OHCHR SYRIA

Suspected ISIL Fighters & Their Families Held in Detention Centres & IDP Camps in Northeast Syria

Questions & Answers

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This document articulates key concerns under international humanitarian law (IHL) and international human rights law (IHRL) as regards suspected ISIL fighters, presumed associates, and their families held in detention centres and IDP camps in northeast Syria, with a focus on concurrent responsibilities of various parties and duty-bearers. It highlights responsibilities and obligations to ensure that alleged perpetrators of international law violations are held accountable, while respecting fair trial and due process guarantees. It is clustered into categories of questions relating to the applicable legal framework, obligations of the parties to the conflict, obligations of the country of nationality, protection issues, and accountability.

Background

Many ISIL fighters (or alleged ISIL fighters) and their families, as well as those presumed to have been associated with fighters or to have family ties with them, are being held in areas controlled by the Syrian Democratic Forces (SDF), a Kurdish-led non-state armed group, in northeast Syria. Some, mostly men and boys accused or suspected of having fought with ISIL, are held in detention centres, while others are in IDP camps such as Al Hol and Roj. The commonality is that all persons held within such facilities are deprived of their liberty and of their right of freedom of movement, including in the camps as they are not allowed to leave unless they are repatriated. Third country nationals held in camps or detention centres are not, for the time being, facing any criminal charges. Deprivation of liberty might be lawful in some cases, but there are also strong concerns that it may be arbitrary (see below).

Unlike detention centres which house mostly suspected ISIL fighters, the population of the IDP camps is diverse. Not only it includes presumed ISIL associates but also persons, mostly women and children, presumed to have family ties with ISIL fighters as well as many Syrian IDPs and Iraqi refugees who arrived in the camps after fleeing hostilities. There are a number of unaccompanied/orphaned children within the camps. In Al Hol, women and children of third country nationality, are kept in a separate annex and are considered as the most “extreme”. That features exacerbated protection concerns also in view of limited humanitarian assistance.

Residents of IDP camps face limits on their freedom of movement as they are not allowed to leave the camps unless they are repatriated to their country of nationality through official channels, or (for some Syrians) sponsored by community/tribal leaders who would warrant for their return to their community of origin. Foreigners can only move within the camps with armed guards. Repatriation programmes are organised for Iraqi nationals through which they are sent to prisons or IDP camps in Iraq. While the majority of these Iraqi returnees sought refuge in Syria because of violence in their home country, they are generally presumed of being affiliated with ISIL. The justified fear of many Iraqis currently held in North East Syria of being arbitrarily detained, ill-treated, tortured, facing unfair trial and potentially death penalty or subjected to enforced disappearance if they return to Iraq, highlights the importance of ensuring safe and voluntary returns, notably seeking individuals’ informed consent to return.

It is important to differentiate the categories of individuals held within detention centres and IDP camps, despite the fact that their deprivation of liberty does not always warrant a different legal analysis. Children have to be considered first and foremost as victims. Finally, individuals present in
camps as IDPs or refugees having fled violence have to be seen as a distinct category, which is not covered by the scope of this note, nor subject to the same legal analysis (see below).
**Legal Framework**

**What legal framework is applicable to the detention centres or IDP camps in northeast Syria?**

The SDF and ISIL are parties to a non-international armed conflict in Syria and the detention centres and IDP camps are located in areas of north-eastern Syria under the control of the SDF. The SDF is thus bound by Common Article 3 to the Geneva Conventions and customary law in its treatment of former ISIL fighters and other civilians, including the families of ISIL fighters, under SDF-control.

IHRL is concurrently applicable. The SDF given their exercise of government-like functions and effective control of the territory at stake acts as a *de facto* authority and must therefore respect international human rights norms when their behaviour affects the human rights of individuals under their control. The Government of Syria maintains international human rights law obligations on the entirety of its territory, including in areas where it no longer has effective control. However its obligations to respect, protect and fulfil human rights are to be implemented “within the limits of its effective power”.2

Depending on their level of control or influence on specific parties, or involvement in particular activities on the ground, other States may have IHRL and IHL obligations or bear responsibility.

**How should the persons held in the detention centres and camps be considered?**

While the status of prisoners of war is not applicable in non-international armed conflicts, relevant IHL norms address the case of persons deprived of their liberty for reasons related to this type of conflicts and provide fundamental guarantees for all those who fall under the control of a party to the conflict.3 This situation covers deprivation of liberty (often called internment), outside any criminal procedure, for reasons directly related to the conflict, namely imperative security reasons. In that respect, suspected ISIL fighters held by the SDF may be subject to security detention if they represent an imperative threat to security. Such detention must not replace criminal detention and should not be linked with allegations of past participation in crimes and can therefore be only based on the future risk that the individual poses. With due consideration to the required procedural guarantees, this type of detention might last as long as the imperative security threat that they represent to the non-State armed group and for which they are being held continues to exist, and thus possibly until the end of the conflict.

