AMERICAN UNIVERSITY OF BEIRUT

SCATTERED ASHES: EXAMINING FATES OF FOREIGN FIGHTERS AND THEIR FAMILIES AFTER THE FALL OF THE ISLAMIC STATE

by
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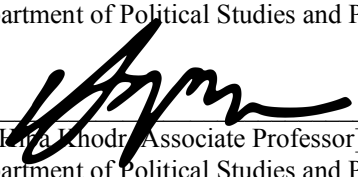

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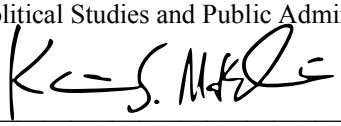

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ABSTRACT
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From the beginning, foreigners played a critical role in aiding the Islamic State's meteoric rise. Between 2013 and 2019, tens of thousands of individuals traveled from at least 80 different countries to join the swelling ranks of the self-declared "caliphate" in Syria and Iraq.

Since the group's final collapse in March 2019, the vast majority of surviving foreign fighters and non-combatants remain trapped in a state of legal limbo. While a large number have been killed, many thousands more remain in indefinite detention at the hands of Iraqi or Kurdish Syrian authorities, unable to return to their countries of origin. A large portion of these individuals are children at high risk of statelessness.

Scholarly consensus holds that states must repatriate and, where necessary, prosecute citizens back in their home countries. These calls have been echoed by military authorities who participated in the campaign against the Islamic State, and by regional officials. While a number of logistical and theoretical obstacles stand in the way of states effectively repatriating all foreign fighters, a thorough analysis shows that these issues can be easily overcome. Ultimately, the decision to repatriate has proven to be a political decision, one dictated by swings in public opinion and assessments of electoral risk by leaders.

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CHAPTER I

INTRODUCTION

Even reduced to ashes, the world is still grappling with the legacy of the Islamic State and its tens of thousands of followers from around the world.

In early 2013, revolutionary Raqqa was gripped by a sense of chaotic and unconstrained possibility, as a patchwork of secular and Islamist opposition groups jostled for power in rebel-held Syria's first large-scale urban experiment in democracy. With the attention of locals diverted toward the messy business of governing an unwieldy city in the throes of newfound political freedom, a trickle of foreign accents and unfamiliar faces was quietly amassing among the diverse milieu. This new group was an offshoot of Al-Qaeda's Syrian affiliate, initially calling itself the Islamic State in Iraq and the Levant. The emerging network of radicals laid low in those early days, content to discreetly lodge its growing legions of foreign fighters on the city's outskirts, treading lightly and displaying no apparent interest in working with civil society groups or other factions to influence the city's efforts at self-governance. Throughout the spring of 2013, in the face of Raqqa's increasingly chaotic political dysfunction, few outsiders paid much attention to this strange band of men, clad in black and preaching a puritanical message of Islamic rule.

Their rhetoric was not totally unfamiliar. In fact, citizens of Raqqa initially saw the group as politically and ideologically indistinguishable from local hardline Islamists, who for months had been entrenching themselves amongst the Syrian opposition, posing a growing threat to the uprising's pluralistic message. And yet, subtle but important differences began to manifest early on in the group's style and

rhetoric. These fighters spoke little about overthrowing the dictatorship of President Bashar al-Assad, and indeed, appeared indifferent toward the Syrian state itself. In contrast to other extremist groups in the area, a large proportion of them were not even Syrians at all. To an increasingly weary group of Raqqan leaders and activists, the group looked less like an extremist fringe of the opposition and more like an alien force of occupiers that had sprung up in the heart of northern Syria.

Within six months of the group's appearance, the Syrian uprising and the opposition's relationship with the outside world had been radically changed forever. Through a brutal campaign of kidnappings, targeted assassinations, and political sabotage that would come to define much of their later strategy, these Islamists wrenched control of Raqqa from a divided and disorganized opposition. Initial military successes there would presage a stunning blitzkrieg campaign that, with head spinning swiftness and brutality, swept across Syria's arid eastern desert and annihilated the international border with Iraq, seizing in the process major cities of Deir Ezzor and Mosul in Iraq's Sunni heartland. At its peak, their territory stretched from Aleppo to the outskirts of Baghdad, an area larger than Great Britain with a population of 7.7 million people.[1] From the pulpit of Mosul's Al-Nouri Mosque, the world was shocked into attention as the group's leader Abu Bakr al-Baghdadi declared the birth of a new political entity, a self-declared "caliphate" calling itself the Islamic State. An initially optimistic but uncertain era of the Syrian opposition had ended, and a new era initiated—one defined by puritanical extremism, political repression, and genocide, all

[1] Barrett Limoges, Justin Clark, Avery Edelman, "What's next for Post-Islamic State Syria? A Month-Long Reporting Series from Syria Direct", *Syria Direct*, July 29, 2018. https://syriadirect.org/news/what%E2%80%99s-next-for-post-islamic-state-syria-a-primer/.

rooted in a global call to jihad that would be heard and heeded by tens of thousands around the world.

The Islamic State seemed to distort and make a mockery of globalization, with its vision of an ever-expanding borderless caliphate, populated by pious followers from across the world. Despite the group's brutality, their techniques were eerily modern. Reveling in the high-tech prowess of its global citizens, the Islamic State expertly produced and disseminated glossy propaganda that made the comparatively low-quality videos of Al-Qaeda appear relics of a bygone era. With online recruitment efforts at the heart of the Islamic State model, they sought to deal a nerve-wracking blow to modern nation states and the assumption that their citizens would naturally choose the modern "civilized" life of home over a theocratic system governed by medieval social norms, punctuated by daily cruelty and violence. Ultimately, the group would attract a massive and stunningly diverse array of foreign followers, from sons of wealthy families in the Persian Gulf to alienated Muslim youth on the outskirts of European capitals, to lonely teenagers in small town America. The organization's meteoric rise and, for a number of months thereafter, seemingly unstoppable expansion, was made possible by this influx of foreign fighters and ideological supporters. Little more than a minor force counting less than 5,000 members in early 2013, the Islamic State's ranks were swelled by an estimated 40,000 new members who crossed the porous Turkish border into the group's sprawling territory, hailing from dozens of countries and all corners of the world.[2] In one sense, the foreignness of the Islamic State and many of its followers was a defining feature. In a radical departure from Al-Qaeda and its transnational jihadist predecessors,

[2] "Guide to the Syrian Rebels," *BBC News*, December 13, 2013, https://www.bbc.com/news/world-middle-east-24403003.

the Islamic State triumphantly reveled in its rootless detachment from the local culture and history. Architects of the caliphate envisioned an entirely new type of state entity—a hardline Islamist utopia, arising from the desert, whose citizens were bound together not by ethnicity or origin, but by ideological adherence to a puritanical form of Islamic supremacy, one brutally opposed to the values of modernity and pluralism.

It would take the combined firepower of 60 nations, over $5.6 billion USD, a bloody ground campaign, the most intensive aerial bombardment since the Vietnam War, and over four and half years of grueling struggle for a coalition of states to eventually defeat the group.[3] When the final semblance of the Islamic State's physical caliphate crumbled in March 2019, the surviving members of this massive empire of foreign fighters, women, and children, found themselves trapped at a dead end, with nowhere else to run. Over the course of the campaign, tens of thousands of the organization's fighters, their wives, and children were captured, primarily by Kurdish ground forces. In Iraq, these forces were primarily a combination of tribal Shia-dominated militias and Peshmerga troops allied to the Kurdish Regional Government (KRG), while progress on the ground in Syria was driven by the Syrian Democratic Forces (SDF), a Kurdish-led umbrella organization that also comprised minority Arab and Christian armed groups.[4] Years before the final surrender of Islamic State forces in the tiny, dusty Syrian town of Baghouz, Kurdish authorities had already been planning for a massive exodus of women and children who had been living under the group, and

[3] "Homepage," Global Coalition Against Daesh, November 22, 2020, https://theglobalcoalition.org/en/. ; "Cost of U.S. Military Operations Against ISIL Total $5.6 Billion," May 6, 2019, https://asmconline.org/news/cost-of-u-s-military-operations-again-isil-total-5-6-billion/. ; "What's next for Post-Islamic State Syria? A Month-Long Reporting Series from Syria Direct," *Syria Direct*, July 29, 2018, https://syriadirect.org/news/what%E2%80%99s-next-for-post-islamic-state-syria-a-primer/.

[4] "Who's Who in the Fight Against ISIS?" *Public Broadcasting Service*, October 11, 2016, https://www.pbs.org/wgbh/frontline/article/whos-who-in-the-fight-against-isis/.

began expanding the sprawling Al-Hol displacement camp in 2017 for precisely this purpose.[5] Within weeks of the SDF's victory, the camp's population had exploded at its peak to an estimated 73,000 individuals, at least 10,000 of whom were foreigners from outside of Iraq and Syria.[6] Many thousands more, both fighters and civilians, are scattered across IDP camps and detention centers across northern Syria and Iraq, where the vast majority remain to this day.

The question of what comes next, the fates of Islamic State fighters and supporters from around the world, and the legal responsibilities of states regarding their repatriation and prosecution, will be the topic of this thesis. In order to address these vexing questions, we must take a thorough accounting of where these individuals originate from, how and why they traveled to join a terrorist organization in a foreign land, how they have been dealt with by the Syrian and Iraqi justice systems, and what precedents exist under international law addressing this uniquely complex situation. The international community now faces a monumental challenge over how to proceed on all of these questions, most of which present no simple answers.

Before continuing, it bears asking why this topic deserves further analysis, given the incredible attention the Islamic State has received from the international press, and the almost fatiguing familiarity with which most people are able to relate with these issues, seven years after the group first appeared. Most people on the planet with a satellite or internet connection have at least a cursory understanding of the Islamic State's existence and background. The media, and western media in particular, has

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[5] Paul McLoughlin, "Syria Weekly: Winter Is Coming to Al-Hol Camp and Children Will Be Its Victims," *Al-Araby*, October 6, 2019. https://english.alaraby.co.uk/english/indepth/2019/10/6/syria-weekly-winter-is-coming-to-this-refugee-camp.

[6] Barrett Limoges, "'Unlike Any Other Camp': A Journey through Al-Hol, Holding Center for Thousands of IS Families." *Syria Direct*, May 17, 2019. https://syriadirect.org/news/%E2%80%98unlike-any-other-camp%E2%80%99-a-journey-through-al-hol-holding-center-for-thousands-of-is-families/.

sometimes been criticized for excessively covering, and subsequently amplifying, the threat that the Islamic State poses to the world.[7] Countless pages of ink have been spilled from the pens of journalists, academics, and policy analysts in an attempt to understand the organization and the countless challenges it poses to the outside world, even after its collapse as a territorial entity. Perhaps an explanation for this ceaseless fascination lies in the group's advanced propaganda strategies, which have excelled in unprecedented ways at seizing the global imagination, inspiring fear and inciting acts of terror far beyond its political reach. The net result after years of this massive global attention to the topic, is that virtually any reader is relatively familiar at this stage with the Islamic State, it's legacy, and the unique role that foreign fighters have played in the group's propaganda.

However, like any spectacular media phenomenon, journalistic coverage and public interest in the Islamic State has ebbed and flowed over time. A surge of renewed attention accompanied the group's final military defeat in March 2019, at the hands of the SDF and coalition air forces. From fear, the tone of coverage and the public reaction to the Islamic State shifted to one of triumphalism, spilling sometimes into a desire for vengeance, against the thousands of captured foreign nationals swept up in the final days of the coalition's campaign in eastern Syria. As a flood of journalists began entering the hastily constructed prisons and refugee camps that now housed these fighters and sympathizers, a dramatic new phase of the group's legacy had begun. Foreign citizens, some already individually infamous for rejecting their lives of comfort back home for the battlefields of Iraq and Syria, now emerged from years of shadowy

[7] Melita Kovačič & Nataša. Berginc, "Online News Coverage of Terrorism: Between Informing the Public and Spreading Fear," *Medijska Istraživanja*. 22. (2016): 5-26.

silence, coming face to face with cameras and a stunned outside world. With these interviews arose a new practical question, long pondered by security analysts and policy makers—what to do with these foreign fighters and sympathizers of the group's ideology? How to prosecute war crimes, committed far away on foreign soil, in spite of scant surviving evidence and unreachable witnesses? And of equally daunting legal complexity, what to do with thousands of children born under the caliphate, many of whom were entitled to foreign nationality and now found themselves at great risk of statelessness?

Despite overwhelming coverage of the group and fates of its members, recent months have witnessed the ever-mercurial eye of the media shift elsewhere, and many of these questions remain as open and unanswered as the day that Baghouz fell more than 20 months ago. The collapse of the Islamic State, and the fallout for its tens of thousands of foreign citizens now interned across the region in camps and prisons, presents an unprecedented legal and security nightmare for policymakers. For that reason, this topic remains one of critical importance, all the more so as public interest has waned and thousands of lives remain in seemingly indefinite limbo. The legacy of the group will continue to leave its mark on the globe, and its presence felt on our collective consciousness, as long as so many loose ends remain unresolved and states fail to account for their citizens in accordance with international law.

1.1. Personal experience

This topic is also deeply personal for me, because the story of the Islamic State has been an intrinsic part of my career for the better part of five years, from the earliest

days of my career as a foreign correspondent in Beirut to my later work as a media trainer with survivors who witnessed the group's atrocities first hand. For that reason, it would be impossible to untangle my research on the fates of foreign fighters from my own personal experiences, media work, and academic reports, which will be a foundational starting point for many of the issues this paper will explore. In discussing the methods through which I will explore and discuss this topic, it is imperative to give a sense of my own professional interaction with the Islamic State, and how first-hand experience forms an important part of how I will analyze the questions ahead. To do so, I will take the unorthodox step of sketching out some of my own biography and the ways in which the Islamic State has helped draw the contours of my career, at the same time that it has played an outsized role in determining the trajectory of the Syrian conflict.

In mid-September 2013 I arrived in Jordan as an aspiring Arabic student and writer, fresh out of journalism school and with three months of internship experience at a travel magazine under my belt. Barely three weeks prior to stepping off the tarmac in Amman, the city of Ghouta on the outskirts of Damascus, was struck by a Sarin gas attack in the bloodiest chemical weapons massacre since the Saddam Hussein's campaign of extermination against Iraq's Kurdish population in the 1980s. The United States and allies were threatening punitive strikes against Damascus, a development that had the potential to reshape the contours and power balance of the entire conflict. Few outsiders, other than military analysts and keen Syria observers, had ever heard of the Islamic State in Iraq and the Levant at that time, which had yet to catapult itself into the public imagination as a force in the region. Syrian rebel forces and groups opposed to Assad controlled over two thirds of the nation's territory, and the nominally secular and

pro-democracy Free Syrian Army appeared to be pushing forward in a slow but inexorable march toward the capital of Damascus. While late 2013 presented a moment of profound volatility and uncertainty for Syria, it was also an era of undefined possibilities for the country's future, amidst an uprising with a destiny that seemed very much up for grabs.

My introduction to the war came early from Syrian companions at Cafe Nishantish, in Abu Nusair—a nondescript neighborhood of quadratic beige tenement blocks and cheap roadside eats, that sprawled over the hills that define Amman's northern extremity, where dusty suburbs slowly dissipate into breathless stretches of emptiness. At that time, Abu Nusair was my home, and the center of a burgeoning population of Syrian families who had fled the fighting that raged over the border several hours north. Every night after closing, I'd gather at that cafe with half a dozen young Syrian friends who worked there, scraping out a passable daily living while their dreams back home were on indefinite hold. Under a dim overhead light, we played cards and puffed shisha pipes into the hours of the early morning. An Al Jazeera newscaster's voice flickered somewhere in the background, our constant nightly companion as bulletins trickled in with the day's events in Syria. In excited tones, those friends eagerly extolled their own experiences, telling me their stories of escape from Syrian forces, their visions of the future in an as yet unrealized democratic Syria, and plenty of news updates, punctuated by frequent phone calls from their siblings and cousins who were fighting on the frontlines for various rebel groups. With the benefit of hindsight, those felt in some ways to be the waning days of hopeful revolutionary fervor and idealism, when a lingering hope seemed to temporarily outshine the daily suffering

of refugees, who exhibited a sanguine strength of purpose which I found impossible not to admire.

It's difficult to say, even today, which armed groups truly embodied those initially high ideals, what Syria might have looked like if the disjointed opposition had managed to wrest power from the Assad government, or even what specific turns of events could have resulted in less brutality and a more inclusive future. There is no clean line to be drawn, demarcating when the conflict shifted from a struggle over hard-fought ideals into something that increasingly resembled a nihilistic dance of power and survival. But much of that euphoric sense of possibility would soon fade, in almost perfectly inverse opposition to the astronomic rise of the Islamic State and their radically different vision of revolution.

I departed Jordan in May of 2014 to travel across Europe for several months before starting my master's degree in Beirut that fall. The world was just living through the very earliest days of the Islamic State's rise at that point, and when I departed Istanbul on a Kemalist-era train for Serbia on June 1st, the group seemed little more than a minor player in Syria's ongoing saga of violence and uncertainty. By the time I had reached my journey's end in Zurich six weeks later, I emerged to find a world and a Syrian war that bore little resemblance to the one I had known so little time ago. Having already seized massive swathes of northern Syria, roaring past the lightly defended Iraqi border and capturing Iraq's Sunni stronghold of Mosul, the group had arrived at the gates of Baghdad and threatened yet further expansion. In the blink of an eye, unimaginable violence and chaos had directly engulfed a second nation, and with the birth of the self-declared caliphate, Syria's national struggle had been internationalized and irrevocably changed forever.

Over those following years, as my journalism career evolved and became ever more enmeshed with the Syrian conflict, the rise and fall of the Islamic State would shadow almost all of my reporting work in one way or another. In discussions with American security officials about Washington's evolving stance toward the Syrian opposition, the entire calculus had turned on a single event; every sentiment suddenly seemed punctuated by fear of the Islamic State, and fixated on the possibility that other rebel groups might soon concede defeat or join the organization's swelling ranks of fighters and affiliates. The outside world's speculation over a rebel takeover and Assad's downfall had been recalibrated with head spinning swiftness. Legions of Syrian activists and exiled political actors in Beirut, many still optimistic about Syria's future when I first reached the city in September 2014, soon began to despair that their revolution had been hijacked by foreign fighters and jihadists, a hopelessness that would soon fuel an unprecedented wave of migration to Europe, capturing headlines and reshaping the tenor of politics around the world. In subsequent years, I would work extensively as a media trainer, teaching investigative reporting to Syrian refugees and activists in the region. Many of those students had escaped areas now controlled by the Islamic State, and their experiences revealed endless stories of almost unimaginable daily horror and suffering.

My work on Syria began initially as a freelance journalist in Beirut in 2015, where I was in regular contact with Free Syrian Army groups and civil society organizations working across the country. At that time I largely chronicled the weakening, and eventually, virtual collapse of the armed pro-democracy opposition, and the mass exodus of Syrian refugees from the region, fleeing to third country safe havens as an impending sense grew that the civil war was turning irreversibly against

opponents of Assad's regime—a feeling that was spurred in no small part by the explosive growth of the Islamic State, and all that their violent ideology portended for the future of Syria's opposition.

Several years later, I returned to Jordan to work with the outlet Syria Direct, a bilingual grassroots news organization founded in 2013 with Syrian journalists who fled abroad during the early days of conflict. This move began a new phase of my work, one which brought me much closer to the impact of the Islamic State on the daily lives of Syrians who had been trapped under the group's rule. The reporting model that Syria Direct helped pioneer mixed traditional journalism with advocacy and teaching, as our mixed newsroom of Arabic and foreign reporters worked to train classes of Syrian refugees in media skills, and further the network of independent local journalists who could report on events unfolding in the country. Many of those trainees had only recently escaped from areas under the control of the Islamic State, and their memories were extremely fresh of the daily life they experienced in the caliphate. Using these human networks that stretched back into Islamic State territory, the trainee program helped Syria Direct become one of the few outlets in those days that was able to independently smuggle stories and photographs out of these highly isolated regions with some of the most restrictive media environments on earth.

In the penultimate days of Islamic State, in the brutal ground campaign that presaged the group's final collapse, my colleagues and I spoke almost daily with Kurdish commanders on the ground as the SDF made their push down the banks of the Euphrates River, eventually reaching the dusty village of Baghouz where the Islamic State made its final stand in March 2019. Weeks of bloody ground combat and the pressure of overwhelming bombardment from coalition aircraft allowed those forces to

claw back the territory at a terrible cost of life, culminating in the eventual fall of Baghouz and evisceration of the group as a territorial entity. The event seemed poised to draw a curtain down over the group's legacy, and at last end the Islamic State as a force shaping the Syrian conflict.

However, it would prove to be just the beginning of a new chapter in the Islamic State story—the focus of my own reporting inevitably shifted in the following weeks from the brutalities of the campaign against the caliphate, to the looming challenge of how Syrian authorities and foreign governments were preparing for the capture of tens of thousands of the group's followers. Perhaps no challenge was more daunting than the open question presented by legions of foreigners living, as civilians and fighters, under the group's control. It soon became clear that few states had any clear plan for what to do with these individuals in the long-term. Many of those same US-backed Kurdish forces we spoke with in the heat of the campaign would later find themselves in the untenable position of jailers for the entire population of a vanquished nation, containing tens of thousands of radicalized fighters and civilians across a sprawling and unwieldy network of internment camps. This challenge unfolded in the face of growing international indifference, as countries around the world, content with the Islamic State's territorial collapse, abdicated responsibility for their radicalized citizens who remained trapped in a state of uncertainty.

Syrian observers and journalists have been stunned by the inconsistent and scattered reactions of states toward their nationals stranded abroad. States' reactions ran the gamut from full repatriation and efforts to rehabilitate foreign fighters, to complete abandonment and punitive stripping of citizenship from those who left the nations of their birth. A volatile political trap arose, in which countries around the world shattered

decades of established protocol and legal obligations toward their captured citizens, while simultaneously ignoring the colossal challenge and burden these decisions placed on others. It is from this point that the latter sections of this thesis will pick up, surveying the diversity of state reactions to their citizens in Syria, drawing on the existing literature to better understand how international law views the responsibility of nations toward their citizens, and examining how these legal precedents have been adhered to or broken.

The indispensable role that foreigners have played in enabling and empowering the Islamic State places an additional responsibility on correspondents covering this conflict. Many of these fighters hail from my own country. Outsiders have played a decisive role in determining the fate of the Syrian people, and the Islamic State is a central embodiment of that fact. The group has fundamentally changed the way so many around the world view the Syrian conflict, and it's rise cannot be separated from the collapse of the uprising's initial dream of a democratic and pluralistic Syria. We all have a duty to unflinchingly examine how these fighters have played a part in this larger story, and continue to until this day. That includes examining the responsibility of states around the world to now account for and repatriate their citizens.

1.2. Methodology

To untangle the myriad issues central to understanding a topic as complex as Islamic State foreign fighters, any research must inherently adopt an approach that is expansive and interdisciplinary. It is impossible to exhaustively study the repatriation of these fighters without touching upon, for example, the psychology of foreign fighters,

the legal rights and responsibilities of states under international law, the domestic threat fighters pose, and processing an array of ongoing current events that have brought about, and continue to shape, the status quo as we know it today. As such, this paper stands at the crossroads of international law, security studies, and Middle Eastern Studies, at the crossroads of academic and non-academic work. It will therefore survey the existing literature across a number of traditional sources, including academic journals, security reports, and UNSC documents, but also media reports. The history of the Islamic State is still very much being written, and the fates of the group's fighters and followers remains a largely open question to this day. Recent reports of an Islamic State resurgence in Syria's Badia desert and reactivation of sleeper cells across Syrian Kurdistan, also mean that obituaries of the group may yet prove premature, and the arc of this story unfinished. Because of the recent and continuously evolving nature of the tumultuous legal topics that will be detailed in this paper, the sourcing and methodology will differ in several aspects from a traditional academic paper, incorporating a large body of new and historical journalistic reports from a number of local and globally-focused outlets.

