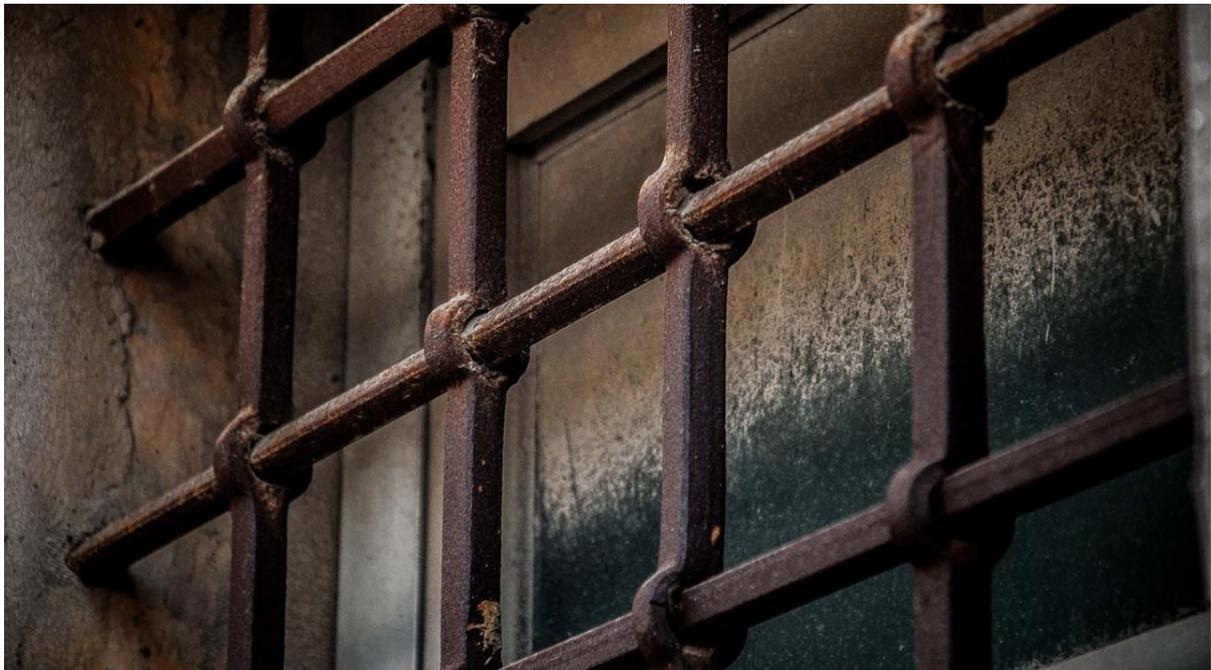


EXPERT MEETING REPORT

*'ISIS Members Detained in North East Syria - Legal and Security Challenges and
Recommendations for Their Judgment Under International and National Law'
Geneva, 23 May 2019*



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1. INTRODUCTION

Context and Objective

On 23 May 2019 the Geneva-based NGO Fight for Humanity and the Geneva Academy of International Humanitarian Law and Human Rights co-organized an expert meeting on the detention and judgment of Islamic State of Iraq and Syria (ISIS) members, including foreign fighters, currently detained in North East Syria. The meeting brought together around 50 experts: academics, representatives from different countries, international organizations, NGOs and UN agencies, as well as representatives from the Self-Administration in North East Syria.

The **objectives** of the meeting were to **(1) foster discussion among experts on the detention and judgment of ISIS members held in North East Syria**, particularly with regards to legal and security challenges and **(2) to discuss concrete options, opportunities and challenges, and how to put them into practice, in order to conclude with a number of tentative recommendations.**

In North East Syria, a Self-Administration was established in 2014 and has increasingly extended its area of administration according to the military advancement of the Syrian Democratic Forces (SDF). Currently, it has territorial control of more than 30% of the Syrian territory. This Self-Administration has also created a judicial system, which is operating according to its own “laws and rules” (a hybrid of new laws and Syrian law), through which it has been judging people, including alleged members of what they refer as “terrorist organizations”.

In January 2019, the Kurdish-led and US-backed SDF launched an operation to capture the last area controlled by ISIS, north of the Euphrates. Since then, they have had to halt or slow the offensive multiple times to allow civilians, including thousands of ISIS families, to evacuate. On 23 March 2019, the small town of Baghuz finally fell to the hands of the SDF, supported by the international coalition forces.

