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HOW SHOULD THE UK DEAL WITH CAPTURED BRITISH ISLAMIC STATE FOREIGN TERRORIST FIGHTERS?

Introduction

A total of 41,490 citizens from 80 different countries travelled to Iraq and Syria to be a part of the Islamic State (ISIS or IS) since its inception with at least 75% of this figure believed to be active foreign terrorist fighters (FTFs) (Cook and Vale, 2018:21). The Caliphate, which once spanned 100,000 km^2 is today reduced to just 50 km^2 as the last towns and villages held by Islamic State continue to steadily fall to the advancing Kurds (Chulov, 2019). Both Iraq and Syria now report to have captured and detained tens of thousands of suspected IS fighters (Chulov and Borger, 2019) including an estimated half of the 850 British citizens who are suspected to have travelled to Iraq and Syria to fight for ISIS (termed 'FTFs') and are now assumed captured. The remaining 425 British individuals are among the human debris of the Islamic State, the question of how best to deal with them is yet to be definitively answered by any involved nation. This paper will assess the three potential avenues open to the UK for prosecution of British FTFs; prosecution in Iraq and Syrian domestic courts, extradition and prosecution in UK domestic courts, and the set up or utilisation of an international court or internationalised tribunal. The shortcomings of the Iraqi and Syrian judicial system will first be highlighted, taking a Western liberal perspective it will be argued that justice regarding British FTFs cannot be effectively done in the Middle Eastern courts whilst simultaneously maintaining basic human rights. Secondly, the option of using UK domestic courts will be considered with specific attention to how the UK might overcome the substantial challenge of producing sufficient evidence for conviction of specific atrocities beyond merely supporting or joining a proscribed organisation. Finally, the collaborative, international, effort is addressed with consideration to the significant political and practical hurdles this presents. The essay concludes that whilst there is no easy solution, there are certainly options that can be ruled out and immediate actions that can be taken to signal that Britain will uphold its responsibilities by pushing a coherent national prosecution policy.

Foreign Terrorist Fighters in the Literature

It is difficult to enter into a discussion regarding the repatriation (even if for the purposes of prosecution) of FTFs without acknowledging that these people are assessed in a multitude of ways by different commentators, both professional and academic. The scholarly assessment shows that FTFs can at once be viewed as both villain and victim, future threat and counter-terror ally, candidate for rehabilitation and criminal beyond redemption (Hegghammer, 2010 and 2013; Jenkins, 2014 and 2019). Much of the discourse on IS FTF policy options focuses on the macro debate of incarceration versus rehabilitation versus citizenship depravation (van Ginkel and Entenmann, 2016; Obe and Silverman, 2014) but the academic commentary overall is somewhat lacking. Typically, assessments can be found not in academic journals, but rather in the works of non-governmental organisations or the reports of supranational bodies. This is even more pronounced when the debate is honed to considering the intricacies of one of the options in the policy response debate: prosecution.

In its assessment this paper highlights the ambiguities that accompany a disjointed approach to dealing with FTFs in the international community. Iraq has displayed a determination to try captured FTFs domestically. Regional powers such as Saudi Arabia request extradition of their citizens. Britain, France, and Belgium have all expressed reluctance to take their citizens back (Coker and Hassan, 2018). The ambiguity regarding appropriate response is therefore unsurprising but it highlights the necessity of carefully considering the topics this paper assesses. It is a very real possibility that caliphate may rise again if next steps are not handled properly: 'military achievement can easily be undone by failing to address what it has brought' (Jenkins, 2019:21).

Middle Eastern Courts

Under the principle of territoriality, a state has the authority to prosecute crimes committed within their borders (Lorenzen, 1924:740) regardless of whether they were committed by citizens or FTFs (Mehra, 2017). One might consider that it is a pragmatic approach to allow Iraq and Syria to prosecute the FTF detainees considering it would be easier for national investigators and prosecutors to collect evidence and investigate suspects since they already have access to the accused (Ibid). Difficulties however lie in the capabilities and suitability of the courts themselves, the domestic legislation, and the sentences delivered.