The interviews, experiences, and stories that I have written over the course of the Islamic State's rise and fall, from a mighty semi-state entity to a scattered imprisoned collection of sympathizers, will form a key first hand source for context throughout this research. Beyond my own published material amassed from years of reporting on the Islamic State as a journalist since 2016, the exposition and legal analysis will also rely on less formal journalistic articles, informed at times by interviews that are indispensable in fully explaining how the world has arrived at this point, and why tens of thousands of foreign fighters remain in precarious limbo across

the region to this day. The more legalistic portions, in contrast, will be grounded in scholarship scanned from articles in publications such as the European Journal for International Law and Journal for Conflict and Security Law. It will also heavily utilize the reports of watchdog organizations, such as Human Rights Watch, which have been on the frontlines of researching this topic, providing much of the most thoroughly up to date information that is slowly working its way into the scholarly literature now.

Through this combination of sources, this paper will seek to chart out the role foreign fighters played in the rise of the Islamic State, and their present whereabouts. From there, it will seek to analyze some of the daunting practical and legal challenges posed by these foreign fighters, their families, and thousands of children who are now growing up as refugees, often at risk of statelessness, in camps across eastern Syria and northern Iraq. To give a more thorough understanding of the issues and context, it will present a brief overview of how the caliphate rose and fell on the backs of its foreign fighters, investigate where those foreign members are now, and examine the extent of nations' customary legal responsibility toward their citizens who left to join the group. This paper will seek to take a broad view of the issues raised, premised on one overarching, descriptive research question: with the Islamic State in ruins, what are the fates of foreign fighters and their families who traveled to live under the group in Syria and Iraq? As a corollary to this question, the paper will also explore the obligations under international law of governments toward their citizens who left to fight for the Islamic State, as well as the children born abroad to these fighters. And finally, in the face of these specific legal obligations, how have different nations actually responded to the situation?

The second chapter will provide a literature review, considering key areas of legal and security scholarship as it relates to the Islamic State and repatriation. While the need for states to repatriate and prosecute foreign fighters at home is the general consensus view of scholars, this near uniformity of opinion bears repeating in the literature review. Theoretical approaches to prosecution will be laid out, while touching upon key challenges to these different approaches. This section will also give some brief background information on the group's rise and fall, defining useful terms and expounding upon key actors that are crucial to understanding the topic at hand.

Chapter three will focus on adult fighters who traveled to join the Islamic State from 80 countries around the world, exploring what is known of their fates and current locations. The whereabouts and living conditions of these fighters have varied widely, depending on their nationality and the circumstances of their capture. This raises a number of pressing legal questions that continue to haunt leaders around the world. From there, subsequent sections will seek to give a succinct outline of the legal and security challenges facing policy makers as they weigh the question of repatriation. These sections will attempt to offer a broad view that captures the full complexity of all theoretical and practical issues surrounding the prospects of repatriating, prosecuting, deradicalizing, and perhaps ultimately reintegrating Islamic State foreign fighters into society.

Chapter four will look at a closely related, though legally distinct, category of repatriation; state responsibility towards children of the Islamic State. Some of these children were brought by relatives to Syria and Iraq, while many others were born to at least one foreign parent under Islamic State authority. Thousands of these children lack proper documentation, and are currently at high risk of statelessness. While

significantly more progress has been made on the topic of juvenile repatriation than repatriation of adults, a massive population of minors currently lives in squalid conditions with little hope of legal resolution on the horizon. Their repatriation encapsulates a large, but fundamentally different, realm of international law from that of foreign fighters, that is nonetheless central to resolving the political and humanitarian disaster building in the region following the Islamic State's collapse. This section will also touch upon the more complex grey area of Islamic State adult noncombatants, particularly foreign Islamic State "brides" who traveled to join and support the group, while often remaining sidelined from committing direct atrocities.

A final concluding chapter will concisely summarize the ideas and challenges presented in this paper. It will conclude on a note that ties the academic research presented in these chapters to the continuous nature of ongoing events, surveying the present state of the group and signs of its growing resurgence across the region. Current events cannot be separated from the challenges of repatriating Islamic State foreign fighters, and the reemergence of an Islamic State insurgency adds new urgency to this topic. Ultimately, the legal questions surrounding repatriation cannot be separated from the real world fates of thousands of real people, both foreign fighters themselves and civilians living in Syria who sit most at risk from an Islamic State resurgence.

CHAPTER II

LITERATURE REVIEW

Despite an overwhelming body of literature, journalistic output and security studies focused on the Islamic State in recent years, it is remarkable the extent to which researchers still rely on guesswork and estimates about the numbers of foreigners affiliated with the group. The difficulties presented in tracking the departure of men, women and children from dozens of countries around the world, and embarking on journeys that leave little paper trail beyond possible entry into Turkey, make it virtually impossible to track many of those who joined the Islamic State—particularly those who may have been captured, killed, or otherwise vanished along the way. The collapse of the Islamic State has given many of these individuals who left their home countries the opportunity to stand for interviews with journalists, researchers, and humanitarian workers since mid-2019, which has helped shed light on some of these questions. However, the highly politicized nature of the Islamic State, along with the need to utilize questionable local sources in the middle of a warzone for critical information—many of whom have strong motivations to either cover up or inflate numbers—is an additional challenge. For that reason, academic studies are often reduced to relying on ranges of estimates, complicating the work of this paper. Although not part of the academic literature in a traditional sense, the questions posed by this topic would be stripped of critical context without first establishing at least a rough idea of how many foreigners ultimately did leave to join the group—and as a parallel to this, how many individuals currently remain in limbo within detention camps, state prisons, and Internally Displaced Person (IDP) settlements across Syria and Iraq today.

Many studies and estimations have tended to be bounded by an upper and lower limit of between 54,000 and 40,000 foreign fighters.[8] However, there is little disagreement that the exodus of extremists from all over the world into Syria was the single largest migration of foreign Islamist fighters into a conflict zone in modern history.[9] The first mass entry of foreign jihadists into Syria began in the earliest days of the armed conflict, predating the official creation of the Islamic State as an independent paramilitary organization. By early 2013, as many as 5,000 foreign citizens had already traveled to Syria to fight with Al-Qaeda-aligned groups, such as the Al-Nusra Front, from which the Islamic State evolved and would diverge a year later. This first wave of militants was primarily composed of young men from Muslim-majority neighboring countries, particularly Iraq, Tunisia, Libya, and Saudi Arabia.[10] In this sense, the demographics and origins of the early foreign jihadists in Syria bore much resemblance to past conflicts in which transnational Islamic extremist groups played a central role, such as the insurgency against American forces in Iraq from 2003 to 2010, and the anti-Soviet mujahideen movement in Afghanistan a generation earlier.

The establishment of the Islamic State in February 2014, initially under the name Islamic State in Iraq and the Levant (ISIL), marked a major turning point for the global recruitment of foreign fighters and civilians. While a majority of foreigners would continue to arrive from other Arab countries throughout the duration of the

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[8] For higher and lower estimates, see respectively; Mohanad Hashim, "Iraq and Syria: Who Are the Foreign Fighters?" *BBC News*, September 3, 2014, https://www.bbc.com/news/world-middle-east-29043331. ; "Greater Cooperation Needed to Tackle Danger Posed by Returning Foreign Fighters, Head of Counter-Terrorism Office Tells Security Council Meetings Coverage and Press Releases," United Nations. United Nations, November 28, 2017, https://www.un.org/press/en/2017/sc13097.doc.htm.

[9] Joana Cook and Gina Vale, "From Daesh to Diaspora: Tracing the Women and Minors of Islamic State," *ICSR*, Department of War Studies, King's College, (2018). https://icsr.info/wp-content/uploads/2018/07/ICSR-Report-From-Daesh-to-%E2%80%98Diaspora%E2%80%99-Tracing-the-Women-and-Minors-of-Islamic-State.

[10] Bill Gertz, "Up to 6,000 Jihadists Fighting with Al Qaeda Groups in Syria," *Washington Free Beacon*, July 1, 2013, https://freebeacon.com/national-security/syria-new-terrorist-training-ground/.

conflict, by mid-2014 an important minority of recruits were originating from more affluent and secular western nations. According to a mid-2014 report from the security consultancy Soufan Group, 3,000 westerners had arrived in Syria at that time, to join local extremist groups. This number constituted approximately 25 percent of an estimated 12,000 foreign fighters present in Syria and Iraq at that time. Among these new recruits, the vast majority had gravitated toward the Islamic State.[11] This estimate came just seven months after the Islamic State announced its formal split from the global Al-Qaeda organization, demonstrating the potency of this new group's propaganda and unique appeal to disaffected radicals from across the globe.[12]

2.1. Motivations for joining Islamic State

The idea that such a staggering number of young people from stable, multicultural societies would be drawn to join a foreign war thousands of miles away, on behalf of an extremist organization ideologically premised on violence and intolerance, has baffled and terrified the general public since the Islamic State first appeared on the scene. Determining the root causes of this exodus to Syria and Iraq is of paramount importance to governments around the world, not just for staunching the future flow of their citizens to conflict zones abroad, but in assessing the potential risk of returnees from the region to their home countries.

[11] "Guide to the Syrian Rebels," *BBC News*, December 13, 2013. https://www.bbc.com/news/world-middle-east-24403003.
[12] Brian Feldman, "Al-Qaeda Cuts Ties with Syrian Rebel Group," The Atlantic. Atlantic Media Company, February 4, 2014, https://www.theatlantic.com/international/archive/2014/02/al-qaeda-cuts-ties-syrian-rebel-group/357686/.

In the decades since the 9/11 attacks, there has been enormous debate over the root causes of terrorism and the factors that drive young people to abandon modern life and join transnational extremist groups like Al-Qaeda and the Islamic State. In the decade following the attacks on the World Trade Center, conflict studies and policy makers tended to emphasize poverty and lack of socioeconomic opportunity as the primary drivers of religious extremism.[13] However, much of this belief was premised on existent research from previous decades, that focused on the general link between economic hardship and political violence rather than on the topic of Islamic extremism specifically. At least one study has extensively demonstrated the link between elevated levels of poverty and the probability of civil war breaking out in a given nation.[14] Later studies have since emerged with a far more specific focus on organizations like Al-Qaeda, that boast extensive track records of foreign recruitment. In one empirical study from 2008, Princeton University's Alan Kreuger found no correlation between the economic conditions in a country and it's likelihood of supplying extremist fighters to conflict zones. Rather, Kreuger postulates that the data lends itself to a stronger relationship between terrorism and levels of political freedom in a country.[15] Other studies have arrived at similar conclusions about the disconnect between poverty and

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[13] E. Benmelech, C. Berrebi, and E. Klor, "Economic Conditions and the Quality of Suicide Terrorism," *The Journal of Politics*, 74, no.1 (2012): 113-128. https://www.journals.uchicago.edu/doi/abs/10.1017/S0022381611001101?journalCode=jop. See also; James A. Piazza, "Rooted in Poverty?: Terrorism, Poor Economic Development, and Social Cleavages." *Terrorism and Political Violence* 18 no.1 (2006): 159–77. https://doi.org/10.1080/095465590944578. ; Claude Berrebi, "Evidence About the Link Between Education, Poverty and Terrorism Among Palestinians. Peace Economics, Peace Science and Public Policy, *De Gruyter*, 13 no.1, (2007): 2, https://www.researchgate.net/publication/4986142_Evidence_About_the_Link_Between_Education_Poverty_and_Terrorism_Among_Palestinians.

[14] Miguel, Satyanath, and Sergenti (2004), Collier and Hoeffer (2004)

[15] A. Krueger, & D. Laitin, "Kto Kogo?:A Cross-Country Study of the Origins and Targets of Terrorism," *Cambridge: Cambridge University Press*, (2008): 148-153, doi:10.1017/CBO9780511754388.006

incitement to join foreign terrorist organizations.[16] The emergence of the Islamic State, and the massive wave of indoctrination it unleashed across affluent, western nations, may instill further doubt into the centrality of economic factors in inspiring individuals to take the radical decision of joining extremist groups abroad.

In one systematic study that looking specifically at Islamic State fighters and conditions in their countries of origin found no correlation linking per capita GDP, Human Development Index score, or domestic political freedom to movements of Islamic State fighters. On the contrary, a significant proportion of extremists in Syria came from nations with a high GDP and general political stability. Rather, the researchers found that one of the biggest factors predicting whether a state would be a significant source of Islamic State fighters, included the racial and cultural homogeneity of the state. As foreign recruits from the West have come overwhelmingly from religious and ethnic minority groups in these countries, this has led some to postulate that this homogeneity may be linked to a sense of cultural alienation among second generation immigrants, and that this sense of non-belonging may provide fertile ground for the propaganda and online recruitment efforts of extremists in the region.[17]

The largest-scale academic study to date of foreign fighters' motivations comes from the International Center for the Study of Violent Extremism, where researchers conducted 220 in-depth interviews with individuals who left for Iraq and Syria from 35

- [16] Efraim Benmelech, Claude Berrebi, and Esteban F. Klor. "Economic Conditions and the Quality of Suicide Terrorism." *The Journal of Politics* 74, no. 1 (2012): 113–28, https://doi.org/10.1017/s0022381611001101. also see: James A. Piazza, "Rooted in Poverty?: Terrorism, Poor Economic Development, and Social Cleavages," *Terrorism and Political Violence* 18, no. 1 (2006): 159-177, https://doi.org/10.1080/095465590944578.

[17] Efraim Benmelech & Esteban F. Klor "What Explains the Flow of Foreign Fighters to ISIS?" *Terrorism and Political Violence* 32, no.7, (2020): 1460, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2777466.

different countries. The vast majority, 83 percent, of those sampled were born into Muslim families of widely varying levels of religiosity.[18] The researchers concluded that foreign followers of the Islamic State claimed a wide range of individual motives for leaving their lives in home countries to join or live under the group, with gender and geographic location appearing to be important variables in these motivations. The most commonly cited and uniting factor among international recruits, voiced by most men, women, and individuals from all geographical locations, was anger at the atrocities being committed by the Assad regime against fellow Muslims, combined with a perceived indifference toward this suffering by the international community. Many were swayed decisively by direct appeals from suffering Syrian civilians, including by some Islamic State propaganda videos that utilized these images of Muslims calling on their co-religionists around the world to come to their aid.[19]

There was some differentiation between genders in regards to their life experiences prior to joining the Islamic State. Among foreign male recruits from non-Muslim countries, the greatest behavioral commonalities the researchers noted was a history of drug or alcohol abuse, prior criminal activity, family conflict, and unemployment—and the feeling of disaffection or personal failure that these experiences engendered in individuals made the utopian vision of Islamic purity presented by the Islamic State a powerful draw, as a means to find redemption, strength, and sometimes employment. Among foreign female recruits, the most common shared experience was a history of parental divorce, or at least one incident of severe personal

[18] Anne Speckhard and Molly D Ellenberg, "ISIS in Their Own Words: Recruitment History, Motivations for Joining, Travel, Experiences in ISIS, and Disillusionment over Time – Analysis of 220 In-depth Interviews of ISIS Returnees, Defectors and Prisoners," *Journal of Strategic Security* 13, no. 1 (2020): 89.
[19] Ibid, 102.

trauma.[20] The influence of family members was also paramount for women in particular—fully 80 percent of those interviewed said that husbands, parents, or extended family were central in convincing them to travel to Iraq and Syria.[21] More often than their male counterparts, women originating from western countries cited discrimination at home and a desire to live an authentically Islamic life as major factors behind their decision to leave. This perhaps echoes across the findings of other studies, which show that visible Muslim women often face greater levels vitriol and racism as members of a minority community than men.[22]

What recruits of both genders commonly shared though, was a general sense of alienation in their life and from society at large, that made them particularly vulnerable to the advances of Islamic State recruiters online. Among those who had been contacted directly by operatives of the group, most spent weeks or months developing relationships with these individuals and were drawn to the sense of friendship and belonging that they offered as members of a community. Most international recruits had also viewed Islamic State propaganda and recruiting material prior to their decision to travel to Iraq and Syria. In general, virtually all those who spoke with interviewers expected a far more positive experience than what they found, attesting to the potency of the groups publicity work that usually strove to portray the caliphate as a victorious, egalitarian Islamic paradise.[23]

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[20] Ibid, 97.
[21] Ibid, 101.
[22] Doris Weichselbaumer, "Multiple Discrimination against Female Immigrants Wearing Headscarves," *ILR Review*, 73 no. 36 (2020): 3.
[23] Speckhard and Ellenberg, "ISIS in Their Own Words: Recruitment History, Motivations for Joining, Travel, Experiences in ISIS, and Disillusionment over Time – Analysis of 220 In-depth Interviews of ISIS Returnees, Defectors and Prisoners," 99.

2.2. Recruitment of foreign fighters

While all global jihadist movements have used propaganda to recruit fighters, the scale and sophistication of the Islamic State's operation was truly unprecedented. The group was able to easily finance this propaganda blitz; as one of the richest extremist organizations in history, the Islamic State was believed to be bringing in over $3 million USD per day at their peak in 2014, netting the group an estimated $2.9 billion USD annually through a combination of black market oil sales, antiquities theft, human sex trafficking, and taxation of the local population.

Armed with these financial resources, they were able to publish a glossy monthly publication online that regularly reached tens of thousands of viewers, despite attempts by authorities around the world to limit viewing and access.[24] Famously, the Islamic State publicity arm, al-Hayat, quickly gained a reputation from 2014 onwards for releasing highly produced videos that mimicked the style of Hollywood action movies, glorifying their cause in Syria and Iraq. The stylistic elements of these videos were clearly aimed at a young, western millennial audience, marking a dramatic departure from the grainy combat and training tapes of Al-Qaeda.[25] As Sean Heuston, a professor of film has noted in his analysis of these videos, "It's actually surprising how contemporary and hip-looking some of these things are, especially considering the fact that the messages that they are promoting are essentially medieval."[26] The group also

[24] H. Bisgin, H. Arslan & Y. Korkmaz, "Analyzing the Dabiq Magazine: The Language and the Propaganda Structure of ISIS," (2019): https://link.springer.com/chapter/10.1007/978-3-030-21741-9_1

[25] Lisa Blaker, "The Islamic State's Use of Online Social Media." *Military Cyber Affairs* 1 no 1, (2015): 3.

[26] Bruce Wallace, "ISIS Has Mastered High-end Video Production in Its New Propaganda Wing," *PRI's World*, September 11, 2014, http://www.pri.org/stories/2014-09-11/isis-has-mastered-high-endvideo-production-its-new-propaganda-wing/.

maintained an expert grasp of social media, as analysts estimate that the group and its supporters were generating as many as 200,000 pro-Islamic State messages every single day on Twitter alone, while supporting legions of online recruiters to locate and engage with disaffected young people across to world via social media, in an attempt to lure them to Syria.[27]

2.3. Islamic State crimes in Iraq and Syria

The atrocities committed by members of the Islamic State have been extensively covered by media outlets, documented by human rights organizations, and displayed prominently by the group itself as a form of propaganda to bring in new recruits and project an image of ruthlessness to viewers around the world.[28] The brazenness of these crimes, and the extreme examples of brutality committed by the Islamic State in Iraq and Syria, were central to the arguments made by coalition partners for initial intervention in the conflict.[29] The first known American airstrikes against the Islamic State in Iraq were in fact triggered by the Sinjar massacre of August 2014, which targeted the local minority Yazidi community and resulted in an estimates 4,000 civilian deaths as many as 10,000 Yazidi women being sold into slavery.[30]

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[27] Blaker, Lisa. 2015. "The Islamic State's Use of Online Social Media." *Military Cyber Affairs* 1 (1), 3.
[28] Schmid, Alex. "Challenging the Narrative of the 'Islamic State.'" *Terrorism and Counter-Terrorism Studies*. (2015): https://doi.org/10.19165/2015.1.05.
[29] *"They came to destroy": ISIS Crimes Against the Yazidis*, 32/CRP.2, Human Rights Council, 32, 2016.
[30] Valeria, Cetorelli, Isaac Sasson, Nazar Shabila, and Gilbert Burnham. "Mortality and Kidnapping Estimates for the Yazidi Population in the Area of Mount Sinjar, Iraq, in August 2014: A Retrospective Household Survey." *PLoS Medicine* 14 no 5, http://doi.org/1002297.

The Islamic State stands accused of crimes that the UN argues amount to war crimes, crimes against humanity, and genocide.[31] Members have been explicitly involved in widespread instances of human trafficking, deliberate targeting and murder of civilians, torture, and rape. Beyond crimes directly related to war, the group has also engaged in the destruction of cultural heritage sites, infamously filming themselves destroying a number of Roman temples at Palmyra, and Mesopotamian statues in the Mosul Museum.[32] While much of this wanton vandalism has been in the service of propaganda, or cultural destruction for its own sake, members have been deeply involved in the looting, smuggling, and black market sale of artifacts.[33] While these incidents have all been widely documented, verified, and attributed to the Islamic State by an array of media and watchdog groups, the burden of evidence for imputing these actions to individual fighters could prove to be a far more complicated task for prosecutors working within domestic judicial system, although leadership may be held accountable for any number of these violations by subordinate members.

2.4. Theoretical approaches to prosecution of foreign fighters

Scholars Adam Hoffman and Marta Furlan have identified four different theoretical legal responses to the situation of Islamic State foreign fighters, all of which have been advocated and adopted to varying degrees by different authorities in the

[31] "New UN Report Lays Bare Widespread ISIL 'Atrocities' Committed against Yazidis in Iraq," 2016, Refugeesmigrants.Un.Org, August 18, 2016, https://refugeesmigrants.un.org/es/node/100042107.
[32] C. Doppelhofer, " Will Palmyra rise again? - War Crimes against Cultural Heritage and Post-war reconstruction," (2016): http://www.ohchr.org/EN/Issues/CulturalRights/Pages/IntentionalDestruction.aspx.
[33] A. Pauwels, "ISIS and illicit trafficking in cultural property: Funding terrorism through art. Freedom from Fear" Freedom From Fear 11, (2016): 64-71, http//:doi.org/10.18356/1df7038c-en.

home countries of individuals who travelled abroad to fight. One group of nations has pursued a policy of encouraging local governments and authorities, namely the Kurdish-led Self Administration in northeast Syria and the Iraqi central government in Baghdad, to prosecute fighters of all nationalities for crimes committed on their territories, with the full encouragement and support of the international community. A second approach taken by some countries has been to actively prevent the return of nationals, through various punitive measures that have gone as far as stripping citizenship and barring entry. The third strategy, and one pursued by the majority of states surveyed by scholars on the topic, has been to recognize the right of return for all nationals who joined the Islamic State, without offering any active consular help or legal aid to those imprisoned in Iraq and Syria. A fourth option, and the one advocated by a decisive majority of legal scholars and national security experts, is for home nations to work towards the swift repatriation of foreign fighters, and then prosecute them under the national anti-terrorism laws.[34]

Questions have been raised by other legal scholars about the possibility of pursuing large-scale prosecutions against Islamic State members through the use of the International Criminal Court (ICC), although this proposition is also riddled with potential legal obstacles. The issue of jurisdiction would present itself as an early complicating factor. At present, the ICC can claim jurisdiction over a case in one of three scenarios; the nation where the crimes took place is a party to the Statute of Rome, the home country of the defendant is a party, or the case is referred to the ICC by the

[34] M. Furlan, & A. Hoffman, "Challenges Posed by Returning Foreign Fighters - Program on Extremism," *George Washington University,* (2020): https://www.researchgate.net/publication/341070232_Challenges_Posed_by_Returning_Foreign_Fighters_-_Program_on_Extremism_George_Washington_University

Prosecutor of the UNSC.[35] At present, both Iraq or Syria have yet to become parties to the Rome Statute, and neither have a plurality of nations from which the majority of Islamic State members originate. As such, any place for the ICC would be heavily dependent on the UNSC, which has historically made very limited use of this power, only referring two cases in its modern history to the court (the cases of Libya and Darfur, both of which were ultimately quite narrow in scope).[36] Furthermore, while the Statute of Rome clearly covers the acts judged to be war crimes, crimes against humanity, and genocide, all of which the Islamic State as an organization stands accused of, significant hurdles stand in the way of prosecuting individuals for these crimes, except in a limited number of cases for which tangible evidence can be collected and witnesses produced—a situation that makes these weak grounds for prosecuting the vast majority of individual Islamic State fighters. Most of those who have been prosecuted so far, rather, have been tried for crimes with a far lower threshold of evidence, and with much less severe sentencing guidelines. The most common charges laid have been traveling to join a "terrorist" organization, or providing tangible material evidence to such an organization, none of which is covered by the ICC's mandate.[37] A final important issue surrounding use of the ICC is the concept of complementarity—the notion that the ICC is posited as a court of final resort, and should only take a case if all other legal bodies have refused to hear an important case.[38] Despite uncertainty over where specific Islamic State crimes might be heard, it is far from clear that

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[35] Rod Rastan, 'Jurisdiction' In: Stahn C, (ed), The Law and Practice of the International Criminal Court (OUP 2015) 152.

