” as an essential aspect of reparations.¹³² This approach is being tried in Colombia, where FARC members are engaged in clearing landmines and unexploded devices. Additionally, the Special Jurisdiction for Peace is designing “restorative sanctions” for those found guilty of crimes who acknowledge their responsibility, a process to be defined with community involvement under Article 141 of Law 1957 of 2019. However, any initiative that involves former fighters needs careful human rights monitoring in order to minimize risks to their safety as well as any form of forced labor. Funding for these projects, and reconstruction more generally, may need to come from donor contributions, perhaps from states whose citizens were involved in the conflict and/or states interested in supporting the peacebuilding process; however, contributions may need to be framed from the perspective of reconstruction and assistance rather than as a response to an obligation to provide reparations. The approach should not follow the practice of compensation claims or trials but, instead, peacebuilding and community reconstruction. The design and implementation of the projects should be done with the local authorities and community leaders, emphasizing the involvement of women. Lessons from community reparations programs in Morocco; Peru; Aceh, Indonesia; and Colombia could help to craft effective policies and avoid corruption.¹³³

Criminal Investigations

As mentioned, the difficulty of investigating massive crimes committed in the context of conflict makes it challenging to prosecute offenders, which has translated, instead, into massive prosecutions for mere group membership or playing minor roles in ISIS, even if they carried weapons. This constitutes a poor form of justice because it does not provide truth for victims and it could result in treating fighters who played a significant role in commanding operations that resulted in massacres and other crimes against humanity the same as fighters with a minimal or nonexistent role. This wide-net approach to criminal justice that results in mass incarceration may provide the appearance of justice and contain the resurgence of ISIS in the short term, but it could create further risks in the long term when those given short sentences are released, escape, or obtain their release with a change in political power. The more that fighters are automatically treated as war criminals or terrorists, the more they are socialized in detention to use violence to achieve their goals and seek revenge.

Given the time and conditions needed for serious investigations, it is advisable to follow lessons from justice processes in conflict and post-conflict scenarios, where investigations have targeted the most serious offenders and low-level participants face prosecutions for less serious offenses, applying differentiated treatments aimed at long-term disengagement. Experiences in Rwanda

¹³² Interview with Haid Haid, August 2021.

¹³³ For Morocco, see ICTJ, “The Rabat Report: The Concept and Challenges of Collective Reparations” (2011), <https://www.ictj.org/publication/rabat-report-concept-and-challenges-collective-reparations>, and Mustapha Hadji, ICTJ, “Moving from Mirage to Reality: Transitional Justice and Prevention in Morocco” (2021), <https://www.ictj.org/publication/moving-mirage-reality-transitional-justice-and-prevention-morocco>. For Peru, see Julie Guillerot, ICTJ, “Alive in the Demand for Change: Transitional Justice and Prevention in Peru” (2021), <https://www.ictj.org/publication/alive-demand-change-transitional-justice-and-prevention-peru>. For Colombia, see Cristián Correa, ICTJ, “From Principles to Practice: Challenges of Implementing Reparations for Massive Violations in Colombia” (2015), <https://www.ictj.org/publication/principles-practice-challenges-implementing-reparations-massive-violations-colombia>.

and Colombia¹³⁴ point to forms of criminal accountability for massive numbers of defendants, differentiating between their levels of responsibility. Conditional benefits in exchange for collaboration could help not only to improve the capacity to target those most responsible for serious crimes, but also provide information for finding the missing and forcibly disappeared, clarifying facts beyond criminal investigations and obtaining acknowledgment of responsibility, apologies, and other forms of symbolic reparations.

Even if there is political support for adopting an appropriate and targeted criminal justice policy, designing a legitimate and effective mechanism that can guarantee impartiality and due process of law is extremely difficult. The International, Impartial and Independent Mechanism can help prosecutions based on universal jurisdiction in other countries and eventually make a referral to the International Criminal Court or to a future court established by a legitimate government. However, none of these alternatives offer a response at the scale and that is needed for victims. Several options have been proposed, including the creation of an international court or a hybrid mechanism or interventions modeled on the experience of the International Commission Against Impunity for Guatemala, which achieved significant success in improving the capacity of Guatemalan authorities to advance justice. Nevertheless, all of them face serious problems of legitimacy and feasibility. The UN Security Council, which is the only organ that has authority to create a special court in these circumstances, is unlikely to reach an agreement or to guarantee such a special court would be legitimate, impartial, and not limited to ISIS. Given the political obstacles to establishing any type of court system, however, the only way forward may be to provide support to the SDF-established judicial system while stressing the importance of other mechanisms. It would require significant capacity and legitimacy building. SDF's de facto rule requires finding ways to give legitimacy to a judicial institution and guarantee its independence from the administration, SDF, other armed groups, and foreign powers operating in the area, and to establish a jurisdiction that does not exclude crimes committed by any faction. Those conditions and other due process guarantees are not in place, but AANES seems to be open to outside assistance to increase its legitimacy, a situation that does not exist in Iraq.¹³⁵