Iraq has expressed a willingness to prosecute and subsequently detain British FTFs on the caveat that the US-led coalition reimburse their claimed $2 billion costs (Defence Post, 2019). This possibility, as well as the parallel Syrian question, should only be considered palatable by the UK

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if there is a legitimate, well-functioning, judiciary in place to facilitate trials. The thousands of detained FTFs, including 425 Brits, would pose a challenge to any functioning judiciary, but the issue is compounded when one considers both the severity of the crimes committed and the state that post-conflict Syria and Iraq have been left in. Mehra (2017) points out that, after years of civil war, Syrian courts lack the funds, staff, requisite specialist knowledge, and training for post-conflict evidence collection and adequate judicial processes. 'People's Courts' have been set up in Syria and are hearing criminal cases despite a lack of available resources, qualified prosecutors, or judges (ILAC, 2017:114). The same can be said of Iraq where investigations courts are being set up in large family houses, hearing fifty cases a day (Knell, 2017). In a process described by Coker and Hassan (2018) as being concerned more with retribution than justice, these courts operate at a conviction rate of 98% (ILAC, 2017:114). Defendants are given the right to appeal to a higher court in Baghdad, though this appeals process is said to be 'little more than a formality' (Knell, 2017). Concerningly, FTFs are subject to the same ad hoc trial processes as the domestic suspects. Abrahams (2018) documents the experience of Ali Sultan, a state appointed lawyer representing 14 FTFs, 12 Turks and 2 Azerbaijanis, who had all been convicted at the same court house within two hours one afternoon. Abrahams (2018) explains that in Syria the defence have no time to prepare for trials and no access to evidence because information related to terrorism investigations is classified. Similar reports detail '10-Minute Trials' in Iraq in which criminal proceedings resulting in death by hanging last just 10 minutes, with defendants being afforded as little as 2 minutes to mount their defence (Coker and Hassan, 2018). Under these time constraints it is not possible for the proceedings to uphold the right to a fair trial, something guaranteed to British citizens under the Human Rights Act (1998). Human Rights Watch (2017b) expresses explicit concerns that trials of this type are not only rushed and deeply flawed, but also that some convictions are based on confessions given under torture (HRW, 2017b:21).

This latter point is an especially concerning one. Whilst it is true that the Iraqi constitution guarantees the right to a fair trial and prohibits torture, the evidence suggests that the justice system is too weak to ensure these vital protections (Jenkins, 2019:16). Iraqi Prime Minister Haider al-Abadi acknowledged as much, speaking of 'clear violations' in reference to torture and extra-judicial killings committed by the Iraq Interior Ministry's Emergency Response Division (Reuters, 2017), the Iraqi Army (BBC News, 2017), and Iraqi Police Officers such as Falah Aziz who admits to (and in some cases is filmed) beheading 50 IS suspects and killing 80 more (Expressen, 2017). For the past 15 years Iraq has been ravaged by terrorist bombings, extremism, and occupation resulting in 'little appetite for leniency or concern' towards suspected ISIS members (Coker and Hassan, 2018). The derision spawned, as Zainedine (2018) notes, has produced a fundamental

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prejudice against FTFs who are widely assumed to be IS' most ardent followers considering they relocated to join the caliphate: 'the presumption is because you are foreign, and you were in ISIS territory, there is no need to provide more evidence' (Coker and Hassan, 2018). The case in Syria is arguably even worse with; a wide-ranging lack of stability, little perceived legitimacy in the judiciary, accusations of war crimes against the Assad regime, and an appalling record regarding human rights and treatment of prisoners. As UN High Commissioner for Human Rights, Zeid Ra'ad Al Hussein, articulates; vengeance is not justice and we should not lose sight of the importance of facts, evidence, and due process in the pursuit of retaliation rather than accountability (OHCHR, 2016).