The SDF is currently detaining over 2'000 ISIS members, of approximately 70 different nationalities in detention centres. In addition to these fighters, their families comprising over 11'000 individuals (mainly women and children) are being held in three camps in the North East of Syria. This poses numerous legal, political, and security-related challenges.

In parallel, there exists a local tribal legal system and the Self-Administration/SDF is under tremendous pressure in the areas under its control to allow local Syrians who joined ISIS to be dealt with through their own tribal system – as was the case when nearly 300 local Syrian fighters were released to their tribal elders in March 2019.

2. PRESENTATIONS

The international legal framework

The first session addressed the international legal framework. The following key legal issues were discussed:

- First, the importance of including not only foreign fighters, but also Iraqis and Syrians without distinction in the discussion was highlighted, according to common article 3 (CA.3) to the Geneva Conventions of 1949 which prohibits adverse distinction.
- Due to its State-centric character, the applicability of international human rights law (IHRL) to armed non-State actors (ANSA) is contested. Yet, its standards are essential for complementing the applicable rules of international humanitarian law (IHL). As a reminder, CA. 3 explicitly applies to both State and non-State actors, and notably establishes fair trial standards.
- From an IHRL perspective, some consider that ANSAs are bound when and to the extent that they exercise control over territory.
- With regard to detainees, it is well-established and uncontroversial that ANSAs are required to treat them humanely. The wider issue revolves around the legal basis for detention, as well as the related grounds and procedures involved. Reference is made to the rules applicable in International Armed Conflict (IAC) on prisoners of war (PoWs) and/or to civilian internees, as both categories can be interned for security reasons. IHL treaty rules provide very little guidance on internment in case of Non-International Armed Conflict (NIAC), however, it is clear that there should be a legal basis and an ANSA should be able to adopt procedures to properly detain persons.
- Trial, on the other hand, raises the issue of jurisdiction. This is problematic for ANSAs since they do not have territorial, active, or passive personality jurisdiction. There is also the issue of universal jurisdiction, which can apply to war crimes. As a judicial guarantee, however, only a law existing at the time of the commission of the crime, can be relied on for prosecution. This issue of legality is critical for ANSAs, especially if they are enacting new laws for the places where they control territory. A number of questions may arise: is there a problem of retroactivity? Moreover, can an enemy ANSA be bound by rules established by another ANSA?
- In all cases, there should be fair trial with judicial guarantees. The International Criminal Court (ICC) could be an avenue, but Syria is not a party to the Rome Statute. Prosecutions for foreign fighters by home states is another option. States could also establish a tribunal to whom they would transfer their jurisdiction to handle certain serious crimes. It seems unlikely however that Syria would ratify such an arrangement.
- Once someone is convicted by an ANSA, there is no obligation to return persons (particularly foreign fighters) to their home states. Legally speaking, ANSA cannot extradite persons since they do not enjoy sovereignty. Extradition laws and principles only apply to States based on treaties concluded for the purposes of judicial cooperation. Transfer without extradition would be the option. In this scenario, ANSA would arguably be bound by the *non-refoulement* principle (prohibition to transfer someone to authorities where he/she would be at risk of being tortured). CA 3 would be the applicable law in this case.

Facts and figures from North East Syria

A representative of the SDF briefed the participants on the general situation in North East Syria, and specifically the situation under discussion:

- The SDF are facing a serious problem regarding detainees in North East Syria, particularly because they result from a situation of prolonged conflict.
- Whilst the battle against ISIS recently ended, ISIS are still conducting attacks from sleeper cells and the SDF are conducting raids against such cells (since 3 March there have been more than 100 such operations).
- There are numerous detainees as a result of this armed conflict. Currently there are 2'010 foreign fighters from more than 70 countries in detention, namely: Arab world - 43%; Turkey 9%; Russia and Asia - 36%; Europe - 10%; America and other states - 2%. Iraqi fighters are not included to this list.
- More than 3'000 Syrian fighters are currently being detained and prosecuted. Most of them were transferred to the People's Court of the Self-Administration, where they are tried under the anti-terrorism law and are also subject to local agreements and released.
- They are detained in special prisons supervised by the Self-Administration. Detainees have children and families who are placed in three camps (Ain Issa, Roj and al-Hol). There are more than 11'000 women and children of ISIS families, including more than 120 orphans. It is very difficult to know and prove if the women have been fighters.
- Out of the above-mentioned 11'000 individuals, 60 children who were members of ISIS are in a rehabilitation centre in Qamishli. They had allegedly been trained for bombings and assassinations.
- All expenses are being paid by the Self-Administration: every detainee costs the Self-Administration 27 USD daily. This is only to cover for their basic needs.
- The conflict with ISIS caused the death of more than 11'000 members of SDF. ISIS fighters committed numerous crimes, and SDF believes there should be an international process of justice to resolve this problem.
- SDF argues that persons having committed crimes on its territory should be tried and brought to justice on the same territory. Indeed, this is a problem not just for SDF but the international community and therefore common ways to resolve these problems need to be identified.

