Working Paper 242 – December 2023

Trial of Foreign Fighters by The Syrian Democratic Forces, a Desired and Legal Solution?

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Abstract

As we speak, the Syrian Democratic Forces are still detaining thousands of ISIS' (foreign) fighters in north-eastern Syria. The detention of foreign fighters by a non-state armed group, however, raises multiple legal issues. Since the foreign fighters' home states generally refuse to repatriate their nationals, the Syrian Democratic Forces have voiced their intention to bring these foreign fighters to trial. At first sight, such trials seem desirable, or at least that is what international and national politics often want us to believe. Nevertheless, at the normative, it is unclear whether a non-state armed group has the authority to conduct such trials. Further, it is debated which legal standard such trials should respect. Multiple solutions exist for this legal vacuum. All of these solutions are reasonable and defendable. Yet, this creates legal uncertainty. The fact that the Syrian Democratic Forces intend to bring these foreign fighters to trial based on their own counter-terrorism legislation further complicates the matter. Paying proper attention to the legality of the Syrian Democratic Forces' trial practice is, however, crucial. Hence, even if desirable, trials without proper legal foundation are null and void. Moreover, the UN counter-terrorism framework includes a multitude of home states' obligations for states to prosecute their nationals themselves. Given the considerably high number of foreign fighters awaiting trial, this working paper will assess the legality of the Syrian Democratic Forces' trials both *in abstracto* and *in concreto*. It will highlight some of the issues that this situation entails and potential solutions under international law, in particular under international humanitarian law. It will also critically assess home states' obligations in relation to such trials.

Keywords

Non-State Armed Group, Foreign Fighters, International Humanitarian Law, Jungle Justice

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Introduction[1]

While the world is focusing on Ukraine and Palestine, thousands of ISIS' (foreign) fighters are still detained by the Syrian Democratic Forces ('SDF') in north-eastern Syria. According to the SDF, hundreds of these detainees are European citizens, most of which French, British, or German.[2] Most European States, however, have refrained from repatriating their nationals or only repatriated very few.[3] Until proper repatriation by their home states, the SDF detain these foreign fighters under their own counter-terrorism law.[4] After the SDF started trying Syrian ISIS' fighters, they have now also voiced their willingness to bring ISIS' foreign fighters of over 50 nationalities to court.[5] The Syrian government, however, did not grant the SDF any domestic law enforcement authority and might, therefore, declare the detention and prosecution by the SDF illegal under domestic law.[6] In the wake of the Covid-19 pandemic, these trials were postponed indefinitely.[7]

Despite the conundrum explained above, these detainees do not find themselves in a legal vacuum. Based on their status, international law provides clear rules on detention and on how these trials should be held.[8] This working paper, therefore, provides a legal analysis of the

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[1] This paper is based on the author's LL.M. Paper as submitted in 2020 at Geneva Academy and has been fully updated.

[2] The Genocide Network, 'Cumulative prosecution of foreign terrorist fighters' (*Publications Office of the European Union*, 27 May 2020) 6 <https://op.europa.eu/en/publication-detail/-/publication/4e735379-a0ca-11ea-9d2d-01aa75ed71a1/language-en> accessed 30 September 2020.

[3] Human Rights Watch, '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 7 July 2020; Emma Broches, 'Wat is Happening With the Foreign Women and Children in SDF Custody in Syria' (*Lawfare*, 24 March 2020) <https://www.lawfareblog.com/what-happening-foreign-women-and-children-sdf-custody-syria> accessed 7 July 2020.

[4] Congressional Research Service, 'Armed Conflict in Syria: Overview and U.S. Response' (*EveryCRSReport.com*, 27 July 2020) 15 <https://www.everycrsreport.com/files/2020-07-27_RL33487_30869ea01706e6bac19a0ab2d33804707474d096.pdf> accessed 5 May 2022; Fight for Humanity Expert Meeting, 'ISIS Members Detained in North East Syria - Legal and Security Challenges and Recommendations for Their Judgment Under International and National Law' (*Fight for Humanity*, 23 May 2019) 4 <https://static.wixstatic.com/ugd/dead75_7395d8f1aa884853b2f60089d0909a3c.pdf> accessed 29 June 2020.