[36] "ICC: Prosecutor to Open an Investigation in Libya," 2011, *HRW*, March 3, 2011, https://www.hrw.org/news/2011/03/03/icc-prosecutor-open-investigation-libya.

[37] C. Kenny, " Prosecuting Crimes of International Concern: Islamic State at the ICC?. *Utrecht Journal of International and European Law* 33, no. 84, (2017): 120-145.

[38] "What Is Complementarity? - National Courts, the ICC and the Struggle Against Impunity," 2010, *ICTJ*, https://www.ictj.org/sites/default/files/subsites/complementarity-icc/.

complementarity would apply to these cases. Given these formidable political and legal hurdles, use of the ICC as a principle means of prosecuting Islamic State fighters seems highly unlikely.

Another alternative approach floated by some scholars and national security officials, would be to set up a special international tribunal with the express purpose of prosecuting Islamic State fighters and bringing a sense of closure to the suffering of communities and individuals that were targeted by the group. This strategy would be modeled on other high profile international tribunals of the past, just as the Nuremberg Trials or the United Nations International Criminal Tribunal for Rwanda. Notably, the Swedish Interior Minister has lobbied other governments across the EU to build consensus for such an idea, and the Dutch government has publicly expressed interest in this approach as well. The most likely location for such a tribunal is generally thought to be Iraq, given the complications of pursuing justice in war torn Syria and the logistical complications of transporting Islamic State prisoners elsewhere.[39]

However, such a tribunal would run into many of the same hurdles as an ICC referral, namely the limitation of trials to international crimes such as genocide, and the difficulty of proving individuals' culpability for such crimes. Iraq would itself be a deeply problematic location to host such a tribunal, given that the nation has never joined the Rome Statute, and is hampered by its own instability and profound security challenges that present practical hurdles to conducting a large-scale tribunal involving judges, attorneys, legal experts from around the world.[40] Furthermore, such an effort

[39] A. Dworkin, "A Tribunal For ISIS Fighters?" *ECFR*, 10, November, 2020, ecfr.eu/article/commentary_a_tribunal_for_isis_fighters/.
[40] J. Crawford, "Do We Need An International Tribunal For Islamic State?" *Justice Info*, 10, November, 2020, https://www.justiceinfo.net/en/tribunals/mixed-tribunals/42224-do-we-need-an-international-tribunal-for-islamic-state.html.

would require several nations stepping forward to provide significant material support and organizational resources, a void into which no single government to date has demonstrated a significant desire to step. Many legal associations have also criticized such a proposal as liable to politicization, providing a high profile platform to prosecute Islamic State crimes while ignoring the crimes committed by other sides in a multifaceted civil war.[41] That body that would also likely bear much of the burden of coordinating an international tribunal and transferring prisoners to trial, the International Coalition to Defeat ISIS, is on record publicly distancing itself from such proposals. Recently, spokespeople from the coalition have reiterated that their official position remains that individual countries must repatriate their citizens and try them for their crimes in courts back home.[42] As such, the prospects for an international tribunal to prosecute Islamic State fighters seems remote at the present time.[43]

2.5. Background on Islamic State collapse and key actors

In order to fully understand the current situation of foreign fighters and followers of the Islamic State, it is important to briefly detail the group's demise, some of the key actors involved in this effort, and to define a few key terms. The international effort to roll back the Islamic State began in earnest in September 2014 with the

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[41] Impunity Watch, "ISIS-only tribunal: selective, politicized justice will do more harm than good" [Media release].

[42] W. Van Wilgenburg, "Coalition Continues To Support The Repatriation Of Foreign ISIS Fighters Not Local Prosecution In Syria: Spokesman," *Kurdistan 24*, 10 November, 6 December, 2020, https://www.kurdistan24.net/en/story/22356-Coalition-continues-to-support-the-repatriation-of-foreign-ISIS-fighters-not-local-prosecution-in-Syria:-Spokesman.

[43] M. Furlan, & A. Hoffman, "Challenges Posed by Returning Foreign Fighters - Program on Extremism," *George Washington University,* (2020): https://www.researchgate.net/publication/341070232_Challenges_Posed_by_Returning_Foreign_Fighters_-_Program_on_Extremism_George_Washington_University

formation of the Global Coalition to Defeat ISIS. This coalition was created by 83 founding member states, coordinated principally by the United States military, and was launched with the singular focus of destroying the Islamic State organization and halting its territorial ambitions.[44]

The campaign against the Islamic State took on the contours of two conflicts in Iraq and Syria, often distinct in daily operations but united in the broader objective of defeating the group. In Iraq the coalition working on the ground with a heterodox array of forces, a group that included Kurdish Peshmerga troops aligned with various factions in the Kurdish-governed Kurdistan Regional Government (KRG), Iraqi government troops loyal to the government in Baghdad, and Iranian-backed Shia militias with members hailing from a number of nations. This uncomfortable coalition ultimately struggled for three years to expel the Islamic State from Iraq.[45] These efforts succeeded at last in November 2017, as the group lost its last territorial stronghold in the country's northwest, and most Islamic State members were able to slip over the porous border into Syria[46]. Among the fighters and civilians who were captured by advancing anti-Islamic State forces, the vast majority have been transferred to camps and detention centers further south, run by Iraqi government authorities.[47]

On the other side of the border in Syria, the battle to defeat the group would last 16 months longer, concluding only with the capture of Baghouz in March 2019. The

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[44] "Home," The Global Coalition Against Daesh. November 24, 2020. Accessed January 04, 2021. https://theglobalcoalition.org/en/.

[45] Priyanka Boghani, "Iraq's Shia Militias: The Double-Edged Sword Against ISIS," *PBS*, March 21, 2017, https://www.pbs.org/wgbh/frontline/article/iraqs-shia-militias-the-double-edged-sword-against-isis/.

[46] "Timeline: The Rise, Spread, and Fall of the Islamic State," *Wilson Center*, October 28, 2019, https://www.wilsoncenter.org/article/timeline-the-rise-spread-and-fall-the-islamic-state.

[47] Wille Belkis, "ISIS Suspect Transfers to Iraq Replete with Risks." *Human Rights Watch*, October 28, 2020, https://www.hrw.org/news/2019/11/01/isis-suspect-transfers-iraq-replete-risks.

principal local partner of the coalition in this battle was the Kurdish-led Syrian Democratic Forces (SDF). Mirroring the strategy in Iraq, dozens of nations provided critical air support, weapons, logistics, and training to the SDF, which painstakingly advanced against Islamic State forces on several fronts. The campaign only ended in March 2019, when the coalition cornered the last of the group's fighters in the tiny desert village of Baghouz, wedged between the Euphrates River and the SDF on three other sides.[48] As the last of the Islamic State's once mighty caliphate crumbled and the final remnants of its territory captured, the SDF suddenly found itself responsible for a massive society of radicalized or traumatized fighters, women, and children, more than 85,000 individuals altogether—the population of a medium-sized city. Noncombatants were promptly transferred to three massive, sprawling camps for Internally Displaced Persons (IDPs); al-Hol, by far the largest with 73,000 inhabitants at its peak, Roj, and Ain Issa.[49] The large majority of noncombatants remain there to this day. In contrast, fighting age men have been incarcerated within a network detention centers across Syrian Kurdistan, where they remain guarded by SDF authorities.

The SDF is the armed wing of the Self Administration of North and East Syria, a Kurdish-led political entity that enjoys autonomous rule over much of the majority-Kurdish lands in northeastern Syria, and comprising approximately 20 percent of the country's territory. Also known as Rojava, this political entity effectively declared de-facto autonomy from the Syria state, following the withdrawal of pro-Assad forces from

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[48] Barrett Limoges and Mohammad Ibrahim, "In Last Stand at Baghouz, IS Uses Civilians, Car Bombs and Booby Traps to Slow On-off SDF Offensive." *Syria Direct*, March 05, 2019, https://syriadirect.org/news/in-last-stand-at-baghouz-is-uses-civilians-car-bombs-and-booby-traps-to-slow-on-off-sdf-offensive/.

[49] Erin Cunningham, "True ISIS Believers Regroup inside Refugee Camp, Terrorize the 'impious'," *Washington Post*, April 20, 2019, https://www.washingtonpost.com/world/middle_east/true-isis-believers-regroup-inside-refugee-camp-terrorize-the-impious/2019/04/19/a30d4986-556c-11e9-aa83-504f086bf5d6_story.html.

the area in early 2012.[50] This paper will refer to the group as many media outlets do, as the Self Administration. In many respects, the Self Administration has evolved over the past decade to become one of the most highly developed non-state governing entities operating in Syria, with a highly developed bureaucracy, tax collection system, and defense apparatus. As the authority that operates the IDP camps and detention centers where most Islamic State foreign fighters and followers are currently being held, it is also the body that nations must negotiate with in talks over repatriation of these individuals.[51]

2.6. "Foreign Terrorist Fighters" or FTFs

It bears mentioning a final note on terminology, and expounding a bit on one central term to this field of study. In scholarship of transnational jihadist extremist networks, the most common description used to describe individuals who leave their home nations to join such groups is "Foreign Terrorist Fighter", often abbreviated to FTF. More specifically, FTFs are defined by United Nations Security Council Resolution 2178 as ""individuals who travel to a State other than their State of residence or nationality for the purpose of the perpetration, planning or preparation of,

[50] J. Clark & M. Ibrahim, "The State of Rojava: A month-long reporting series from Syria Direct," *Syria Direct*, 5 November, 2017, https://syriadirect.org/news/the-state-of-rojava-a-month-long-reporting-series-from-syria-direct/

[51] W. Christou, "Is the EU Obligated to Repatriate Its Children from Northeast Syria?" *Syria Direct*, July 16, 2020, https://syriadirect.org/news/is-the-eu-obligated-to-repatriate-its-children-from-northeast-syria/.

or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict".[52]

In nearly 20 years of the "War on Terror", many nations, groups, and scholars have used the term "terrorist" to define an extremely wide range of individuals, using different tactics to further the goals of disparate ideologies. Many writers have opined that the term has become overloaded with rhetorical connotations, and politicized to the point of being tainted as a helpful concept in scholarship.[53] To avoid any such controversies or misconceptions in the following research, this paper will skirt all usage of the term FTF, and terrorist in general, unless taken as appropriate in direct context from declarations or other verbatim statements of officials and political bodies. Unless otherwise noted, this paper will utilize the term "Islamic State foreign fighter" to convey this idea.

[52] United Nations Security Council Counter-Terrorism Committee. 2021. *Foreign Terrorist Fighters - United Nations Security Council Counter-Terrorism Committee*. [online] Available at: <https://www.un.org/sc/ctc/focus-areas/foreign-terrorist-fighters/> [Accessed 5 January 2021].
[53] Christopher J. Finlay, "How to Do Things with the Word 'terrorist'." *Review of International Studies* 35, no. 4 (2009): 751-74, http://www.jstor.org/stable/40588072.

CHAPTER 3

ALL THE CALIPHATE'S MEN

Adult foreign fighters had occupied a unique place in the popular imagination during the height of the Islamic State, one that seemed characterized by particularly intense revulsion on all sides. Their home nations wished to forget their existence, as they represented a painful reminder of modernity's failings and presented a daunting legal and security challenge that had little precedence in modern history. Among Syrians, the fighters inspired a seething hatred, the very embodiment of foreign actors who had hijacked a democratic uprising and transformed the conflict into a daily parade of almost unfathomable bloodlust and cruelty against the Syrian people they claimed to represent.

While tens of thousands of men, women, and children ultimately left dozens of countries around the world to join the Islamic State, fighting age men stand, legally speaking, in a category of their own for a number of reasons. The repatriation of adult foreign fighters has proven the most controversial and politically explosive question facing governments in the post-Islamic State era. From a culpability standpoint, adult males committed the vast majority of the atrocities now attributed to the Islamic State, and thus must be held uniquely culpable for the immense harm inflicted on local populations across Iraq and Syria. From a security standpoint, many security analysts also see these adult males as potentially posing the greatest threat to their societies if they are allowed to return, thus injecting a second complex dynamic into states' calculations surrounding repatriation. For these reasons, the legal issues and political approaches taken toward this group must be separated from those of non-combatants,

namely women and children. This chapter will parse some of these complex questions, and evaluate the progress that states have made toward repatriation of their citizens.

3.1. Determining numbers of foreign fighters

While the Islamic State was not the only armed group in the Syrian conflict to attract foreign recruits, it was by far the largest draw in the region for its ideological followers from around the world. Approximately 80 percent of all foreign fighters who found their way into Syria would ultimately join the ranks of the Islamic State, comprising as much as 25 percent of the group's members at the peak of its power and contributing enormously to the jihadist organization's propaganda abroad.[54] As early as spring of 2013, before the Islamic State had officially broken ranks with other international jihadist networks and rebranded itself as an ideological home for foreign fighters, it is estimated that over 5,000 people had already entered Syria to fight with Al Qaeda-aligned groups.[55]

3.1.1. Uncertain estimates of foreign fighters

To this day, a precise figure of the Islamic State's international membership remains elusive and the topic of much debate. There is no comprehensive way of knowing the full numbers of foreign fighters and civilians, who left dozens of countries

[54] Abdul Basit, "Why So Many?" *Counter Terrorist Trends and Analyses* 6, no. 9 (2014): 4-8. Accessed September 9, 2020. http://www.jstor.org/stable/26351282.
[55] B. Gertz, "Up to 6,000 jihadists fighting with al Qaeda groups in Syria," *Washington Free Beacon*, July 1 2013, https://freebeacon.com/national-security/syria-new-terrorist-training-ground/.

around the world and slipped illicitly across the Turkish border into Syria or Iraq between 2012 and 2019, many who died unrecorded in battle or were captured and executed in extrajudicial killings by rival armed groups. Despite years of intensive surveillance of extremist groups in Syria, the CIA announced in 2014 that the actual number of foreign fighters in the Islamic State may have been three times greater than the agency had previously believed. The admission came weeks after the American-led coalition had begun bombing jihadist elements in northern Iraq and Syria, demonstrating the difficulty of tracking the origins and movements of such a diverse population across the entire globe.[56]

The Syrian Arab Army under president Bashar al-Assad had estimated the number of foreign fighters in Syria to be as high as 54,000 in 2015, although this number falls on the high end of the spectrum and should be wisely considered suspect for political reasons.[57] Perhaps a more reliable number that holds closer to the scholarly consensus, and which has been often repeated in subsequent studies, comes from a 2017 United Nations report that estimated the number foreign recruits among the Islamic State at 40,000.[58] Another in depth study with more transparent methodology emerged the next year from the Department of War Studies at King's College, which determined that 41,490 foreigners counted themselves as affiliated with the group in Syria.[59] In sheer numbers, the foreign fighters of the Islamic State ultimately represented the

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[56] J. Karadsheh., J. Sciutto, & L. Smith-Spark, "How foreign fighters are swelling ISIS ranks," *CNN,* September 14, 2014, www.edition.cnn.com/2014/09/12/world/meast/isis-numbers/index.html?iref=allsearch.

[57] M. Hashim, "Iraq and Syria: Who are the foreign fighters?" *BBC News*, September 03, 2014, www.bbc.com/news/world-middle-east-29043331

[58] Greater Cooperation Needed to Tackle Danger Posed by Returning Foreign Fighters, Head of Counter-Terrorism Office Tells Security Council | Meetings Coverage and Press Releases. (2017, November 28). Retrieved January 05, 2021, from https://www.un.org/press/en/2017/sc13097.doc.htm

[59] Cook, J. and Vale, G., 2021. *From Daesh To Diaspora*. [ebook] London: King's College, p.52. Available at: <http://www.icsr.info> [Accessed 5 January 2021].

largest international armed jihadist movement in modern history, dwarfing even the 20,000 foreign mujahideen who flocked to Afghanistan during the 1980s in the struggle against the Soviet Union.[60]

3.1.2. Nationalities of foreign fighters

The United Nations estimates that foreign recruits of the Islamic State originate from 110 countries, representing a massive variety of states across every continent.[61] Another study from the International Centre for the Study of Radicalization (ICSR) suggests that foreigners in the Islamic State hold citizenship from approximately 80 countries. Among 41,490 individuals who joined the group from abroad, 18,852 originated from neighboring countries in the MENA region, 7,252 were from Eastern Europe, 5,965 from Central Asia, 5,904 from Western Europe, 2,073 from East Asia, 753 from the Americas, Australia, and New Zealand, 447 from South Asia and 244 from countries in sub-Saharan Africa.[62]

Among this truly global pool of Islamic State members, a majority of the population predictably consists of fighting aged men, which the ICSR estimates at 32,809 out of the total. However, the Islamic State differs tremendously from other transnational jihadist organizations, in that recruitment efforts went out of their way to also target women, often encouraging them to bring their young children to Syria. This

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[60] D. Temple-Raston, "Western Fighters Answer Mideast Extremists' Clarion Call," *NPR*, June 28, 2014, www.npr.org/2014/06/28/326313364/western-fighters-answer-mideast-extremists-clarion-call.
[61] Greater Cooperation Needed to Tackle Danger Posed by Returning Foreign Fighters, Head of Counter-Terrorism Office Tells Security Council | Meetings Coverage and Press Releases. (2017, November 28). Retrieved January 05, 2021, from https://www.un.org/press/en/2017/sc13097.doc.htm
[62] "How many IS foreign fighters are left in Iraq and Syria?" *BBC News*, February 20, 2019, www.bbc.com/news/world-middle-east-47286935

was a central pillar of the organization's propaganda, striving to prove that, far from merely being another fighting force in the region, they were in fact building an entire "state" —one encompassing citizens from all demographics, and whose exodus from the cosmopolitan "modern" world was in itself de facto proof of the Islamic State's superiority.

This recruitment drive ultimately proved remarkably successful, and the spectacle of thousands of primarily young women leaving in mass to create a new life in the group's territory has proven a spectacularly effective means of propaganda for the Islamic State. As a result of those efforts, at least 4,761 women and girls crossed international borders between 2012 and 2013 in order to live under the group in Iraq or Syria. Many of these women, in addition to a smaller number of fighting aged men, also brought children with them on this treacherous journey. Subsequently, ICRS also estimates that at least 4,640 minors had traveled from abroad and were living as de facto citizens under the caliphate.[63]

3.1.3. Killed foreign fighters

Much like estimates of the number of foreigners who left for Syria and Iraq over the course of the conflict, the numbers of those killed, returned, and currently in custody vary considerably from one source to another. While efforts to approximate the number of foreigners who joined the group before its collapse presents numerous challenges, identifying the fates of individuals among this massive and unaccountable population is

[63] Ibid.

a daunting challenge. It's an undertaking that inherently relies on a patchwork of reports and statements from intelligence agencies, local officials, and watchdog organizations, all with varying degrees of reliability and bias. Additionally, most of these sources are ultimately focused on the local dimension of the larger figure, such as detainee numbers from specific prisons and camps, often coming from military officials with only local jurisdiction or knowledge. Therefore, any larger estimates that attempt to capture the global population of Islamic State followers who have been captured, killed or returned tend to rely on a varied source of information which are by definition scattered and in need of extensive curation.

Specific estimates for the numbers of foreign Islamic State fighters killed by coalition bombing and the Kurdish-led ground campaign are few and generally unreliable. The Syrian Observatory for Human Rights (SOHR), a nonpartisan watchdog group that monitors events in Syria, has given estimates only for the number of all foreign fighters killed in the conflict. As of March 2019, SOHR reports that 65,726 foreign fighters have died amongst the factions opposed to Bashar al-Assad, though their reporting fails to expand on which affiliated groups the dead belonged to—as other groups, such as Al-Qaeda-affiliated Hayat Tahrir a-Sham, the Turkistan Islamic Party, and even the Free Syrian Army, also boast significant numbers of foreign fighters. However, SOHR does confirm that the great majority of the foreigners killed belonged to jihadist organizations, including the Islamic State.[64] Other estimates of the number of fighters killed during the campaign against the Islamic State come primarily from US military sources, and generally focus on the total numbers of jihadists killed in the

[64] "War Monitor: Over 570,000 killed in Syria Since 2011," *Syrian Observatory For Human Rights*, March 25, 2019, www.syriahr.com/en/122008/

campaign, with very limited information regarding the nationalities of these deceased fighters. The Global Coalition to Defeat IS, a US-led military coalition that coordinated the air and ground campaign against the group, has said that it believes the large majority of Islamic State militants have been killed, without speculating on statistics regarding foreign fighters.[65]

3.1.4. Returned foreign fighters

Governments around the world view jihadists returning from Syria as a stark security threat, and while some wealthier countries are carefully tracking the return of citizens they suspect of having joined the Islamic State, most have declined to make these numbers public. The degree of vigilance and surveillance furthermore has varied enormously from one nation to another, and many jihadists who left for Syria, themselves emerged from nations that were already enveloped in civil strife, or with limited governing capacity—meaning that authorities in these nations are often severely limited in their capacity to monitor and track their citizens returning from conflicts abroad. This all adds up to further muddy the picture and add to the general difficulty of tracking returnees from the Islamic State on a global scale.

In November 2017, officials from the United Nations Office for Counter-Terrorism put forward an estimate amassed from interviews with officials from dozens of member states, which approximated that 5,600 foreigners had returned home from

[65] "How many IS foreign fighters are left in Iraq and Syria?" *BBC News*, February 20, 2019, www.bbc.com/news/world-middle-east-47286935

Syria, and were now spread out across 33 countries.[66] Despite the subsequent collapse of the Islamic State and capture of thousands of fighters, this figure of 5,600 has remained the most authoritative and frequently used figure in official discourses about the return and reintegration of former Islamic State militants.[67] One explanation for the static nature of these estimates could perhaps be the simplest; relatively few fighters have returned to their countries of origin since the height of the caliphate. One recent study from King's College in London determined that the vast majority of surviving and uncaptured foreign fighters in Iraq and Syria have either remained in the region or have traveled to other parts of the globe where Islamic State affiliates exercise territorial control.[68]

3.1.5. Detained foreign fighters

This raises the question of how many Islamic State followers currently remain in Syria or Iraq, either detained, living in Kurdish-administered displacement camps, or at large as members of sleeper cells. Determining at least an estimate of this captive population is of central importance for this paper, and is key to quantifying the scale of the challenge facing western governments as they grapple with how to approach issues of repatriation for their nationals held abroad.

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[66] Greater Cooperation Needed to Tackle Danger Posed by Returning Foreign Fighters, Head of Counter-Terrorism Office Tells Security Council | Meetings Coverage and Press Releases. (2017, November 28). Retrieved January 05, 2021, from https://www.un.org/press/en/2017/sc13097.doc.htm

[67] T. Govier & D. Boutland, "Dilemmas regarding returning ISIS fighters," *Ethics & Global Politics 13* no. 2, (2020): 93-107, doi:10.1080/16544951.2020.1756562.

[68] ISIS Foreign Fighters after the Fall of the Caliphate, *Armed Conflict Survey* 6*,* no. 1, (2020): 23-30, doi:10.1080/23740973.2020.1761611.

Estimates about the number of Islamic State fighters incarcerated across Iraq and Syria are also largely unreliable, and gathered from a patchwork of sources with oftentimes questionable political motivations for distortion. However, in contrasting foreign estimates against the figures provided by primarily officials in Syria and Iraq, a picture gradually emerges of an enormous population of detainees and displaced women and children, presenting a monumental challenge to local governments, humanitarian workers, and authorities from their nations of origin.