The legal system in North East Syria

A representative of the Self-Administration/Autonomous Administration of North East Syria briefed participants on their legal system. Some of main points from his presentation were:

- The Administration in 2014 established a judicial body, the People's Court, to conduct fair trials and it has already tried 7'000 Syrians from ISIS and al-Nusra front.
- There is a general prosecution committee formed by seven judges and a specific "counter-terrorism" law has been used to try ISIS and al-Nusra front members.
- There is no capital punishment in North East Syria.

- A Syrian law was passed in 1974 on juvenile justice, but it was never put into place. Children are not prosecuted.
- The representative expressed an interest in hearing from participants/experts as to how the Self-Administration can effectively ensure proper accountability, for persons within the territory.
- The wish of the Self-Administration is that those detained should be prosecuted inside North East Syria, both from a moral and practical point of view: the crimes were committed there, the victims and witnesses are there, and it is easier to collect evidence, etc.
- The rehabilitation of detainees is another critical aspect to address, as it is dangerous to keep such persons in their current state for a prolonged period. Detainees also have rights and needs that have to be respected; however proper judicial processes remain of pivotal concern.
- The current judicial system has proven to work, but it can be improved with the assistance of the international community.
- Some needs of the Self-Administration are: the provision of expertise in trial procedures; logistical support and support for rehabilitation of women and children; support to improve detention facilities; and resources/support for rehabilitation of detainees.
- The Self-Administration has a plan to expand the camps for women and children, but it comes with a high cost, for which it is requesting support.

Political and security considerations

The main political and security considerations addressed were the need to respect victims' rights, respect for fair trial principles and the risk of radicalization of detainees if the justice process takes time:

- Attention was drawn to the risk of creating a jihadist solidarity movement if the rights of the people detained were not respected because of lack of capacity.
- It was underlined that it was very important that people are brought to justice in accordance with fair trial principles.
- With regards to the judgement of ISIS fighters by Iraq, it was recalled that NGO reports have been critical of the current system of judgements, which were described as carrying expeditious justice and not respectful of fair trial guarantees. In addition, Iraq applies capital punishment.
- It is therefore essential that the international community, if it does not want to create another generation of jihadist fighters, ensures that the families of the currently detained fighters from ISIS have no reasons to complain about how trials are conducted or how they are treated in detention.

Plenary discussions

During the plenary discussions the emergency of the situation was highlighted, as there are more than 2'000 foreign fighters detained in North East Syria who are awaiting trial. It would be important to know what interim measures could be put in place to take care of them and the situation of Iraqis in

detention is also a matter that needs clarification. Another important question was whether an international tribunal could be established on the territory of a State that does not agree to it.

Some of main points from plenary sessions are:

