

Legal Brief

THE LEGAL STATUS OF ISIS-AFFILIATED FOREIGN NATIONALS HELD IN DETENTION IN NORTH-EAST SYRIA

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Common Acronyms:

IAC:	International armed conflict
ICCPR:	International Covenant on Civil and Political Rights
ISIS:	Islamic State in Iraq and Syria
IHL:	International humanitarian law
IHRL:	International human rights law
IRL:	International refugee law
NIAC:	Non-international armed conflict
NSAG:	Non-State armed group
SDF:	Syrian Democratic Forces

1. INTRODUCTION

The aim of this Brief is to clarify the legal status of ISIS foreign fighters and ISIS-affiliated foreign women and children held in detention by the Syrian Democratic Forces (SDF) under international humanitarian law (IHL). In doing so, this Brief explains the minimum standard of treatment owed to all detainees under IHL in the context of a non-international armed conflict (NIAC). The purpose of this Brief is not to advocate for any particular political solution to the problem of ISIS foreign fighters and ISIS-affiliated foreign women and children held in detention. Rather, its purpose is to clarify the applicable law so that all parties to the conflict in Syria can uphold their obligations under IHL and general international law.

Following this Introduction, the remainder of this Brief is structured as follows:

Section 2 provides a factual analysis of the conflict in North-East Syria. Specific attention is given to: the rise of ISIS and its ability to attract foreign fighters to join its cause in Syria; the composition, structure, and political status of the SDF as the military wing controlling the Self-Administration of North and East Syria (SA NES); and current statistics and standards of treatment of ISIS foreign fighters and ISIS-affiliated women and children detained by the SDF.

Section 3 describes the legal framework applicable to the conflict in North-East Syria. It explains why the conflict is classified as a NIAC due to the sufficient intensity of the violence and organisation of the warring parties. The applicable legal framework consists of: IHL; international human rights law; and international refugee law. As persons rendered hors de combat (out of combat) by reason of their detention, ISIS foreign fighters and affiliated women and children detained by the SDF are entitled to the protection of IHL applicable in NIAC. Due to the SDF's status as a non-State armed group (NSAG), the applicability of international human rights law is disputed. However, there is general agreement that international human rights law applies to NSAGs who, like the SDF, exercise de facto territorial

control over a civilian population. Furthermore, the SDF has shown a willingness to be bound by human rights obligations. International refugee law applies to ISIS foreign fighters in the hands of a State party to the 1951 Refugee Convention who face a genuine fear of persecution if refused protection. The principle of non-refoulement is applicable to NIACs.

Section 4 discusses the SDF's legal authority to detain ISIS foreign fighters and affiliated women and children for security reasons under IHL. Consistent with the official position of the International Committee of the Red Cross (ICRC), this Brief explains that there is an implied authority for the parties to a NIAC to detain persons for 'imperative security reasons'. While treaty law applicable in NIAC does not expressly provide this authority, it is necessary to give effect to the relevant treaty provisions concerning detention in NIAC and is recognised under customary international law. Practically, one of the primary reasons for recognising the implied authority to detain in NIACs is that it is often the only alternative to using lethal force as a means of neutralising a security risk. The internment of ISIS foreign fighters or affiliated women and children is only justified where the individual poses the requisite security risk to the SDF. Membership to ISIS as a fighter or pursuant to a 'continuous combat function' is sufficient to justify internment. Mere affiliation is not sufficient.

Section 5 outlines the minimum standard of treatment owed to ISIS foreign fighters and affiliated women and children detained by the SDF under IHL applicable in NIAC. It is noted that while treaty IHL applicable in NIAC contains certain technical and procedural gaps in detention standards, these gaps have been filled by customary IHL and the synthesis of international human rights law applicable in armed conflicts. At the bare minimum, article 3 common to the Geneva Conventions of 1949 (Common Article 3) requires that all detainees are to be treated humanely at all times. However, various other treaty provisions which now form part of customary international

law are equally binding on the SDF as a party to the NIAC. Along with certain provisions of international human rights law, these IHL rules provide specific procedures, standards, and material conditions of detention that the SDF is legally obliged to uphold.

Section 6 explains the minimum judicial guarantees owed to ISIS foreign fighters and affiliated women and children who find themselves subject to criminal prosecution. These judicial guarantees apply irrespective of whether the individual is charged with violating IHL, terrorism legislation, or ordinary domestic criminal law, providing there is a sufficient connection with the NIAC. A brief discussion is provided on the legal authority of the SDF to enforce laws legislated by the non-State armed group.

Section 7 discusses the legal obligation on both the receiving and transferring parties during the transfer of ISIS foreign fighters and affiliated women and children previously detained by the SDF. While treaty IHL applicable in NIACs does not specifically deal with detainee transfer, it is understood that the obligation to ensure detainees' humane treatment under the law of international armed conflict is applicable as a rule of custom. Furthermore, ICRC commentary to Common Article 3 upholds the principle of non-refoulement as necessary to give effect to the obligation of humane treatment.

Section 8 outlines potential obligations on the States of origin of ISIS foreign fighters and affiliated women and children under general international law. Pursuant to the international human rights law instruments, various United Nations Security Council Resolutions, and the Convention against Statelessness, States of origin of the ISIS foreign fighters and affiliated women and children may be legally obliged to either repatriate their citizens, facilitate their prosecution either at home or overseas, or to at least take action that would avoid rendering such persons either stateless, subject to inhumane treatment, or a continuing terrorist threat.

Section 9 glances at the Belgian experience in dealing with repatriation and returnees.

The Conclusion summarises each of these legal rights and obligations in turn. It reaffirms the legal

status of ISIS foreign fighters and ISIS-affiliated women and children as persons hors de combat by reason of detention and the protection to which they are entitled under IHL. This Brief shall be of use to the warring parties to the NIAC in North-East Syria, lawyers, judges, advisors, and humanitarian actors in introducing the applicable legal framework to the detention, treatments, prosecution, and transfer of ISIS foreign fighters and affiliated women and children detained by the SDF in Syria.

The present legal analysis is based on factual information gathered from open sources, including reports of international organisations, international and local non-governmental organisations, and news outlets.¹

1. This Brief has been prepared by Matias Thomsen (Doctoral candidate - University of Tasmania, Faculty of Law) and Thomas Assaker (Legal Advisor - Diakonia IHL Resource Desk in Lebanon) under the supervision of Jelena Plamenac (Manager of Diakonia's Lebanon IHL Resource Desk). Thomsen would like to thank India Beecroft, Felix Craig, Matthew Etherington, and Salmaan Shah of the International Justice Initiative (IJI) for their research assistance. The IJI is a public interest initiative of the University of Tasmania's Faculty of Law: <<http://www.utas.edu.au/law/left-quick-links/internationaljustice-initiative>>.

2. FACTUAL BACKGROUND

2.1. The rise and decline of ISIS and its territorial control

Originating in Iraq in 2006 as an affiliate of the Al-Qaida movement, the group today known as the Islamic State in Iraq and the Levant ('ISIL' but commonly and hereafter referred to as 'ISIS') strived to establish a State based on ultra-radical Islam in defiance of internationally recognised borders. It progressively spread over Iraq and Syria, prospering financially through extortion, kidnappings, and the selling of oil products and cultural artefacts from captured territories. Led by former senior Iraqi military and experienced Al Qaeda commanders, ISIS was able to take advantage of the Syrian civil war to expand.²

Having taken control of about 55 000 square kilometres spread over the territories of Iraq and Syria, it proclaimed in June 2014 the creation of a caliphate, which it named the 'Islamic State'.³ Over the years, its effective use of media and communication, for propaganda and recruitment purposes, attracted some 40 000 so-called 'foreign fighters' and their families who travelled from all around the world to join the group.⁴ At its peak, the caliphate controlled a population of 10 million.⁵

ISIS lost most of its territory in 2016 and 2017.⁶ By the end of March 2019, it had surrendered its last stronghold of Baghuz, an area of eastern Syria smaller than a square kilometre, after about six weeks of intense fighting.⁷

Despite the significance of this military and territorial defeat, the armed group has not disappeared. Rather, ISIS has shifted from a quasi-State to an underground network of sleeping cells, perpetrating sporadic attacks in order to perpetuate its ideology and undermine its adversaries' ability to guarantee the safety of the population.⁸ It feeds on the latter's discontent with the new balance of power in the region.⁹

2.2. The rise of the SA NES and its military wing, the SDF

In Syria, the SDF has primarily undertaken the fight against ISIS on the ground. Backed by the United States, it consists of an alliance of Arab and Kurdish armed groups led by the Kurdish Protection

2. 'Life under the ISIS Caliphate', The Week, 22 August 2015, <https://theweek.com/articles/572910/life-under-isis-caliphate> (accessed July 2019); Louis Charbonneau, 'ISIS is making \$200 million from stolen ancient artifacts', Business Insider, 6 April 2016, <https://www.businessinsider.com/r-islamic-state-nets-up-to-200-million-a-year-from-antiquities-russia-2016-4> (accessed July 2019).

3. For basic facts about ISIS, see notably: 'ISIS Fast Facts', CNN Library, 1 May 2019, <https://edition.cnn.com/2014/08/08/worldisis-fast-facts/index.html> (accessed July 2019).

4. 'IS 'caliphate' defeated but jihadist group remains a threat', 23 March 2019, BBC News, <https://www.bbc.com/news/world-middle-east-45547595> (accessed July 2019); The Geneva Academy of International Humanitarian Law and Human Rights has produced a detailed analysis of the phenomenon of 'foreign fighters' from the perspective of international law, which is available https://www.geneva-academy.ch/joomlatools-files/docman-files/Publications/Academy%20Briefings/Foreign%20Fighters_2015_WEB.pdf.

5. 'Islamic State and the crisis in Iraq and Syria in maps', BBC News, 28 March 2018, <https://www.bbc.com/news/world-middle-east-27838034> (accessed July 2019).

6. 'Islamic State and the crisis in Iraq and Syria in maps', BBC News, 28 March 2019, <https://www.bbc.com/news/world-middle-east-27838034> (accessed July 2019).

7. Rukmini Callimachi, 'ISIS Caliphate Crumbles as Last Village in Syria Falls', New York Times, 23 March 2019, <https://www.nytimes.com/2019/03/23/world/middleeast/isis-syria-caliphate.html> (accessed July 2019); Sarah el Deeb 'Taking their last breath': IS hides among Syrian civilians', AP News, 18 February 2019, <https://www.apnews.com/0a99dc7cb94742af9947f14cbffa485b> (accessed July 2019).

8. Colin P. Clarke, 'Islamic State's latest video could have long and terrifying consequences', Los Angeles Times, 6 May 2019, <https://www.latimes.com/opinion/op-ed/la-oe-clarke-afghanistan-baghdadi-20190506-story.html> (accessed July 2019); Wladimir Van Wilgenburg, 'SDF arrest 5 ISIS sleeper cell members in Manbij, Raqqa', Kurdistan 24, 26 June 2019, <https://www.kurdistan24.net/en/news/1acdd934-624a-4ec0-964e-3b6918a63782> (accessed July 2019).

9. 'Arabs in Syria's Deir al-Zor protest against ruling Kurdish militia', Middle East Monitor, 29 April 2019, <https://www.middleeastmonitor.com/20190429-arabs-in-syrias-deir-al-zor-protest-against-ruling-kurdish-militia/> (accessed July 2019); Shelly Kittleson, 'More Arab protests expected against Kurdish SDF in Syria', Al Monitor, 3 June 2019, <https://www.al-monitor.com/pulse/originals/2019/05/syria-deir-ez-zor-shuhail-protests-sdf-killing-arabs.html> (accessed July 2019); Jared Szuba, 'ISIS's 'caliphate' was crushed. Now Syria's Kurd-led alliance faces bigger battles', The Defense Post, 29 March 2019, <https://thedefensepost.com/2019/03/29/syria-sdf-kurds-face-bigger-battles-isis/> (accessed July 2019).

Units (YPG).¹⁰ Since 2016, the SDF has assumed the military branch of the Self-Administration of North and East Syria (SA NES),¹¹ which since 2012 has progressively acquired de facto autonomy in administering North-Eastern territories in Syria. It has its own constitution, provides governmental-like services to the local population, and engages in international relations.¹²

In addition to the support from the international coalition, the SDF's relations with the Syrian government played a role in its success. As the Civil War broke out, Damascus prioritised defeating more threatening opposition groups than the Kurds in remote North-Eastern territories. As they became leaders in the fight against ISIS, they were mainly tolerated by the Syrian government,¹³ despite occasional clashes.¹⁴ Assad's regime currently buys oil from the SDF.¹⁵

The SDF was the key to military and territorial victory against ISIS. It recaptured ISIS-held territories, most notably Manbij in the fall of 2016, Raqqa in December 2017, and Baghuz in March 2019.¹⁶ The

SDF is now tasked with a peacekeeping role in the post-conflict areas it administers. The new ruler's popularity is not unanimous amongst the civilian population, and tensions arose quickly.¹⁷

The SDF's position today has become increasingly complex. American support, its extent and duration, is no longer guaranteed. The main YPG component of the SDF, acceptable when defeating ISIS was the priority, is now embarrassing for the US's relations with Turkey.¹⁸ Turkish presence in North Syria threatens the SDF's stronghold and appears motivated by Turkey's unwillingness to see a mainly Kurdish administration function along its southern border.¹⁹ The SDF cannot count on the kind of support they would want from Iraqi Kurds,²⁰ and Iran is pressuring them to turn to Assad.²¹ Reintegration in the Syrian State is not off the table for the SA NES, but on the condition that the Syrian government recognise its authority and autonomy in administering North and Eastern territories, as a federal entity.²²

10. Determining the extent of American support to the SDF, and its potential legal consequences, lies outside the scope of this legal brief. For an overview of the relationship between the SDF and the US, see: Farah Najjar, 'What is the Future of the Syrian Democratic Forces?', Al Jazeera, 25 November 2017, <https://www.aljazeera.com/news/2017/11/future-syrian-democratic-forces-171124110417741.html> (accessed July 2019).

11. The SA-NES was called the Democratic Federation of Northern Syria (DFNS) before September 2018. For an overview, see: Pinar Tank, 'Preserving Kurdish Autonomy', The Cairo Review, 15 February 2019, <https://www.thecairoreview.com/tahrir-forum/preserving-kurdish-autonomy/> (accessed July 2019).

12. See for instance the website of their permanent representation in the Benelux region, based in the Hague: <www.rojavabenelux.nl> (16 May 2019). An English version of the entity's constitution can also be found on this link, under 'Social Contract'.

13. 'Peacekeeping: Ignoring This Problem Makes It Much Worse', Strategy Page, 19 June 2019, <https://www.strategypage.com/htmw/htun/20190619.aspx> (accessed July 2019); Namo Abdulla, 'Everything in Syria is a web, US journalist', RUDAW, 25 June 2019, <https://www.rudaw.net/english/interview/25062019> (accessed July 2019).

14. 'Details regarding Assad's forces attack on SDF-held areas in the western countryside of Deir Ezzor', Deir Ezzor 24, 2018 archives, <https://en.deirezzor24.net/archives/5521> (accessed July 2019); 'Assad's forces advance in rural Deir Ezzor and cross the Euphrates River', Deir Ezzor 24, 2017 archives, <https://en.deirezzor24.net/archives/5025> (accessed July 2019).

15. Zouhir Al Shimale, 'Syrians in Deir Ezzor protest against SDF oil sales to Assad government', Middle East Eye, 8 May 2019, <https://www.middleeasteye.net/news/civilians-vow-continue-protest-against-sdf-sale-oil-syrian-government> (accessed July 2019).

16. Joanne Stocker, 'SDF declares 'total' victory over ISIS in Syria', The Defense Post, 23 March 2019, <https://thedefensepost.com/2019/03/23/sdf-victory-isis-syria/> (accessed July 2019).

17. Jared Szuba, 'New Syrian military councils are the SDF's latest push for decentralization', The Defense Post, 23 June 2019, <https://thedefensepost.com/2019/06/23/syria-sdf-military-councils/> (accessed July 2019); Jared Szuba, 'ISIS's 'caliphate' was crushed. Now Syria's Kurd-led alliance faces bigger battles', The Defense Post, 29 March 2019, <https://thedefensepost.com/2019/03/29/syria-sdf-kurds-face-bigger-battles-isis/> (accessed July 2019).

18. Jared Szuba, 'ISIS's 'caliphate' was crushed. Now Syria's Kurd-led alliance faces bigger battles', The Defense Post, 29 March 2019, <https://thedefensepost.com/2019/03/29/syria-sdf-kurds-face-bigger-battles-isis/> (accessed July 2019); Jack Detsch, 'Congress expands Pentagon aid in Syria to cover Islamic State prisoners', Al Monitor, 17 June 2019, <https://www.al-monitor.com/pulse/originals/2019/06/congress-expands-pentagon-aid-syria-isis-prisoners.html> (accessed July 2019).

19. 'Why is Turkey attacking northwest Syria?', PBS News Hour, 3 February 2018, <https://www.pbs.org/newshour/world/why-is-turkey-attacking-northwest-syria> (accessed July 2019).

20. Joost Hiltermann, 'The Kurds: A Divided Future?', International Crisis Group, 19 May 2016, <https://www.crisisgroup.org/middle-east-north-africa/gulf-and-arabian-peninsula/iraq/kurds-divided-future> (accessed July 2019).

21. Wladimir van Wilgenburg, 'Iran wants Syrian Kurds to depend on Damascus: Experts', Kurdistan 24, 31 December 2019, <https://www.kurdistan24.net/en/news/9d411b9e-61e9-4196-8119-30438c1ee009> (accessed July 2019).

22. Wladimir van Wilgenburg, 'SDF chief says Kurdish authorities ready to talk to Damascus', Kurdistan 24, 23 June 2019, <https://www.kurdistan24.net/en/news/d0bf31c5-e140-4c66-ba13-1d0b85fe7fad> (accessed July 2019); Jane Arraf, 'Revenge Is For The Weak': Kurdish Courts In Northeastern Syria Take On ISIS Cases', National Public Radio, 29 May 2019, <https://www.npr.org/2019/05/29/727511632/revenge-is-for-the-weak-kurdish-courts-in-northeastern-syria-take-on-isis-cases> (accessed July 2019).

In this context, the armed group is tasked with managing tens of thousands of detainees.

2.3. The fate of former foreign ISIS members detained by the SDF

As it was advancing against ISIS on the territory of Syria and recapturing ISIS strongholds, the SDF captured more than 60 000 ISIS affiliates and 9 000 male ISIS fighters.²³

Foreign male ISIS fighters

According to numbers communicated by the SA NES, as of May 2019, 2 010 of the 9 000 detained male ISIS fighters in SDF custody are foreigners, i.e. not Syrians nor Iraqis. 3 000 of the 9 000 are from Iraq. The remaining 4 000 are Syrians. Among the foreigners, 43% are from Arab Countries, 36% from Asia and Russia, 10% from Europe, 9% from Turkey, and 2% from America and other countries.²⁴

These former fighters are detained in a network of SDF-administered prisons, ranging from rehabilitated government prisons, to schools, hospitals and storage facilities transformed into prisons. Some of the known detention places are: Dayriq (Al Malikiah), Al Kasrah, Ain Issa, Kobane, Al Hasakeh, Muheimidah, and Dashisha.²⁵

23. Ryan Browne and Jennifer Hansler, 'US officials say more than 2,000 suspected foreign ISIS fighters being held in Syria', CNN, 17 April 2019, <https://edition.cnn.com/2019/04/17/politics/foreign-isis-fighters-syria/index.html> (accessed July 2019).

24. Figures given by SA NES officials in Geneva on 23 May 2019 ; Ryan Browne and Jennifer Hansler, 'US officials say more than 2,000 suspected foreign ISIS fighters being held in Syria', CNN, 17 April 2019, <https://edition.cnn.com/2019/04/17/politics/foreign-isis-fighters-syria/index.html> (accessed July 2019).

25. Amberin Zaman, 'Inside the prison holding IS detainees in northeast Syria', Al Monitor, 15 March 2019, <https://www.al-monitor.com/pulse/originals/2019/03/syria-kurdish-region-isis-prison-sdf.html> (accessed July 2019); Raf Sanchez, 'Kurdish forces put down riot by Isil prisoners in Syria', The Telegraph, 6 April 2019, <https://www.telegraph.co.uk/news/2019/04/06/kurdish-forces-put-riot-isil-prisoners-syria/> (accessed July 2019); Charlie Savage, 'As ISIS Fighters Fill Prisons in Syria, Their Home Nations Look Away', New York Times, 18 July 2018, <https://www.nytimes.com/2018/07/18/world/middleeast/islamic-state-detainees-syria-prisons.html> (accessed July 2019); Robin Wright, 'A Visit to ISIS' Syria: Amid Ruin, Human Crises Pose Risk', United States Institute of Peace, 7 May 2019, <https://www.usip.org/publications/2019/05/visit-post-isis-syria-human-crises-pose-risk> (accessed July 2019); Robin Wright, 'The Dangerous Dregs of ISIS', The New Yorker, 16 April 2019, <https://www.newyorker.com/news/dispatch/the-dangerous-dregs-of-isis> (accessed July 2019).

Foreign family members

According to the co-chairman of the SA-NES Ministry of Foreign Affairs, by 31 October 2018, 584 women and 1 248 children of 46 different nationalities were held under the SA-NES control.²⁶ Following the recapture of Baghuz in March 2019, the SDF authorities reported that as of 23 May 2019, these figures have increased to include around 11 000 foreign women and children, out of which 3 263 were persons below the age of 18 and 120 were orphans.²⁷

While ISIS foreign fighters are detained in specialised SDF-administered prisons,²⁸ non-fighter affiliates have been held in SDF detention camps.²⁹ Among these, between ten and twelve thousand foreign women and children, of 46 different nationalities,³⁰

26. Wladimir van Wilgenburg, 'Syrian Kurds hold conference in EU capital to press for return of IS wives, children', Kurdistan 24, 1 November 2018 <<http://www.kurdistan24.net/en/news/e27ced39-855f-43e2-9676-89b2eebf40fc>> (15 May 2019).

27. On 23 May 2019, The Geneva Academy and The Fight for Humanity, a Swiss non-governmental organisation, organised an expert meeting on the topic, gathering relevant actors and experts, including SDF officials. See: 'Experts discuss legal and security challenges related to the detention of ISIS members in North-East Syria and their judgment under international and national law', 28 May 2019, <<http://www.adh-geneve.ch/news/detail/235-experts-discuss-legal-and-security-challenges-related-to-the-detention-of-isis-members-in-north-east-syria-and-their-judgment-under-international-and-national-law>> (10 June 2019). The full report of this meeting is available at : https://armedgroupsinternationallaw.files.wordpress.com/2019/07/d4804-dead75_7395d8f1aa884853b2f60089d0909a3c.pdf (accessed August 2019) [hereafter 'Geneva Experts Meeting of 23 May 2019'].