According to officials from the Kurdish-led SDF, approximately 800 foreign male Islamic State fighters were being held in custody by February 2019, one month before the group's final military defeat in Baghouz. The figures reported by officials also counted 700 women and 1,500 children as living in displacement camps across northeast Syria.[69] An estimate from the United Nations estimates that 1,000 foreign fighters remain in custody in Syrian Kurdistan, many of unknown nationality and origin. However, it is unclear whether this figure also includes women and children, or simply men of fighting age who are suspected of taking up arms for the Islamic State.[70] On the other hand, US military sources revealed in March 2020 that officials believed 10,000 foreign fighters hailing from dozens of countries remained in the custody of Kurdish authorities across northern and eastern Syria, although this foreign population was dwarfed by the numbers of Syrian and Iraqi extremists in detention centers.[71] Another estimate from US military sources in late 2019 however, contradicted this

[69] E. Francis, & P. Blenkinsop, "U.S.-backed Syria force seeks help with Islamic State prisoner 'time bomb'," *Reuters*, February 18, 2019, https://uk.reuters.com/article/uk-mideast-crisis-islamicstate-detainees/u-s-backed-syria-force-seeks-help-with-islamic-state-prisoner-time-bomb-idUKKCN1Q71E0.
[70] How many IS foreign fighters are left in Iraq and Syria? (2019, February 20). Retrieved January 05, 2021, from https://www.bbc.com/news/world-middle-east-47286935
[71] L. Loveluck, & L. Sly, "Kurdish-led forces put down revolt by ISIS detainees at prison in Syria," *Washington Post*, March 30, 2020, www.washingtonpost.com/world/middle_east/islamic-state-detainees-mutiny-at-prison-in-syria/2020/03/30/8fc4a0dc-7252-11ea-ad9b-254ec99993bc_story.html

estimate, placing the total number of detained Islamic State fighters from all nationalities in Syria at 10,000, while the source claimed approximately 2,000 of these individuals originated from outside of Syria and Iraq.[72]

In Iraqi detention, other military sources report the total number of foreign detainees associated with the Islamic State at 1,300, although at least one Kurdish commander revealed to journalists that this figure was primarily civilians, and greatly undercounted the number of children among the detained, many of whom were orphaned and of uncertain national origin.[73]

3.1.6. Escaped foreign fighters

Even beyond those foreign Islamic State members killed, returned to their countries of origin, and currently in detention, there remains yet a fourth possibility. On October 9, the Turkish air force commenced strikes along the Syrian-Turkish border, laying the groundwork for a major incursion into SDF-controlled areas in a campaign named Operation Peace Spring.[74] The resulting strife resulted in 300,000 displaced civilians and a major weakening of security conditions at many Kurdish-run detention facilities—several of which were known to be housing thousands of Islamic State fighters.[75] The event presaged a number of massive prison breaks, in which thousands

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[72] K. Williams, "The US Literally Doesn't Know How Many ISIS Fighters Have Escaped In Syria," *Defense One*, July 28, 2020, from https://www.defenseone.com/threats/2019/10/us-literally-doesnt-know-how-many-isis-fighters-have-escaped-syria/160645/

[73] "Iraq: Change Approach to Foreign Women, Children in ISIS-Linked Trials," *HRW*, October 28, 2020, www.hrw.org/news/2018/06/21/iraq-change-approach-foreign-women-children-isis-linked-trials

[74] B. McKernan,J. Borger, & D. Sabbagh, "Turkey unleashes airstrikes against Kurds in north-east Syria," *The Guardia*n, October 09, 2020, www.theguardian.com/world/2019/oct/09/turkey-launches-military-operation-in-northern-syria-erdogan

[75] "Turkey assault in NE Syria displaced 300,000: Monitor," *France24*, October 17, 2019, www.france24.com/en/20191017-turkey-assault-in-ne-syria-displaced-300-000-monitor

of jihadists and sympathizers are thought to have escaped.[76] There have since been numerous reports of a rising extremist insurgency across eastern Syria, featuring sporadic attacks and bombings attributed to sleeper cells of the Islamic State. Some military sources now estimate that the group could have as many as 18,000 militants currently mobilized in Syria, some covertly living among the local civilian population, others regathering deep in the Badia Desert. It is unknown at present what number of these fighters may be of foreign origin.[77]

3.2. State of repatriations

Countries' reactions and approaches to their foreign fighters detained in Iraq and Syria have run an incredible gauntlet of policy options. On the one side, a number of states have moved aggressively to revamp their domestic anti-terrorism laws, establishing the legal foundations to robustly prosecute their citizens at home while using all diplomatic means to repatriate suspected Islamic State members. On the other extreme, some governments have taken steps to prevent the return of any citizens from Iraq and Syria altogether, going as far as to strip individuals of their citizenship, leaving a number of individuals stateless in the process. Most countries have pursued a position somewhere in the middle, neither working to repatriate their citizens nor taking any particular steps to block their return.

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[76] K. Williams, "The US Literally Doesn't Know How Many ISIS Fighters Have Escaped In Syria," *Defense One*, July 28, 2020, from https://www.defenseone.com/threats/2019/10/us-literally-doesnt-know-how-many-isis-fighters-have-escaped-syria/160645/

[77] E. Schmitt, A. Rubin, & T. Gibbons, "ISIS Is Regaining Strength in Iraq and Syria," *New York Times*, August 19, 2019, www.nytimes.com/2019/08/19/us/politics/isis-iraq-syria.html

3.2.1. A political question

While mainstream international legal scholarship has largely urged officials around the world to repatriate citizens and try them at home for crimes committed in Syria or Iraq, this proposition does not come without significant logistical obstacles and security risks which require courage and strong will to work around. The decision to repatriate is ultimately a political rather than legal decision, and such efforts by officials have often wilted in the face of stringent opposition from voters. Public opinion and electoral risk are simple facts of life in any democratic decision making process, and there have already been significant consequences for some office holders for even tepid steps toward repatriation.

An illustrative example of this risk came in January of 2020, when the governing coalition of Norway collapsed over fissures linked to the leadership's support for repatriation of citizens who left to join the Islamic State abroad. The politically explosive case involved the return of just one woman and her young child, who reportedly needed emergency medical care that was unavailable in the IDP camp where they were being held.[78] The seismic political consequences of this minor move towards repatriation, one that could be furthermore justified on special humanitarian and medical grounds, has had reverberations throughout the entirety of the EU and has dampened support for similar gestures of repatriation.[79] Officials in Finland have also floated the idea of repatriating all Finnish citizens to be prosecuted in courts at home.

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[78] Jon Henley, "Norway Populist Party Quits Coalition over 'Isis Bride' Repatriation," *The Guardian*, January 20, 2020, http://www.theguardian.com/world/2020/jan/20/norway-populist-party-quits-coalition-over-isis-bride-repatriation.

[79] W. Christou, "Is the EU Obligated to Repatriate Its Children from Northeast Syria?" *Syria Direct*, July 16, 2020, https://syriadirect.org/news/is-the-eu-obligated-to-repatriate-its-children-from-northeast-syria/.

However, the government has been forced to back down on that promise, or pair back the offer to only repatriating children, following fierce criticism from multiple quarters and deep signs of public unease at the suggestion.[80]

Some governments have partially justified inaction toward repatriation on the grounds of practical obstacles, such as identity verification challenges and a lack of access to detainees in Syria. Kurdish authorities under the umbrella of the SDF are currently responsible for managing detention and IDP camps that house the vast majority of Islamic State fighters and sympathizers, which puts them in the position of gatekeepers for the repatriation of foreign citizens as well. The Self Administration has adopted a policy that citizens linked to jihadist groups, and their children, cannot leave the territory without the permission of officials from their home countries. Predictably, this has led to a situation in which authorities on all sides have largely placed the blame on others, or explained the lack of progress as bureaucratic impasse that cannot be easily solved. However, many government officials in Europe say privately that such issues could be easily overcome, citing fears of electoral rebuke as the main policy driver.[81]

3.2.2. Mixed picture of progress around the world

At present, a survey across the dozens of nations that supplied fighters to the conflicts in Syria and Iraq reveals numerous approaches to the question of repatriation,

[80] A. Speckhard and Gabriel Sjöblom-Fodor, "Finland's Challenges Facing Potential Repatriation of ISIS Detainees," *Homeland Security Today*, January 01, 2021, www.hstoday.us/subject-matter-areas/counterterrorism/finlands-challenges-facing-potential-repatriation-of-isis-detainees/.
[81] Ibid.

spanning full repatriation and prosecution or integration efforts at home, to actively preventing the return of fighters back home, up to the point of punitive loss of citizenship on the other side. A number of Islamic State fighters have also returned independently by various means to their home states as well, particularly those who left Iraq and Syria prior to the group's collapse—the nations with the highest percentage of returned fighters, as of late 2017, were Germany with 33 percent of nationals having reentered the country from the conflict zone, followed by Tunisia with 27 percent and Saudi Arabia rounding out the top three with 23 percent.[82] While each country's experience presents an idiosyncratic case study on the question of repatriation, influenced invariably by internal politics, current leadership, judicial culture, and the number of citizens who left to join the Islamic State, general patterns do emerge and inform the larger picture of political blocks that have aligned around the issue of repatriation.

The United States, as the nation at the center of the Global Coalition to Defeat ISIS, is an important case study, albeit one with a relatively low number of jihadist fighters who left to join the group in the first place. Initially signaling a hardline stance against American foreign fighters, the US State Department went as far as to declare that one Islamic State member from Alabama, Hoda Muthana, was not a US citizen, and subsequently revoked her passport on technical grounds.[83] While litigation of Muthana's case is ongoing, the Trump administration quickly changed course over the following months, and reversed its overall approach to repatriation. At the time of

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[82] Soufan Group, *Beyond the Caliphate: Foreign Fighters and the Threat of Returnees*, October 2017, https://thesoufancenter.org/wp-content/uploads/2017/11/Beyond-the-Caliphate-Foreign-Fighters-and-the-Threat-of-Returnees-TSC-Report-October-2017-v3.pdf.

[83] D. Shortell, Jennifer Hansler, and Michelle Kosinski, "Trump Says Alabama Woman Who Joined ISIS Should Not Return to US," *CNN*, February 20, 2019, https://edition.cnn.com/2019/02/20/politics/hoda-muthana-state-department/index.html.

writing, the US has repatriated all of its known citizens who were being held by the SDF in Syria.[84]

Across the Middle East and North Africa, with the notable exceptions of Iraq, Sudan, and Morocco, most nations have adopted a policy of allowing citizens to return, albeit without offering any consular assistance, and often with a threat of prosecution upon reentry. Eastern European nations, excepting the governments of Albania and Poland which have put special restrictions against returning foreign fighters in place, have actually been among the most proactive nations in terms of repatriating their citizens detained abroad. The Russian Federation and many central Asian countries have similarly worked to repatriate the majority of their citizens from SDF custody.[85] In contrast, Western Europe has proved a hotbed of resistance to repatriation, with the United Kingdom infamously taking the step in February 2019 of leaving British-born Islamic State member Shamina Begum stateless by revoking her passport.[86] Denmark has also revoked the passports of several citizens held in Syria, and politically, the policy of repatriation has proven deeply unpopular across most EU member states. The countries of East Asia have fallen back on a number of different approaches, from a policy of full repatriation pursued by Japan and South Korea, to hardline stances

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[84] United States Department of Justice, 2020. *The United States Has Repatriated 27 Americans From Syria And Iraq Including Ten Charged With Terrorism-Related Offenses For Their Support To ISIS*. [online] Available at: <https://www.justice.gov/opa/pr/united-states-has-repatriated-27-americans-syria-and-iraq-including-ten-charged-terrorism> [Accessed 25 November 2020].

[85] M. Furlan, & A. Hoffman, "Challenges Posed by Returning Foreign Fighters - Program on Extremism," *George Washington University,* (2020): https://www.researchgate.net/publication/341070232_Challenges_Posed_by_Returning_Foreign_Fighters_-_Program_on_Extremism_George_Washington_University

[86] O. Bowcott, "Shamima Begum Loses First Stage of Appeal against Citizenship Removal," *The Guardian*, February 7, 2020, https://www.theguardian.com/uk-news/2020/feb/07/shamima-begum-loses-appeal-against-removal-of-citizenship.

adopted by the Philippines and Australia, which have denied their citizens reentry and revoked their passports.[87]

3.2.3. Stripping citizenship

A number of nations have proposed or enacted statutes stripping citizens of citizenship for crimes related to terrorism, and such laws have in many cases existed on the books for decades to punish other crimes such as treason. It is generally accepted in IL that a state has the right to revoke the citizenship of individuals for any reason it sees fit, although conventions have established that it is illegal to purposely render any person stateless.[88] This has somewhat complicated the issue, as the question of whether citizenship is revocable then comes down largely to whether an individual is a dual citizen of another nation. As a result, such efforts are often seen as targeting members of minority communities or those with immigrant backgrounds. Furthermore, such efforts have often been focused on those guilty of Islamist terrorist acts, while being scarcely if ever applied to individuals engaged in, for example, right wing extremism at home.[89] This has remained an area of contention and tension between authorities and civil liberties advocates across a range of countries, as such efforts have progressed.

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[87] M. Furlan, & A. Hoffman, "Challenges Posed by Returning Foreign Fighters - Program on Extremism," *George Washington University,* (2020): https://www.researchgate.net/publication/341070232_Challenges_Posed_by_Returning_Foreign_Fighters_-_Program_on_Extremism_George_Washington_University

[88] A. Macklin, "A Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien," *Queen's Law Journal* 40, no.1 (2014): 1-54. Doi:10.2139/ssrn.2507786.

[89] K. Roithmaier, "Germany and Its Returning Foreign Terrorist Fighters: New Loss of Citizenship Law and the Broader German Repatriation Landscape." *International Centre for Counter-Terrorism—The Hague*, (2019): https://icct.nl/publication/germany-and-its-returning-foreign-terrorist-fighters-new-loss-of-citizenship-law-and-the-broader-german-repatriation-landscape/.

Canada provides an example of how this type of legislation can be easily derailed through charges of judicial inconsistency. The government introduced a new draft law in 2014 that would have allowed authorities to strip dual citizens of their Canadian passports, in the event that they had demonstrated instances of disloyalty to "Canada, or Canadian ideals". By design, such grounds could include being convicted on terrorism charges for joining a jihadist group such as the Islamic State.[90] The constitutionality of the law was subsequently challenged in court, and ultimately was struck down on the grounds that it created two tiers of Canadian citizens. Similar legislation was defeated in France in 2016, following a series of domestic attacks attributed to Islamic State members and sympathizers.[91]

In other countries, efforts at enshrining citizenship revocation in law have been more successful. According to the Global Database on Modes of Loss of Citizenship, over 130 countries around the world have passed statutes and legislation allowing for the punitive stripping of citizenship, including the majority of EU member states.[92] However, the issue remains highly politically charged, and is subject to ongoing challenges by a number of civil rights and legal organizations. At the end of the day, this approach also sidesteps the central issue of what to do with Islamic State foreign fighters, and how nations are ultimately obligated to account for the actions of their citizens abroad. Stripping individuals of their citizenship only serves to cast the onus onto others, which at present means the overwhelmed regional authority of the Kurdish-led Self Administration, and their armed wing the SDF. While such solutions can be

[90] Canadian Bar Association, *Bill C-24, Strengthening Canadian Citizenship Act*, April 2014.
[91] Meghan Benton, Natalia Banulescu-Bogdan Meghan Benton and Natalia Banulescu-Bogdan. "Foreign Fighters: Will Revoking Citizenship Mitigate the Threat?" *Migration Policy*, April 23, 2019, https://www.migrationpolicy.org/article/foreign-fighters-will-revoking-citizenship-mitigate-threat.
[92] Ibid.

comforting and politically expedient within the domestic political realm of some nations, they cannot ultimately cannot escape their responsibility for their citizens, however explosive the consequences.

3.3. Obstacles to repatriation and prosecution

The question of whether nations will be able to effectively prosecute their citizens for their actions committed in the conflict areas of Iraq and Syria, has loomed large over repatriation efforts. A fundamental incongruence exists between the standard of guilt beyond a reasonable doubt that prevails in most developed court systems, and the realities of gathering evidence in a war zone or myriad issues arising from proving intent through social media. These daunting challenges present a situation in which both experts and the public fear criminals may evade prosecution for their most heinous crimes or, absent robustly updated laws, slip through the net of prosecution altogether.

3.3.1. Non-state actors and Law of Non-international Armed Conflict

Given that the Islamic State is a non-state actor operating in the arena of another nation's civil war, the legal issues facing states around repatriation of citizens fall largely under the area of IL known as the Law of Non-international Armed Conflict. This category of law covers any struggle involving at least one non-state actor, against either a state or other non-state groups, and reaching such an intensity as to be

considered armed conflict involving regular military forces.[93] Despite being among the least developed areas of IL, the proportion of global conflict contained within the scope of Non-international Armed Conflict has spiked since the latter decades of the 20th century, and civil wars, internal armed conflicts, and clashes generally involving at least one non-state actor now account for the vast majority of conflict worldwide.[94] There has been no definitive convention laying out the essential legal parameters of non-international armed conflict, although Article 3, common to all the Geneva Conventions, does lay out the parameters of what constitutes Non-international Armed Conflict.[95] Rather, this murky and largely undefined corner of IL has evolved situationally, as international norms have bent and adapted to respond to civil wars and the growing role of non-state actors in modern conflict. In this sense, it has evolved largely through the development of *lex ferenda*, the name given to the emerging behaviors, statements, and positions of countries, that signal the emergence of new legal consensus. *Lex ferenda* means literally "future law", and as such is not definitive, in contrast to established norms set out by conventions or treaties, and might best be interpreted as the direction that law may be moving in the future.[96] Over the last 19 years of what has been broadly characterized as the "War on Terror", there has been a rapid evolution in these norms, and that evolution has only accelerated during the

[93] M. Sassoli, A. Bouvier, A. Quintin, & J. Gringon, *Non-international armed conflict*, (2011): https://casebook.icrc.org/glossary/non-international-armed-conflict

[94] S. Von Einsiedel, 2017. *Civil War Trends And The Changing Nature Of Armed Conflict*. [ebook] United Nations University, pp.2-8. Available at: <: https://i.unu.edu/media/cpr.unu.edu/attachment/1558/OC_01-MajorRecentTrendsinViolentConflict.pdf> [Accessed 5 January 2021].

[95] M. Sassoli, A. Bouvier, A. Quintin, & J. Gringon, *Non-international armed conflict*, (2011): casebook.icrc.org/glossary/non-international-armed-conflict

[96] H. Thirlway, "Reflections on lex ferenda," *Netherlands Yearbook of International Law 32*, (2001): 3-26. doi:10.1017/S0167676800001148

duration of the Syrian conflict and the international effort to vanquish the Islamic State.[97]

A major and largely unsettled point of contention in the Law of Non-international Armed Conflict, which takes on particular relevance in the case of repatriating Islamic State fighters, is the legal authority of non-state actors, such as the SDF, to detain and imprison individuals in the theater of armed conflict. Under the authority of the Kurdish-led Self Administration, the region of Rojava in northeast Syria effectively declared de-facto autonomy from the Syria state, following the withdrawal of pro-Assad forces in early 2012.[98] In many respects, the Self Administration has evolved over the past decade to become one of the most highly developed non-state entities operating in Syria, with a highly developed bureaucracy, tax collection system, and defense apparatus under the umbrella of the US-backed SDF that was instrumental in defeating the Islamic State.

However, the SDF has been extensively supported by the Global Coalition to Defeat ISIS, and its detention of Islamic State fighters is almost universally supported by states—both explicitly through political declarations, and implicitly by states' policies of encouraging the SDF's detainment of their citizens. Thus, the Syrian conflict may be rapidly moving the world towards an evolving standard of *lex ferenda* in which non-state actors may be increasingly viewed in some instances as viable partners, given greater acceptance to act informally like states in the realm of security and justice. It

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[97] A. Jakab, "Breaching Constitutional Law on Moral Grounds in the Fight against Terrorism: Implied Presuppositions and Proposed Solutions in the Discourse on the Rule of Law vs. Terrorism." *International Journal of Constitutional Law* 9, no. 1 (2011): 58-78. Accessed December 6, 2020. doi:10.1093/icon/mor016.

[98] J. Clark & M. Ibrahim, "The State of Rojava: A month-long reporting series from Syria Direct," *Syria Direct*, 5 November, 2017, https://syriadirect.org/news/the-state-of-rojava-a-month-long-reporting-series-from-syria-direct/

also fits into a larger migration of international law toward partnership with a variety of types of non-state groups, in the name of practicality, for combatting transnational jihadist threats. The evidence of these shifting norms toward non-state actors is hinted at by hundreds of statements and actions by nations around the world. To take one example among many, French president Emmanuel Macron has repeatedly and publicly lauded the SDF as a legitimate coalition partner, playing an indispensable role in stabilizing northeast Syria.[99] Beyond statements by figures in Europe, North America, and around the world, the SDF has been legitimized as an official partner in the Global Coalition to Defeat ISIS, receiving hundreds of millions of dollars of funding from states over the past six year.[100] Given the vast amount of material and diplomatic support granted to the Self Administration and its proxies, arguments by some of these very same states that they cannot coordinate repatriations with the SDF, due to its status as a non-state actor, ring as particularly hollow and disingenuous.[101]

3.3.2. Revamping national terrorism laws

A major source of public and official opposition to repatriating Islamic State foreign fighters is fear that domestic justice systems are simply not equipped to handle such uniquely dangerous and unconventional criminals. Much has been made of the fact that domestic terrorism laws sometimes fall short of what is necessary to effectively

[99] J. Irish, & M. Pennetier, "France's Macron vows support for northern Syrians, Kurdish militia," *Reuters*, March 29, 2018, https://www.reuters.com/article/us-mideast-crisis-syria-france/frances-macron-vows-support-for-northern-syrians-kurdish-militia-idUSKBN1H52V1

[100] L. Mylroie, "US clarifies confusion over 2019 funds for SDF," *Kurdistan24*, February 14, 2018, https://www.kurdistan24.net/en/story/14718-US-clarifies-confusion-over-2019-funds-for-SDF

[101] W. Christou, "Is the EU Obligated to Repatriate Its Children from Northeast Syria?" *Syria Direct*, July 16, 2020, https://syriadirect.org/news/is-the-eu-obligated-to-repatriate-its-children-from-northeast-syria/.

prosecute these individuals, thus potentially setting them free for atrocities committed abroad, and exposing the general public back home to potential danger from fighters after they are released from relatively light sentences.[102]

The issues presented by this scenario are not unforeseen by the international community, and concrete steps were taken by many states and international bodies early on to prepare for future prosecutions of Islamic State fighters. A centerpiece of these efforts is UNSCR 2178, adopted in September 2014, which called upon all UN member states to enact domestic laws that would codify legislation allowing for prosecution of returning foreign fighters and Islamic State supporters.[103] However, subsequent efforts by nations to rapidly overhaul domestic anti-terrorism laws in adherence with the Security Council resolution, to effectively address the unique challenge of the Islamic State era, have had mixed results. In the text, UNSCR 2178 suggests five principal areas where Islamic State foreign fighters might be effectively prosecuted in courts back home. The resolution urges states to update domestic legislation to effectively criminalize travel for the purpose of perpetuating or participating in criminal acts, traveling for the purpose of receiving terrorist training, traveling for the purpose of assisting others in traveling to commit terrorist acts, recruiting individuals to travel for committing terrorist acts, and providing or receiving resources to commit terrorist acts in your own territory.[104] A number of countries have been proactive in the process of overhauling their justice codes, taking responsive steps to enact such laws as

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[102] L. Daniels, (2019, October 31). Prosecuting Terrorism in State Court. Retrieved January 05, 2021, from https://www.lawfareblog.com/prosecuting-terrorism-state-court

[103] United Nations Security Council Counter-terrorism Committee Executive Directorate. (2015). *Implementation Of Security Council Resolution 2178 (2014) By States Affected By Foreign Terrorist Fighters: A Compilation Of Three Reports*. UNSC, pp.28-38.

[104] United Nations Security Council Counter-terrorism Committee Executive Directorate. (2015). *Implementation Of Security Council Resolution 2178 (2014) By States Affected By Foreign Terrorist Fighters: A Compilation Of Three Reports*. UNSC, pp.28-38.

recommended by UNSCR 2178.[105] However, at least one UN study found that of these five major legal and policy recommendations that the resolution had made for states to effectively prosecute returning fighters, only 25 percent of member states had complied with all five. In fact, less than 40 percent of member states had domestic legislation on the books that effectively complied with even one of the five recommendations.[106] This failure to act only fuels skepticism that domestic legal systems can process Islamic State crimes, contributing to public resistance against repatriation.