Another complex political obstacle to conducting investigations and trials in this context is the need to address all of the most serious crimes, regardless of who committed them. Proposals for special courts that would try only SIS members, without examining the criminal responsibility of SDF members, armed groups, or members of the international coalition who fought against ISIS for similar crimes, would be perceived as victors' justice. Even if limited to crimes committed in SDF-controlled territory, investigations may also implicate members of the Syrian Armed Forces and its allies as well as Turkish forces. No matter the practical difficulty or feasibility, the statute of any criminal justice mechanism cannot target one single group but must be based, instead, on a specific time period and territory and specific types of crimes.¹³⁶

The use of criminal justice to address this complex situation seems to be a priority of the international community. This is not surprising because those instruments have been prioritized by the UN framework and several western nations as the instruments that western nations are

134 Most discussions on Colombia tend to focus on the 2016 Peace Agreement and the different institutions set up by it to respond to massive violations. However, there is a wealth of experience from different waves of demobilization of armed groups and the prosecution of those responsible, both members of those groups and state actors, that precedes the peace accords. One notable mention is the system established by Law 975 of 2005, which focused on prosecuting commanders and those with higher responsibility among the different demobilized paramilitary groups, while demobilizing and reintegrating the rank and file members. This effort contributed to creating conditions of trust that helped in reaching an agreement with FARC, the main group that those paramilitary groups fought.

135 Tanya Mehra and Matthew Wentworth, International Centre for Counter-Terrorism, "New Kid on the Block: Prosecution of ISIS fighters by the Autonomous Administration of North and East Syria" (2021).

136 For critique of an ISIS-only tribunal, see Impunity Watch, "ISIS-Only Tribunal: Selective, Politicised Justice Will Do More Harm Than Good," Policy Brief (October 31, 2019).

more familiar with when dealing with crime. It is also a convenient response for countries of origin that refuse to repatriate their nationals and prefer to outsource their responsibility as a way to provide accountability. Those knowledgeable with the situation, however, insist that military or criminal justice responses are not the primary solution to the complex challenges affecting the region. Rather, they suggest focusing efforts on rehabilitation, reparations, finding the missing and forcibly disappeared, and reconstruction. It seems like mere retribution and an excessive reliance on criminal justice are being imposed from the outside on those affected by the conflict.¹³⁷

Finding responses to critical dilemmas and different priorities is something transitional justice is often forced to do. Adapting to the context, including its particular needs, resources, and obstacles, is essential for advancing justice and guaranteeing the rights of victims in difficult circumstances. The response should not be to wait for optimal conditions, but to identify opportunities, and strategically sequence different efforts, and look for ways to have an impact.¹³⁸ As in other processes, it may be advisable to start with reparations, truth seeking, and reintegration, supported by significant assistance and reconstruction efforts, instead of trying to apply a comprehensive cookie-cutter approach. In fact, if the voices of those affected by conflict are taken seriously in defining a policy for northeast Syria, alternative strategies should be implemented without becoming entangled in discussions about legitimacy.

¹³⁷ Interview of Hanny Megally, August 2021.

¹³⁸ Roger Duthie and Paul Seils (eds.), *Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies* (International Center for Transitional Justice, New York, 2017).

Conclusions

Implementing effective justice responses to violence and abuses characterized as terrorism or violent extremism is a very difficult task. One of the main difficulties is the volatility of the global threat that such violence is perceived to represent. Societies that are not used to experiencing large-scale political violence or armed conflict tend to respond to this threat with alarm, implementing counterterrorism and countering-violent-extremism measures focused on security, punishment, and even repression. States previously more exposed to political violence have often used “terrorism” rhetoric as justification to strengthen already-existing repressive policies and systems.