28. Amberin Zaman, 'Inside the prison holding IS detainees in northeast Syria', Al Monitor, 15 March 2019, <<https://www.al-monitor.com/pulse/originals/2019/03/syria-kurdish-region-isis-prison-sdf.html>> (20 May 2019) ; Raf Sanchez, 'Kurdish forces put down riot by Isil prisoners in Syria', The Telegraph, 6 April 2019, <<https://www.telegraph.co.uk/news/2019/04/06/kurdish-forces-put-riot-isil-prisoners-syria/>> (20 May 2019) ; Robin Wright, 'A Visit to ISIS' Syria: Amid Ruin, Human Crises Pose Risk', United States Institute of Peace, 7 May 2019, <<https://www.usip.org/publications/2019/05/visit-post-isis-syria-human-crises-pose-risk>> (20 May 2019).

29. A detailed overview of the infrastructure, living conditions and humanitarian needs in north-eastern Syria camps can be found here: REACH, 'Northeast Syria Camp and Informal Site Profiles', December 2018 <http://r.dissemination.impact-initiatives.org/mk/cl/f/H_oGXPjcuH9pxAEvDqfbqRUFsb1Z5lhkBgNTq2NbJbl-2ANI65MflzMGkrN8jG3QU9wNKyg9o7ftRftFTg324YAXozJd-W5mVclV5JtckRh16mkOgr010gxdY5aSaAp8kiiHNea9i8WJ_RABZiBKYaBJUMwzLKfsYYFZWbKux3NKSV8> (20 May 2019). This data relates to the "general" IDP population within these camps and may not as such be considered as specifically describing the living conditions of the foreign women and children that this Brief is concerned with, as they are detained in separate quarters.

30. This number has been the most consistently used by news outlets, see for instance: "Red Cross: Hundreds of

are currently placed in separate sections of three displaced-persons camps in North-East Syria: al Hol (73,520 residents in May 2019), Ain Aissa (12,901 residents in May 2019) and al Roj (1,700 residents in May 2019).³¹ According to consistent reports, the living conditions in the camps have been increasingly poor because of the lack of food, water and electricity.³² The International Committee of the Red Cross has conducted visits and confirmed these claims.³³

Even though this Brief focuses on North-East Syria, it may be mentioned that of the 20,000 ISIS affiliates currently detained in Iraq by the government, 1,000 are said to be former foreign

fighters.³⁴ In addition, Iraq has pledged to relieve the SDF of the 31,000 Iraqi nationals it detains (not only fighters but all former ISIS affiliates),³⁵ and is offering to detain and prosecute many more, including foreigners, even if they have not previously been active in Iraq.³⁶

The position of SDF authorities on the situation of ISIS-affiliated foreign nationals has progressed in two temporal phases. During the first phase (2014 – early 2019), the SDF authorities repeatedly stated that they had neither the intention nor resources to indefinitely hold foreign nationals under its custody, and flagged their possible escape as a threat for all nations – thus insisting that they be repatriated by their countries of nationality.³⁷ With some exceptions, concerned States have predominantly refused to repatriate their nationals due to security concerns, except on a case-by-case basis.³⁸ In the recent second phase (early

unaccompanied children flood Syria camps”, Al Jazeera, 3 April 2019, <<https://www.aljazeera.com/news/2019/04/red-cross-hundreds-unaccompanied-children-flood-syria-camp-190403094923776.html>> (20 May 2019); Ben Hubbard, “In a Crowded Syria Tent Camp, the Women and Children of ISIS Wait in a Limbo”, The New York Times, 29 March 2019, https://www.nytimes.com/2019/03/29/world/middleeast/isis-syria-women-children.html?rref=collection%2Fbyline%2Fben-hubbard&action=click&contentCollection=undefined®ion=stream&module=stream_unit&version=latest&contentPlacement=2&pgtype=collection (20 May 2019).

31. A detailed overview of the infrastructure, living conditions and humanitarian needs in north-eastern Syria camps can be found on the REACH Initiative factsheets: http://www.reachresourcecentre.info/system/files/resource-documents/reach_syr_factsheet_northeastysyria_campandinformalsiteprofilesround5_alhol_jul2019.pdf (al Hol), http://www.reachresourcecentre.info/system/files/resource-documents/reach_syr_factsheet_northeastysyria_campandinformalsiteprofilesround5_einissaextension_jul2019.pdf (Ain Issa) and http://www.reachresourcecentre.info/system/files/resource-documents/reach_syr_factsheet_northeastysyria_campandinformalsiteprofilesround5_roj_jul2019.pdf (al Roj) (accessed July 2019). This data however relates to the “general” population within these camps and may not as such be considered as specifically describing the living conditions of the foreign women and children that this Brief is concerned with, as they are detained in separate quarters.
32. Save the Children, “More than 2,500 foreign children are living in camps in North-East Syria”, 21 February 2019, <https://www.savethechildren.net/article/more-2500-foreign-children-are-living-camps-north-east-syria> (accessed July 2019); Bethan McKernan and Peter Beaumont, “After ISIS: what happens to the foreign nationals who went to Syria?”, The Guardian, 14 February 2019, <https://www.theguardian.com/world/2019/feb/14/after-isis-what-happens-to-the-foreign-nationals-who-went-to-syria> (accessed July 2019); “Women and children continue to suffer in northeast Syria’s Al Hol camp”, MSF Press Release, 16 May 2019, <https://www.msf.org/women-and-children-continue-suffer-northeast-syrias-al-hol-camp-syria> (accessed July 2019).
33. ‘Statement by ICRC president upon ending 5-day visit to Syria’, ICRC Statement, 22 March 2019, <https://www.icrc.org/en/document/statement-icrc-president-upon-ending-5-day-visit-syria> (14 May 2019); ‘Syria’s Al Hol Camp: Families in Desperate Need’, ICRC Newsroom, 22 March 2019, http://www.icrcnewsroom.org/open.asp?ID=2696&title=Syria_s_Al_Hol_Camp_Families_in_Desperate_Need (14 May 2019).

34. ‘IS ‘caliphate’ defeated but jihadist group remains a threat’, 23 March 2019, BBC News, <https://www.bbc.com/news/world-middle-east-45547595> (accessed July 2019).
35. Robin Wright, ‘A Visit to ISIS’ Syria: Amid Ruin, Human Crises Pose Risk’, United States Institute of Peace, 7 May 2019, <https://www.usip.org/publications/2019/05/visit-post-isis-syria-human-crises-pose-risk> (accessed July 2019).
36. ‘Iraq, U.N. in talks over prosecution of Islamic State prisoners in SDF detention’, Egypt Independent, 26 June 2019, <https://egyptindependent.com/iraq-u-n-in-talks-over-prosecution-of-islamic-state-prisoners-in-sdf-detention/> (accessed July 2019); Omar Sattar, ‘Will Iraq cut a deal to prosecute foreign IS fighters?’, Al Monitor, 3 July 2019, <https://www.al-monitor.com/pulse/originals/2019/07/iraq-isis-detainees-syria.html> (accessed July 2019); Josie Ensor, ‘Iraq ‘offers to try Isil prisoners held in Syria for multi-billion pound fee’’, The Telegraph, 10 April 2019, <https://www.telegraph.co.uk/news/2019/04/10/iraq-offers-try-isis-prisoners-held-syria-multi-billion-pound/> (accessed July 2019); ‘Iraq offers to try ISIS adherents if Coalition pays millions in court costs’, The Defense Post, 10 April 2019, <https://thedefensepost.com/2019/04/10/iraq-isis-trial-coalition-costs/> (accessed July 2019).
37. Liz Sly, ‘The jihadists no one wants’, The Washington Post, 21 December 2018, https://www.washingtonpost.com/graphics/2018/world/syria/isis-prisoners/?noredirect=on&utm_term=.0dbf64a95c2d (14 May 2019).
38. It appears that the United States has repatriated most of its fighters and some but not all women and children, see Martin Chulov and Jordan Borger, ‘US repatriates family from Syrian detention camp for Isis suspects’, The Guardian, 22 May 2019, <https://www.theguardian.com/world/2019/may/22/us-repatriates-family-from-syrian-camp-for-isis-suspects> (10 June 2019); Rukmini Callimachi and Catherine Porter ‘2 American Wives of ISIS Militants Want To Return Home’, 19 February 2019, The New-York Times, <https://www.nytimes.com/2019/02/19/us/islamic-state-american-women.html> (20 May 2019); Russia has made it a policy to repatriate all children, but not the parents, see Samuel Ramani, ‘Why is Russia insisting on bringing home ISIS fighters’ children?’, 9 April 2019, The Washington Post, <https://www.washingtonpost.com/politics/2019/04/09/why-is-russia-insisting-bringing-home-isis->

2019 – up to date), SDF authorities expressed their willingness to prosecute ISIS foreign fighters, subject to the international community's support in expertise and funds, while the SDF position on the available legal options for ISIS-affiliated women and children remains unclear.³⁹

Caveat on the categorisation of ISIS affiliates

The above-operated distinction between 'male fighters' on the one hand, and 'family members' on the other, does not necessarily reflect the reality of the concerned individuals' roles under the Caliphate with sufficient nuance.

Firstly, it is highly likely that not all men living in ISIS-controlled territories exercised combat functions or even an active role in the organised armed group. It appears however that regarding foreign adult males, the SDF has assumed that they posed a significant threat requiring their detention in prisons rather than in camps.

Secondly, some 60 male children have been considered by the SDF as trained fighters and are held in a rehabilitation centre in Qamishli, and not in the camps as other family members.⁴⁰

fighters-children/?noredirect=on&utm_term=.20bb0f50ca8d (20 May 2019) ; Sweden, France, Germany and Canada envisage repatriating children on a case-by-case basis, but are even more reluctant regarding their parents, for fear of lack of elements to adequately prosecute and sentence them. See Robin Wright, 'The Dangerous Dregs of ISIS', 16 April 2019, *The New Yorker*, <https://www.newyorker.com/news/dispatch/the-dangerous-dregs-of-isis> (20 May 2019) ; 'Sweden Will Repatriate the Children of ISIS 'If Possible': Foreign Minister', *The Local*, 12 April 2019, <https://www.thelocal.se/20190412/sweden-will-repatriate-children-of-isis-fighters-if-possible-foreign-minister> (20 May 2019) ; 'Tunisia: Scant Help to Bring Home ISIS Members' Children', *Human Rights Watch News*, 12 February 2019, <https://www.hrw.org/news/2019/02/12/tunisia-scant-help-bring-home-isis-members-children> (14 May 2019); Ben Hubbard, 'Wives and Children of ISIS: Warehoused in Syria, Unwanted Back Home', *The New York Times*, 4 July 2018, <https://www.nytimes.com/2018/07/04/world/middleeast/islamic-state-families-syria.html> (14 May 2019); Lahcen Mokena, 'Morocco Repatriates 8 Nationals from Syria on Humanitarian Grounds', *Asharq Al-Awsat*, 11 March 2019, <https://aawsat.com/english/home/article/1628781/morocco-repatriates-8-nationals-syria-humanitarian-grounds> (10 June 2019). The case of Belgium will be examined more in depth at the end of the Brief.

39. Geneva Experts Meeting of 23 May 2019, report. For an overview of options, see 'ISIS fighters and their families facing justice: Eight options and four principles', *Ceasefire Centre for Civilian Rights*, March 2019, <https://www.ceasefire.org/isis-fighters-and-their-families-facing-justice-eight-options-and-four-principles/> (13 June 2019).

40. Geneva Experts Meeting of 23 May 2019, report. 'Syria: Dire Conditions for ISIS Suspects' Families', *Human Rights Watch*, 23 July 2019, <https://www.hrw.org/news/2019/07/23/syria-dire>

Thirdly, there are numerous explanations for the presence of foreign women and children in ISIS-controlled locations prior to their captivity. While some women willingly joined ISIS in order to contribute to its objectives (becoming active in recruitment, propaganda, fundraising, education, healthcare, policing, surveillance, charity work, tax collection, even exercising combat functions, in addition to being wives and mothers) others were forcibly recruited. While some were captured, others surrendered to the SDF. While some still abide by ISIS' ideology, others quickly changed their minds upon arrival in Syria and have been looking for a way out ever since. While some travelled with their children, others conceived them (not always willingly) and gave birth in Syria. A similar nuanced understanding should finally be upheld with regards to profiles, roles, and motivations of minor ISIS affiliates. It must also be borne in mind that one female individual could 'bridge' different categories, potentially being a minor, an orphan, a wife or widow, a mother, a former combatant, and several or all of these at the same time.⁴¹

Bearing this in mind, the categorisation of foreign ISIS affiliates under SDF custody (2,010 foreign male fighters detained in prisons and around 11,000 foreign family members held in camps) should merely be understood as a simplification for the purpose of this Brief.

conditions-isis-suspects-families (accessed July 2019) ; Charlie Savage, 'As ISIS Fighters Fill Prisons in Syria, Their Home Nations Look Away', *New York Times*, 18 July 2018, <https://www.nytimes.com/2018/07/18/world/middleeast/islamic-state-detainees-syria-prisons.html> (accessed July 2019). For the sake of completion, with respect to the SDF's position on the involvement of children in armed conflict, it can be mentioned that the General Command of the SDF has declared by a military order issued on 5 September 2018 that all its stakeholders abide by the main international law instruments on the issue, and that the recruitment of children under the age of 18 is prohibited.

41. United Nations Counter Terrorism Implementation Task Force, Working Group on the Promotion and Protecting Human Rights and the Rule of Law while Countering Terrorism, "Guidance to States on human rights-compliant responses to the threat posed by foreign fighters", *New York Times*, pp. 24-29, <<https://www.un.org/sc/ctc/wp-content/uploads/2018/08/Human-Rights-Responses-to-Foreign-Fighters-web-final.pdf>> (14 May 2019) (Hereafter: UN CTITF, "Guidance to States..."); Joana Cook and Gina Vale, "From Daesh to 'Diaspora': Tracing the Women and Minors of Islamic State", *International Centre for the Study of Radicalisation*, London 2018, pp. 7-10 and 23-35.

3. APPLICABLE LEGAL FRAMEWORK

The conflict between the SDF and ISIS armed groups in North-East Syria amounts to a non-international armed conflict (NIAC) in the sense of **article 3 common to the Geneva Conventions of 12 August 1949 (Common Article 3)**.⁴² The required thresholds of (i) organisation of the non-State armed groups (NSAG) and (ii) intensity of the hostilities have been satisfied for several years in this region.⁴³ Despite recent significant victories over ISIS, effectively stripping it of its territorial control, the armed group is likely to survive and shift to a more clandestine mode of operations.⁴⁴ In addition, several other armed actors still engage in fighting in the region and it cannot be said that resurgence of violence is unforeseeable.⁴⁵

The following international legal framework governs the non-international armed conflict between the SDF and ISIS: **(3.1) International Humanitarian Law**, i.e. the law governing the conduct of hostilities and the protection of persons in non-

international armed conflict; **(3.2) International Human Rights Law**, a body of rules that applies at all times, including in armed conflict; and **(3.3) International Refugee Law**, as the situation on the ground involves persons in the territory of States other than that of which they are a national and in need of protection. Finally, as the conflict is taking place on the territory of Syria, Syrian domestic law is also applicable to the situation. However, it is beyond the scope of this Brief to analyse the Syrian domestic legal framework in depth.

3.1. International Humanitarian Law (IHL)

The IHL treaty rule governing the non-international armed conflict in North-East Syria is article 3 common to the Geneva Conventions of 12 August 1949 (Common Article 3), which reads as follows:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- a. violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

- b. taking of hostages;

- c. outrages upon personal dignity, in particular humiliating and degrading treatment;

- d. the passing of sentences and the carrying

⁴²In addition to this non-international armed conflict, the involvement of the international coalition in 2014 has raised the issue of parallel armed conflicts related to the context of fighting ISIS. The following States are participating in the coalition active in Syria: Australia, Belgium, Germany, Jordan, Netherlands, Russia, Saudi Arabia, Turkey, United Arab Emirates, United Kingdom and the United States. The international coalition started by conducting airstrikes in Iraq at the invitation of the government. It is worth mentioning that their operations in Syria were never consented to by the authorities in Damascus. On classification of armed conflicts in Syria, see notably the Geneva Academy's RULAC database, Non-international armed conflicts in Syria, available at <http://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-syria#collapse3accord> (13 May 2019); Terry D. Gill, 'Classifying the Conflict in Syria', *International Law Studies*, U.S. Naval War College, Vol. 92, 2016, p. 353ss; David Wallace, Amy McCarthy, Shane R. Reeves, 'Trying to Make Sense of the Senseless: Classifying the War in Syria under the Law of Armed Conflict', *Michigan State International Law Review*, Vol. 25, Issue 3, 2017, p. 556ss.

⁴³ICTY, *Prosecutor v. Tadic*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995) [70].

⁴⁴Colin P. Clarke, 'Islamic State's latest video could have long and terrifying consequences', 6 May 2019, *Los Angeles Times*, <https://www.latimes.com/opinion/op-ed/la-oe-clarke-afghanistan-baghdadi-20190506-story.html> (20 May 2019).

⁴⁵On the temporal scope of application of IHL in NIAC, see 'International Humanitarian Law and the challenges of contemporary armed conflict', Fourth Report prepared by the ICRC for the 32nd International Conference of the Red Cross and Red Crescent held in Geneva 8-10 December 2015, published in *International Review of the Red Cross*, n. 900, pp. 1436-1437.

out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

2. The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. (...)

The situation is thus regulated by this provision, as well as by the customary rules of IHL.⁴⁶

Syria is not a State Party to the Second Additional Protocol of 8 June 1977 to the Geneva Conventions (APII). The provisions of APII are therefore only applicable to the Syrian conflict to the extent that they are reflected in customary international law.

3.2. International Human Rights Law (IHRL)

It is widely recognised that international human rights law continues to apply in situations of armed conflict, including those of non-international character.⁴⁷ Human rights treaties applicable in Syria and relevant for the present analysis are the *International Covenant for Civil and Political*

Rights (ICCPR),⁴⁸ the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT),⁴⁹ the *Convention for the Rights of the Child* (CRC),⁵⁰ and the *Convention for the Elimination of all forms of Discrimination Against Women* (CEDAW).⁵¹

While these instruments are binding for the Government of Syria, it remains disputed to what extent this body of law applies to non-State actors, such as the SDF.⁵² While from a more conservative public international law perspective only States can be bound by human rights treaties, some scholars consider that this approach does not adequately protect individual right-bearers in modern times. The position of the UN Office of the High Commissioner for Human Rights (OHCHR) is that non-State actors incur human rights responsibilities if they control territory and exercise government-like functions,⁵³ which is the case of the SDF.

⁴⁶ Of the 161 rules of customary IHL identified by the ICRC in its 2005 study, 143 of them are applicable both in IAC and NIAC. See Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press, 2005) vol 1 (hereafter 'Customary IHL Study'). These rules can be accessed through the following link: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul (14 May 2019).

⁴⁷ UN Human Rights Committee, 'General Comment No. 31 - The Nature of the General Legal Obligation Imposed on States Parties to the Covenant', CCPR/C/21/Rev.1/Add. 1326, May 2004, para. 11; The relationship between IHL and IHRL is regulated by the principle of *lex specialis*: in case of concomitant applicability, this principle determines which exact rule prevails over the other, and how. The principle was sanctioned by the International Court of Justice in its Advisory Opinion on the Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, (9 July 2004) [106]. For more information on the implications of such principle, see: Marco Sassòli, Antoine Bouvier, Anne Quintin, *How Does Law Protect in War*, Vol. 1, 3rd edition, ICRC, Geneva (2011) p. 453; Marco Sassoli and Laura Olsen, 'The relationship between international humanitarian law and human rights law where it matters: admissible killings and internment of fighters in non-international armed conflicts', *International Review of the Red Cross*, Col. 90, No. 871 (September 2008) pp.599-627; Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press: 2010) pp. 530-536.

⁴⁸ International Covenant on Civil and Political Rights, New-York, 16 December 1966, UNTS 999, p. 171. Syria acceded the ICCPR on 21 April 1969. The treaty entered into force on 23 March 1976. For an overview of Syria's ratification of human rights treaties, see: https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=170&Lang=EN (accessed July 2019).

⁴⁹ Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, New-York, 10 December 1984, UNTS vol 1465, p. 85. Syria acceded the CAT on 19 August 2004 but is not a Party to the Optional Protocol.

⁵⁰ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (hereafter CRC). Key principles include the best interest of the child (article 3), non-discrimination (article 2), right to life, survival and development (article 6), and deprivation of liberty as a measure of last resort and for the shortest possible duration (article 37). Syria ratified the CRC on 15 July 1993, and its Optional Protocol on the involvement of children in armed conflict on 17 October 2003.

⁵¹ Convention on the Elimination of All Forms of Discrimination against Women, New York (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (hereafter CEDAW). Syria acceded the CEDAW on 28 March 2003.

⁵² For an overview of debate on this issue, see notably Jean-Marie Henckaerts and Cornelius Wiesener, 'Human rights obligations of non-State armed groups: a possible contribution from customary international law?', in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law*, Edward Elgar, Cheltenham, 2013, pp. 146ss; Andrew Clapham, 'Focusing on Armed Non-State Actors', in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict*, (Oxford University Press: 2014) pp. 766-810, at 786ss; and Konstantinos Mastorodimos, *Armed Non-State Actors in International Humanitarian and Human Rights Law: Foundation and Framework of Obligations, and Rules on Accountability* (Ashgate, Farnham: 2016).

⁵³ Geneva Academy, 'Human Rights Obligations of Armed Non-State Actors: An Exploration of the Practice of the UN Human Rights Council', Geneva (December 2016) Academy in-Brief 7, pp. 18-30.

Some human rights instruments allow for derogations by State Parties in times of armed conflict. Most notably, it is permitted under article 4 of the ICCPR for a State to temporarily derogate from certain of its treaty obligations in exceptional circumstances. This possibility is subject to strict requirements, such as the existence of a public emergency threatening the existence of the nation, prior official declaration of a state of emergency, and respect for the principle of proportionality.⁵⁴ The Syrian Government has not made use of this option. Thus, the ICCPR is applicable to the Syrian armed conflict in its entirety.