[5] XX, 'Syrian Kurds to put Isis fighters from dozens of countries to trial' *The Guardian* (London, 6 February 2020) <https://www.theguardian.com/world/2020/feb/06/syrian-kurds-to-put-isis-fighters-from-dozens-of-countries-on-trial> accessed 10 July 2020.

[6] Kevin S. Coble, 'Addressing the Foreign ISIS Fighter Problem: Detention and Prosecution by the Syrian Democratic Forces (2021) Military Law Review 107, 113.

[7] Heather Murdock, 'Trials of IS Fighters in Syria Suspended Indefinitely' *VOA News* (Middle East, 2 April 2020) <https://www.voanews.com/a/middle-east_trials-fighters-syria-suspended-indefinitely/6186830.html> accessed 5 May 2022.

[8] Jonathan Horowitz, 'Kurdish-Held Detainees in Syria Are Not in a "Legal Gray Area"' (*Just Security*, 13 April 2018) <https://www.justsecurity.org/54866/kurdish-held-detainees-syria-legal-gray-area/> accessed 10 July 2020.

SDF's trial practice both *in abstracto* and *in concreto*. The first section will introduce some important notions and provides a factual background of the situation. Secondly, this working paper will assess the legality of the SDF's trials and investigate the interaction with home states' obligations under the United Nations ('UN') Security Council's counter-terror framework. The allegations on inhumane detention practices and corresponding violations of international law will not be analysed.

1. Armed Conflict and Factual Background

This first section will introduce some of the key concepts and the actors involved in the armed conflict. This is a crucial step to any legal analysis since the applicable legal framework is dependent upon proper classification of the factual situation.

A. The Notion of Foreign Fighters

The first important notion to explain is the concept of 'foreign fighters'. Even if the concept is used quite frequently in international politics and popular media, there exists no internationally binding definition of foreign fighters. However, the UN Security Council Resolution 2178 provides a definition in its preamble of foreign *terrorist* fighters, so focusing on the counter-terrorism aspect. It defines them as "individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict".[9] This definition is largely accepted and recognised by scholars and practitioners as authoritative.[10] However, at the same time, this definition is not immune to critique since foreign fighters might also travel abroad to participate in an armed conflict but respect the rules of IHL. Thus, not necessarily participating in acts of terrorism (*infra*). Therefore, foreign fighters ought not to be equated with terrorists and the definition cited here has to be nuanced.[11]

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[9] UNSC Res 2178 (24 September 2014) UN Doc S/RES/2178, Preamble.
[10] *Supra* No.2, 4.
[11] Rogier Bartels, 'When Do Terrorist Organisations Qualify as "Parties to an Armed Conflict" under International Humanitarian Law?' (2018) The Military Law and Law of War Review (forthcoming) <https://ssrn.com/abstract=3209305> accessed 30 June 2020; Hanne Cuyckens and Christophe Paulussen, 'The prosecution of foreign fighters in Western Europe: the difficult relationship between counter-terrorism and international humanitarian law' (2019) Journal of Conflict & Security Law (forthcoming) <https://ssrn.com/abstract=3471908> accessed 30 June 2020.

In the Syrian context, the foreign fighters travelling from Europe to Syria are having various ethnic backgrounds, both Muslims and recent converts without prior connection to Syria. Most of them are male, whereas only 17% of them are female.[12] According to the International Centre for the Study of Radicalisation, in 2018, 7,252 people from Eastern Europe and 5,904 from Western Europe were somehow affiliated with ISIS.[13] Though, of course, not all of them travelled to Syria. The foreign fighters detained by the SDF, however, did purposely travel abroad to join ISIS. They support the violent pursuit of imposing ISIS' ideology upon the Syrian population and the dream of establishing the Caliphate. Since these foreign fighters joined a NSAG engaged in a non-international armed conflict ('NIAC')(*infra*), we can assume that there is a sufficient nexus between them and the NIAC to subject them to the rules of IHL. Under IHL, however, the notion of foreign fighters as such does not exist. Therefore, I agree with Sassòli that these detainees have to fall within one of the categories recognised under current IHL. They should benefit from the protections offered by IHL and ought not be excluded from IHL's protective regime based on contested theories such as the 'unlawful combatant'-concept.[14] It is a key principle of IHL that *tertium non datur*. It must be prevented that people find themselves in a legal vacuum, no matter the atrocities they have allegedly committed. For instance, mercenaries do not enjoy combatant status, nor prisoner of war status,[15] but they are not excluded from the protection of IHL. Though it must be acknowledged that mercenaries take part in hostilities motivated by the desire for private gain rather than religion or ideology.[16] We should, therefore, classify these foreign fighters as members of a NSAG with a continuous combatant function or "fighters" (*infra*).[17]