Exploring more comprehensive, rights-based responses to violence and abuse in contexts where foreign fighters are a significant presence—which are often seen through the lens of terrorism or violent extremism—is valuable from both justice and prevention perspectives. Experiences in peacebuilding, transitional justice, reintegration of child soldiers, and disengagement of gang members offer useful examples to be adapted as part of such responses. These are all interventions capable of responding to complex dilemmas, not simple, one-tool solutions. They can offer nuanced approaches that consider the interests and needs of the different actors involved. They are complex in themselves, however, which makes them sometimes perceived as difficult to communicate, but they are nevertheless more connected to people’s day-to-day experiences of civil interaction, community relationships, and conflict resolution. They are also better suited to long-term goals, such as the fight against impunity, the prevention of the recurrence of abuses, and sustainable peace.

In contrast to security and punitive measures, these more comprehensive, rights-based approaches inherently involve a long-term perspective on justice and prevention, which can make them politically more difficult to sustain. Locking up those who are perceived as a threat may seem to create an immediate sense of safety and protection and even a certain amount of justice when court sentences are understood as retribution. It also responds well to the rhetoric of nativism, racism, and discrimination and the collective demonization of an enemy, which fits into a narrative in which those using violence constitute an external threat, rather than belonging to the national community, making primarily criminal justice and security approaches more easily delivered and popularized. At the same time, however, it often ignores the consequences for not only those directly subjected to such measures, but also their communities of origin as well. The potential for members of those communities to feel alienated by such measures, reinforcing their experience of discrimination and daily experience of exclusion and marginalization, should be an important part of the equation. Recognizing the proven risk of the recurrence of armed conflict and political violence can help to ensure the political commitment needed to address an issue like foreign fighters more effectively in the short and long term.

Adopting a comprehensive and rights-based approach to issues such as foreign fighters requires expanding the discussion about political violence beyond the narrow-minded and often manipulative focus on terrorism and violent extremism. It requires expanding the circle of potential responses beyond pure security or punitive approaches. It also requires taking statements about international collaboration and promotion of human rights seriously when facing these challenges. The nature of this type of violence and injustice cannot be addressed by states acting alone, thinking only about their short-term safety. The call for cooperation is a call for assuming responsibility to the extent of each state's capacity. There is no clearer issue here than the repatriation of those who are now in internment camps or prisons in Syria and Iraq and face real risks of serious harm, in violation of human rights obligations. Countries of origin that have institutional resources to guarantee independent justice and due process of law are more capable of dealing with foreign fighters in ways that are consistent with their inalienable rights. They can also deliver forms of accountability for the crimes committed by foreign fighters that respond to the rights of the victims. Similarly, they have the capacity to rescue thousands of children and other internees who have no responsibility for the serious violations of international humanitarian law committed in the conflict. States should meet their responsibilities and facilitate the reintegration of their own citizens back into society in ways that could reduce the likelihood of a resurgence of violence. They should implement reintegration policies that, by involving communities of origin and addressing their grievances, could contribute to social cohesion and better celebrate the diversity of their national community.

Finally, even if such a comprehensive response to foreign fighters is implemented by countries of origin, international peace, security, and human rights cannot be secured if each country is only concerned with its own citizens. A strategy that responds to foreign fighters requires addressing the situation of victims of the armed conflict in which they took part and the human rights and international humanitarian law violations for which they, and possibly other actors, bear responsibility. Victims and affected communities also need conditions of peace and respect for human dignity. They have rights that need to be considered, including the rights to know about the violations they suffered, to see that perpetrators are confronted with the consequences of their wrongdoing, and to find their loved ones who were disappeared or are missing. Accountability for crimes connected to foreign fighters cannot dismiss victims' rights because they were committed in a foreign country. In this sense, a transitional justice approach to foreign fighters requires dealing not just with foreign fighters themselves but with all of the abuses committed as part of the broader context of violence in which they engaged and by the groups with which they were associated.

In summary, a strategy for responding to what has been termed terrorism and violent extremism can be more effective in terms of outcomes such as justice and prevention if it is based on the protection and promotion of human rights or what the Special Rapporteur on human rights and counterterrorism defines not as balancing security and human rights but finding "a positive interplay" between the two.¹³⁹ This requires strengthening such interplay in the framework defined by the UN Security Council to ensure that this message is clearly understood by states parties and committing to action plans that could translate the well-established human rights framework into concrete and comprehensive responses based on shared responsibility.