Those suspected ISIL fighters can also be deprived of liberty if they face criminal charges, as long as it is in accordance with the criminal procedure under which they are being charged/tried, irrespective of the threat they may represent.

Family members - essentially women and children - of alleged ISIL fighters who are currently held in camps are civilians. Given that they are not charged with a criminal offence they could only be deprived of their liberty as internees for reasons related to the armed conflict (i.e. for imperative military reasons) if their alleged affiliation with ISIL actually represents such a threat.
Although outside the scope of this document, the situation is different for individuals held in camps who have no ties with ISIL, mainly Syrian and Iraqi nationals who arrived in the region as IDPs or refugees, as they were fleeing violence in their area of origin. They cannot be considered as internees under IHL. IHRL is applicable to the situation of these individuals, with the rules prohibiting the arbitrary detention of migrants being of particular relevance (see below).
Obligations of the Parties to the Conflict

Is the security detention of suspected ISIL fighters, as well as their families, lawful?

Arbitrary deprivation of liberty is prohibited under both IHL and IHRL. Additionally, while IHRL continues to apply during armed conflict, rules of IHL governing detention can be used to interpret what amounts to an arbitrary deprivation of liberty under IHRL. In this regard, the Human Rights Committee stated that “[s]ecurity detention authorized and regulated by and complying with international humanitarian law in principle is not arbitrary.”

However, IHL applicable in non-international armed conflict does not provide for an explicit legal basis for detention. This being said internment of civilians – including of individuals who have or are suspected of having directly participated in hostilities – is not prohibited. This lacunae gives rise to various interpretations. For example, while the ICRC is of the view that there is an inherent ground to detain based on imperative reasons of security, this position is not unanimous. Such measures must be considered as exceptional and, for the ICRC, “the imperative reasons of security standard is high, and careful evaluation of whether it has been met must take place in relation to each person detained.” Indeed, while a person’s past conduct is recognised as “an important factor in determining whether he or she poses a significant security threat to the detaining authority”, internment may not be used solely for intelligence purposes, as a punishment for past activity, or as a general deterrent for a future activity. Furthermore internment shall not be an alternative to criminal proceedings when such proceedings are feasible. Once the reason for internment no longer exists, it must cease, while indefinite internment amounts to arbitrary detention.

Irrespective of which interpretation is considered, under IHRL, the prohibition on arbitrary deprivation of liberty demands that, in all circumstances, detention be implemented pursuant to substantive grounds as well as appropriate procedures established by law.

In Syria, the internment of suspected (former) ISIL fighters, as well as of the members of their family, is reportedly based on their alleged direct participation in hostilities and/or membership in ISIL or suspected family ties to ISIL members or fighters. Membership in an armed group is generally recognised as an imperative reason of security justifying an internment. However, a case-by-case assessment is necessary to justify the “imperative reasons of security”.

For women and children, a mere suspected affiliation with ISIL might not justify their detention, and an individual assessment would be needed to determine whether they represent a genuine security risk and justify their internment. Women may have held different roles within ISIL organisation and an individual assessment would be needed to assess the security risk they may present. The Convention on the Rights of the Child (CRC) provides that detention of children should be used only as a measure of last resort and for the shortest appropriate period of time. In the same vein, male adults should not be automatically suspected of having fought with ISIL, an individual assessment would also be needed to consider their role within the organisation to assess the security risk they present.
What are the obligations of the parties to the conflict as regards the persons detained?

Persons placed hors de combat are to be protected. This notion is defined by IHL and includes the case of someone who is in the power of an adverse party. Common Article 3 to the Geneva Conventions foresees that persons taking no active part in hostilities, including those placed hors de combat by sickness, wounds, detention or any other cause, shall be treated humanely in all circumstances, without any adverse distinction. Suspected (former) ISIL fighters held in detention by the SDF are considered as hors de combat and protected as civilians who are no longer taking direct part in hostilities. Members of their families that are being held on the basis of mere suspected affiliation with ISIL fighters are protected as civilians.

The obligation to treat humanely these persons who have not or no longer taking active part in hostilities expressly includes the prohibition of: a) violence to life, cruel treatment and torture; b) the taking of hostages; c) outrages upon personal dignity, in particular humiliating and degrading treatment; and d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all indispensable judicial guarantees.