Even if these shortcomings are addressed, problems exist regarding the scope of the domestic legislation which would be employed. Domestic courts in Iraq and Syria cannot prosecute international crimes i.e. war crimes, crimes against humanity, or genocide (such as the genocide, and torture committed by IS against the Yezidi community (UN, 2015:1)) due to the fact that these are not criminalised under their national laws. The courts have so far even failed to prosecute instances of rape and slavery which are domestically criminalised (HRW, 2017a). Most IS FTF crimes are prosecuted instead under Anti-Terrorism Law 13 in Iraq and Counter Terrorism Law 19 in Syria for 'broadly defined terrorism offences' (Amnesty International, 2017:7). Neither law requires proof of terrorist intent, or proof of any specific act committed, but relies instead on the much lower evidentiary threshold of 'membership or support of a terrorist organization' (Mehra, 2017). No distinction is being made as to the brutality of offences either, meaning a taxi driver working peripherally for IS would receive the same sentence, likely death, as an IS fighter who was involved in execution, rape, and torture (Mehra, 2017).

This raises one of the most concerning consequences of the UK's potential secession of responsibility to Iraq and Syria for prosecution; the resulting potential for British citizens to be subject to death penalties, a practice which the UK has long condemned. Figures from Abdul-Zahra and George (2018) show that of the 27,849 people officially imprisoned in Iraq, at least 19,000 of them are being held on terror-related offences, with 3,130 having already been sentenced to death at the time of reporting. The Independent identified in 2017 that Iraq had already begun including FTFs in these death sentences with numbers reaching the hundreds (Worley, 2017; Jalabi, 2018), these trends show no signs of slowing. Prime Minister al-Abadi's push to maintain the severity of sentences whilst stepping up the pace of prosecutions has received widespread public support (Coker and Hassan, 2018). This should be a significant concern for the UK on both a principle and policy level and might actually act as a more formal legal barrier as well. It is established that the UK, under International Humanitarian Law, is prohibited from extraditing

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detainees if it is likely they will subsequently be subject to execution or any form of torture. It could be argued that the same legal principle applies in the case of abandoning captured British FTFs to governments who will similarly torture or execute them (Jenkins, 2019:16). The UK, as a signatory to the European Convention on Human Rights and, therefore, under the jurisdiction of the European Court of Human Rights, could plausibly be prohibited from 'actively participat[ing] in an arrangement that places their citizens at a lesser standard of justice and treatment' (Jenkins, 2019:16). Any scheme arranged would see British citizens detained and convicted in countries with poor human rights records (Ibid), justice simply cannot be guaranteed in Iraq and Syria under current conditions.

UK National Courts

The above concerns have so far not stopped Britain from allowing detention and potential conviction of British citizens in Iraq and Syria despite the fact that the Serious Crime Act (2015) grants extra-territorial jurisdiction for crimes committed abroad. 425 British FTFs are believed to have returned to the UK so far, some remain under surveillance, some have been deemed not to pose a further risk, and some have been prosecuted in UK courts. Jenkins (2019:15) identifies this option of extradition and prosecution as a messaging opportunity not to be missed. He argues that fair trial processes would display Britain's values and act 'in contrast to the brutality of the mass executions, beheadings, and crucifixions that the Islamic State advertised as justice' (Ibid). This could serve to not only uphold national principles but could potentially also counter the radical fundamentalist narrative of the West being an enemy which does not care about its citizens or Muslims more generally: 'the way we treat [FTFs] may well have important significance for the way other people view our society' (Mason, 2019).