139 UN General Assembly, "Promotion and Protection of Human Rights," para. 18.

Recommendations

A transitional justice approach to foreign fighters would be aimed at addressing the causes and consequences of the massive human rights and international humanitarian law violations committed in contexts where significant numbers of people traveled across borders to support armed groups in a conflict zone. A primary purpose of transitional justice is to promote compliance with the human rights obligations of a range of different actors in such contexts. It should not be understood as an alternative framework for human rights compliance, given that actors already hold clear legal obligations under international law. These recommendations, therefore, do not offer alternatives to human rights compliance but potential mechanisms to ensure compliance. The recommendations are articulated in general terms. As with any transitional justice processes, they should be adapted to the particular context of each relevant country. This is particularly important regarding countries where the violations occurred or are occurring, where, for example, the lack of a clearly established and legitimate government may affect the feasibility of the proposals.

For countries of origin

- Assume responsibility for justice and long-term prevention by repatriating citizens and all those who have a legitimate claim to citizenship, in full compliance with human rights obligations, providing for the immediate reintegration of those who bear no responsibility in serious violations of human rights law or international humanitarian law, while holding accountable and reintegrating those who are found responsible for such crimes
- Immediately repatriate children, in compliance with the Convention on the Rights of the Child, consistent with the obligation to proceed based on their best interests, respectful of their right to not be separated from their parents, and mindful that they should be presumed as victims of a situation of abuse and illegal detention while interned in camps.
- Immediately repatriate women, considering that a high proportion of them are unlikely to be responsible for crimes under international law or to represent a serious threat to commit acts of violence, and mindful of the serious risk of suffering harm they run while in interned in camps.
- Implement a screening process of those adults repatriated or who have returned, identifying those for whom there is credible evidence that they may be responsible for crimes under international law or that they represent a serious threat to commit acts of violence. Avoid subjecting all those not identified to any form of surveillance or security records.

- Adopt a discourse that facilitates reintegration and reduces stigmatization of returnees, particularly by rejecting the application of terms such as “foreigner” to citizens, “terrorist” to persons who have not been found guilty of terrorist offenses based on basic rule of law provisions, and “fighter” to the large majority of returnees who were not involved in active combat.
- Develop national frameworks and institutional settings to address the different challenges that return, accountability, and reintegration present, not exclusively based on security concerns or security institutions, in full compliance with human rights obligations and with the integration of human rights institutions and civil society actors in these processes.
- Implement outreach campaigns, consultations, and community dialogues to identify resistance to repatriation, accountability, and reintegration and to articulate the need for a long-term, rights-based approach; target outreach efforts to the wider community, victims’ communities, and communities of origin of returnees or potential reintegration, as appropriate, and ensure their long-term engagement and capacity to respond adequately to possible crises.
- Proactively reach out to all citizens and persons with a legitimate claim to citizenship, providing necessary consular services.
- Define and implement reintegration programs for returnees who were not involved in crimes under international law, including those repatriated as well as those returning voluntarily. Focus reintegration programs on preventing their engagement in political violence or violent crime, rather than their ideological views or religious beliefs. Consider appropriate distinctions among returnees based on their reasons for joining armed groups; their psychological, economic, educational, health, and social needs; and their skills and priorities, as well as gender and age. Engage early with families and communities of origin to prepare conditions for reintegration.
- Draw lessons from other reintegration programs and studies in relevant areas, including economic reintegration, psychosocial support (given the likelihood of returnees’ experience of trauma), health care, skills development, and community acceptance and mutual trust; incorporate the resources, views, concerns, and capabilities of potential reintegration communities.
- Implement truth-seeking processes to facilitate community acceptance and reintegration and to identify factors that led citizens to engage with armed groups in other countries, including grievances resulting from police and security sector abuse and broader forms of political, social, and economic exclusion and structural discrimination, applying lessons from local and national truth-seeking and reconciliation activities implemented in post-conflict countries.
- Implement institutional and societal reforms at the community and national levels to address the factors that contributed to the foreign fighter problem, including security and justice sector reform and, at a broader level, social and economic inclusion and equality.
- Ensure that the national counterterrorism policy and security responses do not interfere with or repress legitimate political engagement for the betterment of communities of origin or the reduction of discrimination or any form of exclusion of religious, ethnic, or migrant communities.

