



The Legal Dilemma of Returning Foreign Terrorist Fighter

Dr. Moin Yahya al-Oeely

Researcher in international relations and Advisor at the Ministry of Education, Yemen.

With the exacerbating Foreign Terrorist Fighters (FTFs) and as large numbers have joined extremist organizations, namely ISIS and al-Qaeda, receiving training on using arms and explosives and all acts of violence, their return to their countries has been a security concern for most countries.

Huge Dilemma

Policymakers and law-enforcement officials have had a hard time approaching returnees legally, given that some countries have no options but to accept them as their citizens. This prompted the search for a way out to handle the issue and, at the same time, achieve balance between law enforcement, establishing security, and respecting ethics, thus sparing countries their risks in future.

Proving that foreign fighters were involved in terrorist acts is one of the most difficult challenges that judicial authorities in various countries face. The public prosecution can often prove individuals' departure from conflict zones, but not their affiliation to terrorist organizations or involvement in militant crimes. What complicates matters even more is the lack of legal foundations and a framework for identifying terrorist crimes. Even though certain provisions of the Criminal Code may be sufficient for a trial in some cases, the penalties are frequently lenient and do not reflect the gravity of the threat. Furthermore, unlawful combatants are not subject to the same conditions as prisoners of war. They are not protected by the Geneva Conventions (III) on Prisoners of War .

Here are some of the most important legislations, laws, resolutions, principles, and conventions that regulate the legal framework approaching foreign fighters and their return to their homelands.

UN Security Council

Several resolutions and conventions regarding terrorism were approved. In this regard, the UN Security Council resolutions bind Member State parties with the relevant laws within the framework of the national laws of each country. The UN Security Council passed the following resolutions: S/RES/1373 (2001); S/RES/2178 (2014); and S/RES/2396 (2017) .

Resolution 1373 (2001), is the most comprehensive resolution through which subsequent resolutions are interpreted; it was issued following the 9/11 events and prompted a series of international conventions on fighting violent extremism and terrorism .

Resolution 2178 (2014) defined Foreign Terrorist Fighters as “individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict”. It calls on Member States to reinforce their efforts that aim to stop the threat of foreign fighters through three approaches: (criminal laws, penalties, and preemptive measures) .

Resolution 2396 (2017) encourages Member States to detect and interrogate returning Foreign Terrorist Fighters (FTFs) and calls for interstate cooperation and information exchange in this regard.

International Cooperation

Over the past 60 years, 19 counter-terrorism conventions and resolutions were passed. In 1979, the UN General Assembly established the principles of combating international terrorism through the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in conformity with the UN Charter. In 1972, the General Assembly decided to establish an Ad Hoc Committee on International Terrorism, which set out an accepted definition of international terrorism. In 1999, the General Assembly produced the Draft International Convention for the Suppression of Terrorism.

On 8 September 2006, the UN General Assembly adopted the UN Global Counter-Terrorism Strategy to address the FTF phenomenon. Even though the Strategy, unlike UN Security Council resolutions, is not legally binding to Member States, it is a unique

global instrument to enhance national, regional and international efforts to counter terrorism. Member States adopted the strategy by consensus based on four pillars :

- addressing the situations leading to the spread of terrorism ;
- preventing and countering terrorism ;
- building the capacities of countries to prevent terrorism ;
- and ensuring respect for human rights and the rule of law.

The UN approved a law-making methodology which encouraged the conclusion of bilateral and multilateral agreements within the framework of regional and international organizations. These agreements attempted to dry up terrorism wellsprings and cut financial support off violent groups. Moreover, developing means of deterrence became the responsibility of national criminal laws.

The legal framework for countering Foreign Terrorist Fighters included some initiatives that provided important recommendations and good practices that prompted Member States to enhance their response to the RFTFs threat .

Some agreements are considered significant initiatives in this regard:

1. **The 1977 European Convention on the Suppression of Terrorism:** This convention was signed in France in 1977, entered into force in August 1978, and was ratified in 2003. The convention established an array of commitments for addressing terrorism and returning foreign fighters. Adopting this convention, officials ensured the implementation of a twofold goal, first: the operationalization of the European Convention and its provisions; second: enhancing its effectiveness and ability to make some adjustments.
2. **The Hague–Marrakech Memorandum:** This initiative was launched by Morocco and the Netherlands in 2014 in the framework of the Global Counterterrorism Forum (GCTF) for policymakers and practitioners in various countries to exchange good practices of facing the security threats of Foreign Terrorist Fighters. The Memorandum set 19 good practices in line with the guidance provided by Governments to develop their own policies. In 2015, an Addendum was annexed to the Memorandum comprising seven recommendations on handling RFTFs.