The requirement of due process and fair trial guarantees are further elaborated by IHRL, in particular by the International Covenant on Civil and Political Rights (ICCPR) (see below). As regards the conditions of detention, torture, cruel or inhuman treatment and outrages upon personal dignity are strictly forbidden under IHL, as well as under IHRL, as enshrined in the ICCPR and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). In addition, IHL provides that persons deprived of their liberty must be provided with adequate food, water, clothing, shelter and medical attention.

What are the relevant fair trial and due process guarantees to which suspected former ISIL fighters are entitled?

As noted above, both IHL and IHRL prohibit arbitrary detention. As IHL applicable in non-international armed conflict does not provide for detailed procedural guarantees in relation to security detention outside criminal proceedings, the arbitrariness of the deprivation of liberty must be assessed on the basis of international human rights law which remains applicable. Article 9 of the ICCPR, which guarantees the right to liberty and security of person, also expressly prohibits arbitrary arrest and detention. Deprivations of liberty that are contrary to international law provisions are considered arbitrary, notably those relating to the right to a fair trial or other procedural guarantees. The same article guarantees prompt access to justice of anyone deprived of his/her liberty. It also provides that anyone detained on a criminal charge must be brought promptly before a judge and be tried within reasonable time or released.

In situations of security detention (i.e., internment), the Human Rights Committee considers the prompt and regular review by a court, or other tribunal possessing the same attributes of independence and impartiality as the judiciary, as necessary to respect Article 9. Anyone who is deprived of his/her liberty, including by security detention, shall be entitled to take proceedings before a court so the tribunal may decide without delay on the lawfulness of the detention and order
the release if the detention is unlawful. Such detention shall not last longer than absolutely necessary. In relation to the review process in cases of security detention, as the ICRC Commentary to the Geneva Convention states, the guarantee of an effective challenge to the lawfulness of internment presupposes the fulfilment of several procedural and practical steps, including providing internees with sufficient evidence supporting the allegations against them; ensuring that procedures are in place to enable internees to seek and obtain additional evidence; and making sure that internees understand the various stages of the internment review process and the process as a whole.²⁰

In the context of criminal proceedings, Common Article 3 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 peoples”.²¹ Moreover article 14 of the ICCPR guarantees further due process rights of individuals who are charged with a criminal offence. These include, amongst others, the right of everyone to be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law, as well as to a range of minimum guarantees.

The CRC provides that the detention of children should be used only as a measure of last resort and for the shortest appropriate period of time. The best interest of the child should always be a primary consideration.²² The specific needs for care of unaccompanied minors, including orphans, has to be further taken into consideration.

Within this context, it is important to keep in mind the principle of presumption of innocence. Not every individual who used to live in an area under the control of ISIL shall be associated to the group’s actions. In addition, the principle of individual criminal responsibility is of particular relevance to families of suspected ISIL fighters. For example, women with alleged family ties to ISIL fighters shall not be considered criminally responsible on the mere basis that they were reportedly married to fighters.

**What about the criminal proceedings by the de facto authorities?**

As mentioned above, security detention must not be used as an alternative to criminal proceedings when these are feasible.

IHL does not provide for the right of a non-state armed group to establish courts. However the most recent ICRC Commentary to Common Article 3 to the Geneva Conventions highlights:

> [A]lthough the establishment of such courts may raise issues of legitimacy, trial by such means may constitute an alternative to summary justice and a way for armed groups to maintain ‘law and order’ and to ensure respect for humanitarian law. Armed groups are frequently called upon to ensure respect for humanitarian law, for example by the UN Security Council.²³

The Commentary further specifies:

> 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 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. Alternatively, armed groups could continue to operate existing courts applying existing legislation.

Putting aside whether or not such courts may be lawful, if such courts are created by a non-State armed group, they must respect fair trial guarantees in accordance with both IHL and IHRL, as outlined above.

In this regard the SDF has constituted its own courts, which are ad hoc anti-terrorism tribunals known as the “Defence of the People” courts set up to prosecute, under the 2014 SDF counterterrorism laws of 2014, Syrian and Iraqi ISIL suspects accused of committing crimes in Syria.

One key question is therefore whether the SDF’s courts are “regularly constituted”. IHRL might be of some guidance as to this requirement – Article 14(1) of the ICCPR provides that a court needs to be independent, impartial and established by law. In addition, Common Article 3 provides that such a “regularly constituted court” shall afford essential fair trial guarantees. If these guarantees are not provided, any trial held by the SDF would violate both IHL and IHRL.