3.3. International Refugee Law (IRL)

International Refugee Law is not directly relevant to ISIS foreign fighters and affiliated women and children under SDF control in North-East Syria, in particular given that the 1951 *Refugee Convention*⁵⁵ does not oblige Syria as a State non-Party to the *Convention* or the SDF as a non-State actor. However, the *Convention* may become applicable to these persons under two cumulative conditions.

First, ISIS foreign fighters or affiliated women and children would have to find themselves on the territory or at the border of the State bound by the 1951 *Refugee Convention* and request asylum,⁵⁶ based on a well-founded fear of persecution for one of the grounds listed in article 1.A.(2) of this international instrument.⁵⁷ Although physical presence at the border or inside the receiving State is not technically a requirement under the

Convention, refugee claims ‘from abroad’ are in practice rarely examined by States.

Second, it should be established that the ISIS foreign fighters or affiliated women and children have been refused protection from their national authorities. The impossibility to avail oneself of the protection of the country of which he or she is a national is a requirement under the definition of refugee in article 1.A.(2) of the *Refugee Convention*.

Provided these applicants have reached the jurisdictional control of a country bound by the 1951 *Refugee Convention* and have been refused protection by their countries of origin, the following principles of international refugee law should be considered: (i) the principle of non-refoulement, under which a State may not expel or return an individual to territories where his or her life or freedom would be threatened on account of his or her race, religion, nationality, belonging to a particular social group or political opinion;⁵⁸ (ii) the obligation by the State to examine the claim;⁵⁹ and (iii) the possible application of the exclusion clause.⁶⁰

Irrespective of the applicability of the *Convention*, the obligation of non-refoulement is part of

54. UN Human Rights Committee, ‘General Comment No. 29 – State of Emergency (article 4)’, 24 July 2001, CCPR/C/21/Rev.1/Add.11 (hereafter ‘G.C. 29’); UN Human Rights Committee, ‘General Comment 35 – Article 9 (Liberty and Security of Person)’ (31 October 2014) CCPR/C/GC/35, paras. 14–16.

55. *Convention Relating to the Status of Refugees* (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (*Refugee Convention*).

56. Bordering countries with Syria are Lebanon, Turkey, Iraq, Jordan and Israel. Of these, only Israel and Turkey are parties to the 1951 *Refugee Convention*.

57. Article 1.A.(2) of the 1951 *Refugee Convention* defines a refugee as someone who ‘... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.’

58. This principle is consecrated in article 33 of the 1951 *Refugee Convention* and has customary status as a non-derogable rule under general international human rights law. See art. 3 of the CAT; art. 7 of the ICCPR; Advisory opinion on the extraterritorial application of non-refoulement obligations, Geneva, 2007, §15.

59. The 1951 *Refugee Convention* merely gives the definition of a refugee and prescribes the legal and administrative treatment a refugee should benefit from once recognized as such. It is up to each State party to put in place the procedures for the determination of refugee status, but this must include a way to establish the facts presented by the applicant and verify whether these fall under the definition. See UNHCR, *Handbook and Guidelines on Procedures and criteria for Determining Refugee Status* under the 1951 *Convention* and the 1967 *Protocol* relating to the Status of Refugees, reissued, Geneva, December 2011, §§ 189 and following.

60. Article 1.F of the 1951 *Refugee Convention* allows for contracting States to consider that an applicant does not deserve international protection if, despite falling under the definition of refugee, there are serious reasons for considering that he or she has committed an IHL crime, a serious non-political crime, or acts contrary to the purposes and principles of the UN. See UNHCR *Handbook*, §§ 140–163. It must be stressed that this concerns the recognition of refugee status but is not an automatic bypass to the principle of non-refoulement.

customary international law⁶¹ and is considered binding under Common Article 3 applicable in NIAC in order to fulfil the obligation of humane treatment (see sections 5 and 7).⁶²

61. UNHCR, 'The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93' (31 January 1994); UNHCR, 'Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol' (26 January 2007) paras. 15 and 21.

62. Nils Melzer, *International humanitarian law – a comprehensive introduction*, ICRC, Geneva, 2016 p. 214; ICRC (2017), *Commentary on Common Article 3*, paras. 730-738.

4. SDF'S AUTHORITY TO DETAIN UNDER IHL

4.1. Factual context

The evidence suggests that, upon capture or surrender, men affiliated with ISIS were screened, in order to determine their 'status' in the armed group. Those believed to be fighters were put in prisons, while mere affiliates without combat functions were placed in camps. It seems that foreign men were all presumed to be fighters and sent to prisons, as there does not appear to be men in the foreigners' sections of the above-mentioned camps.⁶³

4.2. Implied right to detain in NIAC for imperative reasons of security

IHL recognises two types of detention: criminal and internment. Criminal detention is where an individual is detained awaiting trial or pursuant to a judicial sentence. Internment is where an individual is detained because he or she poses a security risk to the armed force or group. Equally applicable to State and non-State entities, Common Article 3 envisages both forms of detention as inherent to non-international armed conflict. Common Article 3 explicitly requires that persons rendered hors de combat by reason of detention shall in all circumstances be treated humanely.⁶⁴ Article 5 of Additional Protocol II stipulates minimum standards of treatment applicable to prisoners in NIAC 'whether they are detained or interned', thereby explicitly recognising the occurrence of internment in NIAC.⁶⁵

IHL applicable in NIAC does not explicitly provide the warring parties with the authority to detain. Notwithstanding, the ICRC maintains that both treaty and customary IHL provide both States and non-State armed groups with an implied right to detain for reasons related to the armed conflict, both for the purposes of running criminal trials (criminal detention) and to neutralise a security threat to the armed force or group (internment).⁶⁶ Prominent IHL scholars also support this position.⁶⁷ The implied right to detain in NIAC is derived from a synthesis of customary IHL, international human rights law, and application by analogy of treaty law applicable in international armed conflict (IAC). The ICRC has formalised this hybrid of legal sources applicable to detention in NIAC in a series of research papers, which it has since adopted as its 'official position'.⁶⁸

Like Common Article 3, Additional Protocol II (APII) to the Geneva Conventions of 1949 applies to conflicts not of an international character.⁶⁹ Syria is not a signatory to APII and its provisions are therefore not directly binding on Syrian territory as a matter of treaty law. However, the provisions of APII relating to the humane treatment of detainees are considered part of customary international law

63. Charlie Savage, 'As ISIS Fighters Fill Prisons in Syria, Their Home Nations Look Away', *New York Times*, 18 July 2018, <https://www.nytimes.com/2018/07/18/world/middleeast/islamic-state-detainees-syria-prisons.html> (accessed July 2019); 'They Sold Us a Dream, but It Was a Prison': Four Women Explain Why They Joined ISIS and Ask to Go Back Home', *Haaretz*, 23 April 2019, <https://www.haaretz.com/middle-east-news/syria/they-sold-us-a-dream-but-it-was-a-prison-women-who-joined-isis-express-regret-1.7160000> (accessed July 2019); Human Rights Watch, 'Syria: Dire Conditions for ISIS Suspects' Families', 23 July 2019, <https://www.hrw.org/news/2019/07/23/syria-dire-conditions-isis-suspects-families> (accessed July 2019).

64. ICRC, *Internment in Armed Conflict: Basic Rules and Challenges*, Opinion Paper, November 2014, 6.

65. Additional Protocol II, opened for signature 12 August 1949, 1125 UNTS 609 (entered into force 8 June 1977), article 5.

66. ICRC, *Internment in Armed Conflict: Basic Rules and Challenges*, Opinion Paper (November 2014) p. 7.

67. For example, see: Gill and Fleck, *The Handbook of the International Law of Military Operations* (2010), p 471.

68. Jelena Pejic, 'Procedural Principles and Safeguards from Internment/Administrative Detention in Armed Conflict and Other Situations of Violence', *International Review of the Red Cross*, Vol. 87, No. 858 (November 2005) pp. 375-392; Jelena Pejic, 'The protective scope of Common Article 3: more than meets the eye', *International Review of the Red Cross*, Vol. 93, No. 881 (March 2011) pp. 1-37; ICRC, *Internment in Armed Conflict: Basic Rules and Challenges*, Opinion Paper, November 2014, <<https://www.icrc.org/en/document/internment-armed-conflict-basic-rules-and-challenges>> (21 May 2019); Zelalem Mogessie Teferra, 'National security and the right to liberty in armed conflict: The legality and limits of security detention in international humanitarian law', *International Review of the Red Cross*, Vol. 98 No. 903 (December 2016) pp. 961-993; See also Gabor Rona, *Is There a Way Out of the Non-International Armed Conflict Detention Dilemma*, in *International Law Studies*, U.S. Naval War College, Vol. 91 (2015) pp. 32ff.

69. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609 (entered into force 7 December 1978), (hereafter: 'Additional Protocol II').

and are therefore equally binding on all parties to a NIAC.⁷⁰

Article 5 of *APII* largely corresponds to the original ICRC draft, which was based on principles in the Third and Fourth *Geneva Conventions* relating to conditions of internment in IAC.⁷¹ Article 5 imposes minimum standards for ‘persons whose liberty has been restricted’ and ‘covers both persons being penally prosecuted and those deprived of their liberty for security reasons, without being prosecuted under penal law’, providing there is a link to the armed conflict.⁷² The expression ‘those who are responsible for the internment or the detention’ in article 5(2) of *APII* recognises that internment is inherent to NIAC and will occur de facto irrespective of whether a legal authority to detain is recognised.⁷³

The position of the ICRC is that both customary and treaty IHL provide for an inherent power to intern in both IAC and NIAC. As stated by the ICRC, ‘[t]his position is based on the fact that internment is a form of deprivation of liberty which is a common occurrence in armed conflict, not prohibited by Common Article 3, and Additional Protocol II – which has been ratified by 167 States – refers explicitly to internment.’⁷⁴ The drafting history of *APII* has been cited in support of the recognition of an implied right to detain so as to give effect to the underlying principle of humanity, generally, and to the provisions relating to internment, specifically.⁷⁵ The right to detain in NIAC is also necessary to give

effect to the equality of belligerents principle such that each party to the conflict is equally capable of carrying out its obligations under IHL.⁷⁶ The ICRC notes that the drafters of *APII* wanted the treaty to be expressed in simple terms so that it may have a broad application.⁷⁷ Finally, the **Lotus principle** dictates that States do not need a rule under international law authorising them to do something within their own territory which is not otherwise prohibited,⁷⁸ thereby supporting the implied right to detain in NIAC.

It should be noted that there are some who reject the view that IHL provides an implied right to detain in NIAC.⁷⁹ In the case of *Serdar Mohammed* before the United Kingdom Supreme Court, Lord Reed stated (in dissent) that while there are ‘substantial arguments both for and against the contention that the Geneva Conventions or their Protocols implicitly confer authority under international law for detention in non-international armed conflicts’, he ultimately ruled that the arguments against recognising an implied right to detain in NIAC were more persuasive. Lord Reed held that the drafting history of *APII* does not support an implied right and stated that recognising the right to detain so as to avoid the use of lethal force as an alternative is a ‘false dichotomy’.⁸⁰ However, his Lordship did not explain what alternative option is available to a non-State armed group when faced with a security threat where its internal laws are not recognised by the State. One may therefore question the accuracy of Lord Reed conclusion insofar as internment by non-State armed groups is often the only genuine alternative to using lethal force. As for whether customary international law recognises an implied right to detain in NIAC, Lord Reed held that there is insufficient state practice and *opinio juris* to support this conclusion, while noting that custom is a ‘developing body of law’

70. Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press, 2005).

71. Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds) *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1986) Geneva, ICRC, at pp. 1391 to 1393, para. 4557 (Hereafter: Sandoz Commentary on the Additional Protocols (1986)), para. 4565.

72. *Ibid.*, para. 4568.

73. *Ibid.*, para. 4582.

74. ICRC, *Internment in Armed Conflict: Basic Rules and Challenges*, Opinion Paper (November 2014) p. 7.

75. See generally: Frederic Megret, ‘Detention by Non-State Armed Groups in Non-International Armed Conflicts: International Humanitarian Law, International Human Rights law and the Question of Right Authority’ in Ezequiel Heffes, Marcos D. Kotlik & Manuel Ventura (eds), *International Humanitarian Law and Non-State Actors: Debates, Law and Practice* (TMC Asser/Springer, Forthcoming) chapter 7, 10-13.

76. *Ibid.*, chapters 7-8, 10.

77. Sandoz Commentary on the Additional Protocols (1986), *supra* note 71, para. 4594.

78. *The Lotus Case (France v Turkey)* PCIJ Rep (1927) Series A No 10, [46]-[47].

79. See: Alex Conte, ‘The legality of detention in armed conflict’, in *The War Report 2014* (2015), ed Casey-Maslen (Oxford University Press: 2015); Yoram Dinstein *Non-International Armed Conflicts in International Law*. (Cambridge: Cambridge University Press, 2014) para. 274; Els Debuf, *Captured in War: Lawful Internment in Armed Conflict* (Hart Publishing: 2013), p 465.

80. *Serdar Mohammed v Ministry of Defence* [2017] UKSC 2, Opinion of Lord Reed [265].

which ‘may reach the stage where it confers a right to detain in non-international armed conflict’.⁸¹

Lord Sumption agreed with Lord Reed insofar that he was also inclined to believe that customary international law does not (yet) recognise an implied right to detain in NIAC.⁸² However, Lord Sumption did not find it necessary to reach a definitive conclusion as he found authority for the right to detain in relevant UN Security Council Resolutions.⁸³ Furthermore, Lord Sumption’s opinion on the right to detain under IHL is more nuanced than that of Lord Reed. He explicitly acknowledged that:

*The availability of detention as an option mitigates the lethal character of armed conflict and is fundamental to any attempt to introduce humanitarian principles into the conduct of war. In many cases, the detention of an enemy fighter is a direct alternative to killing him, and may be an obligation, for example where he surrenders or can be physically overpowered.*⁸⁴

He cited the decision of the US Supreme Court in *re Territo* (confirmed in *Hamdi*) in which the Court stated that:

*The object of capture is to prevent the captured individual from serving the enemy. He is disarmed and from then on must be removed as completely as practicable from the front, treated humanely, and in time exchanged, repatriated, or otherwise released.*⁸⁵

These decisions recognise that, in addition to the fact that detention is the more humane alternative to using lethal force, it may also amount to a legal *obligation* to detain where the individual has surrendered or is otherwise rendered *hors de combat*. It could therefore be argued that internal consistency with IHL’s fundamental provisions requires recognising an implied right to detain.

Furthermore, Lord Sumption notes that the ‘constituent associations of the Red Cross and Red Crescent approved a resolution by consensus which recited that states had the power to detain “in all forms of armed conflict” and proposing measures to strengthen the humanitarian protection available to detainees’.⁸⁶ He therefore concludes that the lack of international consensus is due to disagreement on the limits and conditions of detention applicable to non-state actors rather than the right to detain in principle, noting that ‘practice in international and non-international armed conflicts is converging, and it is likely that this will eventually be reflected in *opinio juris*’.⁸⁷ Lord Mance agrees with the more nuanced position of Lord Sumption. The other Lords in the majority did not deem it necessary to express an opinion on the issue as the right to detain was ultimately recognised by the Court pursuant to relevant UN Security Council Resolutions.

Notwithstanding Lord Reed’s dissent in *Serdar Mohammed* or the fact that some states may not explicitly recognise a right to detain in NIAC, it is submitted that the ICRC’s position represents the better legal view that there is an inherent right to detain persons for imperative security reasons (internment) under treaty and customary IHL applicable in NIAC.⁸⁹ Internment is routinely practice by States and non-State armed groups alike in this context. Common Article 3 and article 5 of APII both recognise the necessity of internment in NIAC to give effect to IHL’s fundamental principles. Practically speaking, the only alternative means of neutralising a security threat to a non-state armed group would be to use lethal force.⁹⁰ Internment is therefore necessary to strike the appropriate balance between military necessity and

81. *Ibid* [275].

82. *Serdar Mohammed v Ministry of Defence* [2017] UKSC 2, Opinion of Lord Sumption [14].

83. *Ibid*.

84. *Ibid* [15].

85. *Re Territo* 156 F 2d 142, 145, (1946); cited with approval in *Hamdi v Rumsfeld* 542 US 507 (2004).

86. *Serdar Mohammed v Ministry of Defence* [2017] UKSC 2, Opinion of Lord Sumption [16].

87. *Ibid*.

88. *Serdar Mohammed v Ministry of Defence* [2017] UKSC 2, Opinion of Lord Mance [145].

89. See the official position of the ICRC expressed in multiple sources, *supra* note 68.

90. ICRC, Expert Meeting on Procedural Safeguards for Security Detention in Non-International Armed Conflict, report prepared by Els Debuf and benefited from Jelena Pejic, Elizabeth Wilmshurst and Toby Fenwick, Chatham House & ICRC, (London, 22-23 September 2008) 3-4.

humanitarian principles.⁹¹ It is therefore advised that the SDF possess the legal authority to detain for imperative reasons of security.

4.3. Grounds for internment: imperative reasons of security

Drawing from the applicable standards under IHL and international human rights law, the ICRC issued 'Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence' (the 'Guidelines') to provide legal authority for grounds of internment in NIAC.⁹² The *Guidelines* impose 'imperative reasons of security' as the minimum legal standard for internment in all situations of armed conflict, including NIAC.⁹³ This wording is based on the internment standard applicable in occupied territories under article 78 of the Fourth Geneva Convention.⁹⁴ The ICRC notes that this is a high threshold, especially where internment takes place outside of the territories of the parties.⁹⁵

While the 'imperative reasons of security' threshold allows for a margin of appreciation by the detaining authorities, internment may not be used for sole intelligence purposes, as a punishment for past activities, or as a deterrent for future ones. Based on the prohibition of collective punishment,

internment cannot be used as retribution for acts committed by others.⁹⁶

In further clarifying the scope and content of internment in NIAC, the ICRC *Guidelines* provide that internment:

- **constitutes an exceptional measure;**
- **is not an alternative to criminal proceedings;**
- **can only be ordered on a case-by-case basis;**
- **must cease as soon as the reasons warranting it no longer exist; and**
- **must only be decided pursuant to and in accordance with procedures provided for by international and/or domestic law (i.e. the principle of legality).⁹⁷**

In its updated (2017) Commentary to Common Article 3, the ICRC notes that it uses the *Guidelines* in its 'operational dialogue with States, international and regional forces, and other actors'.⁹⁸ While there is no precise definition of 'imperative reasons of security', the ICRC notes that it must be implemented on a case-by-case basis. An individual's past conduct may be an important factor in determining whether he or she poses a significant security threat to the armed force or group.⁹⁹

91. Silvia Borelli, 'Casting light on the legal black hole: international law and detentions abroad in the 'war on terror'', *International Review of the Red Cross*, Vol. 87, No. 857, March 2005, p. 54.

92. ICRC, *Internment in Armed Conflict: Basic Rules and Challenges*, Opinion Paper, November 2014, 8; ICRC, *IHL and the Challenges of Contemporary Armed Conflicts*, Annex I 'Procedural Principles and Safeguards on Internment/Administrative Detention in Armed Conflict and Other Situations of Violence', Jelena Pejic, *International Review of the Red Cross*, Vol. 87 No. 858, June 2005 (30th International Conference of the Red Cross and Red Crescent, Geneva, November/December 2007), pp. 375-391, http://www.icrc.org/eng/assets/files/other/icrc_002_0892.pdf.

93. See the official position of the ICRC expressed in multiple sources, *supra* note 68. See also: UN General Assembly, Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, A/HRC/37/7, February 2018, (Annex III, para. 13, footnote 5), <https://www.ohchr.org/Documents/HRBodies/HRCouncil/ColSyria/A-HRC-37-72_EN.pdf>; and Jelena Pejic, *Grounds and Procedures for Deprivation of Liberty in Times of IAC and NIAC – existing law and policy proposals*, Proceedings of the 40th roundtable on current issues of international humanitarian law, San Remo, 2018, p. 7, available at <<http://ihl.org/wp-content/uploads/2018/12/PEJIC-REV.pdf>> (15 May 2019).

94. ICRC, *Convention (IV) relative to the Protection of Civilian Persons in Time of War*, 12 August 1949 Commentary of 1958 (hereafter: GC IV) para. 9.

95. *Ibid*, para. 367.

96. ICRC, *Customary IHL Study*, Rule 103.

97. ICRC Report on Challenges of Contemporary Armed Conflicts presented to the 30th International Conference of the Red Cross and Red Crescent in 2007, available at: <https://www.icrc.org/en/doc/assets/files/other/ihl-challenges-30th-international-conference-eng.pdf> (The aforementioned article by Jelena Pejic, 'Procedural Principles and Safeguards...' is provided in Annex 1 of the ICRC Report and 'reflects the ICRC's official position and now guides its operation', p 11).

98. For the updated (2017) Commentary to Common Article 3, see: ICRC, Lindsey Cameron, Bruno Demeyere, Jean-Marie Henckaerts, Eve La Haye and Iris Müller, *Commentary (2017) on the Second Geneva Convention: Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, Article 3, para. 744. (Hereafter 'ICRC (2017) Commentary on Common Article 3'). Available online at: <<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=D84E8D5C5EB782FAC1258115003CEBE5#633>>.

99. ICRC, *Expert Meeting on Procedural Safeguards for Security Detention in Non-International Armed Conflict*, *supra* note 90, 5.

It has equally been recognised under customary IHL and international human rights law that interment for imperative security reasons does not amount to an arbitrary deprivation of liberty. State practice and *opinio juris*, as evidenced by relevant legislation, treaties, UN General Assembly Resolutions and the conduct of the UN Security Council, confirms that the customary prohibition on arbitrary detention is not offended where the individual is interned for imperative reasons of security.¹⁰⁰ Meanwhile, the European Court of Human Rights has suggested that article 5 of the European Convention on Human Rights may support detention in an IAC, which can, by analogy, justify interment for ‘imperative reasons of security’ in NIAC.¹⁰¹

4.4. Is the interment of ISIS-foreign fighters and affiliated persons justified?

As noted at the beginning of this section, ISIS foreign fighters are detained by the SDF based on their combat function or ‘membership’ to ISIS. They are therefore detained on the basis that such membership poses the requisite degree of security risk to the SDF. While there is some debate over whether membership to a non-State armed group is sufficient to justify interment by the opposing armed force or group, it is generally recognised that the ‘imperative reasons of security’ threshold is satisfied where the individual’s membership is that of a fighter within the armed group.¹⁰² The ICRC determines membership to non-state armed groups where the individual assumes a ‘continuous combat function’, in which case the individual can be targeted (or by extension detained) at any time during the NIAC.¹⁰³ In this sense, such ‘status-based’ detention is similar to that applicable to the right to intern members of the opposing

armed force under the law of IAC, but is limited to the right to target or detain for security reasons. Recognising status-based detention in NIAC complies with the humanitarian rationale for detaining persons rather than using lethal force, and therefore strikes the appropriate balance between military necessity and humanitarian protection, providing that the individual actually poses the requisite security threat to the armed force or group. Where an individual is merely affiliated with ISIS in a political or other sense but does not assume a fighting membership within the group, the threshold will not automatically be met and the SDF will not have the authority to detain without establishing that ‘imperative reasons of security’ exist that justify interment.