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[12] *Supra* No.2, 6.
[13] *Ibid*.
[14] Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edward Elgar Publishing 2019) 272-275&503.
[15] Article 47 Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (APII) .
[16] Geneva Academy, 'Foreign Fighters under International Law' (Academy Briefing No.7, Geneva Academy October 2014) 16.
[17] *Supra* No.11 Cuyckens and Paulussen, 4-5.

B. Islamic State (ISIS)

The UN Security Council formally classified ISIS as a terrorist organisation.[18] This classification is important because it triggers the application of the UN counterterrorism regime and corresponding obligations for UN member states (*infra*). Since 2010, ISIS has been under the responsible command of Ibrahim Awwad Ibrahim Ali al-Badri al-Saarrai, more commonly known as Abu Baker Al-Baghdadi or the 'Caliph'.[19] ISIS is a hierarchically well-structured group that used to control a sizeable portion of the Syrian territory. They also created a system of governance that provides public utilities such as health care, education, security and food.[20] At its height, ISIS controlled over 100,000 km² of territory and approximately 11 million persons residing in this area.[21] By late 2014, ISIS estimately had 20,000 till 31,000 fighters, many of them foreign fighters.[22] Some even estimate that 41,490 fighters were fighting on behalf of ISIS.[23]

C. The Syrian Democratic Forces (SDF)

The SDF are an alliance that is primarily dominated by the Kurdish People Protection Units' forces - the armed wing of the Syrian Kurdish Democratic Union Party -, but also includes Arab and Assyrian armed groups, the Free Syrian Army and other Syrian opposition groups.[24] With the assistance and support of the US, they became one integrated entity to defend the Kurdish northern part of Syria in late 2015.[25] The US also supported the SDF's fight against ISIS through delivering air strikes, weapons, and military advice.[26] At first, the SDF started under

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[18] For example in UNSC Res 2253 (17 December 2015) UN Doc.S/RES/2253 and UNSC Res 2170 (15 August 2014) UN Doc. S/RES/2170.
[19] For more information on Islamic State's roots and links to other terrorist organizations see e.g. *Supra* No.6, 110-111 and *Supra* No.2, 10.
[20] David A. Wallace, Amy McCarthy and Shane Reeves, 'Trying to make sense of the senseless: classifying the Syrian war under the law of armed conflict' (2017) Michigan State International Law Review 555, 567-568.
[21] *Supra* No.2, 5.
[22] *Supra* No.20, 568.
[23] *Supra* No. 2, 10.
[24] RULAC, 'Non-international armed conflict in Syria' (Geneva Academy, 22 January 2020) <http://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-syria> accessed 30 June 2020; UNHRC 'Human rights abuses and international humanitarian law violations in the Syrian Arab Republic, 21 July 2016-28 February 2017' (10 March 2017) UN Doc A/HRC/34/CRP/3, para 86.
[25] *Supra* No.19, 569; Dan E. Stigall, 'The Syrian Detention Conundrum: International and Comparative Legal Complexities' (2020) Harvard National Security Journal 54, 59.
[26] XX, 'Who are the Kurds?' *BBC* (London, 15 October 2019) <https://www.bbc.com/news/world-middle-east-29702440> accessed 20 September 2022.

the command of General Mazlum Kobane.[27] Since their inception, the SDF's size and composition have varied considerably. However, they generally consisted of approximately 60,000 fighters.[28] By 2019, the SDF controlled almost one third of the Syrian territory. They maintained a quasi-government in areas of relative autonomy in north-eastern Syria, also known as 'Rojava', 'Syrian Kurdistan' or 'West-Kurdistan'.[29] Though Kurdish-led, the administration is inclusive and represents Arab and other ethnic minority populations in the region.[30] This Kurdish autonomous administration consists of three cantons which have their own legislative, judicial and executive councils and courts.[31] Despite the far-going autonomy of the region, the Syrian Kurds do not seek independence. They only pursue the recognition of Kurdish autonomy and (internal) self-determination once the conflict in Syria is politically settled.[32] As it stands, the Kurdish administration in north-eastern Syria is not recognised internationally, nor domestically as a sovereign state.[33]