- The need to adopt a broader approach and prosecute foreigner fighters for international crimes (war crimes) rather than terrorism-related crimes. CA 3 provides a basis for prosecution by an ANSA for war crimes, whereas there is no international legal basis for prosecution of terrorist offences. It is important to underline that, under international law there is no crime of terrorism.
- It was argued that, from a pure legalistic perspective, setting up such tribunal without the agreement of the territorial state might not violate the legal principle of non-intervention. It will, however, raise a number of issues from a political perspective and may not be practicable in terms of logistical arrangements. If an ANSA is already trying people, the international assistance to that ANSA could be undertaken and that would not necessarily be a violation of the human rights of the accused.
- Judicial cooperation between States and ANSAs on prosecution for IHL violations is possible as long as the rights of the person are not violated. Would an agreement be an interference in the internal affairs of States? If it is an agreement for cooperation in the pursuit of war crimes, this would *per se* not qualify as interference. The interference is unlawful if it is coercive and is an attempt to change political system of the State. The threshold is quite high for illegal interference.
- States could conclude special agreements based on CA 3 with ANSAs in order to bring into force the provisions from Geneva Conventions dealing with grave breaches and criminal prosecutions. Yet, it was stressed, even though there may be no restrictions on States concluding agreements with ANSAs, it is important to consider the political realities of such measures.
- There needs to be a wider transitional justice framework that helps to prevent further radicalization. It was stressed that UNSC resolution 2170 requires that the judicial/legal processes be addressed as well.
- The Iraq option (for the establishment of an international tribunal) can be considered, but issues would need to be worked through, including matters of the capital punishment and fair trial guarantees.
- There is a risk of focusing on one actor only and of delivering “victor’s justice” in a situation where many parties have been involved and accused of committing violations. Such action could be very damaging for the system of international justice. The main criticism of the system currently is selectivity, and a special court for ISIS would feed into that criticism.
- SDF expressed their difficulties with investigating children and women, and asked for support for the judiciary systems in place now in order for them to proceed with the judicial process effectively.
- In addition, the SDF invited the home States of the foreign fighters to be present at the trials, to monitor and ensure that the processes do not violate the rights of their nationals. The Self-Administration is not claiming to be a State, but they do have territorial control and control of people. The nature of support being sought by the Self-Administration for the judicial system

is financial, material, logistical as well as substantive (capacity building of local officials, possible secondment of judges, etc.).

3. KEY DISCUSSION POINTS FROM WORKING GROUPS

Based on ongoing discussions, three options/scenarios regarding the prosecution of ISIS members currently detained in Syria were proposed to be discussed within the working groups. Three working groups were each assigned one of these options/scenarios and encouraged to identify the related pros and cons, as well as opportunities and challenges in order to come up with suggestions for effective operationalization.

1. North East Syria administration

- 1.1. Continued internment by the Syrian Democratic Forces (SDF)
- 1.2. Criminal procedures undertaken by the SDF
- 1.3. Release by the SDF

Key points/questions from the working group and inputs from plenary discussion:

- The group assessed the pros and cons of criminal prosecution: there is a legal jurisdiction, victims are there, perpetrators are there, and Self-Administration has access to them. Yet, the capacity of the Self-Administration to ensure fair trial in so many cases is a challenge. If some detainees are released, will it be controlled or uncontrolled? How to manage it safely?
- If the Self-Administration wants to prosecute internally, it should have the capacity deal with the 2'000 cases and also the legal basis needs to be clarified.
- Moreover, on a political side it was highlighted that States would need to ask themselves if they are ready to accept that an ANSA tries people, including their nationals?

2. International/mixed administration

- 2.1. Jurisdiction of International Criminal Court
- 2.2. Establishment of an ad hoc/ special/hybrid tribunal by the UNSC or by a multilateral agreement
- 2.3. Prosecutions by foreign national courts based on universal jurisdiction

Key points/questions from the working group and inputs from plenary discussion:

- Concerning ICC jurisdiction, it was stressed that there are obvious political constraints, and from a legal position, also challenges with how to trigger it.
- Selective justice is a problem, i.e. that there would be prosecutions only of ISIS members. The same goes for fragmentation, where different options are made available and implemented in terms of nationality, gender, age, etc. For example, the focus should not be only on foreign fighters. Ideally there should be a mixed approach but coordinated amongst stakeholders.

- There are many unknowns in terms of the individuals and the charges they are facing. A prioritization could be made, for which one participant used the metaphor of peeling an onion: first, you remove those who are not at all related to ISIS; then, those who are not accused of committing crimes; then, those who are not accused of committing international crimes (only accused of affiliation with a terrorist group); finally, those who are not anymore an active security threat (and could thus not be interned in the sense of IHL). This would make the choice of approaches/options easier.
- There is an obvious call for cooperation from the SDF and the Self-Administration that cannot be ignored. There is an opening to deal with the situation – a call to the international community and States – so efforts need to be undertaken, but also coordinated.