It is questionable whether the SDF is in a position to hold trials providing these guarantees before its anti-terrorism tribunals. They have also identified capacity-building needs regarding potential trials. With regards, to third country nationals held by the SDF whom are not facing criminal charges, while the SDF’s calls for support to establish an internationally recognised tribunal have largely remained unanswered, the media reported in early February 2020 that the SDF had announced that it would start trials of the foreign individuals under its own authority. In October 2020, the SDF announced its intention to prosecute Swedish women under their anti-terrorism law. This seems to be a deviation from SDF previous calls to States of origin to repatriate their nationals, notably women and children.

**Shall suspected former ISIL fighters be subjected to criminal proceedings at the national level in Syria and Iraq?**

The UN and others have expressed concerns as to Syria’s ability to conduct fair trials of alleged former ISIL fighters, due in part to the use of the Counter-Terrorism Court, which operates under Syria’s problematic counter-terrorism legislation. The Counter-Terrorism Court has failed to respect fair trial rights; the right of habeas corpus is consistently denied to those in custody, with prisoners being held for prolonged periods without an opportunity to challenge the legal basis of their detention. Death penalties are issued and enforced by courts not upholding fair trial standards, and often in secret. In addition, the wording of some criminal offences of the 2012 Counter-Terrorism Law under which the counter terrorism court operates is extremely vague and too broadly defined, allowing also for the criminalisation of acts in exercise of fundamental freedoms, such as non-violent activism. In addition, the Law appears to fail in laying out key judicial guarantees such as the independence of the judiciary. The Counter-Terrorism Law also criminalises the participation of individuals in hostilities, without also criminalising IHL or gross human rights violations, which could have facilitated a genuine accountability path for international crimes that may have been committed by members of armed or
terrorist designated groups. These limitations and flaws must be considered in the broader context of the lack of accountability for violations of international law attributable to the State, which further undermines the prospect of prosecutions by Syria.

Similar issues are valid in regard to suspected former ISIL fighters, associates, and their family members, who have returned to and/or are being held in Iraq (including foreigners), where the conditions in detention centres and IDP camps are also of grave concern. Criminal proceedings held before Iraqi courts are largely conducted using overly broad counter-terrorism legislation that makes is susceptible to abusive and discriminatory application, with many resulting in the death sentences, including mandatory death penalty for crimes not amounting to most serious crimes. In addition to other serious allegations of ill-treatment, torture, coerced confessions, and enforced disappearance.31

Is it lawful to detain Syrian IDPs and Iraqi refugees who are not suspected of any affiliation with ISIL?

Many Syrian IDPs and Iraqi refugees fled violence before arriving in areas currently controlled by the SDF. Their detention can only be lawful on security grounds if it is determined, based on an individual assessment, that their past association with ISIL represents an imperative reason of security. The mere fact that they fled an area previously controlled by ISIL is not sufficient. If their detention is therefore not linked to the armed conflict due to the absence of imperative security reasons, these individuals cannot be subjected to internment under IHL and IHRL alone is the applicable legal framework pertaining to this part of the population of SDF-controlled camps (see above).

Under IHRL, the detention of migrants raises serious concerns about the right to liberty and security of person, as well as freedom of movement, as it may amount to arbitrary detention.32 The Human Rights Committee noted as regards the detention of migrants that, while not being per se arbitrary, it “must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time.”33

The UN Working Group on Arbitrary Detention considers situations such as those “when asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy” as potential cases of arbitrary detention and within its mandate.34 According to the Working Group, placing migrants in detention should be an exceptional measure of last resort, to be used in strictly limited circumstances, for the shortest period and only if justified by a legitimate purpose, in compliance with the principle of proportionality.35

It is questionable whether the detention of Syrian IDPs or Iraqi refugees in camps held by the SDF is in line with international law. The legality of the detention of these individuals would however have to be determined on a case-by-case basis.
Obligations of the Country of Nationality

What are the obligations of the country of nationality of the suspected ISIL fighters and their families held in camps? According to the ICCPR “[n]o one shall be arbitrarily deprived of the right to enter his own country.” On the notion of arbitrariness, the Human Rights Committee notes that “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 [ICCPR] and should be, in any event, reasonable in the particular circumstances”. It further states that “there are few, if any, circumstances in which deprivation of the right to enter one’s own country could be reasonable.” The Committee also specifies that “[a] State party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country.” Considering that those nationals who are not facing criminal charges in Syria are in effect in a situation of legal limbo, this circumstance would need to be duly considered when limiting an individual’s right to enter his or her own country.