Instances of returning FTFs being prosecuted by their domestic courts can be found in Belgium, the Netherlands, Austria, Germany, and Sweden (Mehra, 2018a; and Escritt, 2016). All of these prosecutions relied, however, on evidence which was either garnered from social media, or related to further planned attacks, circumventing the most pressing barrier to effective domestic prosecution: battlefield evidence collection. Seeking conviction of someone that Britain is aware relocated to Syria or Iraq to fight for the caliphate is one thing, proving committal of specific offences beyond merely joining a proscribed organisation is an entirely different endeavour. The problem begins with the fact that even if it is possible to search for evidence in the requisite location it is likely a war-torn and conflict-ridden area, like both Iraq and Syria, in which the chances of finding any evidence suitably damning is staggeringly low (Mehra, 2018b). Efforts are

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being made in spite of these difficulties, however, with investigators looking at whether the work conducted by non-governmental organisations (NGOs) might be admissible in court.

Rapp (2015:161) identifies the work of the Syria Justice and Accountability Centre, the Syrian Observatory for Human Rights, and the Violations Documentation Centre in Syria which have been investigating and gathering evidence on human rights violations in Syria and could include terrorism-related crime into their mandates. Similarly, in Iraq, Waltman (2016:822) presents the National Institute for Human Rights and the Hammurabi Human Rights Organisation, both of which are documenting human rights violations, as potential partners facilitating evidence gathering. The main concern with this approach of course is whether the information gathered by NGOs will be 'credible and admissible as evidence in criminal court proceedings' (Mehra, 2018b), a threshold that currently requires ongoing efforts to meet.

A more suitable partner for the UK in evidence gathering abroad might be the UN who established in 2017 an investigative team to collect and preserve evidence of crimes against humanity and war crimes committed by ISIS in Iraq with the intention that this evidence be used at a later stage for criminal prosecution of the perpetrators in either Iraqi courts or other national courts (HRW, 2017b). Similarly, the UK, EU, Canada, Germany, Norway, and Denmark-funded Commission for International Justice and Accountability (CIJA) is an option, their evidence collection aims stretch to establishing criminal culpability for offences. Both the CIJA and the UN have a policy of 'not supporting or assisting processes that could lead to the death penalty' (OHCHR, 2015:12) meaning the results produced by the teams cannot inform Iraqi or Syrian prosecutions, but there will be no barrier to the UK utilising the evidence in domestic courts. European authorities are also setting the example of seeking the testimonies of refugees fleeing the Middle East and recording biometrics of detained suspects (Frantzman, 2019). In The Netherlands and Germany, immigration services hand out leaflets with invitations to testify and in Norway the mobile phones of arrivals are screened 'for evidence of possible involvement in war crimes' (Escritt, 2016). Collecting this type of evidence from traumatised escapees of violence can be a painstaking and delicate process, however, meaning progress is slow and results stunted. Nevertheless, UK courts present an option preferable to that of Middle Eastern courts. Britain's judiciary and statutory instruments are sufficient, human rights could be guaranteed, and efforts are already underway to overcome evidentiary difficulties. Not to mention that this option ensures that the UK upholds its responsibility to its citizens, the region, and the international community.

International Court or Internationalised Tribunal

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The final option for the prosecution of the detained FTFs in Iraq and Syria would be the use or establishment of an internationalised court or tribunal. Many argue that this is the most suitable route considering the seriousness of IS' crimes and point to the International Criminal Court (ICC) in The Hague, 'established to investigate, prosecute and try individuals accused of committing the most serious crimes of concern to the international community' as the intuitive choice (ICC, 2014:3). Neither Iraq nor Syria are signatories to the Rome Statute (the treaty that established the ICC and its jurisdiction) however, meaning the ICC does not have territorial jurisdiction in either country. It would take each government to ratify the treaty, or grant jurisdiction through a declaration for the court to be utilised (Brown, 2018). In Iraq's case, Prime Minister al-Abadi has ruled this out, categorically stating that Iraq has no plans to join the court out of apparent concern that 'the court would also be able to examine grave abuses by government security forces' (HRW, 2016). The alternative way to invoke the ICC would be for the UN Security Council to refer the situation to the court. Attempts at utilising this option have so far been stymied by division amongst the Permanent Five (P5) members of the Security Council, all of whom wield veto power. China, as well as Syria's ally Russia, vetoed the move to refer the Syrian situation to the court and establish an investigation into alleged war crimes ostensibly because it would consider crimes being committed by both IS and the Assad Government. French permanent representative Gerard Araud described the vetoes as akin to 'vetoing justice' (BBC News, 2014).