Even with an abundance of apparent foresight among states, preparing and laying the groundwork for charging foreign fighters upon their return, recent history shows that most countries have indeed managed remarkably few successful prosecutions of Islamic State fighters after they did return home.[107] In reaction to these challenges, the British government recently moved to go beyond the recommendations of UNSCR 2178, codifying a law that makes simple entry into designated "terrorism hotspots" a crime punishable by up to 10 years imprisonment.[108] Other high profile cases have also resulted in mild sentences, and most individuals have faced charges that fall far short of war crimes and other atrocities. An illustrative example involves the German national Omaima Abdi, the widow of the infamous German rapper and Islamic State fighter, Dennis Cuspert. The prosecution was buoyed by unique and unrestricted

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[105] Kersti Braun, *Counterterrorism Yearbook 2020*, Report. Edited by Kfir Isaac and Coyne John. Australian Strategic Policy Institute, 2020. 39-42. Accessed October 27, 2020. doi:10.2307/resrep25133.11.

[106] United Nations Security Council Counter-terrorism Committee Executive Directorate. (2015). *Implementation Of Security Council Resolution 2178 (2014) By States Affected By Foreign Terrorist Fighters: A Compilation Of Three Reports*. UNSC, pp.28-38.

[107] Braun, Kersti. *Counterterrorism Yearbook 2020*. Report. Edited by Kfir Isaac and Coyne John. Australian Strategic Policy Institute, 2020. 39-42. Accessed October 27, 2020. doi:10.2307/resrep25133.11.

[108] Nicky Harley, "EU Calls for Returning ISIS Fighters to Be Prosecuted as War Criminals," *The National*. May 22, 2020, https://www.thenationalnews.com/world/eu-calls-for-returning-isis-fighters-to-be-prosecuted-as-war-criminals-1.1023407.

access to incriminating evidence, due to a trove of photos and messages uncovered by journalists from Abdi's Syrian phone, which revealed Abdi's complicity in the enslavement of a 13-year-old Yazidi girl imprisoned by her and Cuspert in their home. Despite the favorable circumstances for authorities in this case, prosecutors were only able to convict Abdi on a slew of lesser charges, including membership in a "terrorist" organization, child neglect, and possession of firearms, ultimately resulting in a three-and-a-half year prison sentence.[109]

3.3.3. Issue of jurisdiction

Although Islamic State atrocities were committed in the territories of Syria and Iraq, there are several reasons for which domestic courts back home can assert jurisdiction over these cases and prosecute citizens, regardless of where crimes were perpetrated. In the case of repatriated foreign fighters, the issue is fairly straightforward and prosecution generally permitted at home on the basis of the "active nationality" principle.[110] This principle asserts that a court may claim jurisdiction over any criminal case involving a citizen of that nation who violates the criminal code of their home nation.[111] Of the returning Islamic State foreign fighters who have been tried under this principle of jurisdiction, most have been found in violation of laws with a relatively low

[109] "Daesh Widow Jailed in Germany for Enslaving Yazidi Girl," *Middle East Monitor*, October 5, 2020. https://www.middleeastmonitor.com/20201005-daesh-widow-jailed-in-germany-for-enslaving-yazidi-girl/.
[110] T. Mehra, "Bringing (Foreign) Terrorist Fighters to Justice in a Post-ISIS Landscape Part II: Prosecution by Foreign National Courts," *ICCN*, (2018): https://icct.nl/publication/bringing-foreign-terrorist-fighters-to-justice-in-a-post-isis-landscape-part-ii-prosecution-by-foreign-national-courts/
[111] C. Ryngaert, "The Principles of Extraterritorial Criminal Jurisdiction." *Jurisdiction in International Law*, 2008, 85-133. Accessed December 6, 2020. doi:10.1093/acprof:oso/9780199544714.003.0004.

burden of evidence, such as domestic laws forbidding membership in a terrorist organization.[112]

In the case of more egregious offenses however, domestic courts can also freely exercise the right to "universal jurisdiction". This can be utilized to prosecute only the most serious of crimes, such as war crimes, crimes against humanity, and genocide—all of which have been documented and committed by members of the group.[113] Most instances of foreign courts invoking universal jurisdiction to prosecute crimes in Syria have not, in fact, involved Islamic State foreign fighters, but rather have pursued Syrian government and security officials who have attempted to receive asylum in Europe. In Germany for example, eight survivors of torture joined to file a complaint for the arrest of several Syrian government officials who they discovered to be residing in the country.[114] In another case, a Spanish citizen filed a complaint against nine government officials, who she accused of torturing her brother in Syria.[115] With sufficient evidence for an individual case, there is no reason that universal jurisdiction could not also be used to prosecute Islamic State officials of any nationality abroad as well.

3.3.4. Collection of evidence

[112] T. Mehdra, Bringing (Foreign) Terrorist Fighters to Justice in a Post-ISIS Landscape Part II: Prosecution by Foreign National Courts," https://icct.nl/publication/bringing-foreign-terrorist-fighters-to-justice-in-a-post-isis-landscape-part-ii-prosecution-by-foreign-national-courts/

[113] Basic Facts on Universal Jurisdiction. (2009, October 19). Retrieved January 05, 2021, from https://www.hrw.org/news/2009/10/19/basic-facts-universal-jurisdiction

[114] Brosch, P. (2019, April 01). Opinion | Here's how German courts are planning to prosecute Syrian war crimes. Retrieved January 05, 2021, from https://www.washingtonpost.com/news/democracy-post/wp/2017/04/04/heres-how-german-courts-are-planning-to-prosecute-syrian-war-crimes/?utm_term=.87b8195aacf0

[115] Jones, S. (2017, March 27). Spanish court to investigate Syrian 'state terrorism' by Assad regime. Retrieved January 05, 2021, from https://www.theguardian.com/world/2017/mar/27/spanish-court-syria-state-terrorism-assad-regime-mrs-ah

Among the most vexing issues facing authorities as they build cases to prosecute returning foreign fighters is the gap between the burden of proof required in many criminal law systems around the world, and their ability to gather evidence that would be permissible in a courtroom from the crime scene, often thousands of miles away. The result is tangible fear that authorities in home countries will fail to successfully prosecute returnees on charges befitting the severity of their crimes, and specific issues have already repeatedly arisen as prosecutors from an array of states grapple with how best to pursue convictions.

Permissible evidence in criminal cases is generally considered to include exhibits (i.e. physical evidence), testimony, documentary material, or demonstrative evidence.[116] Very few states are able to conduct on-site missions to collect material evidence, or contact witnesses to provide corroborating testimony in the unstable warzones where the Islamic State operated. While there have been examples of mutual legal assistance between states to prosecute international crimes in the past, in general, these levels of cooperation are generally low, and encumbered by bureaucratic inefficiency.[117] Given the lack of a credible and internationally-recognized authority to cooperate with in northeast Syria, challenges of mutual legal assistance are even more daunting in these situations. Combined with the high burden of proof typically demanded by the criminal justice systems of many nations, this adds up to present major impediments to effective prosecution of foreign fighters for more serious crimes in their home countries.

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[116] Gehl, Rod, and Darryl Plecas. "Chapter 3: What You Need To Know About Evidence." Essay. In *Introduction to Criminal Investigation: Processes, Practices and Thinking* \, 33–46. Minneapolis, MN: Open Textbook Library., 2017.

[117] 2015. *Implementation Of Security Council Resolution 2178 (2014) By States Affected By Foreign Terrorist Fighters: A Compilation Of Three Reports*. UNSC, pp.28-38.

3.4. Prosecutions of Islamic State foreign fighters

Given the failure of most states to actively repatriate their citizens, and the position of the Self Administration that fighters must be tried in their home countries, the vast majority of prosecutions against Islamic State fighters have taken place in Iraq. Allowing their citizens to be tried and imprisoned with lengthy sentences abroad, or even sentenced to death, has proven a tempting solution for some states. However, numerous issues have arisen within the Iraqi justice system, including mass trials with no legal representation in defendants' native languages, allegations of confessions extracted under torture, and inhumane holding conditions with extreme levels of overcrowding. As a result of these problems, some countries such as France have faced harsh criticism within legal circles for adopting policies that quietly encourage Iraqi officials to prosecute their citizens, despite laws that forbid their nationals from being prosecuted in countries like Iraq that utilize the death penalty.[118]

3.4.1. Prosecutions in Iraq

The Iraqi government has been far more proactive and aggressive than the Kurdish-led Self Administration in Syria when it comes to prosecuting fighters and non-combatants for crimes connected to the Islamic State. To date, Iraqi courts have processed at least 20,000 cases against members of the group, including a substantial

[118] Stevoli, Margherita. "Condemned to Death Abroad: The Case of French ISIS Members in Iraq." Just Security. September 18, 2019. Accessed January 02, 2021. https://www.justsecurity.org/66215/condemned-to-death-abroad-the-case-of-french-isis-members-in-iraq/.

number of prosecutions against women and children. When it comes to the figures involving foreign fighters specifically, researchers have been forced to rely largely on guess work due to an informal policy of secrecy by officials in Baghdad, who have thus far refused to release any state records detailing the number of foreigners who have been charged and convicted. However, substantial evidence has arisen that foreign nationals are being largely dealt with through speedy mass trials, often in the absence of qualified translators or the opportunity to mount a robust legal defense.

In June 2018, Human Rights Watch issued a damning report intended to raise alarm in foreign capitals and alert governments to the precarious situation of their nationals sitting in Iraqi custody. The report claimed that women were being sentenced in mass to death or life imprisonment by the judiciary in Baghdad, generally in criminal cases centered on their illegal entry to the country, association with the Islamic State, or for marrying and receiving financial assistance from Islamic State fighters.[119] In general, watchdog groups have found this legal process to lack basic judicial consistency, with little effort by authorities to differentiate between specific crimes committed by individuals, and overall absence of legal counsel for defendants.[120] Despite widely varying estimates of how many trials have taken place in Iraq, sources from within the court system there have estimated conviction rates are in excess of 98 percent.[121] In pre-trial, groups like Human Rights Watch have also highlighted

[119] "Iraq: Change Approach to Foreign Women, Children in ISIS-Linked Trials." Human Rights Watch, October 28, 2020. https://www.hrw.org/news/2018/06/21/iraq-change-approach-foreign-women-children-isis-linked-trials.

[120] "Flawed Justice." Human Rights Watch, December 15, 2017. https://www.hrw.org/report/2017/12/05/flawed-justice/accountability-isis-crimes-iraq.

[121] Coker, Margaret, and Falih Hassan. "A 10-Minute Trial, a Death Sentence: Iraqi Justice for ISIS Suspects." The New York Times. April 17, 2018. Accessed January 09, 2021. https://www.nytimes.com/2018/04/17/world/middleeast/iraq-isis-trials.html.

deplorable housing conditions and overcrowding that plague prison facilities where most Islamic State fighters, men, women, and children are being kept.[122]

3.4.2. Prosecutions in Syrian Kurdistan

In Syria, the legal situation is murkier and significantly complicated by the disruption of most official cooperation between the Assad regime and the rebellious Self Administration, the Kurdish-led authority that governs most of the area once under Islamic State control. As a political entity, the Self Administration is arguably the most developed among all non-state actors in Syria, establishing a relatively complex system of governance, education, taxation, and even rudimentary justice apparatus that has many trappings of an emergent state. However, this judicial system remains largely unofficial, has functioned only in limited instances as a full-fledged court. It lacks the resources that would be required to prosecute tens of thousands of Islamic State fighters, a judicial task that has no true precedent in the history of modern warfare.

A small number of Syrian and Iraqi fighters have been tried in *ad hoc* and informal "People's Protection Courts" set up by the Self Administration to adjudicate on cases within Kurdish territory. These trials have generally resulted in fighters' statuses being regularized within the framework of locally negotiated amnesty plea bargains.[123] However, Kurdish officials have made numerous public declarations that

[122] Miranova, Vera. (July 28, 2020.) "Iraq's Broken Justice System for Islamic State Fighters." Lawfare. Accessed January 02, 2021. https://www.lawfareblog.com/iraqs-broken-justice-system-islamic-state-fighters.

[123] Houry, Nadim. "The "Unreturned": Dealing with the Foreign Fighters and Their Families Who Remain in Syria and Iraq." In *Militant Jihadism: Today and Tomorrow*, by Pektas Serafettin and Leman Johan, 59-82. Leuven (Belgium): Leuven University Press, 2019. Accessed November 11, 2020. doi:10.2307/j.ctvq2vzmt.7.

foreign states must repatriate their citizens, as officials lack the resources required to effectively prosecute the foreigners incarcerated in facilities across northeastern Syria.[124] As an extension of chronic underfunding and a lack of international support, IDP camps containing Islamic State families are understaffed and bursting at the seams with overcrowding, a state of affairs that has forced authorities in the Self Administration to begin releasing a limited number of these individuals into the nearby towns and cities from which many of them originated.[125]

3.4.3. Prosecutions in other countries

Despite the numerous difficulties, a number of Islamic State fighters have been detained and successfully prosecuted around the world, sometimes after repatriation by governments in their home countries. The vast majority of these cases centered on membership in a terrorist organization, providing material support to terrorist organizations, or traveling for the purpose of committing terrorist acts—criminal code violations that were also recommendations of UNSCR 2178. In October 2020, the US Justice Department brought charges against 27 repatriated American foreign fighters for supporting a terrorist organization.[126] In the face of limited progress on the question of repatriation, a number of European nations have also convicted dozens of their citizens, often high profile members of the Islamic State, *in absentia* for crimes they committed

[124] Seldin, Jeff. "Support Crumbling for Plan to Try IS Foreign Fighters in Syria ." Voice of America, February 8, 2020. https://www.voanews.com/middle-east/support-crumbling-plan-try-foreign-fighters-syria.
[125] "Syria: Dire Conditions for ISIS Suspects' Families." Human Rights Watch, October 28, 2020. https://www.hrw.org/news/2019/07/23/syria-dire-conditions-isis-suspects-families.
[126] "US to Prosecute Dozens of Repatriated ISIS 'foreign Fighters':." Arab Weekly. October 02, 2020. Accessed January 02, 2021. https://thearabweekly.com/us-prosecute-dozens-repatriated-isis-foreign-fighters.

in Syria and Iraq.[127] However, as a general rule the vast majority of returning Islamic State supporters have not yet been charged in their home nations. The British government estimates that only 10 percent of European citizens have faced prosecution upon their return.[128]

In situations where more serious crimes have been brought against individuals, the cases usually involve usable evidence of atrocities being committed, either on video, through photos, or on social media posts. A report issued in May 2020 by Eurojust, the EU agency that is responsible for coordinating justice among 27 member state domestic legal systems, urged the use of "cumulative charging" as a method of prosecuting Islamic State fighters for core international crimes, such as genocide and war crimes. The report cited 20 individual cases across the EU nations of Germany, France, Sweden, Finland, Hungary, and the Netherlands, in which evidence of this sort was used to bring more serious charges against Islamic State members. In addition to membership in a terrorist organization, these crimes included war crimes, participating in *hors de combat* executions, slavery, murder, and "pillaging".[129] In another high profile case, the US government announced the transfer to American custody of two British citizens, members of a group popularly known as "the Beatles", who were involved in the graphic torture and murder of American journalist James Foley and

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[127] Birnbaum, Michael. "Months after the Fall of ISIS, Europe Has Done Little to Take Back Its Fighters." The Washington Post. June 20, 2019. Accessed January 02, 2021. https://www.washingtonpost.com/world/europe/after-caliphate-collapsed-europe-has-done-little-to-take-back-those-who-joined-isis/2019/06/20/4bab9cc2-8bc4-11e9-b6f4-033356502dce_story.html.

[128] Harley, Nicky. "EU Calls for Returning ISIS Fighters to Be Prosecuted as War Criminals." The National. The National, May 22, 2020.

[129] "Increase in Cumulative Charges for Terrorism and War Crimes." Eurojust. May 23, 2020. Accessed January 02, 2021. https://www.eurojust.europa.eu/increase-cumulative-charges-terrorism-and-war-crimes.

three other American citizens in 2014.[130] As the act was filmed, the trial will proceed in a Virginia courtroom on yet to be announced charges, that will likely carry multiple life sentences, rather than on the less serious crime of membership in a terrorist organization.[131]

3.5. Foreign fighters as security threats

In the case of returning radicalized fighters, studies of historical precedents have found that on average across states, approximately one in nine will go on to commit acts of terror at home. Of those attacks that do involve foreign fighters however, they are far more likely to involve casualties, owing to expertise, connections, and combat training acquired abroad.[132] Given the massive numbers of individuals who travelled to Iraq and Syria at the height of the conflict, this figure at least raises the possibility of hundreds of potentially dangerous individuals roaming free across dozens of nations. The danger is not simply the possibility that these former fighters may carry out attacks themselves, but also the threat that many could help spread the influence and ideology of the Islamic State deep into their home communities, inspiring others to act in the future.

3.5.1. Attacks involving returned foreign fighters

[130] Lu Phillips, Roger. "The "Beatles" on Trial: Obtaining Justice for Victims of Foreign ISIS Fighters." Just Security. October 09, 2020. Accessed January 02, 2021. https://www.justsecurity.org/72152/the-beatles-on-trial-obtaining-justice-for-victims-of-foreign-isis-fighters/.
[131] Goldman, Adam, and Charlie Savage. "Islamic State 'Beatles' Jailers Are Charged in Abuse of Murdered Hostages." The New York Times. October 07, 2020. Accessed January 02, 2021. https://www.nytimes.com/2020/10/07/us/politics/beatles-islamic-state.html.
[132] Thomas Hegghammer, "Should I stay or should I go? Explaining variation in Western jihadists' choice between domestic and foreign fighting." American Political Science Review 107.1 (2013): 10.

Fears of violence are certainly not unfounded, and there have already been several high profile cases of returning foreign fighters, usually acting in the name of the Islamic State, conducting massacres and targeting civilians on their home soil. The most infamous and deadly incident of this kind to date in Europe was the November 2015 attack in Paris, in which members of an Islamic State sleeper cell—several of whom were European citizens who had previously traveled to Syria to fight and receive training—simultaneously targeted a number of sites around the French capital, including the Bataclan Theater, a football match at the Stade de France, and several restaurants and bars over the course of one night.[133] The highly coordinated attacks claimed the lives of over 416 people, and represented the deadliest attack on European soil since the 2004 Madrid train bombings, and the largest act of violence perpetrated on French soil since World War II.[134] Another example is the case of Mehdi Nemmouche, a Belgian returnee from Syria, who in May 2017 attacked the Jewish Museum in Brussels. He is also suspected by authorities of having a hand in planning the prior attacks in Paris, and is the first returning Islamic State foreign fighter known to have perpetrated an attack in the EU.[135]

While receiving the greatest media scrutiny, attacks have not been limited to the European continent. Another high profile example of bloodshed linked to Islamic State foreign fighters shook the nation of Sri Lanka on Easter Sunday in 2019, in an attack

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[133] Henley, Jon, and Ian Traynor. "Movements of Isis Extremist Prior to Paris Attack Raise EU Security Questions." The Guardian. Guardian News and Media, November 19, 2015. https://www.theguardian.com/world/2015/nov/19/movements-of-isis-extremist-prior-to-paris-attack-raises-eu-security-questions.

[134] Lynch, Suzanne. "Europe's Open-Border Policy May Become Latest Victim of Terrorism." The Irish Times. The Irish Times, November 19, 2015. https://www.irishtimes.com/news/world/europe/europe-s-open-border-policy-may-become-latest-victim-of-terrorism-1.2435486.

[135] Brussels Jewish Museum murders: Mehdi Nemmouche guilty. (2019, March 07). Retrieved January 05, 2021, from https://www.bbc.com/news/world-europe-47490332

that targeted three churches and luxury hotels in the capital of Colombo. One of the deadliest single coordinated attacks to take place on Sri Lankan soil, the death toll ultimately topped 269 people and is credited with destabilizing relations between the country's diverse religious communities, which span Muslim, Christian, Hindu, and Buddhist traditions.[136] At the center of the Easter violence was the suicide bomber Zaharan Hashim, a Sri Lanka national who had traveled to Syria and received training from the Islamic State before returning home independently to spearhead operations for the group. Another bomber involved is suspected to have received similar training with the group's operatives in Turkey.[137] In an estimate two years prior to the attack, Sri Lankan officials had estimated that at least 32 nationals had already traveled to fight with the Islamic State in Syria.[138]

These examples and others serve to illustrate the potent threat that returning Islamic State fighters pose to public safety and security. However, it should also be noted that none of the individuals involved in any of the attacks mentioned here were repatriated by their governments from conflict zones in Iraq and Syria, but rather returned through other avenues.[139] The challenge of reintegrating fighters into society, particularly given the likely shortcomings that domestic prosecutors are liable to face, is of paramount importance and must be thoroughly considered by policy makers and security officials moving forward.

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[136] Sri Lanka attacks: Easter Sunday bombings marked one year on. (2020, April 21). Retrieved January 05, 2021, from https://www.bbc.com/news/world-asia-52357200

[137] Gettleman, J., Bastians, D., & Beech, H. (2019, May 03). 'We Knew What Was Coming': Sri Lanka Sees ISIS' Hand in Attacks. Retrieved January 05, 2021, from https://www.nytimes.com/2019/05/03/world/asia/sri-lanka-attacks-isis.html

[138] Aneez, S. (2016, November 18). Sri Lanka says 32 'elite' Muslims have joined Islamic State in Syria. Retrieved January 05, 2021, from https://www.reuters.com/article/us-mideast-crisis-syria-sri-lanka/sri-lanka-says-32-elite-muslims-have-joined-islamic-state-in-syria-idUSKBN13D1EE

[139] Trudy Govier & David Boutland (2020) Dilemmas regarding returning ISIS fighters, Ethics & Global Politics, 13:2, 93-107, DOI: 10.1080/16544951.2020.1756562

3.5.2. Deradicalization programs

Beyond simply imprisoning returning foreign fighters, many governments have grasped that prison terms alone are not a quick fix for the long-term security risks posed by their citizens who fought in Syria and Iraq. Prisons themselves have often served as incubators for radical ideologies and extremists networks, as witnessed by the very leadership of the Islamic State—many, such as figurehead commander Abu Bakr al-Baghdadi, were first introduced to each other while imprisoned by American forces during the Iraq War from 2003 to 2011.[140] Furthermore, given the difficulty of connecting Islamic State prisoners to specific atrocities committed in remote pockets of Syria and Iraq, many of the prosecutions have instead focused on much less serious charges, such as membership in a terrorist organization, which carry significantly shorter prison sentences. To contend with these challenges, a number of states have realized that de-radicalization programs will be an essential part of the post-repatriation process, and have already invested in such efforts. While some experts have debated the merits of deradicalization, citing other causes such as material benefit, community, friendship, and sense of purpose as the main drivers of joining extremist organizations, it bears remembering how the Islamic State itself viewed ideology and indoctrination. All new recruits were expected to attend a two week course, teaching the tenets of religion through an extremist lens and providing ideological justification for murder of

[140] Eaton, J. (2016, August 25). U.S. Military Now Says ISIS Leader Was Held in Notorious Abu Ghraib Prison. Retrieved January 05, 2021, from https://theintercept.com/2016/08/25/u-s-military-now-says-isis-leader-was-held-in-notorious-abu-ghraib-prison/

"non-believers".[141] Thus, considering that most fighters are likely to rejoin society at some point in the future, it seems necessary to prove a counterpoint to this indoctrination and training. France, Denmark, Germany, the Netherlands, Sweden, and the United Kingdom have all reportedly instituted deradicalization programs for their nationals returning from Syria and Iraq.[142]

Malaysian authorities have made a one month rehabilitation program a mandatory condition for all citizens repatriated from detention facilities in Syria. While receiving generally positive reviews from observers abroad, the program has been harshly criticized within Malaysia for failing to convincingly de-radicalize fighters. Due to its compulsory nature, some critics contend that individuals merely cooperate in hopes of securing an early release and fulfilling their obligations to the state for repatriation.[143] Another common approach, which Belgium, Austria, and a number of other countries have utilized, involves sending trained imams into prisons where they can directly engage with former Islamic State fighters on a voluntary basis, discussing their motives for leaving home and addressing them on the specific points of each individual. Redouan Safidi, a Belgian imam who has been a part of these efforts, has stressed that many foreigners left to join jihadist groups when they were relatively young, and usually in extremely vulnerable moments of their lives. He has publicly expressed his belief that the vast majority of foreign fighters can ultimately be

[141] Speckhard, A., & Ellenberg, M. (2021, January 01). Can an ISIS Terrorist be Rehabilitated and Reintegrated into Society? Retrieved January 05, 2021, from https://www.hstoday.us/subject-matter-areas/counterterrorism/can-an-isis-terrorist-be-rehabilitated-and-reintegrated-into-society/

[142] Jenkins, Brian Michael. "Options for Dealing with Islamic State Foreign Fighters Currently Detained in Syria." Combating Terrorism Center at West Point. June 06, 2019. Accessed January 02, 2021. https://ctc.usma.edu/options-dealing-islamic-state-foreign-fighters-currently-detained-syria/.