3. **Malta Principles for Reintegrating RFTFs:** The Malta Principles for Reintegrating Returning Foreign Terrorist Fighters is a joint initiative launched in 2016 between the Hedayah Research Center and the International Institute for Justice and the Rule of Law (IIJ). This initiative proposed 22 principles to guide Member States in their policies and programs on the reintegration of RFTFs.
4. **Madrid Guiding Principles:** On 27–28 July 2015, the UN Security Council Counter-Terrorism Committee (CTC) held a special meeting hosted by the Government of Spain in Madrid. Pursuant to their discussions, participants identified 35 Guiding Principles that were subsequently adopted by the Security Council in December 2015. These Principles build upon three major areas:
 - Detection of, intervention against and prevention of the incitement, recruitment and facilitation of Foreign Terrorist Fighters .
 - Prevention of travel by foreign terrorist fighters, including through operational measures, the use of advance passenger information, and measures to strengthen border security.
 - Criminalization, prosecution, including prosecution strategies for returnees, international cooperation and the rehabilitation and reintegration of returnees.

With the defeat of terrorist ISIS, the UN Security Council's attention shifted to the persistent threat posed by RFTFs, and called upon CTC in Resolution 2396 (2017) to review Madrid Guiding Principles in light of the threat posed by RFTFs. At a special meeting of CTC on 13 December 2018 in New York, 17 additional practices were added in an Addendum to the 2015 Madrid Guiding Principles to help Member States to stem the RFTFs phenomenon.

Regional Cooperation

The counter-terrorism legal framework in the MENA region is associated with the improvements made by major organizations, entities, and institutions, including:

- 1) **The Arab League:** The Arab League approved the Arab Convention for the Suppression of Terrorism in April 1998 and endorsed some recommendations at the 26th Arab League Summit held in Egypt in 2015. Those recommendations addressed critical legal matters regarding the definition of terrorism, extradition, and letters rogatory.

- 2) The Organization of African Unity (OAU): OAU passed counter-terrorism resolutions starting in 1992, regarding terrorism perpetrated by individuals and groups. In 1999, the OAU Convention on the Prevention and Combating of Terrorism was concluded in Algeria, aiming to reinforce joint African counter-terrorism efforts.
- 3) The Organization of Islamic Cooperation (OIC): OIC issued the Code of Ethics for Member States involved in the fight against international terrorism, endorsed it in 1994, then adopted the OIC Convention on Combating International Terrorism in 1999, which entered into force on 7 November 2002. Individuals engaged in what is considered a legitimate armed struggle for self-determination were not designated as terrorists under Article II of the Convention. Recognizing the challenges that hindered the implementation of the 1999 OIC Convention on the Prevention and Combating of Terrorism, OIC expressed its intent in 2016 to propose further rules and update the provisions of the Convention to reinforce current cooperations .
- 4) EU Measures: Some European governments seek to bring back their foreign fighters based on their individual situations, while many others are reluctant due to security concerns. EU countries adopted measures to prevent the easy return of foreign terrorist fighters and to sue the ones who are still in conflict zones or detention camps as well as their families .

Furthermore, relevant EU apparatuses help national authorities to coordinate investigations and legal prosecutions and to facilitate judicial cooperation in RFTFs cases by establishing a Unified Court Record (UCR), gathering information on legal procedures in Member States, identifying possible correlations, and developing strategies addressing the RFTFs phenomenon. Established procedures include gathering incriminating evidence against foreign fighters, such as photos of terrorist operations, fingerprints on explosives, and relevant e-mails. The Memorandum published by the European Union Agency for Criminal Justice Cooperation (Eurojust) in 2020 shows that despite the challenges faced when gathering such data, making sure they meet the criteria of admissibility of evidence, it paved the way for bringing suspect terrorists to justice.

Judicial authorities in ten EU countries reported that since 2018 they have received and used abundant information on foreign fighters in conflict zones through trial proceedings, such as mobile and credit card data. The Memorandum also provided a

set of recommendations to further develop the disclosure of evidence of identification on foreign fighters, such as reinforcing process relationships between judicial and law-enforcement authorities and other authorities, and border protection at the national and international levels. European countries, including Sweden, Germany, France, and the Netherlands, also seek to pass new terrorism laws that accept the return of ISIS foreign fighters while counting their crimes as international crimes that are punishable by long-term sentences.

Conclusion

Regional and international cooperation regarding the RFTFs phenomenon should be promoted, taking key relevant UN principles into full consideration, including the repatriation of foreign fighters to their countries for trial, rehabilitation, and reintegration into society. However, establishing an international court for the prosecution of detainees before repatriating them to their homelands remains an option that might ultimately come into action to bring justice based on legal and humanitarian criteria. This phenomenon requires zero tolerance, because any lenience means further extremism, violence, and terrorism.