The Kurds have instead strongly suggested that the UN create an internationalised tribunal to deal with the ISIS detainees (El Deeb, 2019). The precedent for this would be the Special Tribunal for Lebanon, the only prior example of an internationalised tribunal being established to deal 'expressly with acts of terrorism' (Jenkins, 2019:18). There have been similar calls regarding perpetrators of terror crimes facing trial in a UN court comparable to those following Rwandan genocide and the Yugoslav wars of the 1990s (Escritt, 2016), yet this presents a number of practical issues. Firstly, any internationalised tribunal successfully set up would only have the mandate of prosecuting suspects for international crimes: genocide, crimes against humanity, and war crimes (Dworkin, 2019). Attributing responsibility for these types of acts to individual FTFs would be near impossible. It is this same difficulty which discourages nation states from prosecuting FTFs domestically, moving the proceedings' location to the region could certainly aid in evidence gathering but only marginally. Secondly, the concept of the tribunal instead taking a hybrid Iraqi/Syrian-international form is immediately rejected as it would violate Iraq's constitution which prohibits the establishment of any special or exceptional court (Ibid) and would be against the interests of Assad who fears similar investigations into the actions of his regime. Finally, Jenkins (2019:20) takes the pessimistic view that though the creation of a new internationalised tribunal

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would be a theoretically effective response and an option which should not be dismissed, the process would be a long and expensive one in which any court or tribunal would likely only be capable of dealing with a small minority of the suspects currently detained and certainly not for several years. This latter criticism might also be justifiably levelled at the prospect of a successful ICC referral considering the court's 'eight-year-long failure' to try Sudanese President Omar al-Bashir for alleged genocide in Darfur (Tisdall, 2019). The ICC produces more acquittals and dismissal of charges than convictions at a cost of well in excess of $150 million per year (Goldston, 2019). In fact, these concerns make any type of formal multinational tribunal, such as the idea of a European Union Council tribunal proposed by Sweden, unlikely (Kennedy, 2019). Ultimately, most international options face the same P5 veto problem as that of referral to the ICC with the additional barrier of the US also not being in favour of the establishment of a tribunal in place of national prosecution. International efforts should certainly be pursued, but in the realms of evidence collection for domestic trials and policy cohesion amongst concerned states. This is where decisive results can be witnessed immediately, not in a decade's time.

Conclusion

In practice, the international community's counter-terrorism aims include the integral elements of not only holding perpetrators of terrorist acts accountable for their actions, but also doing so in accordance with the rule of law and human rights (Mehra, 2017). This paper has demonstrated that neither of the latter aims can be achieved through the use of Iraqi or Syrian courts. Inadequate trial procedures, mistreatment of suspects, and the use of the death penalty are three red lines which the UK should not be prepared to compromise on. Protection against the aforementioned is a fundamental tenet of British justice which cannot be conceded (Halliday and Sparrow, 2014). It is Britain that holds the responsibility both to and for its citizens, including those FTFs who may have committed atrocities in Iraq and Syria, and thus it is the British criminal justice system which should prosecute the fallen caliphate's British detainees. Assistance should certainly be welcomed from the efforts of international and supranational organisations in the area of evidence collection and production as this can ensure justice for victims, and risk management domestically. The UK national courts option includes appropriate jurisdiction, requires collaboration only between partners who have a common goal, and would not be subject to fatal veto powers. It is therefore preferable to the use of an international court or establishment of an internationalised tribunal which would face opposition from the very countries in which the crimes occurred. There are no illusions that this process would be easy or straightforward but committing to a clear policy which produces convictions, especially if that policy were consistent amongst all

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concerned nations, would transform the dismantling of the caliphate from a military victory, to a triumph of international counter-terror strategy.

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