It may be concluded that the SDF have an inherent right under IHL to detain persons reasonably suspected of holding a continuous combat function or ‘membership’ as an ISIS fighter, or where the individual has otherwise demonstrated that he or she poses a sufficient security risk. However, the SDF is still under an obligation to determine whether each individual poses the requisite degree of risk on a case-by-case basis.¹⁰⁴ Where the imperative security reason for their initial interment is no longer applicable, the SDF is obligated to facilitate that individual’s release.

According to the available information, ISIS-affiliated women and children are detained without criminal charge, but rather because of their affiliation with ISIS. The SDF authorities confirmed that they do not intend to bring criminal charges against captured ISIS-affiliated foreign nationals for the time being.¹⁰⁵ For this reason, such deprivation of liberty can only be categorised as interment, i.e. the administrative detention of an individual based on the serious threat his or her activity poses to the security of the detaining authority in relation to an armed conflict, without an intention of bringing criminal charges against

100. Ibid 4; ICRC, Customary IHL Study, ‘Rule 99. Deprivation of Liberty’, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule99#Fn_B4BD78D1_00023>.

101. Frederic Megret, *supra* note 75, 14-15; ECHR, *Hassan v United Kingdom*, (Judgment) (European Court of Human Rights, Grand Chamber, App. No. 29750/09, 2014).

102. For an overview of the debate related to status-based detention in NIAC, see notably: Sean Aughey and Aurel Sari, ‘IHL Does Authorise Detention in NIAC: What the Sceptics Get Wrong’, 11 February 2015, Blog of the European Journal of International Law, <<https://www.ejiltalk.org/ihl-does-authorise-detention-in-niac-what-the-sceptics-get-wrong/>> (15 May 2019).

103. Ibid. Stemming from article 51(3) of Additional Protocol I to the Geneva Conventions, the notion of direct participation in hostilities and the related concept of ‘continuous combat

function’ have been detailed by the ICRC in: Nils Melzer, *Interpretative Guidance on the notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, May 2009, available at <<https://www.icrc.org/en/doc/assets/files/other/icrc-002-0990.pdf>> (14 May 2019).

104. ICRC, Expert Meeting on Procedural Safeguards for Security Detention in Non-International Armed Conflict, *supra* note 90, 5-6.

105. Geneva Experts Meeting of 23 May 2019, report.

that person.¹⁰⁶ The SDF is not authorised under IHL to detain ISIS-affiliated women and children on the mere basis of their affiliation to ISIS. Rather, the SDF is under an obligation to review each detention on a case-by-case basis and only continue to detain those persons who genuinely impose a security risk and whose detention is justified by ‘imperative reasons of security’. IHL makes it clear that internment may not be used for political purposes, as a punishment for past activities or as a deterrent for future ones, as an act of retribution for the activities of others, or for the sole purpose of gathering intelligence.¹⁰⁷ The SDF is therefore prohibited from detaining ISIS-affiliated women and children *en masse* under IHL based on their affiliation and can only detain persons in order to bring criminal charges or because they pose the requisite security risk to the armed group.

4.5. Procedural safeguards

In addition to satisfying that ‘imperative reasons of security’ justify the internment of ISIS foreign fighters, the SDF is under an obligation to afford the procedural safeguards set out below, which require that all interned persons are:

- **promptly and adequately informed of the reasons for their internment;**
- **registered in a recognized place of internment;**
- **permitted to have their have family, country of nationality, and the ICRC informed of place of detention and of eventual transfer, unless they do not desire such information to be passed on;**

- **given the right to challenge, with the least possible delay, the legality of their internment (the right to habeas corpus);**
- **given the right review of legality of internment be undertaken by an independent and impartial court;**
- **provided with legal counsel;**
- **allowed to personally attend the proceedings against them;**
- **entitled to have the legality of their internment reviewed periodically; and**
- **to make submissions relating to the conditions of their detention.**¹⁰⁸

All persons interned in NIACs are entitled to these procedural safeguards, including ISIS foreign fighters and ISIS-affiliated women and children detained by the SDF.

106. ICRC, Opinion Paper on Internment in Armed Conflict: Basic Rules and Challenges, November 2014, p. 3, available at <<https://www.icrc.org/en/document/internment-armed-conflict-basic-rules-and-challenges>> (14 May 2019).

107. ICRC, Customary IHL Study, Rule 103.

108. Jelena Pejic, ‘Procedural Principles and Safeguards from Internment/Administrative Detention in Armed Conflict and Other Situations of Violence’, *International Review of the Red Cross*, Vol. 87, No. 858, November 2005, pp. 375-392, cited as the ICRC’s official position in the ICRC Report on Challenges of Contemporary Armed Conflicts presented to the 30th International Conference of the Red Cross and Red Crescent in 2007, available at: <https://www.icrc.org/en/doc/assets/files/other/ihl-challenges-30th-international-conference-eng.pdf>, p 11.

5. MINIMUM STANDARDS OF TREATMENT IN NIAC

IHL requires a minimum standard of treatment for all persons deprived of their liberty for reasons related to an armed conflict.¹⁰⁹ The SDF, as a non-State armed group engaged in a NIAC, is bound by applicable customary and treaty-based rules of IHL regarding the standard of treatment of detainees.

5.1. Factual context

The present analysis is based on factual information gathered from open sources, including reports of international organisations, international and local non-governmental organisations, and news outlets.

Material conditions

The SDF is open about the fact that maintaining decent conditions of detention for internees is an impossible challenge without outside support. It received US logistical support to establish ‘pop-up’ prisons but is not receiving financial support. SDF members’ salaries have decreased in order to pay for these detention facilities.¹¹⁰

It seems that, in 2018, Ain Issa and Kobane prisons were visited once a week by a doctor and that detainees had access to a caged courtyard for one hour a day and to a television.¹¹¹ Dayriq is a maximum-security prison with significant resources. As of 14 March 2019, there were

allegedly as many guards as detainees (400 each) and the conditions seemed decent: three meals per day, exercise, activities, religious freedom, ICRC visitations, and so forth.¹¹² However, things may have changed following an escape attempt by detainees in early April.¹¹³

Meanwhile, the Dashisha prison has been described as overcrowded, understaffed, and containing wounded men not appropriately cared for.¹¹⁴

Material conditions in the camps have been described as ‘apocalyptic’.¹¹⁵ In all three camps, more than 95% of inhabited shelters are household-sized tents. Fuel is required for heating in the winter and for cooking. Risk of fire and pollution inside the tent are major concerns. Many residents are undergoing some form of psychological distress. Additional pressure is due to theft, gender-based harassment, child labour and early marriage. Drinking water and food are provided but a considerable number of households have to ration both in order to cope. Latrines and hand washing facilities are not available in all spaces. Almost half of the households include a pregnant or lactating woman.¹¹⁶

109. Note: The term ‘internment’ refers to non-criminal detention of a person based on the serious threat that his or her activity poses to the security of the detaining authority in relation to an armed conflict. The term detainee and internee are used interchangeably here, to encompass the range of foreign fighters held by the SDF irrespective of the factual context.

110. Jeff Seldin, ‘Prison Repairs Underway to Hold Thousands of IS Fighters’, VOA News, 9 April 2019, <https://www.voanews.com/a/prison-repairs-underway-to-hold-thousands-of-is-fighters/4869376.html> (accessed July 2019); Robin Wright, ‘The Dangerous Dregs of ISIS’, The New Yorker, 16 April 2019, <https://www.newyorker.com/news/dispatch/the-dangerous-dregs-of-isis> (accessed July 2019).

111. Charlie Savage, ‘As ISIS Fighters Fill Prisons in Syria, Their Home Nations Look Away’, New York Times, 18 July 2018, <https://www.nytimes.com/2018/07/18/world/middleeast/islamic-state-detainees-syria-prisons.html> (accessed July 2019).

112. Amberin Zaman, ‘Inside the prison holding IS detainees in northeast Syria’, Al Monitor, 15 March 2019, <https://www.al-monitor.com/pulse/originals/2019/03/syria-kurdish-region-isis-prison-sdf.html> (accessed July 2019).

113. Raf Sanchez, ‘Kurdish forces put down riot by Isis prisoners in Syria’, The Telegraph, 6 April 2019, <https://www.telegraph.co.uk/news/2019/04/06/kurdish-forces-put-riot-isis-prisoners-syria/> (accessed July 2019).

114. Robin Wright, ‘A Visit to ISIS’ Syria: Amid Ruin, Human Crises Pose Risk’, United States Institute of Peace, 7 May 2019, <https://www.usip.org/publications/2019/05/visit-post-isis-syria-human-crises-pose-risk> (accessed July 2019).

115. <https://www.france24.com/en/20190704-conditions-syrias-al-hol-camp-apocalyptic-red-cross>

116. See the REACH Initiative factsheets: http://www.reachresourcecentre.info/system/files/resource-documents/reach_syr_factsheet_northeastysyria_campandinformalsiteprofilesround5_alhol_jul2019.pdf (al Hol), http://www.reachresourcecentre.info/system/files/resource-documents/reach_syr_factsheet_northeastysyria_campandinformalsiteprofilesround5_einissaxextension_jul2019.pdf (Ain Issa) and http://www.reachresourcecentre.info/system/files/resource-documents/reach_syr_factsheet_northeastysyria_campandinformalsiteprofilesround5_roj_jul2019.pdf (al Roj) (accessed July 2019).

Human Rights Watch reported the following in July 2019:

During three visits to the section of al-Hol camp holding foreign women and children in June 2019, Human Rights Watch found overflowing latrines, sewage trickling into tattered tents, and residents drinking wash water from tanks containing worms. Young children with skin rashes, emaciated limbs, and swollen bellies sifted through mounds of stinking garbage under a scorching sun or lay limp on tent floors, their bodies dusted with dirt and flies. Children are dying from acute diarrhea and flu-like infections, aid groups and camp managers said ... Many women and children had visible skin sores from leishmaniasis, a sand fly-borne parasite. Some inhabitants have been diagnosed with tuberculosis, camp managers said. Drinking water is insufficiently chlorinated and remains in short supply, aid workers said. Human Rights Watch saw children drink water from a wash-water tank that had worms coming out of the spout.

The annex where foreign nationals are held reflects even worse conditions, due to an enhanced security regime linked to the assumption that foreign women are most dedicated to the ISIS ideology.¹¹⁷

Treatment

The SDF has undertaken to abide by international human rights law and democratic principles in its administration of North-East Syria. Regarding treatment in detention, an SDF General has stated that the group does not 'believe in torture or mistreatment of prisoners'.¹¹⁸

Nevertheless, there have been allegations of ill-

treatment by the SDF, including in several prisons.¹¹⁹ Some sources indicate that systematic torture is occurring within these prisons, including upon civilians arrested for supposed ties to ISIS, who are required to pay money to secure their release. Until recently, Dayriq was the exception with no allegations of torture or mistreatment. However, following an attempted prison-break in April 2019, reports of torture have emerged and ICRC visitations have reportedly ceased.¹²⁰ It is difficult to assess the veracity of these claims, as they arise in the midst of a military, political and ideological battle between the many stakeholders involved.¹²¹ The SDF has acknowledged some instances of ill-treatment and taken internal measures to address them.¹²²

Allegations of ill-treatment within the camps mainly relate to attacks perpetrated by female residents who are strong supporters of ISIS against those who no longer abide by the extremist ideology.¹²³

117. 'Syria: Dire Conditions for ISIS Suspects' Families', Human Rights Watch, 23 July 2019, <https://www.hrw.org/news/2019/07/23/syria-dire-conditions-isis-suspects-families> (accessed July 2019).

118. Anne Speckhart and Ardian Shajkocvi, 'How Dedication, Self-Sacrifice and Courage Can Build a New Democratic, Feminist Society in Rojava, Syria', Homeland Security Today, 16 July 2019, <https://www.hstoday.us/subject-matter-areas/terrorism-study/how-dedication-self-sacrifice-and-courage-can-build-a-new-democratic-feminist-society-in-rojava-syria/> (accessed July 2019).

119. 'Methods of torture in the SDF jails are exactly the same as those of the Assad's: shabeh, impalement, electric shocks and other methods', Deir Ezzor 24, 2019 archives, <https://en.deirezzor24.net/archives/6946> (accessed July 2019); 'Crimes in limbo: SDF commits horrific crimes against Syrians under the cover of the international coalition', Euro-Mediterranean Human Rights Monitor, 30 July 2019, <https://euromedmonitor.org/en/article/3037/Crimes-in-limbo-SDF-commits-horrific-crimes-against-Syrians-under-the-cover-of-the-international-coalition> (accessed August 2019); 'US-backed forces torture, urinate on Arab family in Syria', Middle East Monitor, 29 July 2019, <https://www.middleeastmonitor.com/20190729-us-backed-forces-torture-urinate-on-arab-family-in-syria/> (accessed August 2019)

120. 'The SDF's prisons Human slaughterhouses, where confessions are extracted under torture', Deir Ezzor 24, 25 March 2019, <https://en.deirezzor24.net/the-sdfs-prisons-human-slaughterhouses-where-confessions-are-extracted-under-torture/> (accessed May 2019); 'Combattants de l'État islamique: «Si je ne peux pas rentrer en Suisse, mettez-moi une balle dans la tête»', SWI, 11 Juin 2019, https://www.swissinfo.ch/fre/combattants-de-l-%C3%A9tat-islamique_-si-je-ne-peux-pas-rentre-en-suisse--mettez-moi-une-balle-dans-la-%C3%AAte-/45022104 (accessed July 2019).

121. Kevin Knodell and Benedetta Argentieri, 'ISIS, Assad, and Turkey Are Waging a Shadow War on U.S. Allies in Syria', The Daily Beast, 8 August 2019, <https://www.thedailybeast.com/isis-assad-and-turkey-are-waging-a-shadow-war-on-americas-kurdish-allies-in-syria> (accessed August 2019).

122. See 'Manbij Military Council on torture allegations: We are committed to laws of war', ANHA Hawar News, 16 March 2017, <https://web.archive.org/web/20170623230116/http://en.hawarnews.com/anbij-military-council-on-torture-allegations-we-are-committed-to-laws-of-war/> (accessed August 2019).

123. 'Pregnant Indonesian reportedly tortured and murdered in Syria camp for ISIS supporters', The National, 1 August 2019, <https://www.thenational.ae/world/mena/pregnant-indonesian-reportedly-tortured-and-murdered-in-syria-camp-for-isis-supporters-1.893297> (accessed August 2019).

5.2. Humane treatment under Common Article 3

Common Article 3 to the *Geneva Conventions* of 1949 provides the minimum legal standards applicable to all parties to the conflict in North-East Syria, including the SDF.¹²⁴ It requires that '[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by (...) detention (...) shall in all circumstances be treated humanely'.¹²⁵

ISIS foreign fighters and ISIS-affiliated women and children detained by the SDF are therefore entitled, at a minimum, to humane treatment. Humane treatment must be extended equally to all detainees without discrimination based on race, religion or sex or 'any other similar criteria'.¹²⁶ The meaning of humane treatment is specific to the case, circumstances and context, 'taking into account both objective and subjective elements, such as the environment, the physical and mental condition of the person, as well as age, social, cultural, religious or political background and past experiences'.¹²⁷

The SDF is required to meet a standard of medical care for detained foreign fighters and affiliated women and children. Under Common Article 3, the SDF must respect and protect persons deprived of their liberty who are wounded or sick. They are obliged to provide, to the fullest extent practicable, and with the least possible delay, the medical care and attention required by their condition.¹²⁸

124. Regarding the binding quality of Common Article 3, see: ICJ, *Military and Paramilitary Activities in and against Nicaragua*, Merits, Judgment, 1986, paras 218–219; ICTY, *Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1, 2 October 1995) [98]; ICTY, *Prosecutor v Naletilić* (Trial Judgment) Case No IT-98-34-T (31 March 2003) [228]; and ICTR, *Prosecutor v Akayesu* (Appeals Judgment) Case No ICTR-96-4-A 1 (June 2001) [608–609].

125. Jean S Pictet (ed), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War: Commentary* (International Committee of the Red Cross, 1958) 204. (The principle of humane treatment 'is in truth the leitmotiv of the four Geneva Conventions')

126. *Ibid.*

127. ICRC (2017), *Commentary on Common Article 3*, supra note 98, para. 575.

128. Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press, 2005), vol 1, rule 110.

They must avail themselves, as best as they can, of the medical services of the civilian population or humanitarian organisations. It follows from this that detainees shall have the benefit of medical examinations and shall not have their physical or mental health and integrity endangered by an unjustified act or omission.¹²⁹ These obligations are further contextualised by international human rights law, as discussed in [section 5.5](#).

5.3. War crimes as a violation of Common Article 3

As part of the obligation of humane treatment, Common Article 3 expressly prohibits the following acts:¹³⁰

- a. violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- b. taking of hostages;
- c. outrages upon personal dignity, in particular humiliating and degrading treatment;
- d. the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples (i.e. unfair trials).¹³¹

Serious violations of these provisions under Common Article 3 are qualified as war crimes. The following war crimes are most applicable to the obligation to treat detainees humanely: torture, cruel treatment, and outrages upon personal dignity.¹³² Rape and other forms of sexual violence are prohibited under Common Article

129. *Ibid.*

130. See: ICJ, *Military and Paramilitary Activities in and against Nicaragua case*, Merits, Judgment, 1986, paras 218–219. (The generality of Common Article 3 has been described as a 'minimum yardstick' taking into consideration 'elementary considerations of humanity'). See generally, Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press, 2005).

131. See ICRC (2017) *Commentary on Common Article 3*, supra note 98.

132. See *Elements of Crimes*, articles 8(2)(c)(i) (cruel treatment and torture) and 8(2)(c)(ii) (outrages upon personal dignity) of the Rome Statute.

3 as a violation of humane treatment,¹³³ and as acts specifically constituting cruel treatment,¹³⁴ outrages upon personal dignity,¹³⁵ and torture.¹³⁶

Both torture and cruel treatment under article 8(2)(c)(i) of the *Rome Statute* applicable in NIAC require that the perpetrator inflicted severe physical or mental pain or suffering upon one or more persons. It is further required that the victim was either *hors de combat*, or a civilian, medical personnel or religious personnel taking no active part in the hostilities. Torture as a war crime also requires an additional element of being inflicted for ‘such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind.’¹³⁷ The assessment of severity should be based both on objective and subjective criteria pertaining to the circumstances of the particular case.

The war crime of outrages upon personal dignity under article 8(2)(c)(ii) of the *Rome Statute* requires that the perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons to such a degree of severity as to be generally recognized as an outrage upon personal dignity. It is further required that the victim was *hors de combat*, or a civilian, medical personnel or religious personnel taking no active part in the hostilities of a non-international armed conflict.¹³⁸ The humiliation or degradation has to be ‘real and

serious’, but it does not have to be lasting, nor is it ‘necessary for the act to directly harm the physical or mental well-being of the victim.’¹³⁹

Crimes of sexual violence, although specifically dealt with elsewhere in the *Rome Statute*,¹⁴⁰ constitute an outrage upon personal dignity and are thus equally covered by Common Article 3.¹⁴¹ Sexual violence towards detainees and internees is thus prohibited at all times as part of the absolute prohibition against sexual violence in war, irrespective of the identity of the victim or the perpetrator, or their relationship to one another.¹⁴² In furtherance of this obligation, IHL grants special protection to all women. Female detainees must be ‘especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault’.¹⁴³ Female detainees must be supervised by women and detained separately with separate facilities. Children must also be housed separately.

All perpetrators of the acts listed above, irrespective of their affiliation to a State or non-State party to the conflict, constitute war crimes when committed in the context of and associated with an armed conflict. All perpetrators are therefore liable to prosecution on the basis of individual criminal responsibility.

However, these acts do not exhaust that which has been accepted under IHL as a violation of humane treatment.¹⁴⁴ The prohibitions listed in Common Article 3 are ‘merely specific examples of conduct that is indisputably in violation of the humane

133. ICRC (2017) Commentary on Common Article 3, supra note 98, para 723.

134. ICTY, Prosecutor v. Kupreskic et al. (Trial Judgement) IT-95-16-T (14 January 2000) [116]. (The ICRC notes that ‘[t]here is no difference between the notion of ‘inhuman treatment’ committed in an international armed conflict and the notion of ‘cruel treatment’ prohibited under common Article 3; see the commentary on Article 51, para. 3093’.) ICRC (2017) Commentary on Common Article 3, footnote 628.

135. ICTY, Prosecutor v. Anto Furundzija (Trial Judgement), IT-95-17/1-T (10 December 1998) [270-275]; ICTR, The Prosecutor v. Ndindiyimana et al. (Judgment and Sentence), ICTR-00-56-T (17 May 2011) [2158].

136. ICTY, Prosecutor v. Delalić et al. (Trial Judgement), IT-96-21-T (16 November 1998) [495-497]; Prosecutor v. Kunarac et al. (Trial Judgment), IT-96-23-T & IT-96-23/1-T (22 February 2001) [151]. See also UN Commission on Human Rights, Torture and other cruel, inhuman or degrading treatment or punishment, Report by the UN Special Rapporteur on Torture, UN Doc. E/CN.4/1986/15, 19 February 1986, para. 119.

137. Elements of Crimes, article 8(2)(c)(i)-(iv) of the Rome Statute.

138. Elements of Crimes, article 8(2)(c)(ii) of the Rome Statute. See footnote 57 indicating that ‘persons’ can include dead persons and that the cultural background of victims should be taken into account.

139. ICC, Katanga and Ngudjolo (Decision on the Confirmation of Charges) Case No ICC-01/04-01/07-717 (14 October 2008) [367]; [369].

140. Rome Statute article 8(2)(e)(vi).

141. ICRC (2017) Commentary on Common Article 3, supra note 98, paras 727-729. This has been confirmed in numerous decisions of international criminal tribunals and is replicated in Additional Protocol II, article 4(2)(e).