Within this context, the question arises as to whether nationals of a country abroad fall under the jurisdiction of their country of nationality. While it has been argued that asserting such jurisdiction might be an infringement on the sovereignty of the country at stake (here Syria), the recognition – to a certain extent – of a State’s jurisdiction over its own nationals abroad may also be considered as an expression of that State’s personal sovereignty towards its citizens. Furthermore, the fact that the “recipient” country is not able or willing to protect the human rights of the foreign citizens might strengthen the obligation of the country of nationality, in order to avoid any protection gap which would be contrary to the spirit of IHRL. With regard to the question of the extraterritorial application of IHRL obligations for third States in Syria, the Committee on the Rights of the Child, for example, considered that France has jurisdiction over children in SDF-controlled camps in Syria who are French nationals due to a combination of circumstances.

The answer is more straightforward on the non-derogable prohibition of torture. States have a positive duty to ensure the respect of this prohibition at all times, which may infer an obligation of the country of nationality to repatriate its citizens as the only way to avoid them being subjected to torture or ill-treatment.

The case for repatriation of children can also be made based on the CRC which foresees that:

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

This might also justify an obligation of the State of nationality to repatriate its children.
As a minimum, a State must take measures when the human rights of its citizens are gravely violated outside of its borders, i.e., a so-called obligation to protect its citizens abroad. This is not only a moral obligation, but one grounded in international law. However, this is only the case if suspected ISIL fighters and their families held by the SDF are victims of IHRL violations (see below).

For violations of IHL, the country of nationality would be considered a third State in the sense of Common Article 1 to the Geneva Conventions, provided that it is not involved as a party to the conflict. Third States are under the obligation to respect and ensure the respect for IHL, which might justify an obligation to repatriate its citizens if they are victims of IHL violations.

Finally, while provisions relevant to accountability do not establish a obligation to repatriate— but are limited to the obligation to extradite or prosecute—it is generally agreed that the country of origin has to facilitate the effective prosecution of these individuals, in particular when it is not seeking their extradition (see below).

**Does the law of consular relations entail a duty to protect one’s citizens abroad?**

According to the 1963 Convention on Consular Relations, protecting the interests of its nationals, issuing passports and travel documents to its nationals, and helping and assisting nationals, is part of the consular functions of any representation of a State abroad. While it is difficult to infer based on the text of the Convention, an obligation of a State to provide consular assistance to its citizens abroad appears to be a general practice amongst States.

In its Draft Articles on Diplomatic Protection, the International Law Commission (ILC) defined diplomatic protection as,

> the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.

It nevertheless appears that diplomatic protection remains a right of the State, and not a duty thereof or an entitlement of its citizens.

**How does the law pertaining to statelessness relate to these situations?**

Some States have revoked or announced the revocation of the citizenship of nationals suspected of having fought with ISIL or linked to such individuals, voiding any claim to a possible obligation to repatriate these individuals. Strict conditions need to be abided by for a country to withdraw the citizenship of a national, as mostly regulated within domestic law. One of the safeguards set up by international law in this regard is the prohibition to render an individual stateless, as enshrined in the Convention on the Reduction of Statelessness. However, even in such a case, a State retains the right to deprive nationality when the citizen has acted inconsistently with the duty of loyalty to the State, or has given evidence of intent to repudiate allegiance to the State. IHRL provides for additional safeguards. It includes the right of everyone to a nationality and that no one shall be arbitrarily
deprived of their nationality.\textsuperscript{50} According to the ICCPR, every child has the right to acquire a nationality.\textsuperscript{51} As noted by the High Commissioner for Human Rights:

Any interference with the enjoyment of nationality has a significant impact on the enjoyment of rights. Therefore, loss or deprivation of nationality must meet certain conditions in order to comply with international law, in particular the prohibition of arbitrary deprivation of nationality. These conditions include serving a legitimate purpose, being the least intrusive instrument to achieve the desired result and being proportional to the interest to be protected. Where loss or deprivation of nationality leads to statelessness, the impact on the individual is particularly severe. International law therefore strictly limits the circumstances in which loss or deprivation of nationality leading to statelessness can be recognized as serving a legitimate purpose.\textsuperscript{52}

Due process rights must be respected, as well as the right to family life and the best interests of the child.\textsuperscript{53}

The 1961 Convention on the Reduction of Statelessness underlines that while States maintain the right to elaborate the content of their nationality laws, they must do so in compliance with international norms relating to nationality, including the principle that statelessness should be avoided.\textsuperscript{54} Similarly, the European Convention on Nationality expressly guarantees the right of everyone to a nationality and provides that statelessness shall be avoided.\textsuperscript{55} It is questionable whether the fact that the individual deprived of his/her nationality might be able to claim another nationality (which may not be granted) would adhere to these provisions.