- Implement investigations and prosecutorial strategies for returnees who may bear criminal responsibility for crimes that constitute grave breaches of international humanitarian law or serious violations of human rights, with mechanisms in place for victims to participate in or be informed about proceedings and findings and mechanisms for judicial or prosecutorial collaboration and the use of information obtained from the battlefield as evidence, in full compliance with due process of law, and particularly the presumption of innocence and the equality of arms.
- Develop a system for allowing reduced or alternative sentences to former fighters as incentives for collaboration, provision of information about other serious violations committed during the conflict or information to help the search for the missing and forcibly disappeared, and reparations for victims, acknowledgment of wrongdoing, and, if pertinent, apologies; include the participation of victims during implementation. Make sure that any form of incentive for collaboration does not interfere with the right to be presumed innocent, the right to defense, and the right to due process of law, and guarantees that defendant decisions are made with appropriate counsel advise.
- Identify mechanisms through which the convicted can provide material or symbolic reparations and information to help the search for the missing and forcibly disappeared.
- Design and implement a reintegration process for those being investigated, tried, and sentenced, as recommended above, but adapted to persons involved in the commission of serious crimes, considering in its definition relevant experiences as well as the different stakeholders regarding their implementation, including prosecutors, judges, the prison service, guards, parole officers, and those providing rehabilitation services, in ways that guarantee the coherence of the treatment that participants receive. Include an accompaniment and reintegration process after a prison term is completed.
- Promote and support efforts within the countries where returnees engaged in violence to address the damage caused by the conflict and the consequences of human rights violations through processes of accountability, reparations, truth, reform, and reconstruction efforts. Assist and support processes of consultation to define and implement these policies, based on obligations under international human rights law and international humanitarian law; ensure they are implemented and led by bodies and institutions that are independent of political interference and committed to the protection of human rights, in partnership with civil society and human rights actors.

For countries where violations have been committed (particularly Iraq, including the Kurdistan autonomous region; northeast Syria; and Turkey, because of the Syrian territory it now controls)

- Cooperate in the immediate human rights and international law compliant repatriation of women and children internees to their countries of origin if full human rights protections, including due process of law, can be guaranteed. When repatriating internees who potentially committed serious crimes, cooperate with countries of origin to screen and share information, with the participation of victims and affected communities.
- Cooperate with the countries of origin of the persons interned in camps or detained in prisons who were involved in serious crimes under international law to ensure their conditions of imprisonment meet human rights standards, screen and conduct investigations, share information, collaborate on legal and judicial matters, and help victims and affected communities to participate in these efforts.

- When safety and conditions allow, consult with victims and affected communities, including Sunni communities, about measures to provide accountability, truth, and reparations as well as measures to foster guarantees for future peaceful coexistence and safety under conditions that respect human rights.
- Screen internees to identify their level of possible involvement in grave breaches of international humanitarian law or serious human rights violations, based on specific evidence of their involvement, with the participation of affected communities and victims, if security conditions allow. Resettle out of detention camps all internees for whom there is no specific evidence of involvement in crimes under international law.
- Accept the cooperation of countries of origin in screening, investigating, and prosecuting foreign internees allegedly involved in crimes under international law, with the participation of victims and affected communities, if security conditions allow.
- Redefine existing criminal justice approaches to guarantee due process of law, in accordance with human rights obligations, particularly the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; focus criminal investigations on those who bear responsibility for crimes under international law.
- Collaborate with international human rights bodies, nongovernmental organizations, and civil society groups to introduce reforms and accept monitoring of existing trial and detention conditions and to search for the missing and forcibly disappeared, with the participation of victims.
- Assess the possibility of implementing less punitive approaches for defectors, based on their level of engagement and possibility for reengagement in political violence, adapting positive and negative lessons from countries such as Kenya, Nigeria, the Philippines (in regards to the Moro Islamic Liberation Front), and Somaliland.
- Implement a transitional justice process that is based on the protection of human rights, the rule of law, and the promotion of sustainable peace, and led by bodies and institutions that are independent of political interference and committed to the protection of human rights, in partnership with civil society and human rights actors, in areas affected by armed conflict including:
 - Reconstruction in order to guarantee basic living conditions and facilitate the sustainable return and resettlement of internally displaced persons, prioritizing the return of those who lived in affected areas before the armed conflict; include a land restitution program for those expelled from their property, particularly from their homes, providing assistance for rebuilding without distinction based on religion or ethnicity or gender, guaranteeing women's equal right to access to property.
 - Measures for investigating, clarifying, and acknowledging the truth about violations committed by all sides in the conflict, their causes and consequences, and reparations based on consultations with victims, in an inclusive way, involving affected communities and helping to foster peaceful and safe coexistence.
 - Reintegration of those in camps who cannot be repatriated, or returned to their communities of origin in other parts (of Syria) due to occupation by hostile armed groups; assess risks based on consultations to reduce stigma and the possibility of revenge, minimize the likelihood of future engagement with armed groups, and facilitate peaceful and safe coexistence.