142. ICC, Prosecutor v. Bosco Ntaganda (Judgment on the appeal of Mr Ntaganda in respect of Counts 6 and 9) Case No ICC-01/04-02/06 OA5 (15 June 2017).

143. See Article 76 of Geneva Convention IV.

144. See: Concise Oxford English Dictionary, 12th edition, Oxford University Press, 2011, p. 693, adding ‘inflicting the minimum of pain’ as another element as part of ‘compassionate or benevolent’ treatment. Persons deprived of their liberty must be treated with humanity and dignity.

treatment obligation'.¹⁴⁵ Common Article 3 uses deliberately open-textured language and must be interpreted in accordance with the overarching obligation of humane treatment.¹⁴⁶ Developments in customary IHL, international human rights law, and various judicial decisions of international criminal tribunals have helped to define the content and scope of humane treatment. The specific standard of treatment owed to ISIS foreign fighters and ISIS-affiliated women and children detained by the SDF under IHL must therefore be ascertained from a synthesis of treaty-based and customary law, as well as certain applicable provisions of international human rights law.

5.4. Minimum standard of treatment under customary IHL applicable in NIAC

The SDF is bound by customary IHL applicable in NIAC. Customary international law confirms that persons hors de combat in NIACs must be treated humanely and provides greater clarity on the constituent elements of the obligation of humane treatment.¹⁴⁷ Customary law prescribes those rules which are logically necessary to give effect to an existing rule of customary international law.¹⁴⁸ Several obligations on detaining authorities are necessary to give effect to the fundamental customary obligation of humane treatment and are therefore considered part of customary international law themselves. The customary status of these rules is derived from evidence of consistent State practice observed in a form and manner indicating their acceptance as legally binding rules (*opinio juris*).¹⁴⁹

As one of the strongest indicators of State practice in the context of customary IHL, States' military manuals recognise the following obligations in the treatment of detainees applicable in NIAC:

- **respect for convictions and religious practices;**
- **provision of adequate food and drinking water, as well as clothing;**
- **safeguards for health and hygiene;**
- **provision of suitable medical care;**
- **an entitlement to sleep;**
- **protection from violence and against the dangers of the armed conflict; and**
- **appropriate contacts with the outside world'.¹⁵⁰**

Like Common Article 3, Additional Protocol II (*APII*) to the Geneva Conventions of 1949 applies to conflicts not of an international character.¹⁵¹ Syria is not a signatory to *APII* and its provisions are therefore not directly binding on Syrian territory as a matter of treaty law. However, the provisions of *APII* relating to the humane treatment of detainees are considered part of customary international law and are therefore equally binding on all parties to a NIAC.¹⁵² *APII* 'develops and supplements' Common Article 3 'without modifying its existing conditions of application' and therefore helps to explain the scope and content of obligation of humane treatment under Common Article 3.¹⁵³

APII reiterates the obligation that: 'In all circumstance [detainees] shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical

145. ICRC (2017) Commentary on Common Article 3, supra note 98, para 577.

146. Ibid, para 555.

147. Ibid.

148. See: Stefan Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion', *European Journal of International Law* 26 (2015) 419, 427. ('Where a rule of customary international law is logical, because it can be deduced from an existing underlying principle, the burden of proving the rule by way of inductive reasoning is proportionally diminished. In essence, a logical rule requires a smaller pool of state practice and *opinio juris*.')

149. See: *North Sea Continental Shelf*, Judgment, ICJ Reports 1969, p. 3. at para 39, 77; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports 1986, p. 14 at para. 186.

150. ICRC (2017) Commentary on Common Article 3, supra note 98, para 580, citing the military manuals of Australia, Canada, Chad, Nepal, Sri-Lanka, Turkey, the United States, and the United Kingdom.

151. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609 (entered into force 7 December 1978), (hereafter: 'Additional Protocol II').

152. Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press, 2005).

153. Additional Protocol II, Article 1 'Material field of application'.

care and attention required by their condition. There shall be no distinction among them founded on any grounds other than medical ones.¹⁵⁴ It provides a non-exhaustive list of the obligations on detaining authorities to ensure humane treatment to detainees, much of which is confirmed by State practice and *opinio juris* and is thus binding on all parties to a NIAC.¹⁵⁵ The following obligations on detaining authorities are part of customary IHL applicable in NIAC and are thus binding on the SDF:¹⁵⁶

- **An ICRC offer to visit detainees must be examined in good faith and may not be refused arbitrarily.**

Persons deprived of their liberty must:

- **not be detained near a combat zone;**
- **have their health and hygiene safeguarded;**
- **have their personal details recorded, as well as the reasons for their detention;**
- **be released as soon as the reasons for the deprivation of their liberty cease to exist, provided they are not subject to a lawfully imposed prosecution or sentence;**
- **not be subjected to corporal punishment, ‘including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure’;**
- **not be subjected to torturous treatment, defined as the ‘intentional infliction, by act or omission, of severe pain or suffering, whether physical or mental, in order to obtain information or a confession, or to punish, intimidate or coerce the victim or a third person, or to discriminate on any ground, against the victim or a third person’.**¹⁵⁷

154. Additional Protocol II, article 7, ‘Protection and care’.

155. Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press, 2005), vol 1, Chapters 33–39.

156. *Ibid.*

157. ICTY, *Kunarac case*, Judgment, 1332.

Other obligations regarding the treatment of prisoners are found consistently across other instruments pertaining to NIACs.¹⁵⁸ These are further supported by legislation and practice.¹⁵⁹ These procedural obligations on the SDF are subject to reasonable regulation depending on the factual context, which takes into account the means available and the local conditions. Persons deprived of their liberty must:¹⁶⁰

- **be allowed to correspond with their families, subject to reasonable conditions relating to frequency and the need for censorship by the authorities.**
- **extend the benefit of working conditions and safeguards similar to those enjoyed by the local civilian population.**
- **be provided with adequate food, water, clothing, shelter and medical attention, either by the detaining authority or by external assistance.**¹⁶¹
- **have their personal convictions and religious practices respected.**

Some of the specificities of the above obligations, such as the provision of adequate food or religious services, may be reasonably restricted by the external pressures and resource limitations of the armed conflict. However, the underlying obligation of humane treatment ‘is absolute and knows no exceptions’.¹⁶² The obligation of humane treatment is therefore non-derogable and ‘[n]o circumstances justify deviating from the obligation’.¹⁶³ Military

158. See: United Nations, *Standard Minimum Rules for the Treatment of Prisoners*, *European Prison Rules* and the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*. Available at: https://www.unodc.org/documents/justice-and-prison-reform/GA-RESOLUTION/E_ebook.pdf (accessed August 2019).

159. Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press, 2005), vol 1, Chapters 33–39.

160. *Ibid.*

161. See: United Nations, *Standard Minimum Rules for the Treatment of Prisoners*, Rules 9–20 (12), as one example of a range of international agreements declaring basic needs of prisoners must be met. These standards are the ‘minimum conditions which are accepted as suitable’ by the international community.

162. ICRC (2017) *Commentary on Common Article 3*, *supra* note 98, para 582.

163. *Ibid.*

necessity does not justify deviating from the obligation of humane treatment.¹⁶⁴

In addition to the obligations on detaining authorities under customary IHL noted above, the *Standard Minimum Rules for the Treatment of Prisoners*, adopted by the UN General Assembly on 17 December 2015, provides a list of guarantees that *should* be afforded to detainees wherever possible. The obligations contained in this instrument are not specific to conflict-related detention and are therefore of lesser weight. Nonetheless, they constitute significant *opinio juris* of the international community and thus represent the standard to which all detaining authorities should endeavour to meet. Accordingly, the SDF should:

- **Avoid overcrowding, ensure separate beds and regularly supervise detainees by night.**¹⁶⁵
- **Ensure accommodation meets all requirements of health, with regard to climatic conditions, cubic content of air, minimum floor space, lighting, heating and ventilation.**¹⁶⁶
- **Ensure that the sanitary installations shall be adequate to enable every prisoner to comply with the needs of nature when necessary and in a clean and decent manner.**¹⁶⁷
- **Ensure that adequate bathing and shower installations shall be provided so that every prisoner may be enabled and required to have a bath or shower, at a temperature suitable to the climate, as frequently as necessary for general hygiene according to season and geographical region, but at least once a week in a temperate climate.**¹⁶⁸
- **Ensure that every prisoner who is not allowed to wear his own clothing shall be provided with an outfit of clothing suitable**

for the climate and adequate to keep him in good health. Such clothing shall in no manner be degrading or humiliating.¹⁶⁹

- **Ensure that every prisoner who is not employed in outdoor work shall have at least one hour of suitable exercise in the open air daily if the weather permits.**¹⁷⁰
- **Ensure that detainees are protected and to take necessary measures to ensure their safety of released detainees.**

As stated by the ICRC, '[t]he meaning of humane treatment is context specific and has to be considered in the concrete circumstances of each case, taking into account both objective and subjective elements, such as the environment, the physical and mental condition of the person, as well as his or her age, social, cultural religious or political background and past experiences.' The SDF must therefore consider the particular needs and circumstances of each detainee in order to fulfil the obligation of humane treatment.

Finally, the SDF must use its best efforts to provide care for the wounded and sick, including permitting humanitarian organisations to provide for their care.¹⁷¹ Persons suspected of being foreign fighters must not be arbitrarily deprived of their liberty.¹⁷² Consequently, the SDF is required to demonstrate valid security or criminal reasons for the deprivation of their liberty and for the continuation of that detention. The standard to be met is of an exceptional threat to security.¹⁷³

5.5. Overlap with IHRL (key provisions)

International human rights law (IHRL) applies to States vis a vis its own citizens and all persons within its jurisdictional control.¹⁷⁴ Although subject to the

164. Ibid 583

165. United Nations, *Standard Minimum Rules for the Treatment of Prisoners*, rule 12.

166. Ibid, rule 13.

167. Ibid, rule 15.

168. Ibid, rule 16.

169. Ibid, rule 19.

170. Ibid, rule 23.

171. Ibid.

172. Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press, 2005), vol 1, rule 99.

173. Ibid.

174. UN General Assembly, Res. 2675 (XXV), 9 December 1970 (adopted by 109 votes in favour, none against and 8 abstentions), preamble and article 1. Note IHRL case law re: ECHR and ICHR which decided that human rights obligations are owed to persons over whom the State has jurisdiction and 'effective control' over that jurisdiction.

lex specialis application of IHL, IHRL continues to apply in situations of armed conflict and often contextualises certain IHL obligations with greater detail and clarity.¹⁷⁵ While the applicability of IHRL to non-State armed groups is disputed, it is generally accepted that non-State armed groups that exercise territorial control over a civilian population are bound by IHRL.¹⁷⁶ As stated by the ICRC, '[a]t a minimum, it seems accepted that armed groups that exercise territorial control and fulfil government-like functions thereby incur responsibilities under human rights law'.¹⁷⁷ Furthermore, the SDF has specifically undertaken to be bound by IHRL.¹⁷⁸ Provisions of IHRL relating to the treatment of detainees may therefore be considered binding on the SDF.

IHRL is also based on the principle of humane treatment of persons,¹⁷⁹ and its rules give useful expression to the meaning of 'humane treatment' under IHL.¹⁸⁰ The right to humane treatment means

that detainees should not be subject to 'any form of hardship or constraint in addition to those that are an unavoidable incident of detention in a closed environment'.¹⁸¹ The UN Human Rights Council declared that Article 10 of the ICCPR, which requires that 'persons deprived of their liberty be treated with humanity and with respect for the inherent dignity of the human person', is non-derogable and therefore applicable at all times.¹⁸²

IHRL can be used to 'support, strengthen and clarify analogous principles' of IHL.¹⁸³ For example, key phrases such as 'degrading treatment' receive useful application by human rights case law, where it is defined as an act which 'grossly humiliates the victim before others or drives the detainee to act against his/her will or conscience'.¹⁸⁴ Another area which IHRL meaningfully explicates the meaning of humane treatment concerns the conditions which amount to arbitrary detention. The SDF must, as far as practicable: inform the detainee of the reasons of their detention, and provide them with an opportunity to challenge the lawfulness of their detention.¹⁸⁵

A relevant example of the convergence of IHRL and IHL is the *Standard Minimum Rules for the Treatment of Prisoners*, which provides the 'minimum conditions which are accepted as suitable' by the international community.¹⁸⁶ Another is the UNGA's *Body of Principles for the Protection of All Persons*

175. See: ICRC, Strengthening International Humanitarian Law Protecting Persons Deprived of Their Liberty, Synthesis Report from Regional Consultations of Government Experts (Geneva, November 2013) 10–11; ICRC, Strengthening international humanitarian law protecting persons deprived of their liberty, Concluding Report, Document prepared by the ICRC for the 32nd International Conference of the Red Cross and Red Crescent, (June 2015) 12, 20–21; ICRC, 32nd International Conference of the Red Cross and Red Crescent, Res. 2, 'Strengthening compliance with international humanitarian law', para. 8; and Copenhagen Process: Principles and Guidelines (2012), Preamble, para. IV.

176. For discussion, see: Marco Sassòli and Laura Olson, 'The relationship between international humanitarian law and human rights law where it matters: admissible killing and interment of fighters in non-international armed conflicts' (2008), *International Review of the Red Cross*, Vol. 90, No. 871 at pp 603–605. See also: Sivakumaran, Sandesh, *The Law of Non-International Armed Conflict* (Oxford University Press: 2012) pp. 95–99; Jean-Marie Henckaerts and Cornelius Wiesener, 'Human rights obligations of non-State armed groups: a possible contribution from customary international law?', in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar, Cheltenham: 2013) pp. 146–169; Andrew Clapham, 'Focusing on Armed Non-State Actors', in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press: 2014) pp. 766–810, at 786–802; and Konstantinos Mastorodimos, *Armed Non-State Actors in International Humanitarian and Human Rights Law: Foundation and Framework of Obligations, and Rules on Accountability* (Ashgate, Farnham: 2016).

177. ICRC (2017) *Commentary on Common Article 3*, supra note 98, para 539.

178. See: Section 5.7 'Overlap with Syrian law and the internal law of the SDF'.

179. Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press, 2005), vol 1, rule 87.

180. *Ibid.*

181. Human Rights Committee, General Comment 21: Article 10 (Humane treatment of persons deprived of their liberty), 13 March 1993; Human Rights Committee, Views: Communication No 1818/2008, 100th sess, UN Doc CCPR/C/100/D/1818/2008 (2 November 2010) 10 [6.8] ('*McCallum v South Africa*').

182. UN Human Rights Committee, General Comment No. 29 (Article 4 of the International Covenant on Civil and Political Rights) (*ibid.*, 321). See also, Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD), Article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Article 37 of the Convention on the Rights of the Child (CRC) and Article 14 of the Convention on the Rights of Persons with Disabilities (CRPD).

183. Marco Sassòli and Laura Olson, 'The relationship between international humanitarian law and human rights law where it matters: admissible killing and interment of fighters in non-international armed conflicts' (2008), *International Review of the Red Cross*, Vol. 90, No. 871 at pp 603–605.

184. European Commission of Human Rights, Greek case, [1339].

185. Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press, 2005), vol 1, rule 99.

186. United Nations, *Standard Minimum Rules for the Treatment of Prisoners*.

under *Any Form of Detention or Imprisonment*.¹⁸⁷ These provide specific requirements for medical care, appropriate punishment, and principles which can be used by both detaining authorities to determine the appropriate standard of treatment, and on a case-by-case basis in determining whether the standard has been met. Instruments such as these also reinforce many of treaty-based and customary IHL rules outlined above.

5.6. Special protection of women and children

While Common Article 3 does not explicitly refer to women and children, the obligation to ensure humane treatment is absolute and shall be administered ‘without adverse distinction founded on race, colour, religion or faith, sex, birth or wealth’.

Rape and other forms of sexual violence violate the obligation to ensure humane treatment and have been found to violate the specific prohibition on ‘violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture’ under Common Article 3(1)(a), and to constitute an outrage upon personal dignity contrary to Common Article 3(1)(c).¹⁸⁸ In certain circumstances, IHL recognises the specific protection of women with dependent children.¹⁸⁹

Common Article 3 equally does not mention children as a distinct category, but it is obvious that the threshold to reach humane treatment must be set higher when concerning children.¹⁹⁰ Based on international customary law,¹⁹¹ it is also widely recognised that children are entitled to special care and protection. The recruitment of children

under 15 years old into armed forces is prohibited, along with their participation in hostilities.¹⁹² IHL instruments notably affirm that children shall not be subject to discrimination, shall be registered and have the right to acquire a nationality.¹⁹³ When dealing with children involved in armed conflict, the emphasis should be set on rehabilitation and reintegration into society.¹⁹⁴

5.7. Overlap with domestic Syrian law and the internal law of the SDF

The SDF are required under treaty and customary law to provide humane treatment to individuals within their custody. Syrian law is considered in this context. The internal law of the SDF is also considered. It is important to recall that domestic law can only apply in addition to IHL; it does not override IHL and can under no circumstances reduce the SDF’s obligations under Common Article 3 and customary international law.

Syrian law

Syrian law adopts language upholding the rights and dignity of its citizens. The law generally criminalises acts that threaten public security, which includes foreign fighters who take part in active hostilities. Relevant provisions of Syrian law applicable to standards of detention are summarised below. These provisions are for illustrative purposes and do not constitute a complete or thorough analysis.

The **Constitution of the Syrian Arab Republic (2012)** states at:

- **Article 25 (1):** that ‘Freedom is a sacred right.’
- **Article 51 (2):** that ‘Every defendant shall be presumed innocent until convicted by a final court ruling in a fair trial; The right to conduct

187. These are couched in the language of IHL but have been applied by the ICRC and case law in the context of NIACs.

188. See articles 4 and 5 of the AP II, as well as Rule 134 of the Customary IHL Study, and its commentary (footnote 46), pp. 476-479. See generally, United Nations Department of Peacekeeping Operations, ‘Review of the Sexual Violence Elements of the Judgements of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone in the Light of Security Council Resolution 1820’, available at http://www.icty.org/x/file/Outreach/sv_files/DPKO_report_sexual_violence.pdf (accessed August 2019).

189. Where applicable, article 6(4) of AP II prohibits the carrying out of death sentence of persons under the age of 18, pregnant women, and mothers of dependent infants.

190. ICRC, ‘2016 Commentary on C.A.3’, §553.

191. Rules 105, 120, 135-137 of the Customary IHL Study.

192. It is worth noting that the age-limit for recruitment of children varies between international instruments. 15 years old is the limit set by the AP I and AP II to the Geneva Conventions of 1949, as well as by the CRC and the Rome Statute (Rome Statute of the International Criminal Court, UNTS Vol. 2187, No. 38544). The Optional Protocol to the CRC on the Involvement of Children in Armed Conflict sets such limit at age 18.

193. Art. 24 of the ICCPR.

194. UN CTITF, ‘Guidance to States...’, pp. 24-29; Optional Protocol to the CRC on the Involvement of Children in Armed Conflict, article 6(3).

litigation and remedies, review, and the defense before the judiciary shall be protected by the law, and the state shall guarantee legal aid to those who are incapable to do so, in accordance with the law;’

- **Article 53 (2):** that ‘No one may be tortured or treated in a humiliating manner, and the law shall define the punishment for those who do so;’

The Syrian Arab Republic’s **Military Penal Code (1950)** provides that: it is a criminal offence to perform acts of violence or cruelty in the battlefield against an injured or sick soldier who is unable to defend himself.

The Syrian Arab Republic, pursuant to **legislative decree No. 39 of 1/2004**, acceded to the Convention against Torture which takes precedence over prevailing Syrian law and gives every individual the right to invoke its provisions and demand that they be implemented.

SDF Internal Law

SDF General Command: official policy describes ten rules, published in People’s Defence Units. These rules recognise the devastating impact of war, calling upon all parties to the conflict to act in accordance with the laws and customs of war and human rights,¹⁹⁵ as part of a broader commitment and obedience to humanitarian principles. These commitments are made in expectation of reciprocity:

- **Rule 1** directs that basic humanitarian services be allowed to everyone.
- **Rule 4** reflects the absolute prohibition on sexual violence and the military use of children.
- **Rule 8** prohibits field executions.
- **Rule 9** upholds the rule of law, and guarantees fair trial rights, including a composition of an

independent and impartial judiciary and the right to appeal. This may be indicative of a wider commitment to procedural rights.

- **Rule 10** prohibits torture and other forms of ill-treatment such as ‘violence, abuse, insult and disrespecting the human dignity of prisoners’, including ‘using these methods to extort information’. Critically, it also requires ‘respect [for] prisoner rights according to international humanitarian law and international human rights in correspondence with our religions and traditions’. This indicates that the SDF clearly accepts to be bound by the laws and customs of war, as well as human rights.

One of the four military councils, Manbij, also referred members to a military court in an explicit recognition of, and commitment to, the applicable laws of war.¹⁹⁶

Social Contract of the Democratic Federalism of Northern Syria

The Social Contract of the Democratic Federalism of Northern Syria (*Social Contract*) is a renewed (2016) agreement following the first constitutional document of the self-proclaimed Autonomous Federation of Northern Syria, the *Charter of the Social Contract* (2014).¹⁹⁷ The updated version names the SDF as its official defence force.¹⁹⁸ At the time of writing, the most recent version of the *Social Contract* available in English provides the following constitutional guarantees:

- **Article 17:** ‘The Democratic Federalism of Northern Syria shall abide by the international declaration of human rights and all related charters of human rights.’
- **Article 19:** ‘Human dignity shall be preserved and it is not permissible to torture anyone psychologically or physically; the doer shall be punished.’

195. SDF General Command established the official policy on compliance with laws and customs of war in a form of ten rules, published in People’s Defence Units, ‘SDF calls opposition to act in accordance with humanitarian principles’, 3 November 2016. (<https://www.ypgrojava.org/SDF-calls-opposition-to-act-in-accordance-with-humanitarian-principles>).

196. See ‘Manbij Military Council on torture allegations: We are committed to laws of war’, ANHA Hawar News, 16 March 2017, <https://web.archive.org/web/20170623230116/http://en.hawarnews.com/anbij-military-council-on-torture-allegations-we-are-committed-to-laws-of-war/> (accessed August 2019).