D. Conflict Qualification and Applicable Law

For IHL to apply, it is necessary that the situation constitutes an armed conflict. Since ISIS and the SDF are two non-state entities, the situation could only classify as a non-international armed conflict ('NIAC'). Such qualification requires that the fighting between the SDF and ISIS meets a certain intensity threshold and that both non-state parties involved have a level of organisation as established per the ICTY *Tadić*-case.[34] However, the situation in Syria is complex,[35] consisting of *inter alia* various NIACs fought between different NSAGs.[36] The conflict between both groups started in mid-2013 when ISIS directed its military efforts towards conquering three Kurdish enclaves that bordered its territory in northern Syria. The People's Protection Units of the Kurdish administration managed to repel ISIS' repeated attacks. In September 2014, however, ISIS launched a large-scale assault on the town of Kobane, forcing

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[27] *Supra* No.6, 112.
[28] *Supra* No.25 Stigall, 59-60.
[29] *Ibid*.
[30] *Supra* No.6, 112.
[31] *Supra* No.25 Stigall, 61.
[32] *Supra* No.26.
[33] Liz Sly, 'Captured ISIS fighters get short sentences and art therapy in Syria' *The Washington Post* (Washington DC, 14 August 2019) <https://www.washingtonpost.com/world/2019/08/14/captured-isis-fighters-get-short-sentences-art-therapy-syria/?arc404=true> accessed 20 July 2020.
[34] *Tadić Case* (Trial Judgment) IT-94-1-AR72 (2 October 1995) para 562.
[35] For further information on the conflict and its background see e.g. *Supra* No.6, 109-113.
[36] *Supra* No.20, 590.

tens of thousands of people to flee across the nearby Turkish border. In January 2015, after a battle that killed at least 1,600 people, the Kurdish forces regained control over Kobane. At this moment in time, the Kurds fought alongside several local Arab militias as the newly created SDF alliance. The SDF steadily reconquered tens of thousands of square kilometres of territory in north-eastern Syria on ISIS. In October 2017, the SDF took over the *de facto* ISIS' capital of Raqqa and advanced south-eastwards into the neighbouring province of Deir al-Zour, ISIS' last major foothold in Syria. In March 2019, the very last Syrian stronghold of ISIS, near the village of Baghouz, fell into the hands of the SDF.[37] Between 2015 and 2021, the conflict killed an estimated twelve thousand SDF-affiliated persons and over twenty thousand ISIS' affiliates.[38] Hence, it can be concluded that the conflict is sufficiently intense.

Both ISIS and the SDF clearly classify as NSAGs with sufficient organisation.[39] The SDF are organised under the command and control of General Mazlum Kobane. They operate as one organised unit of roughly 60,000 fighters.[40] They exercise exclusive control over Rojava and have been conducting military operations against ISIS in their current composition since 2015. Also ISIS operates under the command and control of a single individual, though its leadership has changed over the course of the conflict and was generally dominated by foreign fighters. ISIS used to control a substantive part of north-eastern Syria and managed to build out an exclusive zone of control, the Caliphate.[41]

It is important to keep in mind that the terrorist nature and/or ideology of a group are not considered relevant indicators to assess the level of organisation of NSAGs, nor the applicability of IHL.[42] For instance, the UN Commission of Inquiry in 2006 determined that an armed conflict existed between Hezbollah and Israel, regardless of Israel's characterisation of Hezbollah as a terrorist organisation.[43] Also Boko Haram, FARC, Al-Qaeda, and Al-Shabaab are well-known examples of NSAGs being party to a NIAC and carrying the terrorist-label.[44] Therefore, ISIS' terrorist classification does not impede the application of IHL (*infra*). After all, to conclude the existence of a NIAC, the facts on the ground are all that matters. A similar approach has been accepted in cases of alleged involvement of international peacekeeping

