

Executive Summary

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

August 2019

Diakonia
International
Humanitarian
Law Centre

This briefing provides an overview of the legal status under International Humanitarian Law (IHL) of Islamic State of in Iraq and the Levant ('ISIL' but commonly and hereafter referred to as 'ISIS') foreign fighters and ISIS-affiliated foreign women and children detained by the Syrian Democratic Forces (SDF). As confirmed in to the Rule of Law in Armed Conflicts (RULAC) portal, in Northeast Syria, the SDF have engaged in a non-international armed conflict (NIAC) against ISIS. Estimates disseminated by the de facto Administration of Northeast Syria indicate that, as of May 2019, approximaly 9,000 male ISIS foreign fighters have been detained in SDF administered prisons and according to media sources, between March and April 2019, 10,000 to 12,000 foreign women and children who are affiliated with ISIS have been detained in camps administered by the SDF.

This briefing examines the legal framework applicable to the SDF as a party to a NIAC. It clarifies the group's obligations as a detaining authority, and the rights of ISIS foreign fighters and ISIS-affiliated foreign women and children as persons rendered hors de combat through detention. The study also analyses the legal obligations of the countries of origin of ISIS foreign fighters, and of women and children affiliated to the armed group. While the analysis and the case studies are specific to the Syrian context, the relevance and applicability of the international legal framework could be extended beyond this context and applied to other non-state armed groups in other NIACs.

Legal framework

The conflict between the SDF and ISIS in Northeast Syria has been characterised as a NIAC as it met the required thresholds of organisation of armed groups and intensity of violence required under IHL. Therefore, as a party to a NIAC, the SDF is bound by:

- **Common Article 3 of the Geneva Conventions** and other relevant provisions of **customary IHL**.
- **International Human Rights Law (IHRL)** as

it exercises de facto control over the civilian population in Northeast Syria and has expressly committed to respect it.

- The principle of **non-refoulement**, which is applicable to all parties to a NIAC.

SDF's authority to detain

According to the ICRC, the SDF has an implied right to detain persons both on criminal charges and for "**imperative security reasons**", which are the lawful grounds for internment. This authority stems from norms of customary international law and from the principle of equality of belligerents.

In relation to internment, the existence of the grounds for detention should be assessed on a case-by-case basis. However, it is generally recognised that membership to ISIS as defined by the ICRC, where the member holds a "continuous combat function", is sufficient to justify internment. Conversely, mere affiliation to the group, such as political support, would not meet the threshold of imperative security reasons to allow for internment.

Minimal Standards of Treatment in NIAC

Under both IHL and IHRL, non-state armed groups must treat detainees humanely at all times, and without exception. This is an absolute obligation that can never be derogated from even in case of military necessity.

The minimum standard defining humane treatment is determined on a case by case basis, depending on the practical needs of detainees. The detaining power must take into account the detainees' physical and mental condition, age, social, cultural religious or political background.

Judicial Guarantees

Under Common Article 3 of the Geneva Conventions, non-state armed groups such as the SDF must afford persons subjected to criminal prosecution all judicial guarantees recognised as indispensable. This provision of IHL is of customary

nature, and is equally applicable to both States and non-state armed groups. The judicial guarantees it enshrines are detailed under IHRL.

Legal obligations of SDF during transfer to third parties

The SDF has an obligation towards detainees they decide to transfer. Under the customary international law principle of non-refoulement, both non-state armed groups and state authorities are prohibited from transferring detainees to a third State where they could be at risk of being denied their rights under Common Article 3 of the Geneva Conventions or of being subject to serious human rights violations, including torture and ill-treatment.

Similarly, under Article 12 of the Third Geneva Convention, both the sending and the receiving State have an obligation to ensure protection from harm of the transferred prisoners. The International Criminal Tribunal for the former-Yugoslavia stated that under Common Article 3 of the Geneva Conventions this obligation also applies to non-state armed groups that are party to a NIAC. The Tribunal also established that the transfer of detainees constitutes a joint detention operation whereby both parties share the responsibility of upholding the provisions of the Geneva Conventions.

Under IHL, the obligation to protect transferees from harm also entails procedural safeguards, such as informing the detainees of the intended transfer and granting them the opportunity to submit concerns and fears related to such a transfer to an independent and impartial body.

Legal obligation on ISIS foreign fighters' state of origin

According to customary international law, as reflected in several UN Security Council resolutions, States are under an obligation to either repatriate their nationals suspected of acts of terrorism or international crimes in order to secure their prosecution, or to facilitate their extradition for them to stand trial before a foreign or international jurisdiction.

According to the Human Rights Committee, customary international law also establishes that the State of origin of foreign fighters cannot arbitrarily withdraw their citizenship. Such withdrawal is considered arbitrary when conducted in circumstances in which the decision cannot be challenged through due process or would result in statelessness.

Additionally, the 1961 Convention on the Reduction of Statelessness explicitly prohibits the withdrawal of nationality that would render an individual stateless. The exceptions to this prohibition are applicable only if the State has declared to retain them upon ratification of the convention and relate to the bond of loyalty between the State and its citizens, and to a conduct that is seriously prejudicial to the vital interests of the State.

In the same vein, the European Convention on Nationality lists the circumstances in which State parties may withdraw the nationality of their citizens. This includes the case when they have been in voluntary service with foreign military forces. However, the withdrawal of nationality is not applicable if it would render the individual stateless.

Conclusion

The briefing provides an overview of the IHL and IHRL provisions regulating the status of foreign members of non-state armed groups and their affiliates detained by other non-state armed groups in situations of NIAC. While non-state armed groups might have an implied power to detain foreign fighters and their affiliates, they are under an obligation to treat all detainees humanely at all times, grant them judicial guarantees, and ensure that their transfer to a third State does not expose them to harm. The states of origin of foreign fighters and their affiliates are under the legal obligation to allow for their repatriation or extradition to a third jurisdiction - national or international – to stand prosecution for alleged international crimes. Additionally, States of origin cannot arbitrarily withdraw the nationality of foreign fighters and their affiliates as this would be at odds with their international legal obligations.



Diakonia
International
Humanitarian
Law Centre