Even if not categorically outlawed, statelessness – from an IHRL perspective - impedes the enjoyment of numerous human rights. Hence, it is fair to claim that revoking the nationality of an individual as a measure to prevent his/her return is likely to be in violation of its IHRL obligations, including the principle of non-discrimination. In certain cases, the right of children to acquire a nationality is likely violated, if they cannot claim the nationality of one of their parents. This is compounded by the fact that in many Arab States, mothers are not allowed to confer nationality to their children, which means that in the absence of fathers and even in such cases where mothers have another (Arab) nationality beyond the stripped one or were able to acquire Syrian or Iraqi nationality, children are still likely to remain stateless as the mothers may not be allowed to pass on their nationality to children.
Protection Issues

What IHL/IHRL violations have been reported in detention centres/IDP camps?

Reports received by OHCHR Syria indicate that suspected ISIL fighters and members of their families held in detention centres or IDP camps face several protection concerns, including:

- **Arbitrary deprivation of liberty and other restrictions on the freedom of movement**, in violation of IHL rules on detention (internment and possibly criminal detention) and IHRL provisions guaranteeing the right to liberty and security of person, as well as freedom of movement.\(^{56}\)
- **Violations of the right to a fair trial and other due process guarantees**, in violation of IHL, as well as IHRL.\(^{57}\)
- **Enforced disappearance** in violation of the right to life, liberty and security of persons, **lack of information on the whereabouts of possibly detained relatives** in violation of family-related rights (see under family separations below).\(^{58}\)
- **Violations related to conditions of detention or living conditions in camps**, which may amount to inhumane or ill-treatment,\(^{59}\) and infringe on the right to an adequate standard of living, food, health and education.\(^{60}\) There is also a high level of criminality in IDP camps due to the lack of law and order, which would amount to a violation of the right to security of person.\(^{61}\)
- **Family separations**, in violation of the right to family life and family unity.\(^{62}\)
- **Lack of civil documentation**, impeding the enjoyment of a number of human rights.\(^{63}\)
- **Concern over the heightened risk of human rights violations in light of COVID-19 potential spread** in the camps and inability of de facto authorities to take needed protective measures
- **Concerns over the respect of the right to privacy**, with regard to the use of biometric registration.\(^{64}\)

What is the relevance of the principle of **non-refoulement** within this context?

First stated in the 1951 Refugees Convention (to which Syria is not a party) and considered as a cornerstone of refugee law,\(^{65}\) **non-refoulement** is now recognised as a principle of international customary law.\(^{66}\) Under IHL, there is an explicit reference to the principle of **non-refoulement for international armed conflicts**. While this is not the case for non-international armed conflicts, the principle is considered as implied by Common Article 3 to the Geneva Conventions.\(^{67}\)

Under IHRL, the principle of **non-refoulement** is interpreted as guaranteeing that,

> no one should be returned to a country where they would face torture, cruel, inhuman or degrading treatment or punishment and other irreparable harm. This principle applies to all migrants at all times, irrespective of migration status.\(^{68}\)

Implied by the right to life and the prohibition of torture and ill-treatment,\(^{69}\) **non-refoulement** is explicitly stated in the CAT\(^{70}\) and the Convention for the Protection of All Persons from Enforced Disappearance (CPED).\(^{71}\)
The SDF are bound to respect *non-refoulement* both as a party to the conflict and as a human rights duty-bearer. They will have to consider the conditions of reception of alleged ISIL fighters and their families in their respective country of nationality, and make sure that their lives will not be endangered or that they will not face torture or other ill-treatment. *Non-refoulement* also needs to be considered by States that are encouraging the repatriation of these individuals to their country of nationality as well by those encouraging or facilitating repatriation of their own nationals to Iraq for prosecution, where they are likely to suffer a host of human rights violations as highlighted above. In addition, the principle of *non-refoulement* also applies to the hand over of detainees between one detaining authority to another, such as between the SDF and the Government of Syria, even if this takes place within the territory of Syria.
Accountability

Who is responsible for ensuring that suspected ISIL fighters are brought to justice?