197. Charter of the Social Contract, available at: https://peaceinkurdistancampaign.files.wordpress.com/2014/03/english-version_sc_revised-060314.pdf

198. Article 64.

- **Article 31:** ‘The right to self-defence is sacred and shall not be restricted. The law shall guarantee to everyone the right to prosecution.’¹⁹⁹

Charter of the Social Contract

The earlier (2014) version of the Social Contract, or Charter of the Social Contract, provided the following:

- **Article 20:** The Charter holds as inviolable the fundamental rights and freedoms set out in international human rights treaties, conventions and declarations
- **Article 22:** The Charter incorporates the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, as well as other internationally recognized human rights conventions.
- **Article 25(b):** All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
- **Article 25(c):** prisoners have the right to humane conditions of detention, which protect their inherent dignity. Prisons shall serve the underlying objective of the reformation, education and social rehabilitation of prisoners.²⁰⁰

Human Rights Watch (2014) stated that while the Social Contract upholds some human rights standards, it neglects to stipulate a number of core principles under IHL. Particularly, it does not prohibit arbitrary detention, the right to prompt judicial review, and the right to a lawyer in criminal proceedings.²⁰¹

199. An unofficial translation is available at: <<https://internationalistcommune.com/social-contract/>>.

200. Charter of the Social Contract, available at: <https://peaceinkurdistancampaign.files.wordpress.com/2014/03/english-version_sc_revised-060314.pdf>

201. Human Rights Watch, Under Kurdish Rule, available at: <<https://www.hrw.org/report/2014/06/19/under-kurdish-rule/abuses-pyd-run-enclaves-syria>>.

The commitment to be bound by international human rights law supports the applicability of this body of law to the SDF as non-State armed group exercising *de facto* territorial control in North-East Syria.

5.8. Factual context of SDF detention

The following is an examination of SDF’s detention practices obtained from field work conducted by Jelena Plamenac.²⁰² It examines how the SDF carried out its detention operations and the normative framework that it adopted. It concludes that the SDF used internment as a security measure when conducting active military operations outside its territorial control and in relation to foreign belligerent nationals, but resorted to predominantly domestic Syrian law or its own internal law when detaining persons under its *de facto* territorial control in North-East Syria as well as in relation to captured belligerents of Syrian nationality.

As previously noted, limited resources and external pressures relating to the armed conflict will impact the ability of the SDF to meet all of its detention obligations under IHL.²⁰³ ICRC Commentary confirms that such deviation is permissible where unavoidable, providing that the underlying obligation of humane treatment is respected at all times.²⁰⁴

Areas under territorial control

- The Kurdish administration enacted a series of laws applicable to conflict-related detention of persons residing in Rojava as well as deprivation of liberty resulting from operations

202. Jelena Plamenac, ‘Security Detention in Non-International Armed Conflict: A Qualitative Study on Conflict-Related Detention Practices in Afghanistan, Syria and Ukraine’, Doctoral Thesis, University of Geneva, September 2019 [unpublished].

203. Jonathan Horowitz (2018) The Challenge of Foreign Assistance for Anti-ISIS Detention Operations (<https://www.justsecurity.org/59644/challenge-foreign-assistance-anti-isis-detention-operations/>). Commentators and experts have concluded that many of the obligations for detention required by the SDF would need financial and technical assistance to fulfil. More specifically, the SDF require advice and assistance from foreign states and humanitarian organisations to detain foreign fighters in humane conditions over an extended period of time.

204. ICRC (2017) Commentary on Common Article 3, paras. 582-583. Note military necessity is not accepted as a basis for a lower standard.

- aimed to restore public order and protect the local population from ordinary crimes within the given geographical scope.²⁰⁵
- These regulations mirrored States' approach to criminalising participation in hostilities in relation to persons belonging to the enemy or otherwise contributing to belligerent acts.
 - Internal rules and regulations for those carrying out detentions of persons suspected of terrorism are accompanied by procedural guarantees relevant for pre-trial detentions. Specifically, a person can be held in detention initially for 24 hours, and subject to judicial extension, for no more than 7 days without the start of criminal proceedings.²⁰⁶ Further, a detainee has the right to challenge the lawfulness of the detention before an independent and impartial tribunal.²⁰⁷
 - As previously stated, 'imperative reasons of security' is relied upon as the minimum legal standard that should inform internment decisions in non-international armed conflict.²⁰⁸

Areas outside territorial control

- When individuals were captured by Kurdish forces outside of Rojava, outside areas of territorial control, their internment tends to be regulated by rules of IHL applicable in armed conflict.
- The SDF and Kurdish authorities have interned persons believed to be foreign fighters, during active military operations for reasons of security and public order.

205. Kurdish de facto authorities applied the criminal code of the Syria State for ordinary crimes directly or through implementing its legal provisions in internal legislative acts. Jelena Plamenac, 'Security Detention in Non-International Armed Conflict: A Qualitative Study on Conflict-Related Detention Practices in Afghanistan, Syria and Ukraine', Doctoral Thesis, University of Geneva, September 2019 [unpublished].

206. Asayish Rules and Regulations, Chapter 6. Criminal proceedings were held before judicial bodies under the auspices of the Judicial Council, Social Contract of Rojava Cantons in Syria (Constitution), articles 63, 75.

207. Social Contract of Rojava Cantons in Syria (Constitution), article 72. See: ICRC (2017) Commentary on Common Article 3, supra note 98, para 745. ('In practice, mounting an effective challenge will presuppose the fulfilment of several procedural and practical steps, including: i) providing internees with sufficient evidence supporting the allegations against them; ii) ensuring that procedures are in place to enable internees to seek and obtain additional evidence; and iii) making sure that internees understand the various stages of the internment review process and the process as a whole').

208. This reflects a basic feature of humanitarian law, which is the need to strike a balance between the considerations of humanity, on the one hand, and of military necessity, on the other. See ICRC (2017) Commentary on Common Article 3, para. 743.

6. JUDICIAL GUARANTEES

6.1. Factual context

The SA NES has adopted its own counter-terrorism law and established three ‘terrorism courts’, whose names it later changed to ‘Defence of the Peoples’ courts. Panels of three judges, men and women, hear and try former ISIS members, reportedly in the aim of reconciliation rather than punishment, through reduced sentences and amnesty where possible. As of May 2018, they had recorded 1 500 convictions. The hearings were not public (out of concern for the security of the judges), there were no defence lawyers, and no appeals mechanism.²⁰⁹

As of May 2019, 7 000 individuals, mainly Syrians and some Iraqis, had been tried, while 6 000 were still awaiting trial. Defence lawyers and appeals had in the meantime become available. Most convictions so far were based on confessions by the former fighters who were captured while in combat or had incriminating evidence on their cell phones. The SDF does not resort to the death penalty, and the maximum sentence is twenty-years imprisonment. SA NES judges receive threats and are wanted for arrest by the Syrian government for having established a parallel legal system.²¹⁰

This raises the question of the validity of these trials. From a merely political perspective, recognising them would grant the SA NES considerable legitimacy and recognition as an autonomous State, an unacceptable scenario in the eyes of both Syria and Turkey.²¹¹

As mentioned above, the SDF has not tried foreign fighters yet but is open to the idea of doing so if provided with the necessary resources. The SDF has indicated that it does not intend to bring criminal charges against ISIS-affiliated foreign women and children at this stage. If this were to change, the same judicial guarantees would apply to this category of persons.

International tribunal

The creation of an international or hybrid tribunal has been suggested. Sweden hosted discussions on the topic in early June 2019. Iraq also suggested the establishment of an ad hoc international tribunal. Understanding that they would get little to no support from Western countries through repatriation or funding, by the end of March 2019, the SDF have themselves started advocating for an international tribunal in North-East Syria to prosecute former ISIS fighters.²¹²

However, there are several jurisdictional, legal, and practical issues that would need to be resolved for this to become a reality, including clarification on:

- the legal status of the SA NES, or obtaining consent of the Syrian government;
- whether individuals should be tried under international criminal law or domestic terrorism law;
- whether it is acceptable to only try perpetrators from one side in the post Syrian civil war era; and
- whether it is acceptable to impose the death penalty.²¹³

209. Sarah El Deeb, ‘Syria’s Kurds put ISIS on trial with focus on reconciliation’, RUDAW, 7 May 2018, <http://www.rudaw.net/english/middleeast/syria/07052018> (accessed July 2019).

210. Jane Arraf, ‘Revenge Is For The Weak’: Kurdish Courts In Northeastern Syria Take On ISIS Cases’, National Public Radio, 29 May 2019, <https://www.npr.org/2019/05/29/727511632/revenge-is-for-the-weak-kurdish-courts-in-northeastern-syria-take-on-isis-cases> (accessed July 2019); Shelly Kittleson, ‘Distrust of SDF, unclear future divide Syrian tribal massacre area’, Al Monitor, 10 June 2019, <https://www.al-monitor.com/pulse/originals/2019/06/syria-deir-ez-zor-shaitat-massacre-islamic-state-kurdish.html> (accessed July 2019).

211. Julia Crawford, ‘What should be done with foreigners who joined Islamic State?’, SWI, 30 June 2019, https://www.swissinfo.ch/eng/justice-options-_what-should-be-done-with-foreigners-who-joined-islamic-state-/45063374 (accessed July 2019).

212. Joanne Stocker, ‘SDF calls for international tribunal to try ISIS members in Syria’, The Defense Post, 25 March 2019, <https://thedefensepost.com/2019/03/25/syria-sdf-international-court-isis/> (accessed July 2019).

213. ‘ISIS fighters and their families facing justice: Eight options and four principles’, Ceasefire Centre for Civilian Rights, March 2019, <https://www.ceasefire.org/isis-fighters-and-their-families-facing-justice-eight-options-and-four-principles/> (accessed July 2019).

6.2. Fair trial guarantees under customary IHL

All persons subjected to criminal prosecution in the context of a NIAC are entitled to a fair trial. At a minimum, the right to a fair trial ensures that a person facing criminal prosecution will be afforded all judicial guarantees recognised as indispensable under customary IHL applicable in NIAC.

Common Article 3 expressly prohibits ‘the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized people’.²¹⁴ In short, all persons subjected to criminal prosecution in NIAC must be: (a) afforded all judicial guarantees recognised as indispensable; and (b) have their case heard by a regularly constituted court. Common Article 3 represents customary IHL and is equally applicable to both State and non-State armed groups.

Common Article 3 does not provide a list of indispensable judicial guarantees. *APII*, which was drafted to ‘supplement and develop’ Common Article 3, provides that ‘[n]o sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality’. The ICRC has thus commented that the independence and impartiality of the court have come to be regarded as the ‘touchstones’ of the right to a fair trial.²¹⁵ Article 6(2) of *APII* goes on to provide an illustrative list of indispensable judicial guarantees applicable in NIAC. While Syria is not signatory to *APII* and its provisions are therefore not directly binding on Syrian territory as a matter of treaty law, the list in Article 6(2) has been held to reflect the minimum judicial guarantees applicable in NIAC under customary international law.²¹⁶ The following list is thus applicable to ISIS foreign fighters or affiliated women and children and is binding on the SDF:

- a. **an accused is to be informed without delay of the particulars of the offence alleged against him (or her) and shall be afforded before and during his trial all necessary rights and means of defence;**
- b. **no one shall be convicted of an offence except on the basis of individual penal responsibility;**
- c. **no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under the law, at the time it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;**
- d. **anyone charged with offences presumed innocent until proved guilty according to law;**
- e. **anyone charged with an offence shall have the right to be tried in his [or her] presence;**
- f. **no one shall be compelled to testify against himself [or herself] or to confess guilt.**

APII was clearly inspired by the advent of international human rights law. However, it is apparent that the drafters of *APII* did not see fit to include all fair trial guarantees recognised under international human rights law in the list of ‘essential’ guarantees in the context of a NIAC. Judicial guarantees directly binding on parties to a NIAC are therefore found under customary IHL rather than international human rights law.²¹⁷

214. ICRC, Common Article 3(1)(d).

215. ICRC (2017) Commentary on Common Article 3, supra note 98, para. 700.

216. Ibid para. 706. Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law (Cambridge University Press, 2005), vol 1, rule 100.

217. Knut Dörmann, Elements of War Crimes under the Rome Statute of the International Criminal Court (ICRC/Cambridge University Press, 2003) p. 419. Sivakumaran makes this point as follows: When drawing on any of these approaches, it is important to bear in mind the particular context in which the relevant instruments apply. Additional Protocol II applies in conflicts in which the armed group exercises such territorial control as to enable it to carry out sustained and concerted military operations; the Geneva Conventions and Additional Protocol I apply to conflicts usually fought between states; and human rights law traditionally regulates the relationship between the state and the individual. As such, the content of none of these instruments can be transported ipso facto and without more into a common Article 3 conflict simpliciter, for that would be to

However, as demonstrated in the ICRC Customary IHL study, there has been a considerable degree of overlap between these two bodies of law.

The ICRC 2005 Study on Customary IHL has identified the following judicial guarantees as essential to the existence of a fair trial in both international and non-international armed conflicts:

- i. the right to be tried by an independent, impartial and regularly constituted court;**
- ii. the right to be presumed innocent;**
- iii. the right to be informed of the nature and cause of the accusation:**
- iv. the right to have the necessary rights and means of defence, including:**
 - a. Right to defend oneself or to be assisted by a lawyer of one's own choice;*
 - b. Right to free legal assistance if the interests of justice so require;*
 - c. Right to sufficient time and facilities to prepare the defence;*
 - d. Right of the accused to communicate freely with counsel;*
- v. the right to be tried without undue delay;**
- vi. the right of the accused to examine witnesses;**
- vii. the right to an interpreter;**
- viii. the right for the accused to be present at trial;**

destroy the 'intimate nexus' between the scope and content of the article. ... To transfer the one into the other would also be to fail to appreciate that regular constitution, independence and impartiality in a conflict of some intensity is not necessarily the same as that in a conflict involving sustained and concerted military operations, just as regular constitution, independence and impartiality may differ in time of conflict from time of peace. Sandesh Sivakumaran, 'Courts of Armed Opposition Groups: Fair Trials or Summary Justice?' (2009) 7 *Journal of International Criminal Justice* 489, 503. See also Somer, above n, 688.

- ix. the right to public proceedings;**
- x. the right to be advised of available remedies and time limits; and**
- xi. the right of *non bis in idem*.**

In the *Hamdan Case*, the US Supreme Court found that the phrase 'judicial guarantees which are recognized as indispensable by all civilized peoples... must be understood to incorporate at least the barest of those trial protections that have been recognized by customary international law'.²¹⁸

Accordingly, all ISIS foreign fighters facing and affiliated women and children criminal trial are entitled to the judicial guarantees listed above on the basis that they are recognised as indispensable under customary IHL applicable in NIAC.²¹⁹ By the same token, the party responsible for administering such prosecution is obligated under IHL to ensure that these judicial guarantees are provided to all ISIS foreign fighters subjected to criminal prosecution.

6.3. SDF's authority to conduct criminal trials

The second requirement under Common Article 3 is that sentences be passed by a 'regularly constituted court'. The ICRC Customary IHL Study defines a regularly constituted court as one that has been 'established and organized in accordance with the laws and procedures already in force in a country'.²²⁰ The obvious problem with this definition is that non-State armed groups would not be capable of establishing a court in accordance with the State's procedural laws as they are unrecognised by the State and usually engaged in conflict against the State. Accordingly, it is widely accepted that non-State armed groups are permitted under IHL to establish courts for the

218. *Hamdan, Petitioner v. Rumsfeld, Secretary of Defense, et al.*, 548 U. S. (2006), Opinion of the Court (Stevens J.) p. 70. The US Supreme Court found that many of these guarantees under customary international law are described in Article 75 of Additional Protocol I.

219. Jelena Pejic, 'The protective scope of Common Article 3: more than meets the eye', *International Review of the Red Cross*, Vol. 93, No. 881, March 2011, pp. 23-26.

220. Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press, 2005), vol 1, rule 100.

purposes of, at a minimum, punishing violations of IHL and other international crimes.²²¹ The SDF is therefore entitled to prosecute foreign ISIS fighters suspected of committing such crimes.

One of the legal principles in favour of recognising the right of non-State armed groups to establish courts is that of ‘equality of belligerents’. This principle ensures that the laws of IHL apply equally to all parties to the conflict, including non-State armed groups in the context of a NIAC, and thus encourages non-State armed groups to comply with IHL.²²² The drafting history of *APII* supports the fact that States accepted the necessity for non-State armed groups to establish courts in order to comply with the provisions of *APII*.²²³ As stated by the delegate of the United Kingdom:

*[T]he principle that ‘the rights and duties of the Parties to the conflict under the present Protocol are equally valid for all of them’ must clearly be given special consideration when provisions concerning penal law were being drafted.*²²⁴

States recognised that non-State armed groups must be able to establish their own courts so as to give effect the equality of belligerents principle.²²⁵ This understanding is implicitly recognised in article 28 of the Rome Statute of the ICC, which imposes individual criminal responsibility on military-style commanders in NSAGs for failing to prosecute breaches of IHL. The Pre-Trial Chamber in Bemba confirmed this interpretation. It held

that the Mouvement de Libération du Congo maintained a ‘functional military judicial system’,²²⁶ which the Trial and Appeals Chambers subsequently agreed was capable of fulfilling a commander’s duty to repress, prevent, and punish violations of IHL under Article 28 of the Statute. This practice is also evident in the jurisprudence of the ICTY.²²⁷

The right of non-State armed groups to establish courts in order to comply with their treaty obligations under Common Article 3 is reflected in the obligation under Article 31(1) of the Vienna Convention on the Law of Treaties to interpret provisions in light of their object and purpose,²²⁸ as well as the principle *ut res magis valeat quam pereat*, which provides that ‘a treaty must be given an interpretation that enables its provisions to be ‘effective and useful’.²²⁹ Non-State armed groups, like the SDF, are therefore entitled to establish courts in order to uphold their obligations under IHL.

The law is less clear on whether non-State armed groups are permitted to legislate and enforce their own criminal laws in the territory under their *de facto* control.²³⁰ One position, recognising

221. ICRC (2017) Commentary on Common Article 3, *supra* note 98, para. 714.

222. ICRC, Online Casebook, available at: <<https://casebook.icrc.org/law/implementation-mechanisms>>. See also: Jonathan Somers, ‘Jungle justice: passing sentence on the equality of belligerents in non-international armed conflict’ 89 *International Review of the Red Cross* (2007) 867 [Somers, IRRC].

223. Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (CDDH), Geneva, 1974–7, Federal Political Dept., Bern, 1978, Volume VIII. (hereafter ‘Official Records of the Diplomatic Conference of 1974–1979’), Volume XIII, 346–347.

224. Official Records of the Diplomatic Conference of 1974–1979’), Volume XIII, at p. 350.

225. See also USSR delegate statement, Official Records of the Diplomatic Conference of 1974–1979’), Volume XIII, at p. 365: ‘It was not correct to say that the provisions of article 10 would be applied only by the representatives of legal Governments, since article 5 stated quite clearly that each Party to the conflict would have equal rights and duties.’

226. ICC, Prosecutor v. Bemba Gombo (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute) ICC01/05-01/08 (15 June 2009), at para. 501. See also: Amicus Curiae Observations on Superior Responsibility submitted pursuant to Rule 103 of the Rules of Procedure and Evidence, ICC Bemba Gombo (ICC-01/05-01/08-406), Pre-Trial Chamber II (20 April 2009) [22]–[23], in which Amnesty International’s argument that the MLC Courts were not ‘regularly constituted’ and therefore unlawful was dismissed.

227. ICTY, Prosecutor v Kordic, IT-95-14/2-T, Trial Judgement (26 February 2001) [444]: ‘The duty to punish naturally arises after a crime has been committed.... This duty includes at least an obligation to investigate the crimes to establish the facts and to report them to the competent authorities, if the superior does not have the power to sanction himself.’ See also regarding command responsibility being applicable in NIACs: ICTY, Prosecutor v Hadzihasanovic, Alagic and Kubura, Case No. IT-01-47-ar72, ‘Decision on interlocutory appeal challenging jurisdiction in relation to command responsibility’ (16 July 2003) [17].

228. United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, which reads: ‘A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’

229. Antonio Cassese, *International law* (2008: Oxford University Press), 179.

230. ICRC (2017) Commentary on Common Article 3, *supra* note 98, para. 714. (‘Common Article 3 requires ‘a regularly constituted court’. If this would refer exclusively to State courts constituted according to domestic law, non-State armed groups would not

the necessity for non-State armed groups to effectively maintain the civilian population under their de facto territorial control, holds that non-State armed groups are limited to enforcing the pre-existing criminal law of the State in which they operate.²³¹ This position has received support from international human rights law jurisprudence on the basis that non-State entities have no legal authority to create new law.²³² Others have argued that IHL does not limit the ability of non-State armed groups to enforce their own law, providing they comply with fair trial guarantees.²³³ A recent decision by the Swedish Court of Criminal Appeal has held that non-State armed groups are limited to enforcing either the pre-existing law of the State or, at most, law that is not ‘considerably stricter’ than that which existed before the outbreak of the conflict.²³⁴

For present purposes, it is sufficient to note that the SDF is entitled under customary IHL to establish courts in order to prosecute ISIS foreign fighters for alleged violations of IHL and other international crimes. If ISIS foreign fighters are to be prosecuted under domestic criminal law, it would be prudent to limit the scope of that prosecution to the pre-existing criminal law of the State on which the alleged conduct took place or at least criminal law that is not ‘considerably stricter’ than the pre-existing law of the State.

be able to comply with this requirement. The application of this rule in common Article 3 to ‘each Party to the conflict’ would then be without effect. Therefore, to give effect to this provision, it may be argued that courts are regularly constituted as long as they are constituted in accordance with the ‘laws’ of the armed group.’) See also: Sandoz Commentary on the Additional Protocols (1986), supra note 71, at para. 4605, under art 6 APII (1977), which deals with penal sanctions: ‘The possible co-existence of two sorts of national legislation, namely, that of the State and that of the insurgents, makes the concept of national law rather complicated in this context.’

231. This is generally supported in the literature: A. Roberts & S. Sivakumaran, ‘Lawmaking by NonState Actors: Engaging Armed Groups in the Creation of International Humanitarian Law’, *Yale Journal of International Law*, 1, (2012) 133. ([‘G]iving armed groups plenary lawmaking powers would effectively upgrade them to the level of states and would subordinate the interests of the international community as a whole to the interests of armed groups’).

232. See, for example, jurisprudence from the European Court of Human Rights in recognising the courts of non-State entities providing they enforce the existing law: *Ilaşcu and others v. Moldova and Russia*, 48787/99, Council of Europe: European Court of Human Rights 8 July 2004, [460]; *Cyprus v. Turkey*, 25781/94, Council of Europe: European Court of Human Rights, 10 May 2001, [231]; [237]. See also the decision of the ICJ in: *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports (1971), 12, [125].