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[37] *Supra* No.26.
[38] *Supra* No.6, 115.
[39] *Supra* No.20, 588.
[40] *Supra* No.6, 112; *Supra* No.25 Stigall, 59.
[41] *Supra* No.6, 116-117.
[42] *Prosecutor v Ramush Haradinaj et al* (Judgement) ICTY-04-84-T (3 April 2008) para 60.
[43] Human Rights Council, 'Report of the Commission of Inquiry on Lebanon, pursuant to Human Rights Council Resolution S-2/1' (23 November 2006) UN Doc A/HRC/3/2, para 62; *Supra* No.16, 23.
[44] *Supra* No.11 Bartels, 16.

forces in armed conflict.[45] Bartels confirms this view by stating that the designation of a group as "terrorist" is often done for political reasons. It would be more appropriate to consider terrorism as a method of conducting hostilities rather than a type of warfare in itself (*infra*).[46] ISIS' non-compliance with IHL does not as such impede the existence a NIAC, nor the application of IHL. Especially since in ISIS' case the disregard for the rules of IHL is rather the result of an unwillingness to comply with these rules, not a matter of incapability.[47]

Based on the above, it can be concluded that it concerns an armed conflict between two organised armed groups meeting the threshold of violence, i.e. a NIAC.[48] Also the Geneva Academy RULAC-database classifies the conflict as a NIAC.[49] Common Article 3 to the Geneva Conventions ('CA3') and customary IHL will, therefore, be applicable. Additional Protocol II to the Geneva Conventions ('APII'), however, does not apply *qua* treaty law since Syria is not a party to it and both sides to the conflict are NSAGs.[50] Therefore, APII-related considerations will be relied upon to the extent that these rules are custom.

2. The Legality Assessment of Trial by The SDF

Since 2014, the SDF have been trying ISIS fighters with Syrian nationality.[51] In 2020, they expressed their intention to try foreign fighters as well.[52] Under current IHL, however, the SDF are not explicitly granted the right to hold trials.[53] IHL simply provides certain rules that the

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[45] Nils Melzer, *International Humanitarian Law: A Comprehensive Introduction* (ICRC, Geneva 2016) 50.
[46] *Supra* No.11 Bartels, 7-8.
[47] *Supra* No.2, 10.
[48] *Supra* No.8.
[49] RULAC, 'Non-international armed conflict in Syria' (Geneva Academy, 22 January 2020) <http://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-syria> accessed 30 June 2020.
[50] Article 1(1) APII; ICRC, 'Treaties, States Parties and Commentaries' <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=SY> accessed 25 July 2020.
[51] Will Christou, 'The 'Autonomous Administration' struggles under weight of ISIS detainees as insurgency evolves' (*Syria Direct*, 17 September 2019) <https://syriadirect.org/news/the-%e2%80%98autonomous-administration%e2%80%99-struggles-under-weight-of-is-detainees-as-insurgency-evolves/> accessed 20 July 2020.
[52] Thomas Renard, 'Fair juger nos djihadistes en Syria : la fausse bonne idée' *Le Soir* (Paris, 26 February 2020) <https://plus.lesoir.be/282862/article/2020-02-26/faire-juger-nos-djihadistes-en-syrie-la-fausse-bonne-idee> accessed 27 July 2020.
[53] The US, for instance, also explicitly states in its military manual that a "non-State armed group lacks authority to prosecute members of the State armed forces" (US Department of Defense, *Department of Defense Law of War Manual* (Office of General Counsel Department of Defense, 2016) 1042).

SDF should respect once they decide to hold trials.[54] This implies that the Syrian government could still declare these trials null and void, release those convicted by the SDF, and prosecute the SDF for holding these trials.[55] However, the Syrian government could only take such measures under domestic law.[56] At the same time, CA3 does not explicitly prohibit the establishment of courts, nor the holding trials.[57] The ICRC accepts the establishment of courts by NSAGs as part of their duty to maintain law and order and to ensure respect for IHL.[58] As explained by Somer, the *effet utile* of the equality of belligerents requires that the SDF have the legal capacity to exercise the rights which flow from their obligations under IHL. Therefore, one could deduct from the fair trial obligations that protect those *hors de combat* (*infra*) that the SDF must have the right to legislate to establish courts, to enact penal legislation covering conduct related to the conflict, and to hold trials.[59] In its commentary to Article 6 APII, the ICRC explains that the reference in the Article to "*every responsible organized body*" able to hold trials includes bodies created by "*dissident armed forces and organized armed groups within the meaning of Article 1 of the Protocol, which are opposed to the government in power*".[60] The Swedish District Court, citing Klamberg, accepted that NSAGs can establish courts in situations similar to occupation under GCIV. Others subscribe to this reasoning.[61] Also the Global Coalition against ISIS implicitly supports the SDF's trials by stating that it *"appreciates*

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[54] More in particular in CA3 and Article 6 APII.