- Remedies for victims of human rights violations or grave breaches of international humanitarian law committed by armed groups like ISIS or security forces conducting operations under the framework of counterterrorism, in full compliance with human rights norms. Define forms of reparations that can guarantee accessibility for all victims of the most serious violations, without discrimination based on the perpetrator, the identity of the victim, the role they played in the conflict, or gender; based on standards of evidence that do not pose an impossible burden for victims, particularly the vulnerable, members of ethnic minorities, women, and those who fear stigma or reprisals. Develop reparations mechanisms that are possible to implement and reach all victims that qualify with goods and services that respond to the most serious consequences of violations, delivered expediently, with full transparency and control mechanisms to prevent corruption.
- Implement reforms to prevent the recurrence of political violence or to strengthen the effectiveness of check and balances or accountability for them based on the factors that motivated people to join or support violent armed groups, lessons learned from truth-seeking processes to be implemented in the country, and factors identified by affected communities as possible contributors to the future resurgence of armed groups. In general, assess the possibility of reforms to reduce government corruption, abuse of power, and discrimination in accessing jobs, education, and opportunities for communities vulnerable to engagement in political violence or to address long-held grievances from community members that could contribute to repeated cycles of violence.

For the international community

- Adopt a comprehensive, rights-based, rule of law approach to foreign fighters, focused on the protection and promotion of human rights of all those involved, as an essential element and precondition for peace and security.
- Critically assess the role played by the UN Security Council and its relevant decisions under Chapter VII of the UN Charter in regard to foreign fighters, recognizing its responsibility to safeguard human rights as a core principle of the UN, as affirmed by international human rights law and the preamble of the UN Charter, including its provisions considered as *ius cogens*, by an independent panel that could make recommendations to the council.
- Revise the discourse around foreign fighters to reduce their association with terrorism and violent extremism, replacing, for example, the expression “foreign terrorist fighters” with a term that suggests they are members of the national community and presumed innocent, avoids stigmatizing all those who are not responsible for crimes, and underscores the obligation of states with respect to return, accountability, reintegration, and long-term security and peace.
- Promote a stronger commitment to state responsibility for common security, including exercising jurisdiction over citizens responsible for serious crimes, with full respect for the rights of victims and due process of law, and repatriating internees in conflict zones.
- Promote the immediate voluntary repatriation of children and women who are interned, imprisoned, or residing in conflict zones and in danger of harm to countries of origin, based on their best interests and the protection of their rights under international law.
- Clarify that any decision made under the existing framework does not entail obligations that could undermine member states’ ability to define legislation under their democratic

and constitutionally defined processes, respectful of separations of branches of government and existing constitutional check and balances, including human rights obligations.

- Ensure that the international approach to foreign fighters is defined by transparency and the participation of civil society groups, including human rights actors.
- Support the reconstruction of areas affected by conflict involving foreign fighters, providing technical, financial, and political assistance to help to improve living conditions, reduce corruption, facilitate inclusion, and address grievances, with an emphasis on guaranteeing better living conditions for victims and affected communities.
- Promote and support the design and implementation of transitional justice principles and processes through technical, financial, and political assistance, as part of a comprehensive approach to foreign fighters that can include, but is not limited to, measures such as criminal justice, reparations, truth seeking, reintegration, search for the disappeared and missing, and reform in both countries of origin and countries in conflict.
- Investigate the involvement of states' own agents and armed groups acting in support of or under state control, particularly states that intervened in or provided direct assistance to parties involved in armed conflict where foreign fighters committed grave breaches of international humanitarian law or applicable human rights law. If necessary, investigate and prosecute those suspected of responsibility. In cases where those crimes are part of a pattern of abuse or reflect deficits in military doctrine, training, command structure, or accountability mechanisms, implement corresponding reforms to prevent recurrence. Finally, support and strengthen the International, Impartial and Independent Mechanism established by the UN General Assembly.

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