As provided by IHL, States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. The obligation to investigate would concern Syria and the States whose nationals have allegedly committed war crimes, i.e., respective countries of nationality of foreign fighters. However, in particular in cases where international crimes have not been incorporated into national legislation, the most common offence used to prosecute alleged perpetrators is ‘membership in a terrorist group’. This means that the span of criminality committed by members of armed groups is not exposed and victims are prevented from knowing the truth behind the abuses/violations they suffered.72

States must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects. This would for example relate to the case of a belligerent occupation, as well as when acts of a non-State armed group are attributed to a State, i.e., when a State controls a specific armed group operating in the territory of another State.73

The positive obligation of third States to take accountability measures for acts allegedly committed by their own citizens could also be based on Common Article 1 to the Geneva Conventions providing that the parties to the Conventions must respect and ensure the respect of IHL.74 This article provides a basis for accountability measures pertaining to violations of IHL that are not considered war crimes, and not covered by the above-described obligation to investigate and prosecute.

IHRL might also justify accountability responsibilities of respective countries of nationality of alleged perpetrators. Similar to the argument made above, jurisdiction might be established for a specific country when the alleged perpetrator is one of its nationals. The CAT, for instance, expressly provides that State parties shall establish their jurisdiction when the alleged offender is one of its nationals.75

Furthermore, under the law of States’ responsibility for internationally wrongful acts, States are obliged to cooperate to bring to an end serious breaches of obligations under peremptory norms of general international law (erga omnes obligations) given that all States may have a legal interest in their protection.76 Such cooperation could include steps towards accountability. The work of the ILC on the obligation to extradite or prosecute (aut dedere aut judicare) might also be relevant.77

Despite it being an expression of the obligation to fight impunity for genocide, war crimes, crimes against humanity and for violations of IHL and gross violations of IHRL, it does not, however, include an obligation for States, including the country of nationality, to seek extradition.

Finally, various resolutions of the UN Security Council, which had designated ISIL as a terrorist group, have called on Member States to take action to combat terrorism. Such actions include the development and implementation of prosecution, rehabilitation and reintegration strategies for returning “foreign terrorist fighters” and their accompanying family members.78
In line with the principle of non-discrimination, all nationalities are considered here, including Syrians and Iraqis who are usually not included in the commonly used term of “foreign” fighters. This term is avoided here given its misleading nature.


3 Common Art. 3 to the Geneva Conventions and Art. 4(1) Additional Protocol II.

4 Common Art. 3 to the Geneva Conventions, Art. 4 and 5 Additional Protocol II, see ICRC Study on Customary IHL, Rule 99; Art. 9 ICCPR.

5 See HRC General Comment No. 35, para. 64.


11 See “Integrity of the judicial system”, Report of the High Commissioner for Human Rights, (A/HRC/43/35), para. 20. See also ICCPR, Article 9; and CCPR/C/GC/35, para.11.

12 Art. 3(1) and 37(b) CRC.

13 While this definition is to be found in Art. 41(2) of Additional Protocol I applicable in IAC, it is also based on Common Article 3 applicable in NIAC; see also ICRC Study on Customary IHL, Rule 47. See also OHCHR Syria, “Persons Hors de combat in Non-International Armed Conflicts,” September 2017.

14 Common Art. 3 to the Geneva Conventions; Specific judicial guarantees are further elaborated in Article 75 (4) of Additional Protocol I and Article 6 (5) Additional Protocol II, and are reflected in customary law (see ICRC Study on Customary IHL, Rule 100).

15 Art. 9 and 14 ICCPR.

16 See Art. 5(1) AP II; see ICCPR Study on Customary IHL, Rule 118.

17 See also ICCPR Study on Customary IHL, Rule 99.

18 See Human Rights Committee General Comment No. 35 (2014) on liberty and security of person; and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (A/RES/43/173).

19 See HRC General Comment No. 35, para. 15.


22 Art. 3(1) and 37(b) CRC.


24 Ibid., para. 728.

25 See HRC, General Comment No. 32, para. 19 (on the requirement of independence) and para. 21 (on impartiality).


29 See A/HRC/46/54, para 75


31 While there are no official figures pertaining to executions, the Iraqi High Commission for Human Rights reported in August 2019 that over 100 individuals have been executed in Iraq since January 2019, with more than 8,000 currently on death row. See Human Rights Watch’s compilation of 2019 events in Iraq, referring to data from the Iraqi Ministry of Justice. See also “Human Rights in the Administration of Justice in Iraq: Trials under the anti-terrorism laws and implications for justice, accountability and social cohesion in the aftermath of ISIL”, United Nations Assistance Mission for Iraq / OHCHR.

32 Art. 9 and 12 ICCPR.

33 In General Comment No. 35, para. 18, the Human Rights Committee states: “Any necessary detention should take place in appropriate, sanitary, non-punitive facilities and should not take place in prisons. The inability of a State party to carry out the expulsion of an individual because of statelessness or other obstacles does not justify indefinite detention.”