[143] Abdul Nasir, A. (2020, May 26). Returning Foreign Fighters: Is Malaysia Ready? Retrieved January 05, 2021, from https://www.mei.edu/publications/returning-foreign-fighters-malaysia-ready

rehabilitated through long-term programs, and after serving their prison sentences, safely reintegrated into society.[144]

CHAPTER 4

[144] Speckhard, A., & Ellenberg, M. (2021, January 01). Can an ISIS Terrorist be Rehabilitated and Reintegrated into Society? *Homeland Security Today*. Retrieved January 05, 2021, from https://www.hstoday.us/subject-matter-areas/counterterrorism/can-an-isis-terrorist-be-rehabilitated-and-reintegrated-into-society/

POLITICAL ORPHANS OF A FALLEN STATE

While armed conflict sweeps up entire societies and destroys the lives of all segments of the population, children are inevitably the most vulnerable group—suffering the deepest and longest lasting impacts of any conflagration. Young children are viewed inherently as civilian non-combatants through the eyes of international law, and are treated fundamentally as victims rather than perpetrators, even in instances when they have been coerced into the ranks of armed groups. In a sense, the attention paid to children in conflict rose over the course of the 20th century as war itself changed, and civilians increasingly became targets of violence.[145] During WWI, civilians made up a mere 5 percent of total those killed over the course of the conflict. In the subsequent four decades following WWII, from 1945-1982, the majority of conflict deaths were civilians. An additional 1.5 million children were killed and 4 million disabled during various conflicts around the world between the years 1984 and 1994, and a great many more across all regions of the Syrian conflict.[146]

Children are afforded special protections under international law, the roots of which go back at least a century. The legal question of whether children constitute a unique party to conflict, requiring additional protections beyond those afforded to regular civilians in, was first raised internationally in the 1924 Declaration of the Rights of the Child. The declaration established little more than an initial principle that children should be the first group provided with humanitarian aid in the course of a

[145] Cronin, B. (2013). Reckless endangerment warfare. *Journal of Peace Research, 50*(2), 312-318. doi:10.1177/0022343312468460

[146] Van Bueren, Geraldine. "The International Legal Protection of Children in Armed Conflicts." *The International and Comparative Law Quarterly* 43, no. 4 (1994): 809-10. Accessed December 6, 2020. http://www.jstor.org/stable/761002.

militarized conflict. However, it laid the foundations for numerous future conventions that would lay down fundamental and unique protections for children against the effects of armed hostilities, such as the Convention for the Protection of Children in Emergency and Armed Conflict (1939), Convention for the Protection of Children in the Event of International Conflict or Civil War (1946), and the Geneva Convention on the Protection of Civilians (1949), which incorporates 17 articles specific to children in conflict zones.[147]

While these conventions address the effects of conflict on children, the question of children's culpability for atrocities is a somewhat more complex issue. The International Criminal Court (ICC) is unable by design to prosecute any individual under age 18, although the Office of the Special Representative of the Secretary General has stated that this is to let individual states make the ultimate decision on whether to pursue charges against minors, rather than as a statement that such prosecutions are inherently inappropriate for certain crimes.[148] The age of criminal responsibility varies considerably across nations, ranging anywhere from 7 to 16-years-old around the world.[149] Perhaps the best age benchmark for criminal responsibility in conflict is set indirectly by International Humanitarian Law, in which it is a crime to coerce children under the age of 15 into an armed group.[150]

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[147] Van Bueren, Geraldine. "The International Legal Protection of Children in Armed Conflicts." *The International and Comparative Law Quarterly* 43, no. 4 (1994): 812. Accessed December 6, 2020.
[148] Children and Justice During and in the Aftermath of Armed Conflict - World. (2011, September 12). Retrieved January 05, 2021, from https://reliefweb.int/report/world/children-and-justice-during-and-aftermath-armed-conflict
[149] Should child soldiers be prosecuted for their crimes? (2019, July 15). Retrieved January 05, 2021, from https://www.thenewhumanitarian.org/analysis/2011/10/06/should-child-soldiers-be-prosecuted-their-crimes
[150] United Nations High Commissioner for Refugees. (2011, September). Working Paper No. 3, Children and Justice During and in the Aftermath of Armed Conflict. Retrieved January 05, 2021, from https://www.refworld.org/docid/4e6f2f132.html

In the case of the Islamic State, young children were both the victims and perpetrators of violence as a result of the group's frequent use of child soldiers. However, given the precedent of numerous conventions and prevailing views of younger children as blameless victims of conflict, the issues and questions surrounding repatriation of children differ significantly from that of adult fighters in Syria and Iraq. As such, foreign children and dual citizens are dealt with separately from foreign fighters, so as to discuss the very different processes that have surrounded efforts to repatriate them. This section will also touch upon the subject of adult women non-combatants, who have often fallen into a complex grey zone between the two groups. Despite having travelled to join the group as adults, authorities have often found difficulty prosecuting non-combatant women for crimes other than membership in a "terrorist" organization, and in other situations for child neglect or abduction.

4.1. Children as a tool of jihad

The Islamic State has contributed its own unique chapter to the role of children in armed conflict, using those born under their reign and brought to the region by ideologically sympathetic family members in ways that differentiate them from other victims of the group's brutality. Children were largely seen as a tool to further the group's objectives both on the battlefield and in the larger war of public opinion and image. As a lynchpin of Islamic State propaganda, the presence of children living in the "caliphate" was a critical element of the group's attempts to present itself to the world as more than just another militia engaged in the Syrian conflict. The message as well that these children's mothers, non-combatant women, travelled to Syria and Iraq as willing followers of the group, allowed leaders to further present the Islamic State as an

emergent nation that offered Muslims an entire alternative society with other men, women, and families. Just as Islamic State recruiters dedicated significant energy to recruiting women to leave their home countries and travel to join the group, parents were often encouraged to bring their children along with them. There is no shortage of examples of adults abducting their children and leaving secretly for warzones controlled by the Islamic State. A number of these individual cases also received extensive media coverage in their home countries. Thousands of children are estimated to have been abducted and brought along with family members who made the crossing from Turkey into Syria between 2015 and 2019, many of them never to return.

4.1.1. Parental abductions of children

The act of endangering children by bringing them to a warzone, has served as a central basis for prosecution against some returning Islamic State supporters, particularly mothers, and several high profile cases have already concluded against these individuals. One case that received extensive media coverage is that of 38-year-old French national Jihane Makhzoumi. Along with her then husband Eddy Leroux, the couple left their home in eastern France in August 2014, abducting and transporting their four children on the dangerous journey, including three children who were born from previous marriages and had surviving second parents living in France. While Leroux is suspected to have died on the battlefield in Syria, Makhzoumi ultimately returned with just three of the children, leaving the fourth behind with her current whereabouts uncertain.[151] Prosecutors in Paris ultimately charged Makhzoumi and

[151] Une djihadiste française condamnée à 14 ans de prison pour soustraction d'enfant. (2019, November 22). Retrieved January 05, 2021, from https://www.leparisien.fr/faits-divers/une-djihadiste-francaise-condamnee-a-14-ans-de-prison-pour-soustraction-d-enfant-22-11-2019-8199840.php

convicted her in November 2019 on charges of child abduction, neglect, and belonging to a terrorist organization, and sentenced her to 14 years imprisonment.[152] In a similar case from 2016, 26-year old Tareena Shakil was tried upon returning to her native United Kingdom from Syria, after multiple social media posts that showed photos of her under an Islamic State flag and posing next to weapons with her one-year-old toddler, whom she had smuggled with her across the porous Turkish border. The charges ultimately filed against her included joining a terrorist organization and encouraging terrorism on social media.[153]

4.1.2. Use of children as propaganda

The reason that mothers were encouraged to abduct children and smuggle them to territories controlled by the Islamic State in Iraq and Syria was the spectacle of example—much like the image of adults leaving their home nations by the thousands to create a life in an Islamic paradise, child smuggling by parents was largely an extension of this act of propaganda, and publicists of the group looked to these parents to set an example for disaffected Muslims around the world and demonstrate the existence of a radically different society under their control, where they could raise families and adhere to a strict Islamic life. However, upon arrival, children also featured prominently

[152] Rfi. (2019, November 22). Radicalised French woman who left child in Syria sentenced to 14 years. Retrieved January 05, 2021, from https://www.rfi.fr/en/international/20191122-Radicalised-French-woman-sentenced-14-years-jail-leaving-child-Syria-ISIS

[153] British mother convicted of joining ISIS in Syria with young child. (2016, January 29). Retrieved January 05, 2021, from https://de.reuters.com/article/us-mideast-crisis-britain-trial/british-mother-convicted-of-joining-isis-in-syria-with-young-child-idUSKCN0V72AS

in the group's officially produced propaganda, including videos, photos, and expositions released in the organization's glossy publications, Dabuq and Ramiya.[154]

According to quantitative research by Wojciech Kaczkowski of Islamic State propaganda output, children played a special role in depictions of training for the group, particularly towards the end of the physical caliphate's existence. Images of pubescent-aged boys training for combat and posing next to weapons were intended to project a sense of continuity, that these would be the soldiers of tomorrow and that a new generation of jihadists was rising. In other contexts, children were used to draw images of normalcy or safety for those considering a move to the Islamic State territories. Depending on the time and context, other propaganda output presented children as perpetrators of violence, murdering and beheading prisoners to help inspire fear among enemies of the group. Other times they served examples of victims—showing images of bodies of dead children, to reinforce the righteousness of the group's cause, and display the wickedness of its opponents.[155]

4.1.3. Child soldiers and crimes against Yazidis

While the Islamic State made extensive use of children in propaganda to further certain goals, a second and more sinister use for minors was their exploitation and murder directly on the battlefield. Like so many armed groups before them, including a number of other militias involved directly in the Syrian and Iraqi conflicts, the Islamic State relied extensively on child soldiers to perpetrate violence and advance military

[154] Kaczkowski, Wojciech. (2019). Qualitative content analysis of images of children in Islamic State's Dabiq and Rumiyah magazines. Contemporary Voices: St Andrews Journal of International Relations. 1. 26-38. 10.15664/jtr.1470.
[155] Ibid.

goals. While combat roles were far less frequently assigned to foreign-born children transported to the Islamic State territories by their parents, the use of child soldiers is a critical element of the greater story of how the group viewed children as tools and cannon fodder. In this sense, even as victims, the group ultimately sought to implicate minors and abductees in their war crimes.[156]

The most widely known and reported examples of child soldiers exploited by the Islamic State are from the Iraqi Yazidi minority. On August 3, 2014, Islamic State forces forced a brutal assault against the defensive frontlines of overwhelmed Peshmerga troops in Iraqi Kurdistan, forcing through their outgunned ranks and streaming into the Nineveh Plain region, the traditional homeland for a number of religious minorities that included the Yazidi religious community.[157] The tragedy that ensued over the following weeks of August and into early September, was a massacre on a genocidal scale. Systematically sweeping through dozens of villages, soldiers of the Islamic State engaged in a spree of murder, enslavement, and cultural destruction that would irreparably shatter ancient tribal societies and familial bonds that had survived centuries of assault and discrimination by other invaders.[158] The Sinjar Massacre, as the series of events would come to be known, was the seminal atrocity of the conflict that galvanized international support for a rapid intervention to roll back advances by the Islamic State, triggering the first airstrikes by US forces against the

[156] Dozier, K. (2019, May 23). What Happens Now to the Child Soldiers of ISIS? Retrieved January 05, 2021, from https://time.com/longform/isis-child-soldiers-yezidi/

[157] Morris, L. (2014, August 03). Islamic State seizes town of Sinjar, pushing out Kurds and sending Yazidis fleeing. Retrieved January 05, 2021, from https://www.washingtonpost.com/world/islamic-state-seize-town-of-sinjar-pushing-out-kurds-and-sending-yazidis-fleeing/2014/08/03/52ab53f1-48de-4ae1-9e1d-e241a15f580e_story.html

[158] Dozier, K. (2019, May 23). What Happens Now to the Child Soldiers of ISIS? Retrieved January 05, 2021, from https://time.com/longform/isis-child-soldiers-yezidi/

group within weeks.[159] However, the intervention came too late for thousands of women and children who would be abducted into sexual slavery and indoctrination camps, where brutal trainers stamped out their Yazidi identity and trained them as child soldiers.[160]

Extensive documentation and reporting shows that thousands of Yazidi children were trained, thorough a relentless campaign of brainwashing, brutalization, and forced complicity in Islamic State crimes, to turn their back on their communities and join the ranks of their jihadist captors as child soldiers. In most cases, these children were seen by commanders as cannon fodder, sent into battle first, and intentionally placed in the most direct line of fire, while strapped into suicide vests—with instructions to self-detonate if coalition forces advanced too close. It remains unclear to this day how many Yazidi children were sent off to die in battle by the Islamic State. However, as the group was slowly beaten back by coalition forces, many thousands of Yazidis would be gradually returned to their surviving relatives and communities, frequently in exchange for exorbitant sums of ransom money.[161] Many of them had thoroughly internalized the extremist ideology of their captors and to this day require extensive therapy and deradicalization support. Although surviving Yazidi children have largely left the custody of Islamic State members at this point, their stories of radicalization and the danger that they potentially pose to their home communities sheds light on the perils of leaving a generation of foreign children to grow up in the extremist environment that prevails across enormous displacement camps like al-Hol, where most Islamic State

[159] Timeline: The Rise, Spread, and Fall of the Islamic State. (2019, October 28). Retrieved January 05, 2021, from https://www.wilsoncenter.org/article/timeline-the-rise-spread-and-fall-the-islamic-state
[160] Dozier, K. (2019, May 23). What Happens Now to the Child Soldiers of ISIS? Retrieved January 05, 2021, from https://time.com/longform/isis-child-soldiers-yezidi/
[161] Ibid.

non-combatants are being held.[162] The risk grows more acute with time, as thousands enter their formative years and their indoctrination becomes more deeply entrenched by contact with other camp residents.

4.2. Current whereabouts of children

In the face of inaction by countries around the world to repatriate the women and children of the Islamic State, the temporary solution arrived at by authorities of the Self Administration has been to expand the al-Hol camp, a sprawling facility of heavily guarded tent encampments that lies to the north of Hasakah in Syrian Kurdistan. Originally built in 1991 during the first Gulf War, for the purpose of housing refugees fleeing over the Iraqi border, al-Hol was massively expanded prior to the International Coalition's assault on the final Islamic State stronghold of Baghouz.[163] As battle by battle, SDF troops progressed along the Euphrates River, clawing back territory from the collapsing caliphate, the camp was intended as only a temporary holding facility for foreign non-combatants who most imagined would be swiftly repatriated. At present, al-Hol is the de-facto holding site for tens of thousands of women and children, although the Self Administration has begun arranging for the limited release of certain Syrian IDPs there who originated from the surrounding towns and villages.[164]

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[162] Wescott, T. (2019, February 16). 'Caliphate Cub' survivor fights to save other Yazidis forced to join Islamic State. Retrieved January 05, 2021, from https://www.middleeasteye.net/news/caliphate-cub-survivor-fights-save-other-yazidis-forced-join-islamic-state

[163] Saad NJ. "The Al Hol camp in Northeast Syria: health and humanitarian challenges". *BMJ Global Health* 2020;**5:**e002491.

[164] France 24. (2020, November 16). Hundreds of Syrians leave Kurdish-held Al-Hol camp. Retrieved January 05, 2021, from https://www.france24.com/en/live-news/20201116-hundreds-of-syrians-leave-kurdish-held-al-hol-camp

4.2.1. Estimated numbers of children and noncombatants

While an indeterminate number of children have already been repatriated or returned home with their parents, by other means, the initial numbers of those who traveled to live under the Islamic State are vast. The Soufan Center estimates that at least 4,640 children of western parents traveled to the caliphate with family members, while at least 700 others were born there to western parents over the course of the conflict.[165] In al-Hol camp, the primary displacement camp holding former citizens of the Islamic State, there are currently 65,000 individuals who are either family members of fighters, or who used to live under the group when it still held territory.[166] While this number is not a complete accounting of all non-combatants captured during the campaign against the Islamic State, it is the holding center for the vast majority of women married to the group's fighters, and children brought to or born under the state's control. According to the United Nations, around two thirds of current inhabitants are children under the age of 18 years old.[167] Other estimates put the number of children in al-Hol at 43,000.[168] Of that total number of non-combatants, some have estimated that 10,000 are foreign nationals, divided approximately between 3,000 women and 7,000

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[165] Children of the Caliphate: Uncertain Futures and Living in Limbo. (2018, November 09). Retrieved January 05, 2021, from https://www.thecipherbrief.com/column_article/children-of-the-caliphate-uncertain-futures-and-living-in-limbo

[166] "In Al-Hol camp, almost no healthcare is available and the consequences are devastating" - Syrian Arab Republic. (2020, August 27). Retrieved January 05, 2021, from https://reliefweb.int/report/syrian-arab-republic/al-hol-camp-almost-no-healthcare-available-and-consequences-are

[167] Amid Rising COVID-19 Infection Rates, Medical Supply Shortages in Syria, More Testing Key to Gauging Extent of Outbreak, Humanitarian Chief Tells Security Council | Meetings Coverage and Press Releases. (2020, September 16). Retrieved January 05, 2021, from https://www.un.org/press/en/2020/sc14306.doc.htm

[168] Hurley, J. (2020, May 28). Coronavirus and ISIS: The Challenge of Repatriation from Al-Hol. Retrieved January 05, 2021, from https://www.usip.org/publications/2020/05/coronavirus-and-isis-challenge-repatriation-al-hol

children.[169] Other reports suggest that of the foreign minors in al-Hol, at least 750 are children of European nationals.[170] Based on interviews with foreign women and children living in al-Hol, researchers from the Egmont Institute in Brussels estimate that between 60 and 70 percent of these foreign children are under the age of five.[171]

A much smaller cohort of foreign non-combatants are also being held in the Roj and Ain Issa camps in Hasakah, close to the Iraqi border. The total population of the Roj camp is no more than 1,700, the vast majority of whom are Syrian and Iraqi.[172] Another estimate, based on the original research and interviews by the Washington Post's Louisa Lovelock, suspects the true combined number of foreign women and children in al-Hol, Roj, and Ain Issa was perhaps 40 percent higher than previously believed, closer to 14,000 individuals as of summer 2020.[173]

In Iraq, the number of children and non-combatants held in facilities is far more difficult to ascertain, due to the systematic secrecy and suppression of information by authorities in Baghdad. The numbers of detainees there are known to be far lower than in Syria however, since most civilians were able to slip over the border and evade capture as the Islamic State lost its final wedge of territory in Iraq. The large majority of

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[169] Save the Children International. (2020, May 11). Syria: Thousands of foreign children in Al Hol camp must be repatriated given coronavirus fears. Retrieved January 05, 2021, from https://www.savethechildren.net/news/syria-thousands-foreign-children-al-hol-camp-must-be-repatriated-given-coronavirus-fears-0

[170] W. Christou, "Is the EU Obligated to Repatriate Its Children from Northeast Syria?" *Syria Direct*, July 16, 2020, https://syriadirect.org/news/is-the-eu-obligated-to-repatriate-its-children-from-northeast-syria/.

[171] Repatriation to Europe remains complicated for ISIS-children:. (2020, October 30). Retrieved January 05, 2021, from https://thearabweekly.com/repatriation-europe-remains-complicated-isis-children

[172] Camp Profile: Roj, Al-Hasakeh governorate, Syria, October 2020 - Syrian Arab Republic. (2020, December 12). Retrieved January 05, 2021, from https://reliefweb.int/report/syrian-arab-republic/camp-profile-roj-al-hasakeh-governorate-syria-october-2020

[173] Loveluck, L. (2020, July 02). In Syrian camp for women and children who left ISIS caliphate, a struggle even to register names. Retrieved January 05, 2021, from https://www.washingtonpost.com/world/middle_east/syria-al-hol-annex-isis-caliphate-women-children/2020/06/28/80ddabb4-b71b-11ea-9a1d-d3db1cbe07ce_story.html

women and children who are currently being held in Iraqi custody are from among a group of 1,400 non-combatants who surrendered to authorities during the Tel Afar offensive in August 2017.[174] Of this group, it is believed that 509 individuals are adult women and 813 are children. While only a small minority of these detainees are foreigners, accurate statistics on how many traveled to Iraq from abroad and remained there are illusive. The Iraqi journalist Ghazwan Hassan al-Jibouri has written that at least 300 children in custody were fathered by Islamic State fighters, and are currently not recognized as citizens of any state.[175] However, studies by the Norwegian Refugee Council have stated that the number of children without recognized documentation may be massively higher. According to their estimates, as many as 45,000 children born under the Islamic State are living in camps, towns, and cities across Iraq without any form of recognized documentation, and are currently at high risk of statelessness. This figure includes both children of foreigners and of solely Iraqi parents.[176]

4.2.2. Conditions at al-Hol

Fully understanding the living conditions and experiences of foreign children living in al-Hol is crucial to grasping the urgency of repatriation and rehabilitation in home countries. Camp conditions have drawn scathing reports from human rights watchdogs around the world. A major concern has been and continues to be a lack of

[174] Van Esveld, B. (2020, October 28). Iraq/KRG: 1,400 Women, Children From ISIS Areas Detained. Retrieved January 05, 2021, from https://www.hrw.org/news/2017/09/20/iraq/krg-1400-women-children-isis-areas-detained

[175] Iraq: Change Approach to Foreign Women, Children in ISIS-Linked Trials. (2020, October 28). Retrieved January 05, 2021, from https://www.hrw.org/news/2018/06/21/iraq-change-approach-foreign-women-children-isis-linked-trial

[176] Hampton, K. (2019, August 01). Born in the twilight zone: Birth registration in insurgent areas. Retrieved January 05, 2021, from https://international-review.icrc.org/articles/born-twilight-zone-birth-registration-insurgent-areas

healthcare for residents of the camp, particularly as the Covid-19 pandemic has swept through northeastern Syria, bringing with it hundreds of deaths.[177] Residents have reported that administrators at al-Hol sometimes withhold crucial aid and supplies such as food and water, as a form of collective punishment against entire sections of the camp.[178] Residents there are currently living in tents provided by the United Nations High Commission for Refugees. Like thousands of other displaced people across the region, these temporary tents mean they are often subjected to dangerously high temperatures in the summer, and bitter cold in the winter, with no running water and constant leakage from the rains.[179] Malnutrition is also rampant in the camp, and appears to be a growing problem in the past 12 months. In one five day period alone in August of this year, eight children died due to complications related to starvation.[180]

Another element of danger for the women and children living in al-Hol is the presence of a large number of radicalized camp residents, many of whom had previously assisted or been married to members of the Hizba—the religious enforcers of hardline Islamic norms in society, responsible for perpetrating some of the Islamic State's worst crimes and abuses against the population living under its control. Vera Mironova, a researcher with Harvard University who has conducted numerous interviews with members of al-Hol camp, estimates that this radicalized cohort may

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[177] Speckhard, Anne & Ellenberg, Molly. (2020). Can We Repatriate the ISIS Children?. Horizon Insights. 3. 10.31175/hi.2020.03.02.

[178] Loveluck, L. (2020, July 02). In Syrian camp for women and children who left ISIS caliphate, a struggle even to register names. Retrieved January 05, 2021, from https://www.washingtonpost.com/world/middle_east/syria-al-hol-annex-isis-caliphate-women-children/2020/06/28/80ddabb4-b71b-11ea-9a1d-d3db1cbe07ce_story.html

[179] Speckhard, Anne & Ellenberg, Molly. (2020). Can We Repatriate the ISIS Children?. Horizon Insights. 3. 10.31175/hi.2020.03.02.