233. See: M. Bothe, K.J. Partsch, and W.A. Solf, *New Rules for Victims of Armed Conflicts* (The Hague: Martinus Nijhoff, 1982), 651 (‘There is no basis for the concept that the rebels are prevented from changing the legal order existing in the territory where they exercise factual power’).

234. *Prosecutor v. Omar Sakhanh Haisam Sakhanh*, Svea hovrätt (Svea Appeal Court), B 2259-17, Judgment of 31 May 2017. See also: *Prosecutor v. Omar Haisam Sakhanh*, Stockholms tingsrätt (Stockholm District Court), B 3787-16, Judgment (16 February 2017), [26].

7. LEGAL OBLIGATIONS DURING TRANSFER TO THIRD PARTIES

7.1. Factual context

The SDF has facilitated the transfer to Iraq of a significant number of detainees, including those with foreign nationality, in order for them to be tried by the Iraqi State. Trials take place at Baghdad Central Criminal Court. Human Rights Watch expressed concerns regarding torture in detention, coerced confessions, and unfair/expedite trials, leading to death penalties and life prison sentences.²³⁵

As mentioned above, Iraq has offered to try not only its nationals but also the foreign ISIS affiliates if countries of origin pay the costs (estimated at 2 million dollars per year per individual, based on Guantanamo prices).²³⁶ Iraq is currently in talks with the UN to be given the green light to prosecute ISIS members who did not commit crimes on Iraqi territory.²³⁷

In general, Iraq is known to have adopted a vengeance-based response to ISIS, both in its methods of fighting while retaking former ISIS cities, and in its administration of justice.²³⁸

SA NES judges allegedly ceased all transfers to Iraq due to these trial conditions.²³⁹ 500 foreign fighters have already been sentenced to death by Iraq. France expressed support for such transfers to Iraq, recognising Iraqi sovereignty over the matter, but asking Iraq to resort to life sentences rather than the death penalty.²⁴⁰

7.2. Non-refoulement obligations on non-State groups in NIAC

IHL applicable in NIAC does not contain explicit provisions on detainee transfer standards. The principle of *non-refoulement* generally governs conflict-related transfers of persons under different branches of international law.²⁴¹

Non-refoulement is reflected in treaty IHL applicable in IAC. The principle is clearly expressed in article 45 of *Geneva Convention IV*, under which the Detaining Power should refrain from a detainee transfer to 'a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs'.²⁴²

The principle of *non-refoulement* is furthermore deeply rooted in IHL treaties. It is explicitly sanctioned in article 3 of the *Convention Against Torture*, and has been found, through the interpretation of the Human Rights Committee, to be part of articles 6 (right to life) and 7 (prohibition

235. 'Transfer of ISIS suspects to Iraq raises torture concerns: HRW', Kurdistan 24, 5 March 2019, <http://www.kurdistan24.net/en/news/1b49cd0c-f6e1-4538-8a9b-e043f6c4ee3f> (accessed July 2019); Raya Jalabi and Alissa de Carbonnel, 'Exclusive: Islamic State suspects sent by U.S. from Syria to Iraq', Reuters, 29 May 2019, <https://www.reuters.com/article/us-mideast-crisis-islamicstate-transfers/exclusive-islamic-state-suspects-sent-by-u-s-from-syria-to-iraq-idUSKCN1SZ0R1> (1 July 2019).

236. Josie Ensor, 'Iraq 'offers to try ISIL prisoners held in Syria for multi-billion pound fee'', The Telegraph, 10 April 2019, <https://www.telegraph.co.uk/news/2019/04/10/iraq-offers-try-isil-prisoners-held-syria-multi-billion-pound/> (accessed July 2019); 'Iraq offers to try ISIS adherents if Coalition pays millions in court costs', The Defense Post, 10 April 2019, <https://thedefensepost.com/2019/04/10/iraq-isis-trial-coalition-costs/> (accessed July 2019).

237. 'Iraq, U.N. in talks over prosecution of Islamic State prisoners in SDF detention', Egypt Independent, 26 June 2019, <https://egyptindependent.com/iraq-u-n-in-talks-over-prosecution-of-islamic-state-prisoners-in-sdf-detention/> (accessed July 2019); Omar Sattar, 'Will Iraq cut a deal to prosecute foreign IS fighters?', Al Monitor, 3 July 2019, <https://www.al-monitor.com/pulse/originals/2019/07/iraq-isis-detainees-syria.html> (accessed July 2019).

238. See the video by The New Yorker labelled 'Iraq's post-ISIS Campaign of Revenge' annexed to the article on this link: <https://www.newyorker.com/news/dispatch/the-dangerous-dregs-of-isis> (accessed July 2019).

239. Jane Arraf, 'Revenge Is For The Weak': Kurdish Courts In Northeastern Syria Take On ISIS Cases', National Public Radio, 29 May 2019, <https://www.npr.org/2019/05/29/727511632/revenge-is-for-the-weak-kurdish-courts-in-northeastern-syria-take-on-isis-cases> (accessed July 2019).

240. See the video on the following link: 'Combattants de l'État islamique: «Si je ne peux pas rentrer en Suisse, mettez-moi une balle dans la tête», SWI, 11 Juin 2019, https://www.swissinfo.ch/fre/combattants-de-l-%C3%A9tat-islamique_-si-je-ne-peux-pas-rentre-en-suisse--mettez-moi-une-balle-dans-la-%C3%AAte-/45022104 (accessed July 2019).

241. In addition to refugee law which has already been mentioned above (article 33 of the 1951 Refugee Convention). See Tilman Rodenhäuser, 'Better Safe Than Sorry: Transferring Detainees Safely to Coalition Partners', Lawfare Blog, 18 January 2019, <https://www.lawfareblog.com/better-safe-sorry-transferring-detainees-safely-coalition-partners> (11 Jun 2019).

242. Article 45, Geneva Convention IV.

of torture and ill-treatment) of the ICCPR.²⁴³ For Member States of the Council of Europe, the European Court of Human Rights consistently considers this principle as component of several of the fundamental rights protected by the European Convention of Human Rights, including to protect against flagrant denial of justice²⁴⁴ and against the death penalty.

Finally, the principle of non-refoulement is part of customary international law.²⁴⁶

In light of the above, the ICRC considers that even though it is not explicitly mentioned in Common Article 3, the prohibition of transfers of detainees to authorities where there are substantial grounds for believing that they would be in danger of being deprived of the fundamental rights protected by Common Article 3, is the only way to guarantee respect for that provision.²⁴⁷ As stated by the ICRC:

Because of the fundamental rights it protects, common Article 3 should be understood as also prohibiting Parties to the conflict from transferring persons in their power to another authority when those persons would be in danger of suffering a violation of those fundamental rights upon transfer. The prohibition on such transfer is commonly known as 'non-refoulement'.²⁴⁸

Thus, under Common Article 3, when considering the transfer of ISIS foreign fighters or affiliated women and children from its custody to third parties, warring parties to a NIAC, including the SDF authorities, are bound to assess:

[W]hether there are substantial grounds for believing that the person would be subjected to torture, other forms of ill-treatment, arbitrary deprivation of life or persecution after transfer. If there are substantial grounds to believe so, the person must not be transferred unless measures are taken that effectively remove such risk.²⁴⁹

This requires a case-by-case assessment based on individual circumstances and subjective fears of the concerned person, in light of the available information regarding the receiving authority's practice. The possibility exists to set up post-transfer monitoring mechanisms, although this cannot yet be said to be a legal obligation.²⁵⁰

Under international human rights law, the prohibition of *refoulement* entails an obligation not to extradite, deport, expel, return or otherwise remove a person, whatever his or her status, when there are substantial grounds for believing that he or she would be at risk of being subject to serious violations of human rights, including torture or cruel, inhuman and degrading treatment or punishment, in the place to which he or she is to be transferred or removed.²⁵¹ The obligation of *non-refoulement* is absolute and it does not matter for these purposes under international human rights

243. UN Human Rights Committee, G.C. 31, §12; UN Human Rights Committee, 'General Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life - The Nature of the General Legal Obligation Imposed on States Parties to the Covenant', CCPR/C/GC/36, 30 October 2018, §§30-31, <https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf> (11 June 2019).

244. For an overview of the case law on this issue, see ECHR, Guide to article 6 (criminal limb), updated 30 April 2019, para 520-522, <https://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf> (11 June 2019).

245. For an overview of the case law on this issue, see ECHR, Guide to article 2, updated 30 April 2019, para 69-72, <https://www.echr.coe.int/Documents/Guide_Art_2_ENG.pdf> (11 June 2019).

246. UNHCR, 'The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93', 31 January 1994; UNHCR, 'Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol', 26 January 2007, paras 15 and 21.

247. Nils Melzer, *International humanitarian law – a comprehensive introduction*, ICRC, Geneva, 2016 p. 214; ICRC (2017), *Commentary on Common Article 3*, paras. 730-738.

248. *Ibid.*, para. 730.

249. *Ibid.*, para. 737.

250. *Ibid.*

251. Convention against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3; International Covenant on Civil and Political Rights, art. 7; International Convention for the Protection of All Persons from Enforced Disappearance, art. 16(1); Human Rights Committee general comment No. 20 (1992) on the prohibition of torture or other cruel, inhuman or degrading treatment or punishment, para. 9; Human Rights Committee general comment No. 31, para. 12; Committee on the Rights of the Child general comment No. 6 (2005) on the treatment of unaccompanied and separated children outside their country of origin, paras. 27–28, 58 and 84; Committee on Migrant Workers general comment No. 2 (2013) on the rights of migrant workers in an irregular situation and members of their families, para. 50; Committee on the Elimination of Discrimination against Women general recommendation No. 32 (2014) on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, paras. 17–23; Joint general comment No. 3 of the Committee on the Protection of the Rights of All

law if the individual poses a danger to national security or not.²⁵²

The SDF is also bound by the following procedural safeguards.

- First, the transferring authority has to inform the concerned person in a timely manner of the intended transfer;
- Second, transferring authority has to grant the person concerned the opportunity to express any fears he or she may have about the transfer and explain why he or she would be at risk. Such fears need to be assessed by an independent and impartial body.
- Third, the transfer needs to be suspended during this assessment.²⁵³

After transfer completion, the possibility to intern the transferred individuals would depend on the nature of the receiving authority's involvement in the Syrian armed conflict, and the possibility to prosecute and try them would depend on that receiving party's rules of criminal jurisdiction under domestic law.²⁵⁴

7.3. Joint duty on receiving and sending States to protect detainees from harm

In addition to the obligation of *non-refoulement* set-out above, both the sending and receiving State and required under IHL to ensure that detainees are protected from harm. Art 12 of the *Geneva Convention III of 1949* states:

'Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention. When prisoners of war are transferred under such circumstances, responsibility for the application of the Convention rests on the Power accepting them while they are in its custody.'

As a matter of treaty law, *Geneva Convention III* is only applicable to IAC and is therefore not directly binding on the SDF in the context of the NIAC in North-East Syria. However, the ICTY held that the obligation to protect a detainee from harm under article 12 of the *Third Geneva Convention* is also contained within Common Article 3 applicable to NIAC.²⁵⁵ It further determined that the act of transfer between the transferring and receiving party is a joint detention operation and thus both parties share the responsibility for applying the *Geneva Conventions*.²⁵⁶

Migrant Workers and Members of Their Families and No. 22 of the Committee on the Rights of the Child, para. 46. Pursuant to article 3 of the European Convention on Human Rights, the prohibition on non-refoulement also applies to other forms of ill-treatment, including torture, see European Court of Human Rights, *Saadi v. Italy*, application No. 37201/06, judgment, 28 February 2008 [125].

252. Both the Human Rights Committee and the Committee against Torture have affirmed the absolute and non-derogable nature of the prohibition of refoulement (see Convention against Torture, art. 3; and International Covenant on Civil and Political Rights, art. 7) and in cases involving people who have committed serious crimes (for example, *V.X.N. and H.N. v. Sweden* (CAT/C/24/D/130-131/1999) or were involved in terrorism (for example, *T.P.S. v. Canada* (CAT/C/24/D/99/1997); *Nasirov v. Kazakhstan* (CAT/C/52/D/475/2011); *Agiza v. Sweden* (CAT/C/34/D/233/2003); *Ahani v. Canada* (CCPR/C/80/D/1051/2002); and *Alzery v. Sweden* (CCPR/C/88/D/1416/2005)).

253. Tilman Rodenhäuser, 'Detainee transfers under IHL of IAC and under IHL of NIAC' (41st Round Table on Current Issues of International Humanitarian Law - Deprivation of liberty and armed conflicts: exploring realities and remedies; September 2018) 5.

254. 'ISIS fighters and their families facing justice: eight options and four principles'. 6.

255. ICTY, *Prosecutor v. Mrksic et al.* (Appeal Judgment) IT-95-13/1 (5 May 2009) [70].

256. ICTY, *Prosecutor v. Vujadin Popovic* (Judgment) IT-05-88-T (10 June 2010) [1545]; [1551].

8. LEGAL OBLIGATIONS ON ISIS FOREIGN FIGHTERS' STATE OF ORIGIN

8.1. Factual context

As previously explained, the topic of repatriation arose as the SDF originally claimed it could not indefinitely hold foreign fighters or ISIS-affiliated foreign women and children in its custody in North-East Syria.

Most countries show reluctance to repatriate their nationals who became ISIS affiliates. Aside from the lack of public support for repatriation, countries of origin invoke the terrorist threat and the difficulty of gathering sufficient evidence for effective prosecution and sentencing. Western countries in particular fear that higher standards of proof in their domestic legal systems will enable suspects to escape with lower sentences or walk free, thereby risking their re-engagement in violent extremism. Another concern is the fear of proselytism in detention.

A pentagon official has stated that, '[t]he only countries to accept significant transfers from the SDF prisons are Kazakhstan, Macedonia, Kosovo, Morocco and Bosnia'.²⁵⁷ Morocco and Algeria have repatriated some 40 male fighters.²⁵⁸ Most Western European countries seem to favor repatriation of children, and sometimes women, on a case by case basis.²⁵⁹ The United States has repatriated most

captured fighters to try them, and encouraged other countries do the same. It has not repatriated all women and children, but the process seems to be ongoing.²⁶⁰ The United Kingdom has resorted to withdrawing citizenship of its nationals abroad.²⁶¹ Australia repatriated 8 children of two deceased fighters in June 2019, and is on the process of adopting legislation preventing returns of foreign fighters.²⁶² Russia has a public policy of repatriating children,²⁶³ and had repatriated 35 women as of July 2018.²⁶⁴

As many of them do not adopt an official and public position on repatriation, understanding countries of origin's stance on this topic often requires to closely monitor their declarations and practices with respect to their foreign nationals in Syria.

8.2. Repatriation

Despite the reluctance of States to repatriate their nationals, a combination sources would suggest

257. David Ignatius, 'Europeans must take responsibility for its jihadists fighters', My San Antonio, 1 June 2019, <https://www.mysanantonio.com/opinion/commentary/article/Europeans-must-take-responsibility-for-its-13914503.php> (accessed July 2019).

258. Georges Brenier, 'Syrie : des cadres français de Daech impliqués dans une mutinerie', LCI, 11 April 2019, <https://www.lci.fr/terrorisme/info-tf1-lci-syrie-des-cadres-djihadistes-francais-de-daech-impliques-dans-une-mutinerie-a-la-prison-kurde-de-derik-2118134.html> (accessed July 2019).

259. Wadimir van Wilgenburg, 'Dutch-French delegation picks up ISIS orphans from northeast Syria', Kurdistan 24, 10 June 2019, <https://www.kurdistan24.net/en/news/c5156815-1d72-4421-a8c3-0142567d7aab> (accessed July 2019); Robin Wright, 'The Dangerous Dregs of ISIS', The New Yorker, 16 April 2019, <https://www.newyorker.com/news/dispatch/the-dangerous-dregs-of-isis> (accessed July 2019); 'Belgium takes back six orphaned Islamic State children - SDF', Euronews, 14 June 2019, <https://www.euronews.com/2019/06/14/belgium-takes-back-six-orphaned-islamic-state-children-sdf> (accessed July 2019); 'Switzerland refuses to repatriate its jihadists', SWI, 8 March 2019, https://www.swissinfo.ch/eng/tough-line_switzerland-refuses-to-repatriate-its-jihadists/44810396 (accessed July 2019).

260. Rukmini Callimachi and Catherine Porter, '2 American wives of ISIS militants want to return home', New York Times, 19 February 2019, <https://www.nytimes.com/2019/02/19/us/islamic-state-american-women.html> (accessed July 2019); Wadimir van Wilgenburg, 'Dutch-French delegation picks up ISIS orphans from northeast Syria', Kurdistan 24, 10 June 2019, <https://www.kurdistan24.net/en/news/c5156815-1d72-4421-a8c3-0142567d7aab> (accessed July 2019); 'Syrian Kurds Repatriate 8 American ISIS Women, Children to US', Asharq Al-Awsat, 5 June 2019, <https://aawsat.com/english/home/article/1754791/syrian-kurds-repatriate-8-american-isis-women-children-us> (accessed July 2019).

261. 'Shamima Begum citizenship decision sets a dangerous precedent', The Guardian, 21 February 2019, <https://www.theguardian.com/uk-news/2019/feb/21/shamima-begum-citizenship-decision-sets-a-dangerous-precedent> (accessed July 2019).

262. 'Preventing foreign fighters from returning home could be dangerous to national security', The Conversation, 23 July 2019, <http://theconversation.com/preventing-foreign-fighters-from-returning-home-could-be-dangerous-to-national-security-120752> (accessed July 2019).

263. Samuel Ramani, 'Why is Russia insisting on bringing home ISIS fighters' children?', The Washington Post, 9 April 2019, https://www.washingtonpost.com/politics/2019/04/09/why-is-russia-insisting-bringing-home-isis-fighters-children/?utm_term=.5eb688fb8614 (accessed July 2019).

264. 'Wives and Children of ISIS: Warehoused in Syria, Unwanted back home', New York Times, 4 July 2018, <https://www.nytimes.com/2018/07/04/world/middleeast/islamic-state-families-syria.html?module=inline> (accessed July 2019).

that States are under a legal obligation to either repatriate their nationals accused of fighting for ISIS or to otherwise facilitate their prosecution overseas for alleged violations of international law and/or acts of terrorism.

Regarding ISIS fighters suspected of war crimes, **Rule 158** of the ICRC's Customary IHL Study provides that:

States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects.... The Geneva Conventions require States to search for persons alleged to have committed, or ordered to have committed, grave breaches and to try or extradite them.²⁶⁵ The obligation to investigate and prosecute persons alleged to have committed crimes under international law is found in a number of treaties that apply to acts committed in both international and non-international armed conflicts.²⁶⁶ The preamble to the Statute of the International Criminal Court recalls 'the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.'²⁶⁷

States are therefore under a legal obligation to repatriate nationals suspected of committing war

crimes in order to facilitate their prosecution. At the very least, States must facilitate their prosecution abroad, whether through the provision of financial, technical, or other forms of assistance to the relevant foreign State.

With regard to nationals suspected of committing **acts of terrorism** while fighting for ISIS, several UN Security Council Resolutions confirm that States are under a legal obligation to facilitate their prosecution, preferably on home soil.

UN Security Council Resolution 2178 provides that:

Member states are under an obligation '[4] ... to cooperate in efforts to address the threat posed by foreign terrorist fighters, including by ... developing and implementing prosecution, rehabilitation and reintegration strategies for returning foreign terrorist fighters.

UN Security Council Resolution 2396 provides that member States are:

Obliged, in accordance with resolution 1373, to ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice, to develop and implement comprehensive and tailored prosecution, rehabilitation, and reintegration strategies and protocols, in accordance with their obligations under international law, including with respect to foreign terrorist fighters and spouses and children accompanying returning and relocating foreign terrorist fighters, as well as their suitability for rehabilitation.

UN Security Council Resolution 1373 provides that Member States shall:

Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the

265. Geneva Convention I, Article 49; Geneva Convention II, Article 50; Geneva Convention III, Article 129; Geneva Convention IV, Article 146.

266. UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, United Nations, Treaty Series, vol. 78, p. 277, Article VI; UN Educational, Scientific and Cultural Organisation (UNESCO), Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, Article 28; Convention against Torture, Article 7; United Nations, Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (and Protocols) (As Amended on 21 December 2001), 10 October 1980, 1342 UNTS 137, Article VII(1); Amended Protocol II to the Convention on Certain Conventional Weapons, Article 14; United Nations, Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 18 September 1997, Article 9; Second Protocol to the Hague Convention for the Protection of Cultural Property, Articles 15–17.

267. ICC Statute, preamble and Customary IHL Study, p. 608.

punishment duly reflects the seriousness of such terrorist acts.

Under international human rights law, depriving nationals suspected of fighting for ISIS of the right to return to their country of origin might be considered arbitrary and contrary to that States legal obligations under the ICCPR.

Art 12(4) of the **ICCPR** provides that:

No one shall be arbitrarily deprived of the right to enter his own country.

Any limitations to that right must be lawful, pursuant to a legitimate aim and necessary and proportionate to achieve that aim. The **Human Right Committee** has interpreted any limit on the 'right to enter his own country' narrowly, even going so far as to suggest that there might be no circumstances under which it would be reasonable to deprive an individual of this right. **General Comment No 27** provides that:

The scope of 'his own country' is broader than the concept 'country of his nationality'. It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien. This would be the case, for example, of nationals of a country who have there been stripped of their nationality in violation of international law, and of individuals whose country of nationality has been incorporated in or transferred to another national entity, whose nationality is being denied them. The language of article 12, paragraph 4, moreover, permits a broader interpretation that might embrace other categories of long-term residents, including but not limited to stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence.

In no case may a person be arbitrarily deprived of the right to enter his or her own country. The reference to the concept of arbitrariness in this context is intended to emphasize that

it applies to all State action, legislative, administrative and judicial; it guarantees that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable.

Furthermore, the **UN Security Council** has declared that the obligation to prevent the freedom of movement of terrorists does not extend to repatriating a State's own nationals.

UN Security Council Resolution 2178 provides that Member States shall prevent

Entry into or transit through their territory of any individual about whom that state has credible information that provides reasonable grounds to believe that he or she is seeking entry into or transit' for the purposes of participating in terrorist acts. The obligation under the paragraph excludes their 'own nationals or permanent residents.

