UNITED NATIONS SECURITY COUNCIL COUNTER-TERRORISM COMMITTEE

BRIEFING ON: THE LIMITS OF PUNISHMENT

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The UN Security Council Counter-Terrorism Committee invited United Nations University to brief its members on 13 December 2018 in relation to a hearing on the Madrid Guiding Principles at UN headquarters.

It was based on a research project entitled The Limits of Punishment: Transitional Justice and Violent Extremism led by Cale Salih.

The following is an adapted summary of that briefing.

PROJECT LEAD

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The Limits of Punishment was a research project led by the United Nations University Centre for Policy Research in partnership with the Institute for Integrated Transitions. It was supported by the UK Department for International Development. The findings were published in May 2018, and presented at events held at Whitehall in London and at the Brookings Institution in Washington, DC. In December 2018, members of the research team held roundtable meetings with Iraqi policymakers to promote uptake of the findings.

The research sought to understand if, when and how transitional justice, in combination with other conflict resolution tools, can contribute to transitions away from conflict in settings affected by major jihadist groups.

The project undertook three fieldwork-based case studies that assessed nationally-led approaches to handling individuals accused of having been associated with: al Shabaab in Somalia; Boko Haram in Nigeria; and the Islamic State (IS) in Iraq. The case studies look at a broad range of formal and informal mechanisms of punishment and leniency. These include, inter alia: amnesties; prosecutions; traditional justice; and disarmament, demobilization, reintegration (DDR), rehabilitation, and similar programs that, in practice, offer some individuals alternatives to criminal justice. The case studies demonstrate the risks of excessively heavy-handed and at times indiscriminate approaches that penalize broad sectors of local populations accused of association with these groups, and assess the quality and limitations of existing leniency programs for such individuals.

In addition, the project analyzed the empirical evidence of the case studies in light of broader lessons learned from decades of international practice in the field of transitional justice. On this basis, a framework was developed to assist national policymakers and practitioners – as well as their international partners – in applying transitional justice tools as part of a broader strategy to resolve conflicts involving groups deemed violent extremist. The framework offers a range of approaches toward effectively balancing leniency and accountability, that can be tailored to conflict settings marked by violent extremism.
The Madrid Guiding Principles, as well as UN Security Council Resolutions, call on states to pursue a range of goals with respect to individuals associated with terrorist groups, including prosecution and criminalization, as well as rehabilitation and reintegration.

The reality is, however, that these goals will often come into tension with one another. States need more guidance on how to balance punitive and leniency measures, including alternatives to prosecution for low-risk cases, as part of a comprehensive, human rights-based approach. Otherwise, an over-reliance on repressive measures will undermine rehabilitation and reintegration imperatives, and will even risk exacerbating the causes of terrorism.

Three key findings from The Limits of Punishment research project offer insights into this challenge. The project sought to understand the potential role of transitional justice tools in nuancing how states respond to individuals accused of terrorist association.

The project’s findings are relevant for locals who become associated with groups such as Islamic State in Iraq (ISIL), Boko Haram in Nigeria, and al Shabaab in Somalia, as well as for foreign fighters.
THREE KEY FINDINGS

1. Wide range of roles in terrorist groups
Individuals play a wide range of roles in association with groups that are deemed terrorist. A large percentage of these roles are non-violent. In most cases, their involvement is not purely voluntary, rather it takes place along a continuum of coercion. For example, millions of people who lived under ISIL in Iraq had little choice but to pay taxes to the group on penalty of death. Foreign children have traveled with their parents to states like Iraq and Syria, or have been born there. Some, especially older, children may have been trained by ISIL to play support roles. Justice responses must be nuanced enough to address the spectrum of individual involvement, including those cases in which the lines between victim and perpetrator are blurred.

2. Iron-fist response can backfire
Excessively punitive responses to those accused of terrorist association can backfire. Many states have counter-terrorism laws that impose harsh punishments for vaguely-defined terrorist acts. UN Security Council Resolutions often contribute to this problem, by calling for the criminalization of a broad range of terrorist acts, without defining terrorism. Combined with hasty investigations and trials, which in many states lack due process, these laws penalize a broad mix of serious criminals and those who committed minor offenses or did so under duress. The risks of this are myriad. Casting the punishment net too wide can exacerbate grievances among communities that feel targeted. In prisons, abusive conditions, overcrowding, and the mixing of inmates can drive further resentment and recruitment. All of this could produce new waves of conflict in which terrorist groups thrive. And broadly repressive approaches can overstretch a state’s investigative and prosecutorial capacities, reducing its ability to identify and hold accountable the most serious offenders.

3. Prioritizing serious crimes and transitional justice tools
For locals and returning foreign fighters alike, states need to develop strategies to prioritize serious crimes over lesser ones. Transitional justice tools, such as conditional amnesties, can offer alternative accountability models for low-risk or minor offenders. In order to avoid violating victims’ rights or exacerbating impunity, amnesties should be designed with strict eligibility and other conditions attached. For example, the beneficiary may be required to contribute to reparations for victims, or disclose his or her crimes in a truth-telling process. Such transitional justice tools can be combined with rehabilitation and reintegration programming to offer eligible individuals an exit ramp out of non-state armed groups. Dealing with lesser offenders through such models, in turn, will allow a state to better focus its deterrence tools on the most dangerous individuals.