3. Country of origin and third country administration

3.1. Repatriation to countries of origin

3.2. Transfer to a third country

Key points/questions from the working group and inputs from plenary discussion:

- Repatriation primarily depends on the willingness of the State of origin to take them back.
- If detainees are not prosecuted correctly and are then released because of lack of evidence this may lead to new security risks.
- ANSAs from a legal perspective are not able to extradite a person, this would need to be done differently.
- If detainees are transferred to a third party, all human rights concerns need to be well analysed, including the death penalty, quality of detention and related risks of tortures, quality of judicial proceedings.
- As a recommendation, it is hard to come with one size fits all. There is a need for complementary responses to achieve any kind of accountability and redress.

4. CONCLUSION

During the meeting the experts discussed the different options available to the SDF/North East Syria Self-Administration for dealing with the ISIS members who are under their control - in particular non-Syrian nationals, from a legal point of view: continued North East Syria administration, international/mixed administration or country of origin or third country administration. It is clear that each option raises different questions and there will not be one solution that fits all.

The discussions were very fruitful and raised many new questions, which would need to be further explored.

Currently the panorama is mixed: various States whose citizens are amongst those detained have no official or common policy regarding ISIS members and their families. Several European governments

have stated that they would not look for active repatriation of their citizens who are accused of being involved in an armed conflict as ISIS members, while the US Government has been encouraging each government to repatriate their own citizens and bring them to justice, and some governments are doing so.

Yet, in order to achieve any kind of accountability and redress, avoid fragmentation in the approach, coordination and cooperation between actors is essential.

The rights of the victims to justice need to be guaranteed in all situations and any solution chosen would need to integrate their perspective.

Clarity is needed on the different charges of the various persons detained, and whether currently there are different paths applicable for different persons depending on their characteristics – gender, age, nationality, etc. To avoid negative differentiation the principle of non-discrimination should be applied, with the notable exception of special considerations for children.

One message was very clear: that the focus should be on prosecuting war crimes, not terrorism crimes, as the former is solidly anchored in international law, even for ANSAs, while the latter mainly plays out in domestic law.

In the current context, the North East Self-Administration recognizes that it cannot deal with this very complex situation on its own without additional resources and support. Indeed, in response to accusations of arbitrary detention and inhumane treatment of detainees, it has repeatedly requested international support to confront its limited resources and capacities. The situation should be further analysed from a security point of view, looking to minimize the risk for future security threats. The Self-Administration needs, and is openly requesting, support to find a final solution to the issues.

There are also several risks attached to measures that create the perception of “selective” or “victor’s justice” if only ISIS detainees are brought to justice. A balance has to be found without “letting the best become the enemy of the good”, i.e. doing nothing while awaiting a situation where all conflict actors can be brought to justice. As stressed by the SDF, detained ISIS members who are facing charges for committing massacres cannot be released just because international law does not facilitate their trial.

In spite of the complexity of the situation, there is a need for swift action. As time passes, the grievances of the detained fighters and their families risk creating the ground for future conflict and violence, as they see their rights and needs not being respected nor met. Any solution will take time, ensuring human treatment during detention in the meantime is essential.

5. ANNEX

AGENDA - 23 May 2019 – GENEVA ACADEMY				
Morning session	8:30 - 9:00	Welcome coffee		
	9:00 - 9:10	Opening remarks and presentation of the meeting objectives	Geneva Academy & Fight for Humanity	
	9:10 - 9:30	Definition of the international legal framework	Geneva Academy	
	9:30 - 10:00	Briefing on the general situation of ISIS detainees in North East Syria (facts and figures)	Syrian Democratic Forces	
	10:00 - 10:15	Questions and clarifications	All participants	
	<i>Break</i>			
	10:30 - 10:55	Presentation of the legal system in North East Syria	Autonomous Administration of North East Syria	
	10:55 - 11:10	Questions and clarifications	All participants	
	11:10 - 11:30	Setting the scene: political and security-related considerations	Fight for Humanity	
	11:30 - 12:30	Plenary discussion: operational and political challenges	All participants	
<i>Lunch break at the Academy</i>				
Afternoon session	13:15 - 14:00	Three working groups	Individual working group	
	14:00 - 14:20	Presentation by each working group	All participants	
	14:20 - 15:40	Plenary session: summarizing the main ideas, opportunities and suggestions	All participants	
	15:40 - 15:50	Closing remarks	Geneva Academy & Fight for Humanity	