Finally, the **European Commission on Human Rights** has confirmed the prohibition on collective expulsions, requiring instead that each case must be considered on its merits. Pursuant to Article 4 of **Protocol 4**, collective expulsions are strictly prohibited, and individual assessment mechanisms must be in place and implemented with respect to due process guarantees.²⁶⁸ Collective expulsions take place when two constitutive elements are cumulatively met: the aliens are (1) expelled together with other aliens in a similar situation, (2) without due examination of their own individual

268. Council of Europe, Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto, 16 September 1963, ETS 46, art. 4. See European Court of Human Rights, *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012; also International Covenant on Civil and Political Rights, art. 13; Convention against Torture, art. 3; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 22; A/HRC/23/46, para. 56; OHCHR, 'Recommended principles and guidelines on human rights at international borders'.

situations.²⁶⁹ This example serves to demonstrate that denials of repatriation should equally be dealt with on a case-by-case basis and not subject to a collective denial of the right to enter one's own country.

Considering these legal obligations together, it would seem that States are in most cases under a legal obligation to repatriate their nationals who are detained in Syria due to their membership to ISIS or to facilitate their prosecution. The majority of foreign fighters would be suspected of involvement in the commission or planning of terrorist acts or, in some cases, war crimes. States are thus obligated to facilitate their effective prosecution. For ISIS fighters who do not fall into either of those categories, including persons detained for mere affiliation, denying their return to their country of origin might be considered arbitrary and contrary to article 12 of the ICCPR.

When envisaging transfer or repatriation, detaining authorities should comply with the IHL standard not to separate family members and in particular children from their mothers. Customary IHL states that family unity must be upheld in armed conflict including in detention.²⁷⁰

The available information, however, indicates that separating children from their mothers in detention has been suggested as a means of fulfilling repatriation requests by countries of origin. However, in most cases such conduct would be contrary to the best interests of the child,²⁷¹ especially given the specific psychological distress they would most likely face.²⁷² Applicable international legal standards therefore require that in case of transfer or repatriation, children be kept together with their mothers or primary caretakers.

8.3. Withdrawal of citizenship by ISIS fighters' country of origin

Beyond the refusal to repatriate, some States have purported to withdraw the citizenship of its nationals who have opted to fight for ISIS in Syria.²⁷³ In certain circumstances, withdrawal of citizenship may amount to: (i) an arbitrary deprivation of nationality; (ii) an unlawful means of rendering an individual stateless; or (iii) an unlawful infringement of the individual's other human rights.

With respect to children, article 24(3) of the ICCPR guarantees that all children have a right to nationality. Even if they were born on Syrian territory, children of ISIS families thus have the right to acquire a nationality. Depending on the domestic law in question, the nationality will be that of the known parents or of the soil on which they were born. Syrian domestic law makes it difficult to obtain Syrian citizenship in the presence of a foreign mother without a Syrian father.²⁷⁴ One of the many challenges remains to establish parenthood in cases of orphans or other complex family experiences notably due to armed conflict and displacement.²⁷⁵

Arbitrary deprivation of nationality

The **UN Declaration on Human Rights** declares that: 'Every person has the right to a nationality, and 'shall not be arbitrarily deprived of [their] nationality nor denied the right to change his nationality.'²⁷⁶

The **Human Rights Committee** has held that the right to not arbitrarily deprive individuals

269. Available at: <<https://eumigrationlawblog.eu/collective-expulsion-or-not-individualisation-of-decision-making-in-migration-and-asylum-law/>>.

270. Rules 105, 119, 120 of the Customary IHL Study.

271. Art. 9 of the CRC.

272. See the assessment by a child psychologist who visited the camps: "Europe wonders whether to bring back children raised under Islamic State", National Post, 17 February 2019, <<https://nationalpost.com/news/world/europe-wonders-whether-to-bring-back-children-raised-under-islamic-state>> (20 May 2019).

273. Shamima Begum citizenship decision sets a dangerous precedent', The Guardian, 21 February 2019, <https://www.theguardian.com/uk-news/2019/feb/21/shamima-begum-citizenship-decision-sets-a-dangerous-precedent?CMP=share_btn_tw> (13 June 2019).

274. Depending on States, the acquisition of citizenship varies by an interplay of the principle of *Ius Sanguinis*, whereby a person receives the nationality of his or her parents at birth, and the principle of *Ius Soli*, whereby it is the territory in which the person is born which determines his or her nationality. For the particular challenges of access to nationality in the Syrian context, see Zahra Albarazi, "Regional Report on Citizenship: The Middle East and North Africa (MENA)", Robert Schuman Centre for Advanced Studies, November 2017, 24 p., <http://cadmus.eui.eu/bitstream/handle/1814/50046/RSCAS_GLOBALCIT_Comp_2017_03.pdf> (10 June 2019).

275. "From Daesh to 'Diaspora'...", pp. 52-53.

276. Universal Declaration on Human Rights, art 15.

of citizenship is widely accepted as a part of customary international law.²⁷⁷

Regarding the ISIS foreign fighters, the decision on the deprivation of nationality by their country of origin needs to follow certain safeguards in order not to be considered arbitrary. Proceeding with the withdrawal while the person is held in a camp, unable to effectively challenge the decision, might not meet with due process guarantees.

Rendering a person stateless

In certain circumstances, withdrawal of citizenship may render the individual stateless. For States signatory to the 1961 Convention on the Reduction of Statelessness, such withdrawal is expressly prohibited. Article 8(1) of this Convention provides that: 'A contracting state shall not deprive a person of his nationality if such deprivation would render him stateless.'

However, the following exceptions to Article 8(1) may apply:

- If the individual resides abroad for more than seven years (determined by domestic law of the contracting State);²⁷⁸
- If they were born outside the State's territory and the State's law outlines that nationality expires after one year 'from his attaining his majority conditional upon residence at that time in the territory of the State or registration with the appropriate authority';²⁷⁹ or
- If nationality was obtained by misrepresentation or fraud.²⁸⁰

Further exceptions by which the Contracting State may retain the right to deprive nationality, if these exceptions were mentioned at signature, ratification or accession:

Further exceptions by which the Contracting State may retain the right to deprive nationality,

277. A/HRC/13/34, [21]: 'The right to a nationality implies the right of each individual to acquire, change and retain a nationality. The right to retain a nationality corresponds to the prohibition of arbitrary deprivation of nationality.'

278. Convention on the Reduction of Statelessness, art 7(4), 8(2).

279. Ibid, art 7(5), 8(3).

280. Ibid, art 8(2)(b)

if these exceptions were mentioned at signature, ratification or accession:

- That the person has acted inconsistently with the duty of loyalty to the State by:
 - Disregarding express prohibition by the Contracting State, rendered/continued to render services to, or received/continued to receive emoluments from another State, or
 - Has conducted themselves in a manner seriously prejudicial to the vital interests of the Contracting State.²⁸¹
- That the person has taken an oath/formal declaration of allegiance to another State, or given evidence of intent to repudiate allegiance to contracting State.

The **European Convention on Nationality** states that countries may within their internal law remove nationality where individuals have been in the 'voluntary service in a foreign military force.'²⁸² However, this Convention also states that any State Party's may not provide for the loss of nationality in cases where the person concerned would become stateless.²⁸³

Violation of other human rights

Deprivation of nationality has the ability to affect a variety of human rights, including political rights, freedom of movement, liberty, right to family life, right to work, right to social security, and the right to health.²⁸⁴ A further consequence of deprivation of nationality for dual citizens is the possibility that their second country may not confirm their citizenship, or refuse to accept them. The result of this could lead to indefinite immigration detention.²⁸⁵

281. Ibid, art 8(4).

282. Convention on Nationality, 6.XI.1997, ETS 166, art 7(1)(c)

283. Ibid.

284. See A/HRC/19/43, there is a detailed report into the consequences of the deprivation of nationality.

285. United Nations Counter Terrorism Implementation Task Force, Working Group on the Promotion and Protecting Human Rights and the Rule of Law while Countering Terrorism, 'Guidance to States on human rights-compliant responses to the threat posed by foreign fighters', New York 2018, pp. 24-29, <<https://www.un.org/sc/ctc/wp-content/uploads/2018/08/Human-Rights-Responses-to-Foreign-Fighters-web-final.pdf>>

Due to these possible impacts upon human rights, any loss or deprivation of citizenship/nationality must meet particular conditions as to comply with international law.

This was found particularly necessary by the Human Rights Council in the prohibition of arbitrary deprivation of nationality.²⁸⁶

The **Human Rights Council** also found that any deprivation of nationality must be in conformity with domestic law, while complying with specific procedural and substantive standards - particularly, proportionality. Accordingly, the deprivation of citizenship must 'serve a legitimate purpose that is consistent with international law and, in particular, the objectives of international human rights law'.²⁸⁷

The **European Court of Justice** held in *Rottmann v Freistaat Bayern* that when depriving someone of their citizenship, it was necessary to take into account the consequences of that decision for the person and their family members, with regard to the loss of rights enjoyed by every citizen, and whether the loss was justified in relation to the gravity of the offence committed.²⁸⁸

Further, in cases of dual citizenship, the principle of *non-refoulement* prohibits withdrawing nationality of a person where there is serious concern that he or she would be subject to torture or ill-treatment in the other country.²⁸⁹

8.4. Consular assistance

Finally, the *Vienna Convention on Consular Relations (1963)* stipulates more generally that States should provide consular assistance to their citizens.

Based on article 5 of the 1963 *Vienna Convention on Consular Relations*, consular protection consists in

the help provided by a State to its citizen travelling or living abroad – notably in cases of detention and political unrest. Individuals must ask for such protection to the consulate of their country of nationality. Due to either the insufficiency or lack of diplomatic representation in Syria, ISIS foreign fighters and affiliated women and children cannot access consular protection. Such protection is however accessible from neighbouring countries, the closest being Turkey and Iraq. Many Western States are thus encouraging their nationals to seek protection there, but claim they are not obliged, under international law, to take active and direct measures to ensure their repatriation. If ISIS foreign fighters or affiliated women and children attempt to flee Syria to seek consular assistance, the neighbouring countries are under an obligation not to prevent their passage at the border based on the universally applicable principle of *non-refoulement*.²⁹⁰

EU consular protection allows EU citizens abroad to seek consular assistance from the consular representation of any Member State, in case a citizen's own State does not have a consular representation in the country.²⁹¹

286. A/HRC/25/28.

287. A/HRC/13/34, para 7.

288. European Union: Court of Justice, *Rottmann v. Freistaat Bayern*, C-135/08 (2 March 2010).

289. United Nations Counter-Terrorism Implementation Task-Force, 'Guidance to States on human rights-compliant responses to the threat posed by foreign fighters' (2018), supra note 285, pp. 21-23.

290. The international refugee law principle of non-refoulement shall also apply if the receiving State is party to the 1951 Geneva Convention relating to the Status of Refugee (article 33 thereof).

291. Articles 20 and 23 of the Treaty on the Functioning of the EU and article 46 of the EU Charter of Fundamental Rights ; Council Directive (EU) 2015/637 of 20 April 2015 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries and repealing Decision 95/553/EC OJ L 106, 24.4.2015, pp. 1-13. For instance, France has consular representation in Erbil, whereas Belgium does not. Belgian women could theoretically ask for assistance at the French Consulate General in Erbil, see: European Commission, Consular Protection, 'Find an embassy/consulate', <https://ec.europa.eu/consularprotection/representations_en?f%5B0%5D=im_field_country_of_origin%3A%5B*+TO+*%5D&f%5B1%5D=im_field_target_country%3A152&solrsort=ss_ms_country+asc&form_build_id=form-U951eebV-ZQyCzkEDzb2idg6YFV2YJWNLHBdxW60g-A&form_id=just_cp_core_form> (15 May 2019).

9. CASE STUDY: BELGIUM

9.1. Contextual background

The Kingdom of Belgium is the European country which has the most nationals per capita among foreign fighters joining the ranks of ISIS, in the past years.²⁹² The number of Belgian women and children who followed these fighters and held in SDF camps before March 2019, was estimated to 17 women and 32 children.²⁹³ These numbers could be five times higher after the recapture of Baghuz.

Given that Belgium has been a part of the international coalition, conducting air strikes on ISIS positions since 2016,²⁹⁴ it is a party to the NIAC against ISIS and is bound by the applicable IHL rules, including Common Article 3, as well as by the applicable IHRL instruments such as the ICCPR.²⁹⁵

9.2. Repatriation

It seems that the Belgian Government agrees to repatriate children under the age of 10, but not their mothers or older minors.²⁹⁶ It is unclear under which legal standard such determination has been made given that international legal framework contains no similar solution.

According to the ICRC Customary IHL Study, IHL sets “different age-limits with respect to different protective measures for children, although 15 is the most common.”²⁹⁷ Under IHRL, a child is considered to be minor until the age of 18 and does not provide any ground to setting the limit to childhood at 10 years old. As an indicator, the UN Committee on the Rights of the Child sets age 12 as the absolute minimum international standard for prosecuting a minor.²⁹⁸

The Belgian Judiciary is dealing with several *ad hoc* requests by families of these women and children, who ask that it imposes the Executive to organise repatriations. On 27 February 2019, the Court of Appeals in Brussels overruled a first instance decision to repatriate two mothers with three children each on humanitarian grounds. The Court found, amongst other technical considerations regarding the admissibility of the initial application, that these women and children had in the meantime been transferred from *al Hol* and *al Roj* camps to *Ain Aissa*, which the petitioners had not established as unsafe.²⁹⁹

On 7 June 2019, a Brussels Court of First Instance ruled that a 24 years old woman currently detained in *al Roj* camp did not have a subjective right to consular assistance by Belgium. The State argued that this might change if the applicant could reach a Belgian consular post, but the situation

292. David A. Graham, “What’s the matter with Belgium?”, *The Atlantic*, 17 November 2015, <<https://www.theatlantic.com/international/archive/2015/11/belgium-radical-islam-jihad-molenbeek-isis/416235/>> (21 May 2019); Edwin Bakker and Roel de Bont, “Belgian and Dutch Jihadist Foreign Fighters (2012–2015): Characteristics, Motivations and Roles in the War in Syria and Iraq”, *Small Wars & Insurgencies*, Vol. 27, No. 5, 2016, pp. 837–857.

293. Bart Biesemans, “Family devastated by Belgian ruling not to bring back Islamic State children”, *Reuters*, 28 February 2019, <<https://www.reuters.com/article/us-mideast-crisis-belgium-syria/family-devastated-by-belgian-ruling-not-to-bring-back-islamic-state-children-idUSKCN1QH2O0>> (15 May 2019).

294. Catheline Remy, “Quel cadre légal pour la lutte armée contre l’Etat islamique ?”, *Institut Royal Supérieur de Défense*, 20 September 2016, <<http://www.irsd.be/website/images/livres/enotes/E-note22.pdf>> (20 May 2019).

295. Belgium has not made use of the possibility to derogate from certain of its international human rights obligations.

296. “Belgium not obliged to repatriate Islamic State supporters and their children, court rules”, *Middle East Eye*, 27 February 2019, <<https://www.middleeasteye.net/news/belgium-not-obliged-repatriate-islamic-state-supporters-and-their-children->

[court-rules](https://www.middleeasteye.net/news/belgium-not-obliged-repatriate-islamic-state-supporters-and-their-children-)> (15 May 2019); “Les Kurdes de Syrie dénoncent le refus des pays de l’UE de reprendre leurs jihadistes » *L’Orient Le Jour*, 31 October 2018, <<https://www.lorientlejour.com/article/1141520/les-kurdes-de-syrie-denoncent-le-refus-des-pays-de-lue-de-reprendre-leurs-jihadistes.html>> (15 May 2019); Christophe Lamfalussy, « La Belgique propose une alternative au retour des djihadistes » *La Libre*, 18 February 2019, *La Libre*, <<https://www.lalibre.be/actu/politique-belge/la-belgique-propose-une-alternative-au-retour-des-djihadistes-5c6ab90b7b50a60724c5a9a7>> (15 May 2019).

297. Customary IHL Study, p. 482.

298. Committee on the Rights of the Child, General Comment No. 10 (2007), “Children’s rights in juvenile justice”, *CRC/C/GC/10*, § 32.

299. Brussels Court of Appeals, civil emergency interim proceedings, 27 February 2019, 19/KR/4.

in North-East Syria is too unstable, access to camps is restricted, and Belgium does not have diplomatic relations with the SDF and will in any case give priority to children rather than people who willingly joined ISIS (in this case the applicant had converted to Islam at age 16 and joined a now deceased husband in Syria at age 18). The judge stated that it could not overstep on this sovereign appreciation by the Executive. Regarding the protection from human rights violations, the Court found that it was not established that Belgium had jurisdiction over what was ongoing in the area.³⁰⁰

On 11 June 2019, the Brussels Court of First Instance ordered that the Belgian Government issue travel documents and take all necessary steps, including cooperation with authorities and organisations present in North-East Syria, to ensure the repatriation of an 18-year-old Belgian woman. The determining argument was that she had been abducted and brought to Syria by her father as a child and had asked for repatriation to Belgian authorities before turning 18. The Court considered that the criterion of the child's best interest was therefore still applicable to her, and that it required the Government to be proactive in her repatriation.³⁰¹

Immediately after this decision, the Ministry of Foreign Affairs announced that a Memorandum of Understanding had been signed in Erbil with Kurdish authorities to repatriate children up to the age of 12, giving a priority to orphans.³⁰²

To our knowledge, there have so far been no judicial decisions regarding repatriation of Belgian fighters of ISIS. Regarding prosecution of returnees, it can be noted that the Belgian judiciary has almost

always refused to resort to the 'IHL exclusion clause' and has rather consistently charged and sentenced individuals returning from conflict zones with terrorist offences.³⁰³

9.3. Withdrawal of citizenship

Belgium has in recent years taken and enforced decisions to withdraw citizenship to nationals it considered to be radicalized.³⁰⁴ According to publicly available information, this has not been the case for women and children currently under SDF custody.

300. Brussels Court of First Instance, civil emergency interim proceedings, 7 June 2019, 19/30/C.

301. Brussels Court of First Instance, civil emergency interim proceedings, 11 June 2019, 19/37/C.

302. "Des enfants de djihadistes pourraient être rapatriés dans les prochains jours, selon Didier Reynders", *Le Soir*, 12 June 2019, <<https://www.lesoir.be/230227/article/2019-06-12/des-enfants-de-djihadistes-pourraient-etre-rapatries-dans-les-prochains-jours>> (13 June 2019).

303. Article 141bis of the Belgian Criminal Code provides that terrorist offences should not be applied to the activities of members of armed forces in times of armed conflict as defined by IHL. Belgian Courts are uncomfortable with this clause: see Thomas Van Poecke, 'The IHL Exclusion Clause, and why Belgian Courts Refuse to Convict PKK Members for Terrorist Offences', *EJIL: Talk!*, 20 March 2019, <https://www.ejiltalk.org/the-ihl-exclusion-clause-and-why-belgian-courts-refuse-to-convict-pkk-members-for-terrorist-offences/> (accessed August 2019).

304. 'Fouad Belkacem: Belgian Islamist leader loses citizenship', *BBC News*, 23 October 2018, <https://www.bbc.com/news/world-europe-45951138> (accessed August 2019).

10. CONCLUSION

This Brief has considered the legal obligations of the SDF as a detaining authority party to a NIAC, the legal rights of ISIS foreign fighters and ISIS-affiliated foreign women and children as persons rendered *hors de combat* by reason of detention, and the legal obligations of countries of origin of ISIS foreign fighters and affiliated women and children. The following points can be made in conclusion:

Applicable Law

- Common Article 3 of the *Geneva Conventions* and customary IHL applicable to NIAC is binding on all parties to the conflict in North-East Syria and applicable at all relevant times.
- International human rights law continues to apply during armed conflicts and applies to the SDF as a non-State armed group exercising *de facto* territorial control over a civilian population. The SDF has further undertaken to abide by international human rights law.
- The obligation of *non-refoulement* is applicable to all parties to the conflict at all times.

SDF's authority to detain

- The SDF has the authority to detain persons for imperative security reasons, as there is an implied right to detain in NIAC. This right is applicable to all parties to a NIAC under the equality of belligerents principle.
- The SDF has the authority to detain persons who hold a 'continuous combat function' or fighting 'membership' to ISIS on the basis that such persons pose the requisite security threat to the armed group. The SDF does not have the authority to detain persons merely due to their affiliation to ISIS.
- The SDF must address each interment on a case-by-case basis and afford procedural guarantees to all internees.

Minimum standards of treatment owed to detainees

- The SDF must treat detainees humanely at all times, without exception.
- The minimum standard of treatment must be determined on a case-by-case basis taking into account the objective and subjective needs of the individual detained.
- While the specification of certain material conditions may be subject to the external realities of the conflict, the underlying obligation of humane treatment is absolute and non-derogable. Military necessity does not constitute an exception.
- International human rights law is applicable to detention standards and helps to explain the scope and content of humane treatment.

Judicial guarantees

- All persons detained by the SDF who are or will be subject to criminal prosecution are entitled to all judicial guarantees recognised under customary IHL as applicable in NIAC.
- IHL recognises the authority of non-State armed groups to prosecute violations of IHL and other international crimes under the equality of belligerents principle.

Legal obligations during transfer

- It is prohibited under IHL to transfer detainees to 3rd States where there are substantial grounds to believe that they will be deprived of the rights contained in Common Article 3.
- Both sending and receiving States are under an obligation to ensure respect for the *Geneva Conventions*.

Legal obligations on countries of origin

- States are under an obligation to either repatriate their nationals suspected of terrorism offences or war crimes in order to secure their prosecution, or to at least facilitate their prosecution in a foreign State.
- For ISIS foreign fighters who are not suspected of terrorism offences or war crimes, including persons with mere affiliation to ISIS, withdrawing citizenship may amount to an arbitrary deprivation of nationality, contrary to article 12 of the ICCPR.
- States may be under an obligation not to withdraw the citizenship of their nationals where: (i) it would amount to an arbitrary deprivation of nationality; (ii) it would render that person stateless where the relevant State is party to the Convention prohibiting statelessness; or (iii) it would violate other fundamental human rights of the individual concerned.

This Brief is an objective legal analysis of the obligations owed by all parties to conflict in North-East Syria under IHL and international human rights law, as well as the obligations owed by ISIS foreign fighters and affiliated women and children's countries of origin under general international law. It is not intended to offer political solutions to the problem of ISIS foreign fighters and affiliates held in detention in Syria. This Brief is of specific relevance to States, non-State actors, humanitarian organisations, military personnel, lawyers, judges, and any other stakeholders involved in the conflict or detention operations in North-East Syria. The legal advice is of general applicability to all NIACs.



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