[180] Syria: Child death rate triples in Al-Hol camp as medical access deteriorates - Syrian Arab Republic. (2020, August 13). Retrieved January 05, 2021, from https://reliefweb.int/report/syrian-arab-republic/syria-child-death-rate-triples-al-hol-camp-medical-access-deteriorates

represent 20-30 percent of the entire population at al-Hol.[181] Foreign residents reported daily and occasionally bloody struggles for dominance waged by these extremist ideologues. The tools of control used by these elements include threats of violence, social coercion, stabbings, and arsonist attacks, as they have attempted to assert social control over the lives of residents. Women in these situations have few options to leave the camp or protect their families, and thus the environment largely perpetuates the same cycles of extremism and indoctrination of children that prevailed under the reign of Islamic State authorities.[182] The future security threats posed by an entire generation of children growing up surrounded by extremist ideology and violence cannot be ignored by authorities around the world when taking account of the prevailing conditions in the al-Hol and Roj camps as a factor in repatriation efforts.

4.2.3. Conditions in Iraqi detention

Due to the rampant secrecy that shrouds most aspects of the Iraqi prison system, relatively little is known about the numbers of combatants, non-combatants, foreigners, and locals currently being held there after the fall of the Islamic State. The government in Baghdad has refused to release any official statistics on the matter, Furthermore, humanitarian watchdog groups are severely limited in their ability to enter detention centers and assess the prevailing conditions there, as repeated requests by organizations such as Human Rights Watch to do so have been roundly rebuffed by Iraqi

[181] Miranova, V. (2020, July 9). Life inside Syria's al-Hol camp. Retrieved January 05, 2021, from https://www.mei.edu/publications/life-inside-syrias-al-hol-camp
[182] Miranova, V. (2020, July 9). Life inside Syria's al-Hol camp. Retrieved January 05, 2021, from https://www.mei.edu/publications/life-inside-syrias-al-hol-camp

authorities.[183] What is known, however, from the stories and accounts that have leaked primarily to the media, is that conditions are dramatically worse for those held in Iraq than in Syrian Kurdistan. Prisoners in these facilities are consistently subjected to torture, denied medical care, and live in conditions of overcrowding that are far more severe than those prevailing in Syria's al-Hol camp.[184]

Furthermore, these abhorrent conditions reveal profound philosophical differences in how women and children are viewed by the Self Administration and Iraqi authorities. While non-combatants in al-Hol are officially designated as displaced civilians, and thousands of Syrians have been allowed to return to their villages of origin, Iraq has taken a decidedly punitive view of these individuals' initial presence in former Islamic State territories. The illegal entrance by foreign women and others into Iraq has been treated as a serious criminal act in and of itself, and hundreds of women and children have been convicted in a series of shadowy trials, often utilizing confessions extracted under torture as evidence. According to Human Rights Watch, children as young as nine have been regularly sentenced to five years imprisonment for membership in the Islamic State, and 15 years for actively participating in criminal acts by the organization. While the numbers of foreigners tried in these courts have been suppressed by the government in Baghdad, media reports have managed to identify at least 72 foreign women and children who have been prosecuted as of June 2018.[185] A number of countries have adopted a non-official policy of relying on these Iraqi courts

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[183] Iraq: Change Approach to Foreign Women, Children in ISIS-Linked Trials. (2020, October 28). Retrieved January 05, 2021, from https://www.hrw.org/news/2018/06/21/iraq-change-approach-foreign-women-children-isis-linked-trials

[184] Jacob Schulz, interview with Bobby Chesney, Vera Mironova, and Leah West. https://www.lawfareblog.com/lawfare-podcast-what-do-detained-islamic-state-fighters-iraq-and-syria.

[185] Iraq: Change Approach to Foreign Women, Children in ISIS-Linked Trials. (2020, October 28). Retrieved January 05, 2021, from https://www.hrw.org/news/2018/06/21/iraq-change-approach-foreign-women-children-isis-linked-trials

to prosecute their citizens in lieu of repatriation and prosecution at home. For example, even though the French constitution prohibits French citizens from being prosecuted in countries where the death penalty prevails, Paris has not protested these prosecutions, and has even given quiet diplomatic support to these efforts by Iraqi authorities.[186]

4.3. Halting progress toward repatriation

Much like the repatriation of adult foreign fighters, the question of whether to repatriate children and women non-combatants is essentially political rather than legal. As such, approaches have varied wildly from one nation to another, and are often subject to shifts in public opinion or political coalition building. In general, the process of repatriating children has progressed more swiftly across many nations than has been the case for male fighters or adult female non-combatants. However, thousands of children still remain in legal limbo across Iraq and Syria, some at risk of statelessness, and most living in poor conditions with limited medical care. The urgency of repatriation is heightened by the persistent danger of physical harm from prison authorities in Iraq, or coercion and indoctrination by adult Islamic State supporters in the Syrian camps.

4.3.1. The question of public opinion

While far less controversial than repatriating adult fighters, opinion polling on the subject of repatriating Islamic State children has been mixed and sometimes reveals a surprising amount of resistance among the public. For example, a resounding 89

[186] Oehlerich, E., Mulroy, M., & McHugh, L. (2020, October 13). Jannah or Jahannam: Options for Dealing with ISIS Detainees. Retrieved January 05, 2021, from https://www.mei.edu/publications/jannah-or-jahannam-options-dealing-isis-detainees

percent of French respondents to a poll indicated that they opposed the repatriation of French adults who had willingly made the journey to Iraq and Syria. When the question came to the repatriation of children of French fighters however, polling in France still indicated that around two thirds rejected the idea that the state should actively work toward their repatriation.[187] A similar Australian poll found that 60 percent of the general public believed the government should leave ISIS women and children in Syria.[188] In contrast, a poll of Canadian adults found that 60 percent either strongly or somewhat favored government action to repatriate orphans of Islamic State fighters to Canada.[189] Part of this mixed polling, and antipathy towards seemingly fundamental humanitarian principles, may be driven by fears of what children could grow up to represent in the future.

Among legal scholars and policymakers however, there is virtually uniform consensus around the need to regard children abducted by Islamic State members as victims, and it is widely understood that repatriation of minors inevitably involves a major direct role for the home countries of these children in securing their return.[190] However, despite the clarity of the issue from a moral and humanitarian perspective, several vexing obstacles have arisen in the process that have complicated any mass move toward repatriation of minors. The first is an inherently legal hurdle, which is the

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[187] Cebrián, P. (2019, September 15). They Left to Join ISIS. Now Europe Is Leaving Their Citizens to Die in Iraq. Retrieved January 05, 2021, from https://foreignpolicy.com/2019/09/15/they-left-to-join-isis-now-europe-is-leaving-their-citizens-to-die-in-iraq

[188] Burke, K. (2020, September 24). Stay where you are: Most Australians don't want ISIS wives and kids brought home. Retrieved January 05, 2021, from https://7news.com.au/news/terrorism/most-australians-want-isis-wives-and-kids-to-stay-put-in-syria-newspoll-finds-c-515928

[189] Slaughter, G. (2019, July 15). Most Canadians support helping orphans of ISIS fighters: Nanos survey. Retrieved January 05, 2021, from https://www.ctvnews.ca/politics/most-canadians-support-helping-orphans-of-isis-fighters-nanos-survey-1.4507927

[190] Azeem Ibrahim, M. (2020, June 18). Foreign ISIS Children Deserve a Home. Retrieved January 05, 2021, from https://foreignpolicy.com/2020/06/18/islamic-state-foreign-fighters-children-syria-camps-repatriation/

issue of family separation, which stems as a consequence from resistance by authorities to repatriate the parents of children who brought them to Syria in the first place. The second is the logistical complication of proving a child's nationality, particularly in common circumstances that have repeatedly arisen; both parents were killed or are otherwise missing, and children either lost their documentation in transit, or were born in the Islamic State without any reliable documentation to start with.[191]

Family separation is a thorny issue for home states, which would be largely simplified by a political willingness to repatriate all citizens, including adults, in order to charge them in national courts. As a result of this political impasse, children are often the victims of public fear and anger towards their parents' actions, and their inability to return home an unintentional extension of the original obstacles to repatriating their parents. In particular among states that refuse to repatriate adult members of the Islamic State, there is fear that mothers of children may use the legal issue of family reunification as a "backdoor" into Europe.[192] In this sense, the more straightforward issue of repatriating children is vastly complicated by the unwillingness of governments to repatriate all citizens from Iraq and Syria, and the possible public anger that could result from the implications of these repatriations.

4.3.2. State of repatriation

Despite the legal complications surrounding family separations, many governments have nonetheless made slow and laborious progress toward repatriating

[191] W. Christou, "Is the EU Obligated to Repatriate Its Children from Northeast Syria?" *Syria Direct*, July 16, 2020, https://syriadirect.org/news/is-the-eu-obligated-to-repatriate-its-children-from-northeast-syria/.
[192] Speckhard, Anne & Ellenberg, Molly. (2020). Can We Repatriate the ISIS Children?. Horizon Insights. 3. 10.31175/hi.2020.03.02.

children of their nationals. While the effort to bring these minors home often stands in stark contrast to official stances toward combatants and adult women non-combatants, state policies have frequently been inconsistent. In countries where general repatriation of citizens is not the policy, authorities have tended to treat orphaned children differently than those with a living mother or father incarcerated abroad.[193] The end result, of course, is the creation of two classes of children and a large population of minors from dozens of countries who appear unlikely to return home in the foreseeable future.

Many European nations have approached repatriation of children on a case-by-case basis, adopting a piecemeal approach that, while bringing some tangible results, has also proven highly vulnerable to shifts in public opinion and political control. The perils of this approach were abundantly demonstrated in Norway in January 2020, when the governing Conservative-led coalition of Prime Minister Erna Solberg faced collapse following the withdrawal of support by the anti-immigration Progress Party. The political earthquake was a result of the government's decision to repatriate three Norwegian nationals from al-Hol, an unnamed woman who had married an Islamic State fighter, and her two young children. One of these children was reportedly in need of emergency medical care, and Norwegian policy does not permit the separation of women from their children for the purpose of repatriation.[194] The country has thus far repatriated a total of only five non-combatant citizens from Syria.[195]

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[193] Mironova, V. (2020, November 25). What to Do About the Children of the Islamic State. Retrieved January 05, 2021, from https://foreignpolicy.com/2020/11/25/islamic-state-isis-repatriation-child-victims/

[194] Henley, J. (2020, January 20). Norway populist party quits coalition over 'Isis bride' repatriation. Retrieved January 05, 2021, from https://www.theguardian.com/world/2020/jan/20/norway-populist-party-quits-coalition-over-isis-bride-repatriation

[195] Broches, E. (2020, April 17). What Is Happening With the Foreign Women and Children in SDF Custody in Syria? Retrieved January 05, 2021, from https://www.lawfareblog.com/what-happening-foreign-women-and-children-sdf-custody-syria

A number of EU member states have made only marginal progress towards repatriating children, and the political sensitivity of the issue means that many governments have been loath to publicly discuss the scope of quiet negotiations with members of the Self Administration. As such, accurate numbers of returned children are often difficult to access, and for some countries, researchers have primarily garnered statistics on the matter from aggregated media reports. It is known that Denmark, Finland, Austria, the Netherlands, and the United Kingdom have repatriated only a handful of orphans, as policies in these states have generally allowed children without parents to return, but currently block the return of entire families. As mentioned previously, some EU member states such as France, Germany, and Norway evaluate repatriation on a case-by-case basis, sometimes granting passage to children who are in need of urgent medical care or who have a vetted guardian waiting to take them in upon their return. For example, France made a rare and notable exception to its repatriation policy in the case of one 7-year-old girl in April 2020, when authorities flew her home by private jet due to a medical emergency, leaving her mother and sisters behind in Syria.[196] However, the end result is often a policy of inconsistency that has delivered only a few dozen returns among the hundreds of children from these countries stranded in al-Hol and other camps.[197] Despite having repatriated several dozen children to France, estimates place the remaining French children of Islamic State fighters at around 270 others.[198]

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[196] Hubbard, B., & Méheut, C. (2020, May 31). Western Countries Leave Children of ISIS in Syrian Camps. Retrieved January 05, 2021, from https://www.nytimes.com/2020/05/31/world/middleeast/isis-children-syria-camps.html

[197] Speckhard, Anne & Ellenberg, Molly. (2020). Can We Repatriate the ISIS Children?. Horizon Insights. 3. 10.31175/hi.2020.03.02.

[198] Méheut, C., & Hubbard, B. (2020, June 22). France Brings 10 Children of French Jihadists Home From Syria. Retrieved January 05, 2021, from https://www.nytimes.com/2020/06/22/world/europe/france-isis-children-repatriated.html

While there is a great degree of variation in policies, some European nations—particularly those in Eastern Europe—have been more proactive. Many of these states are the same countries that have more aggressively tried to repatriate their own foreign fighters as well. Since the collapse of the caliphate, Kosovo has worked to bring 74 children home, instituting robust de-radicalization and reintegration programs for these returnees. The government of Finland has announced plans to repatriate 30 Finnish children from Syria, despite facing significant pushback and legal challenges from the nation's Parliamentary Committee. Belgium has also declared its intention to repatriate 42 Belgian children under the age of 10, leaving the remainder of children up to age 18, with Belgian nationality, in legal limbo for the foreseeable future.[199]

Thus far, the countries of central and western Asia have been among the most active in repatriating children brought to or born in Syria. The Russian Federation has led the way, repatriating hundreds of children, with officials in Chechnya and Dagestan organizing a large portion of the returns among citizens coming from the Caucasus regions.[200] Russia is among a smaller number of countries that has actively worked to secure the repatriation of all children detained in Iraq as well, cooperating with authorities in Baghdad to bring at least 122 home between 2018 and 2019.[201] It is notable that Moscow has treated these minors as blameless victims, since adult returnees have, in contrast, been subjected to harsh punishment by Russian

[199] Broches, E. (2020, April 17). What Is Happening With the Foreign Women and Children in SDF Custody in Syria? Retrieved January 05, 2021, from https://www.lawfareblog.com/what-happening-foreign-women-and-children-sdf-custody-syria

[200] Speckhard, Anne & Ellenberg, Molly. (2020). Can We Repatriate the ISIS Children?. Horizon Insights. 3. 10.31175/hi.2020.03.02.

[201] Russia repatriates orphans of suspected Islamic State fighters in Syria. (2020, February 7). Retrieved January 05, 2021, from https://www.middleeasteye.net/news/russia-repatriates-26-islamic-state-linked-children-syria

authorities.[202] Kazakhstan has repatriated at least 400 children and 100 mothers, while also investing in programs to help minors reintegrate into Kazakh society. Turkey and Uzbekistan have also been notable for repatriating the vast majority of their citizens detained in Syria, including women and children.[203] Tajikistan has also repatriated most, if not all, of the children born to its citizens in Syria and Iraq, and has adopted a policy of separating these children from their families upon return and placing them in orphanages.[204]

Across the Middle East and North Africa, countries have taken a largely hands-off approach to the repatriation of children, mirroring a larger strategy toward their citizens in general who are currently detained in Iraq and Syria. The example of Tunisia is instructive, as the country has the single largest contingent of citizens who left to join the Islamic State and other jihadist groups in Syria—as many as 7,000, by some estimates.[205] There are at least 200 children confirmed to hold or be eligible for Tunisian citizenship, currently trapped in Syria and Iraq. Despite this fact, Tunisian authorities have taken no steps to repatriate any of their citizens, despite some declarations from political leaders on the principle of bringing Tunisian children home.[206] This is fairly typical of countries across the MENA region, with only infrequent instances of successful repatriation taking place across the 22-member Arab

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[202] Arutunyan, A. (2019, April 29). ISIS Returnees Bring Both Hope and Fear to Chechnya. Retrieved January 05, 2021, from https://www.crisisgroup.org/europe-central-asia/caucasus/chechnya-russia/isis-returnees-bring-both-hope-and-fear-chechnya

[203] Speckhard, Anne & Ellenberg, Molly. (2020). Can We Repatriate the ISIS Children?. Horizon Insights. 3. 10.31175/hi.2020.03.02.

[204] Mironova, V. (2020, November 25). What to Do About the Children of the Islamic State. Retrieved January 05, 2021, from https://foreignpolicy.com/2020/11/25/islamic-state-isis-repatriation-child-victims/

[205] Trofimov, Y. (2016, February 25). How Tunisia Became a Top Source of ISIS Recruits. Retrieved January 05, 2021, from https://www.wsj.com/articles/how-tunisia-became-a-top-source-of-isis-recruits-1456396203

[206] Tunisia: Scant Help to Bring Home ISIS Members' Children. (2020, October 28). Retrieved January 05, 2021, from https://www.hrw.org/news/2019/02/12/tunisia-scant-help-bring-home-isis-members-children

League. Another major contributor of foreign fighters to the conflict, Saudi Arabia, provided a rare counterexample to this policy immediately after the collapse of the Islamic State, when two young boys abducted by their father were returned to their mother, who had remained in Riyadh.[207]

In North America, the United States and Canada have taken very different approaches to the question of repatriation. As the largest member of the international coalition and the chief organizing partner on the ground with the SDF, many scholars and researchers have argued that the United States is obligated to play a unique role in facilitating the transfers of children from Kurdistan to their home countries. As of late 2020, the American government has created a task force to do precisely this, assisting foreign governments in the identification and repatriation of their citizens.[208] Despite initial reluctance on the part of the Trump administration, going so far as taking steps toward stripping the citizenship of one American woman in Syria, the United States had successfully repatriated all known Islamic State fighters, women, and children as of October 2020.[209] In contrast, Ottawa has been considerably more reluctant to take action to repatriate citizens. Canadian authorities are aware of 26 Canadian children, most under the age of five, who are trapped in northwest Syria. One four-year-old Canadian child was orphaned during the campaign against the Islamic State, and despite a

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[207] Wasmi, N. (2019, March 31). Saudi children kidnapped to join ISIS return home. Retrieved January 05,
2021, from https://www.thenationalnews.com/world/gcc/saudi-children-kidnapped-to-join-isis-return-home-1.843451

[208] Pearson, E. (2020, October 28). Australians Trapped in Syria Need Government's Help. Retrieved January 05, 2021, from https://www.hrw.org/news/2020/10/13/australians-trapped-syria-need-governments-help

[209] Seldin, J. (2020, October 01). Last Known American IS Supporters Repatriated From Syria. Retrieved January 05, 2021, from https://www.voanews.com/middle-east/last-known-american-supporters-repatriated-syria

pressure campaign led by the girl's uncle in Canada, officials in Ottawa have refused to allow her safe return to the country of her parents' birth.[210]

4.3.3. Legal challenges surrounding repatriation

There have been numerous legal challenges to the approach of some governments' towards repatriation of women and children. These challenges have oftentimes come from family members living in the home countries of children trapped in Iraq and Syria, and have yielded strikingly different results across countries. Several instructive national court cases have resulted in judgements and verdicts on the matter, in some instances siding with the government while handing a few notable victories to the wives of Islamic State fighters and their children as well. However, a number of these cases have subsequently been thrown out on technical grounds. As the legal justifications in these suits have often rested primarily on the domestic laws and constitutional rights of citizens in individual countries, not all of them provide guiding principles that could be applied on a larger scale in the arena of international law to pressure governments into action.[211]

In the Netherlands, a legal team representing 26 Dutch women and their 56 children in Syria launched a case against the national government, arguing that authorities were required by the constitution to make all possible efforts to repatriate their citizens from abroad. While winning an initial victory in lower court, the Supreme Court of the Netherlands ultimately overturned that decision, ruling in June 2020 that no

[210] Hubbard, B., & Méheut, C. (2020, May 31). Western Countries Leave Children of ISIS in Syrian Camps. Retrieved January 05, 2021, from https://www.nytimes.com/2020/05/31/world/middleeast/isis-children-syria-camps.html

[211] LL.M, T. (2019, November 11). European countries are being challenged in court to repatriate their foreign fighters and families. Retrieved January 05, 2021, from https://icct.nl/publication/european-countries-are-being-challenged-in-court-to-repatriate-their-foreign-fighters-and-families/

right of repatriation existed for Dutch citizens trapped abroad.[212] On the other side, a case decided by a court in Berlin was brought forth by family members of a female German Islamic State supporter and her three children in al-Hol camp. The particulars of the case centered around the right to be free from torture and degrading treatment, as stipulated by Article 3 of the European Convention on Human Rights.[213] The case analyzed the conditions in the camp, ultimately breaking with the plaintiffs in deciding that they fell short of minimal international standards for safety and livability, while also citing the threat posed by other extremist residents living there. In this interpretation of Article 3, continued internment in al-Hol would violate the essential human rights of the women and children unable to leave, thus obliging German authorities to repatriate them.[214] However, the Higher Administrative Court ruled that repatriation was only constitutional if families were kept united up to the point of their arrival in Germany. Authorities in Berlin have been unwilling to extend consular help to adult women who left willingly to join the Islamic State, and thus the case has failed to break the policy gridlock and provide a clear path forward on the matter.[215] Another case in Belgium centered on the right of Belgian citizens to consular assistance. A judge there ultimately ruled in favor of six Belgian children and their mothers in al-Hol, stating that Belgian citizens are entitled to consular assistance when they find

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[212] Netherlands isn't required to repatriate Islamic State families in Syria, court rules. (2020, June 26). Retrieved January 05, 2021, from https://www.al-monitor.com/pulse/originals/2020/06/netherlands-isis-children-women-al-hol-syria-kurds-camps.html

[213] Duffy, P. J. "Article 3 of the European Convention on Human Rights." *The International and Comparative Law Quarterly* 32, no. 2 (1983): 316-46. Accessed December 28, 2020. http://www.jstor.org/stable/759498.

[214] LL.M, T. (2019, November 11). European countries are being challenged in court to repatriate their foreign fighters and families. Retrieved January 05, 2021, from https://icct.nl/publication/european-countries-are-being-challenged-in-court-to-repatriate-their-foreign-fighters-and-families/

[215] LL.M, T. (2019, November 11). European countries are being challenged in court to repatriate their foreign fighters and families. Retrieved January 05, 2021, from https://icct.nl/publication/european-countries-are-being-challenged-in-court-to-repatriate-their-foreign-fighters-and-families/

themselves in extreme circumstances, as per the wording in the Belgian Code of Consular Affairs. The case is currently pending an appeal by Belgian authorities.[216]

In one repatriation case with potential ramifications for international law, the UN Committee on the Rights of the Child published a unanimous decision in the case of L.H. et al v. France, which broke unanimously against French authorities. The case centered on the issue of jurisdiction, and whether the French governments ultimately maintained jurisdiction, and thus responsibility, over French children living in Kurdish-controlled camps. Despite al-Hol and Roj camps clearly existing outside the territorial jurisdiction of the French state, the panel of judges took a more expansive view of the question of jurisdiction, and the role that nationality played in establishing jurisdiction. Ultimately, the question of jurisdiction in the case came down to how the actions of states *affected* citizens, and the panel decided that French authorities were obliged to help their citizens because they had the ability to do so—by virtue of the children's nationality and the willingness of Kurdish administrators to cooperate with the French government.[217] In contrast to some of these other decisions, the case's focus on jurisdiction and application to international law means that it could have far reaching implications for other countries failing to act on repatriation. However, some legal scholars, such as Marko Milanovik, have expressed concern that the legal logic of the judge panel contains many internal contradictions, and may be challenged by other judges in similar pending cases.[218]

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[216] LL.M, T. (2019, November 11). European countries are being challenged in court to repatriate their foreign fighters and families. Retrieved January 05, 2021, from https://icct.nl/publication/european-countries-are-being-challenged-in-court-to-repatriate-their-foreign-fighters-and-families/

[217] Aboella, G., & El-Assasy, A. (2020, December 04). UN: Paris Responsible for ISIS French Children Detained in Syria. Retrieved January 05, 2021, from https://see.news/un-paris-responsible-for-isis-french-children-in-syria36/

[218] Milanovic, W., & Milanovic, M. (2020, November 10). Repatriating the Children of Foreign Terrorist Fighters and the Extraterritorial Application of Human Rights. Retrieved January 05, 2021, from

4.4. The specter of statelessness

Children born to foreign parents under the authority of the Islamic State, and then abandoned due to their parents' death or disappearance, present a particularly complex challenge to governments around the world. Many are currently orphaned, and lack any paper trail linking them to deceased or missing parents, and a subsequent right to some kind of citizenship. As a result, these children are at perilously high risk of statelessness and possibly demand a separate legal avenue for repatriation from children who were brought directly to Syria by their parents, after being born abroad.[219]

In addition to rendering any kind of repatriation impossible, statelessness is linked to a long list of vulnerabilities and disadvantages that are likely to severely restrict these children for the rest of their lives. Stateless young people around the world are far more likely to be denied formal education, and to face job discrimination later in life. This often locks individuals and communities of stateless people into self-perpetuating cycles of poverty and marginalization, opening them up to greatly elevated rates of abuse and exploitation. These are dire consequences that can stretch far into the future, adversely affecting generations of children after the initial failure to establish citizenship for the first generation.[220] These well-known long term and systematic risks add increased urgency to the situation, as all actors must contend with the reality of a

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https://www.ejiltalk.org/repatriating-the-children-of-foreign-terrorist-fighters-and-the-extraterritorial-application-of-human-rights/

[219] Limoges, Barrett. (2019, April 17). 'Unlike any other camp': A journey through al-Hol, holding center for thousands of IS families. Retrieved January 05, 2021, from https://syriadirect.org/news/%E2%80%98unlike-any-other-camp%E2%80%99-a-journey-through-al-hol-holding-center-for-thousands-of-is-families/

[220] United Nations High Commissioner for Refugees. (2015, November 03). UNHCR report reveals debilitating impact of statelessness on children. Retrieved January 05, 2021, from https://www.unhcr.org/news/press/2015/11/563762946/unhcr-report-reveals-debilitating-impact-statelessness-children.html

ticking time bomb in Iraq and Syria, where thousands of children are already missing crucial years of education and being denied basic services due to their stateless status.