35 See “Migrant detention must be ‘last resort’, UN rights group underlines in its Revised Deliberation on deprivation of liberty of migrants,” 26 February 2018 and Revised Deliberation No. 5 referenced therein.
The question of the obligations of the country of nationality of the suspected ISIL fighters and their relatives has been mostly examined – at least publicly – under the prohibition of statelessness.

The Committee noted that “the State party, as the State of the children’s nationality, has the capability and the power to protect the rights of the children in question by taking action to repatriate them or provide other consular responses. These circumstances include the State party’s rapport with the Kurdish authorities, the latter’s willingness to cooperate and the fact that the State party has already repatriated at least 17 French children from the camps in Syrian Kurdistan since March 2019.” See Committee on the Rights of the Child, Decision concerning communications No.79/2019 and No. 109/2019, para. 9.

The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment stated that “the jus cogens non derogable prohibition against torture and ill-treatment cannot be territorially limited and that any jurisdictional references found in the Convention against Torture cannot be read to restrict or limit States’ obligations to respect all individuals’ rights to be free from torture and ill-treatment, anywhere in the world.” (Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 7 August 2015, para. 27 (A/70/303); see also CAT, General Comment No. 2, 23 November 2007, para. 16, CAT/C/GC/2.)


According to the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Fionnuala Ní Aoláin: “It seems obvious to note that countries have a positive obligation to take necessary and reasonable steps to intervene in favour of their nationals abroad, when there are reasonable grounds to believe that they face treatment in flagrant violation of international human rights law. This includes denial of justice; the imposition of the death penalty; torture or cruel, inhuman or degrading treatment; sexual violence; or deprivation of liberty in grave violation of human rights standards, including arbitrary detention, incommunicado detention, and detention that fails to comply with the most basic standards of humanity.”

Common Art. 1 to the Geneva Conventions; see also the ICRC Commentary of 2016 to Common Art. 1 to the Geneva Conventions, that elaborates on the existence of obligations to take positive steps as a third State to ensure the respect of IHL by parties to the conflict.


See ibid, in particular Art. 2 (Right to exercise diplomatic protection) and Art. 19 (Recommended Practice).

Art. 8(1) Convention on the Reduction of Statelessness.

Art. 8(2) Convention on the Reduction of Statelessness.

See for example, article 15 UDHR.

Art. 24(3) ICCPR; see also Art. 7(1) CRC.


Ibid.


Common Art. 3 to the Geneva Convention; see Art. 4 and 5 Additional Protocol II, and ICRC’s 1987 Commentary to Art. 5 AP II, para. 456; see ICRC Study on Customary IHL, Rule 99; Art. 6 and 12 ICCPR; the reference to fair trial and other due process guarantees does not imply the legitimacy of the authorities.

Common Art. 3 (1)(d) to the Geneva Conventions; see also ICRC Study on Customary IHL, Rule 100; Art. 9 and 14 ICCPR.

Art. 6 ICCPR; International Convention for the Protection of All Persons from Enforced Disappearance (CPED); See ICRC Study on Customary IHL, Rule 98; and also rights pertaining to family life and family unity (see FN 51).

Common Art. 3 (1) to the Geneva Conventions; see also Art. 4 and 5 Additional Protocol II; see ICRC Study on Customary IHL, Rule 87; Art. 7 ICCPR; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); it can also be argued that the uncertainty that such measures imply for the detainee in the absence of any charges, known evidence or trial, as well as of any foreseeable detention period, may amount to ill-treatment.

Art. 11, 12 and 13 ICESCR.

Art. 6 ICCPR.

Art. 17 and 23(1) ICCPR, Art. 10(1) ICESCR; Art. 8(1) and 16(1) CRC.

The lack of civil documentation impacts the ability to claim a series of rights, such as the right to be recognised as a person before the law, the right to family life, the right to an adequate standard of living, and the rights to work and to health.

Art. 33 (1) Convention relating to the Status of Refugees: “No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”


OHCHR, The principle of non-refoulement under international human rights law, 1.

Art. 6 and 7 ICCPR.

Art. 3 CAT.

Art. 16 CPED.


Under the law of State responsibility for internationally wrongful acts, States can be held responsible for acts of non-State armed group that are under their effective control (see e.g., Ezequiel Heffes/Brian E. Frenkel, “The International Responsibility of Non-State Armed Groups: In Search of the Applicable Rules,” Goettingen Journal of International Law 8 (2017) 1, 39-72.

See ICRC 2016 Commentary to Common Art. 1 to the Geneva Conventions, para. 181, which lists “resorting to penal measures to repress violations of humanitarian law” amongst possible individual measures.

Art. 5 (1)(b) CAT.