4.4.1. Estimates of at risk children

While the numbers of children at risk of statelessness in Iraq and Syria are, by definition, poorly documented and incredibly murky, the numbers are certainly vast and in the tens of thousands. The Norwegian Refugee Council estimates that 45,000 children may become homeless in post-Islamic State Iraq.[221] Regarding children of foreign fighters, the guesswork is less reliable still. An aid assessment from 2017, a year and a half before the caliphate's collapse, estimated that 5,000 children had been born to Islamic State foreign fighters or foreign-born women.[222] This number has indisputably grown in the years since, offering only a hint at the true scope of the problem and the full number of potentially stateless children who could potentially be eligible for repatriation by foreign governments.

While the risk of statelessness is vastly more present among the children of local Syrian and Iraqi Islamic State members than those known to be born to foreign parents, some decisions by governments in home countries have greatly elevated the risk of homelessness for certain children. In particular, the issue is significantly complicated by the willingness of some authorities to punitively strip adult women of their citizenship. To take one example, Australian officials in January 2020 moved forward with a decision to confiscate the citizenship of an unnamed woman being held in al-Hol camp.

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[221] New report: 45,000 children may become stateless in post-IS Iraq. (2019, April 29). Retrieved January 05, 2021, from https://www.nrc.no/news/2019/april/new-report-45000-children-may-become-stateless-in-post-is-iraq/

[222] Chulov, M. (2017, October 07). Scorned and stateless: Children of Isis fighters face an uncertain future. Retrieved January 05, 2021, from https://www.theguardian.com/world/2017/oct/07/children-isis-fighters-syria-raqqa-orphans-uncertain-future

Although a dual citizen of Australia and Lebanon, discriminatory Lebanese laws prevent women from passing down citizenship to their children. The decision therefore had the knock on effect of punishing her children living with her in the camp, three of whom were born in Australia and thus held nationality there, but two of whom were born under the Islamic State and thus at new risk of statelessness.[223] In another high profile case, London-born Shamina Begum was stripped of her nationality by British authorities in the weeks after her surrender to SDF troops in 2019. The move had implications as well for her infant son, born in Syria to a foreign fighter father, and the child died within weeks amid squalid camp conditions.[224]

While these particular cases were unveiled by each respective government and debated publicly, it should be noted that many states have gone about this process in secrecy, refusing to reveal how many women have been stripped of their citizenship. As a result, we cannot say with certainty how widespread this specific risk is to children in Iraq and Syria. To illustrate this point, British government records show that the number of citizenships revoked by authorities increased six-fold between 2016 and 2017. However, officials there have refused to disclose how many of these individuals were Islamic State brides, and no British women interviewed by journalists in al-Hol had been informed about whether their citizenship had been stripped or not—despite the serious implications for their children born under the caliphate's rule.[225]

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[223] Doherty, B. (2020, January 17). Australian mother of five stripped of citizenship, leaving two children potentially stateless. Retrieved January 05, 2021, from https://www.theguardian.com/world/2020/jan/18/australian-mother-of-five-stripped-of-citizenship-leaving-two-children-potentially-stateless

[224] Shamima Begum: Sajid Javid criticised as baby dies. (2019, March 09). Retrieved January 05, 2021, from https://www.bbc.com/news/uk-47506145

[225] Dearden, L. (2020, February 09). Ministers refuse to reveal how many extremists they have stripped of British citizenship. Retrieved January 05, 2021, from https://www.independent.co.uk/news/uk/home-news/isis-syria-syria-shamima-begum-uk-citizenship-terror-a9312226.html

4.4.2. Recognition of Islamic State documentation

The central issue at the heart of statelessness is a lack of nationally or internationally recognized documentation, which would prove the parentage, birth date, and birth location of a child, which are generally prerequisites for being recognized as a citizen of any nation.[226] The Islamic State did issue birth certificates and other documentation to some residents living under its authority. However, a number of governments have refused to recognize this documentation as legitimate or reliable. Furthermore, a large volume of personal records held at Islamic State offices or hospitals were lost or destroyed in the battle to vanquish the group—oftentimes as collateral damage, other times in acts of deliberate sabotage by Islamic State officials.[227] The group also forbid the entry and operation of humanitarian services by any aid agencies or United Nations bodies, which have often acted as ad hoc record keepers in conflict zones, where state authorities have been unable to track or issue essential civil documentation.[228] With the Islamic State acting as the sole issuer of documentation in areas under its control, aid agencies have been unable to fulfill this role, and the births or parentage of children from these areas are consequently going unrecognized by authorities in many states where they should hold a right to citizenship.[229]

The vast majority of children at risk of statelessness are of Iraqi or Syrian parentage, for the simple reason that most fighters were Iraqi and Syrian, but also

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[226] UNHCR. 2021. *About Statelessness*. [online] Available at: <https://www.unhcr.org/ibelong/about-statelessness/> [Accessed 5 January 2021].
[227] Houry, N. (2020, October 28). Children of the Caliphate. Retrieved January 05, 2021, from https://www.hrw.org/news/2016/11/23/children-caliphate
[228] Aid and the Islamic State. (2014, December 01). Retrieved January 05, 2021, from https://www.odi.org/publications/9133-aid-and-islamic-state
[229] Houry, N. (2020, October 28). Children of the Caliphate. Retrieved January 05, 2021, from https://www.hrw.org/news/2016/11/23/children-caliphate

because authorities in both these countries have flatly refused to recognize any records kept by the Islamic State. In fact, Iraqi officials in particular have displayed a documented unwillingness to consider the records of any child born to Islamic State members.[230] This stonewalling extends beyond birth certificates to marriage papers and other civil documentation as well.[231] While western states have shown more flexibility in proving the birth and parentage of children, the issue of non-recognition of Islamic State documents remains an enormous problem for the children of foreign fighters from other Arab states, and a handful of others around the world.[232]

4.4.3. Circumstances of births

Another important aspect of these children's nationality stories is the circumstances of their births, which often resulted from unions between foreign women and local fighters, or vice versa. The policy of the Islamic State was to pair off unmarried foreign women with other foreign or local fighters, and the primary role of women there was defined as producing children who would one day populate the future "state". While many of these marriages were consensual, a number also concluded in forced marriages, often involving underage women who were drawn to the group by online recruiters.[233] In addition, the atrocities committed toward Yazidi women, in the form of sexual slavery, has resulted in many thousands of children born from rape and

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[230] Houry, N. (2020, October 28). Children of the Caliphate. Retrieved January 05, 2021, from https://www.hrw.org/news/2016/11/23/children-caliphate

[231] Wanless, J. (2018, January 21). Born under ISIS, the children struggling in Iraq - Iraq. Retrieved January 05, 2021, from https://reliefweb.int/report/iraq/born-under-isis-children-struggling-iraq

[232] Kalin, S. (2020, May 20). Iraq's children of 'caliphate' face stateless future. Retrieved January 05, 2021, from https://english.alarabiya.net/en/features/2016/11/15/Iraq-s-children-of-caliphate-face-stateless-future

[233] Perešin, Anita. "Fatal Attraction: Western Muslimas and ISIS." *Perspectives on Terrorism* 9, no. 3 (2015): 21-30. Accessed December 29, 2020. http://www.jstor.org/stable/26297379.

sexual abuse between 2014 and 2019.[234] For children born from these arrangements, determining the nationality of the father is of paramount importance in protecting them from stateless. It was common practice during the reign of the Islamic State for Yazidi women to be handed over as “gifts" to foreign fighters, and resulting children to be prepared from a young age to accept the radical doctrine of the group. As the caliphate collapsed, the majority of these foreign men were ultimately killed in battle, and Yazidi women gradually escaped, were rescued by SDF forces, or were ransomed to family members for exorbitant cash payments.[235]

The Yazidi religion places extreme importance on bloodlines, and children born to mixed marriages have traditionally faced nearly universal rejection by the priestly class and broader society. In the case of Yazidi sex slaves, religious authorities issued proclamations welcoming them back to their villages and urging understanding among family members for their traumatic ordeals. In the case of their children conceived with Islamic State fighters however, the reaction was unbending hostility and rejection—most women were forced to make a choice, abandoning their children of rape and rejoining Yazidi society, or social banishment and rejection themselves.[236] The result is that a massive but largely unknown number of children are currently sitting in orphanages or displacement camps across Iraq and Syria, abandoned by their Yazidi mothers. A large portion have unknown paternity—although many of these fathers are

[234] Dozier, K. (2019, May 23). What Happens Now to the Child Soldiers of ISIS? Retrieved January 05, 2021, from https://time.com/longform/isis-child-soldiers-yezidi/

[235] Plucinska, J. (2015, August 21). Campaign to Buy Back ISIS Sex Slaves Hits Funding Milestone. Retrieved January 05, 2021, from https://time.com/4005921/ransom-yazidi-women-isis-sex-slaves/

[236] Louisa Loveluck, M. (2019, August 03). Yazidi women raped as ISIS slaves face brutal homecoming choice: Give up their child or stay away. Retrieved January 05, 2021, from https://www.washingtonpost.com/world/middle_east/yazidi-women-raped-as-isis-slaves-face-brutal-homecoming-choice-give-up-their-child-or-stay-away/2019/07/30/f753c1be-a490-11e9-b7b4-95e30869bd15_story.html

undoubtedly foreign men who are currently detained or dead. Given that local authorities, in Iraq especially, have rejected birth certificates issued by the Islamic State, these children are at extremely high risk of statelessness, even as many would be eligible for a separate nationality and perhaps repatriation from their fathers' home nations.

4.4.4. Verifying parentage of children

There are formidable practical challenges in verifying the parentage of children born or living in Iraq and Syria, given that as many as 43,000 children may reside in al-Hol camp alone, many of them orphaned, separated from parents at a young age, or resulting from rape involving a foreign father and Syrian or Iraqi mother.[237] In all of these cases, proving that children are in fact eligible for consular assistance or repatriation in the first place is an essential piece of the puzzle of securing their rights and repatriations.

A number of countries, such as the Russian Federation, have only approved the children of foreign fighters for transfers after performing a DNA verification test.[238] Others, such as Australia, have considered the selective use of DNA testing to prove the citizenship of certain orphans who are suspected to have at least one Australian parent.[239] However, Australian authorities have thus far taken no concrete steps to repatriate any of their known or suspected citizens from Syria or Iraq, despite public

[237] Hurley, J. (2020, May 28). Coronavirus and ISIS: The Challenge of Repatriation from Al-Hol. Retrieved January 05, 2021, from https://www.usip.org/publications/2020/05/coronavirus-and-isis-challenge-repatriation-al-hol

[238] Russia repatriates orphans of suspected Islamic State fighters in Syria. (n.d.). Retrieved January 05, 2021, from https://www.middleeasteye.net/news/russia-repatriates-26-islamic-state-linked-children-syria

[239] Jennifer Percival, R. (2019, October 09). Who bears responsibility for the children of ISIS? Retrieved January 05, 2021, from https://www.lowyinstitute.org/the-interpreter/who-bears-responsibility-children-isis

comments by Prime Minister Scott Morrison that children bear no responsibility for the crimes of their parents.[240] Although numerous DNA tests have been performed under the auspices of the Self Administration, an unknown number of children born to Islamic State parents in Iraq and Syria—possibly thousands—have no documented parentage at all, leaving them at great risk of statelessness and abandonment.[241]

Exceptionally few foreign followers of the Islamic State alerted their consular authorities to the births of their children while residing in Syria and Iraq. As a result, almost none of these births were recorded in official government registers, and few of these births have come to the attention of authorities in home countries until months or years after the fact—generally gathered through interviews with their citizens in Iraqi detention or al-Hol.[242] However, this gap in verification has been exploited by many foreign residents in displacement camps to their own advantage in other ways. In one instance, an unnamed woman who was repatriated along with her infant, lied about the paternity of the child, falsely claiming that the father belonged to a wealthy family back home. The woman used this story in an attempt to extract money from the deceased man's family, and the truth was only uncovered following an investigation by the state's intelligence agency.[243]

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[240] Pearson, E. (2020, October 28). Australians Trapped in Syria Need Government's Help. Retrieved January 05, 2021, from https://www.hrw.org/news/2020/10/13/australians-trapped-syria-need-governments-help

[241] Arraf, J. (2017, December 27). Kidnapped, Abandoned Children Turn Up At Mosul Orphanage As ISIS Battle Ends. Retrieved January 05, 2021, from https://www.npr.org/sections/parallels/2017/12/27/569396126/kidnapped-abandoned-children-turn-up-at-mosul-orphanage-as-isis-battle-ends

[242] Houry, N. (2020, October 28). Children of the Caliphate. Retrieved January 05, 2021, from https://www.hrw.org/news/2016/11/23/children-caliphate

[243] Mironova, V. (2020, November 25). What to Do About the Children of the Islamic State. Retrieved January 05, 2021, from https://foreignpolicy.com/2020/11/25/islamic-state-isis-repatriation-child-victims/

4.4.5. States that restrict maternal citizenship

Although hundreds of women have managed to register the births of their children after the fact with consulates outside of Iraq or Syria, discriminatory laws in many countries restrict women from passing citizenship on to their children, particularly across the Arab world. This fact becomes a major barrier to children obtaining any citizenship, when considering the reality that many male Islamic State fighters are currently dead or missing. In total, 27 countries around the world currently bar women from passing on citizenship to their children, including 13 members of the Arab League, all of which saw significant numbers of their citizens leave to join the Islamic State.[244] Some of these states do allow women to petition to confer citizenship upon their children under extraordinary circumstances. Among these circumstances, is sometimes the risk that a child will otherwise remain stateless. However, in practice these exceptions are exceptionally rarely enacted, and are usually reserved only for the powerful or very well-connected.[245]

[244] Theodorou, A. (2020, September 10). 27 countries limit a woman's ability to pass citizenship to her child or spouse. Retrieved January 05, 2021, from https://www.pewresearch.org/fact-tank/2014/08/05/27-countries-limit-a-womans-ability-to-pass-citizenship-to-her-child-or-spouse/

[245] Global Legal Research Directorate staff, L. (2020, February 01). Retrieved January 05, 2021, from https://www.loc.gov/law/help/gender-equality/index.php

CHAPTER 5

CONCLUSION

Nearly two full years have passed since the Islamic State made its last stand at a dusty bend of the Euphrates River, in the tiny village of Baghouz. Despite the many months that have elapsed since then, the fates of the foreign fighters and their family members who traveled to live under the group remain as uncertain as ever. While many fighters died defending the dream of a border-shattering, hardline Islamist Utopia, many thousands more remain alive in an intractable state of legal limbo. As the SDF routed the final remnants of the group, Kurdish authorities gradually inherited full responsibility for more than 80,000 men, women, and children from all corners of the world—the entire population of a vanquished nation, a dizzyingly mixed array of lethal criminals, duped supporters, and innocent young victims.

Foreigners from around 80 nations constituted a significant subsection of that group, most of them traumatized, many potentially dangerous, and the vast majority unable to return to their lands of origin. In addition to the sudden burden of housing, feeding, and securing the unwanted citizens of these nations, the Self Administration was handed the Byzantine task of determining how to proceed in legal and security terms with tens of thousands of complex individual cases. Unlike the end of many colossal armed struggles of decades past, the conclusion of the campaign largely reflected the messy, unfinished state of affairs in the Syrian conflict, from which the Islamic State had first sprung—rather than a state authority, the massive responsibility of finding a solution for these people was thrust upon a weak, teetering pseudo-state entity. Already struggling with unfunded public services, a massive displaced

population of their own resulting from years of conflict, and an embryonic justice system, the Self Administration has found itself wholly unable to take on the monumental duty of securing justice for thousands of Islamic State victims.

Every aspect of the situation was entirely foreseen by the international community, and thousands of extremists fighters and civilians who traveled to join the group had originated in the same nations that had partnered on the ground with the SDF in their struggle to vanquish the group after it seized power in northeastern Syria and Iraq. However, despite the anticipated humanitarian and legal fallout from the Islamic State's collapse, only a relatively small number of countries have stepped up to take any semblance of responsibility for their citizens. Most have been content to leave thousands either trapped in indefinite limbo across a network of Kurdish-run internment camps, or left to die in deplorable conditions within the prison system of Iraq.

Progress has been made by some countries toward repatriating their citizens, beginning trials at home, or initiating deradicalization programs, depending on the decisions and priorities of individual governments. Particular bright spots on repatriation appear among a smattering of nations in central Asian, Eastern Europe, and the United States. However, recent events have showcased a scattershot of approaches among many countries elsewhere, with little coordination between, say, EU member states to solve this complex riddle. To this day, a large proportion of governments have demonstrated no discernible, coherent, overarching strategy to deal with the intractable situation of their citizens who traveled to join the Islamic State. As such, the overall situation of repatriation remains little changed since the collapse of the Islamic State in March 2019. This is a profound injustice, not only to the Kurdish people who suffered immensely in their struggle to vanquish the group and its murderous ideology from their

lands, but to the thousands of innocent children who are blameless victims in a situation over which they have never exercised any control. For states that have made opposition to the death penalty a key plank of modern civility, their willingness to look the other way during the harsh prosecutions taking targeting their citizens in Iraqi show trials, or even quietly encouraging the process, represents a profoundly disturbing moral failure.

There has never been any serious scholarly disagreement on whether or not states should act to swiftly repatriate their citizens from the camps of Syria. Across virtually all circles of mainstream legal and security analysis, there have been numerous petitions, declarations, and consistently argued pleas, urging governments to move towards returning their citizens home. The Self Administration has been unequivocal and steadfast in its insistence that authorities in home states must begin the process of removing their citizens from SDF custody, in addition to prosecuting them in their own nations when necessary. This also remains the official position of the US-led Global Coalition to Defeat ISIS, which has set up a task force to assist states in doing precisely that. Compelling arguments for repatriation are grounded in both practical and moral reasoning, each vitally important in understanding the present situation and need for decisive action.

From a practical security standpoint, ongoing radicalization of the next generation is a looming problem that grows more imminent with every day that states fail to take action. As many as 45,000 children are growing up in al-Hol camp, most likely a fifth of them with at least one foreign parent, amidst an environment of radical jihadist doctrine, daily struggles for factional dominance, and ingrained violence. The United State Central Command chief, General Kenneth McKenzie, put the problem succinctly in August 2020 when he said of the children growing up in the camp:

> "If we stay where we are, we're going to have huge problems: huge problems in the near term with lots of people potentially dying, and then huge problems in the long-term because I have yet to see a scheme that can talk about deradicalization at scale... I don't have an answer besides repatriation ... We either deal with this problem now or deal with it exponentially worse a few years down the road."[246]

Without an immediate change of course by states that are refusing to repatriate Islamic State women and children from Syria, it is highly likely that a future generation of extremists, indoctrinated since birth in the ideology of the group's supporters, will arise from this unwanted community. Actions taken by many states to strip the citizenship of some foreign women, as well as discriminatory policies of other states that prevent women from passing down citizenship to their children, also vastly increase the chances of statelessness among many of these children. The risk of statelessness comes attached to a long list of dramatic social disadvantages, including exclusion from formal education, restricted access to the labor market, and drastically higher risk of abuse or exploitation. These are all conditions that only add further to the allure of joining future extremist groups.

From a moral perspective, the issues undergirding the need for repatriation are no less compelling. In regards to young children, innocent victims of the Islamic State themselves, their home nations are consciously punishing them for the crimes of their parents and robbing them of a future that they deserve to have. The state owes them protection and robust consular assistance, particularly with a willing partner in the Self

[246] Babb, Carla. "CENTCOM Chief Warns of Resurgent IS Without Repatriation from Syrian Camps." *Voice of America*, 12 Aug. 2020, www.voanews.com/usa/centcom-chief-warns-resurgent-without-repatriation-syrian-camps.

Administration that has urged repatriation of all citizens since the campaign against the Islamic State began. The Kurdish-led government in northeast Syria has demonstrated ample willingness to coordinate with nations that have made efforts to repatriate their citizens—casting doubt on the claims of some officials that such coordination is not possible with a regional non-state entity. The decision to repatriate is ultimately a political decision, and unwillingness to do so, a moral choice.

The question of how to proceed on the repatriation of Islamic State fighters is, understandably, more politically contentious still. However, states cannot ultimately escape these questions through evasion and bureaucratic delay tactics. These fighters must be tried at home for their crimes, and victims of their violence deserve a measure of justice for the brutalities they suffered at the hands of these citizens from around the world. In preparation for these repatriations, states must move to rapidly update their counterterrorism laws in accordance with UNSCR 2178, and lay the foundations for long-term deradicalization programs, particularly targeted towards incarcerated individuals, should these prosecutions proceed.

While the need for all these steps has been evident since well before the collapse of the Islamic State, recent events have made the situation in Syria all the more urgent. In the months since this research began, militants affiliated with the group have launched a spectacular comeback in the areas once controlled by the Islamic State. Targeted Improvised Explosive Devices and attacks against the SDF by unknown gunmen have been attributed to the Islamic State, and instances of violence by the group have become a nearly daily occurrence, particularly in the provinces of Hasakah, Deir Ezzor, and Raqqa. The Russian Armed Forces have also responded with airstrikes against the group's positions in Badia Desert, as fighters there have expanded their

attacks against Russian and Syrian government troops.[247] Syria observers estimate there may be anywhere between 8,000 and 16,000 Islamic State forces active in the country today—far short of the numbers at the group's peak in 2016, but a stunning resurgence in relatively little time.[248]

While foreign fighters are thought to constitute only a small fraction of this revitalized incarnation of the group, things can change rapidly. In March of 2020, Islamic State prisoners staged a riot in SDF-run Ghweren detention center, temporarily seizing control of the facility and allowing an unknown number of fighters to escape.[249] The event illustrated the ease with which foreign fighters could potentially escape, and rejoin the swelling ranks of the group, particularly if assisted by operatives on the outside. These fighters remain a massive liability for the local population in Syria and Iraq, and potentially far beyond. With the outsized role that foreigners have played in the destruction of these nations and the suffering of their peoples, it is the duty of governments to take responsibility for their citizens and hold them accountable for their atrocities committed abroad. With the transnational jihadist threat seemingly on the rise once more, the role of these fighters in the Islamic State story may otherwise see devastating, future chapters, with potential consequences for the entire world.

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[247] Al Arabiya English. (2020, May 20). Russian air strikes kill 42 in ISIS-held Raqqa. Retrieved January 05, 2021, from https://english.alarabiya.net/en/News/middle-east/2015/11/06/Russia-bombs-Palmyra-eastern-Syria

[248] Jeffrey, James F. "Part 1: The Future of ISIS." Wilson Center. December 22, 2020. Accessed January 04, 2021. https://www.wilsoncenter.org/article/part-1-future-isis.

[249] Yeung, Jessie, and Ryan Browne. "ISIS Members Riot and Break out of Syrian Prison." CNN. March 30, 2020. Accessed January 04, 2021. https://www.cnn.com/2020/03/30/middleeast/isis-prison-escape-syria-intl-hnk/index.html.

APPENDIX

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