[55] *Supra* No.8; Louise Doswald-Beck, 'Judicial Guarantees under Common Article 3' in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (Oxford Public International Law, Oxford 2015) para 86.

[56] Jonathan Somer, 'Jungle justice: passing sentence on the equality of belligerents in non-international armed conflict' (2007) international Review of the Red Cross 655, 663.

[57] *Supra* No.56, 670.

[58] ICRC, 'Commentary of 2016 to Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949' (2016) para 689 <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=CDEF5D508578B983C1257F15004A89CA> accessed 7 July 2020.

[59] *Supra* No.56, 658&663.

[60] Article 6 APII further supplements and develops CA3 and "lays down some principles of universal application which every organized body must, and can, respect," according to the ICRC Commentary (ICRC, 'Commentary of 1987 to Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977' (1987) para 4597 <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=0F47AE2F6A509689C12563CD004399DF> accessed 7 July 2020)(*infra*); ICRC, 'Commentary of 1987 to Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977' (1987) Footnote 3 <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=0F47AE2F6A509689C12563CD004399DF> accessed 7 July 2020.

[61] *Sweden v Syria*, Case No. B 3787-16, Stockholm District Court (16 February 2017) para 31 <https://casebook.icrc.org/case-study/swedensyria-can-armed-groups-issue-judgments>; *Supra* No.55 Doswald-Beck, para 88.

the considerable contributions and continued work of all those who contributed to hold ISIS accountable for its heinous crimes."[62] Moreover, the UN Security Council and/or UN Special Rapporteurs have a track record of calling upon all warring factions in NIAC, irrelevant of their status, to bring alleged perpetrators to justice.[63]

All of the above leads to the same conclusion, though based on different argumentation: the SDF are entitled to organize trials and bring ISIS' fighters to justice. Nevertheless, this conclusion seems limited to offences related to hostilities, arguably war crimes. When the SDF prosecute ISIS' fighters for terrorist offences, and not for violations of IHL, the SDF's judicial capacities are less clear cut (*infra*). Moreover, the limits to the territorial jurisdiction of the SDF's courts and legislation have to be taken into account (*infra*).[64] This section will look into the applicable law that governs NSAGs' courts and the legal standard to which courts and proceedings by NSAGs are subject. It is important to make such analysis both *in abstracto* and *in concreto* since, for instance, the European Court of Human Rights has made clear that the Court would not automatically accept sentences passed by courts established by NSAGs.[65]

A. Applicable Provisions: IHL vs Human Rights

Despite the uncertainty surrounding the legal basis for NSAGs to prosecute and to establish courts (*infra*), current IHL provides some clarity on the way in which trials should be conducted. The general rule in CA3 prohibits the imposition of sentences and executions without a judgement by a regularly constituted court that provides appropriate judicial guarantees. The same principle can be found in Rule 100 of the ICRC Customary Law Study. Since the protections provided in Article 75 API and Article 6 APII are custom, the SDF also need to respected them.[66] Moreover, since General Comment 29 recalls the link between fair trial

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[62] U.S. Embassy and Consulates in Turkey, 'Statement by Ministers of the Global Coalition to Defeat ISIS/DAESH' (*Media Note*, 6 February 2019) <https://tr.usembassy.gov/statement-by-ministers-of-the-global-coalition-to-defeat-isis-daesh/> accessed 7 July 2020.

[63] See for example on the situation in Côte d'Ivoire UNSC Res 1479 (13 May 2003) UN Doc S/RES/1479(2003), §8; on the situation in Liberia UNSC Res 1509 (19 September 2003) UN Doc S/RES/1509(2003) para 10; and on the situation in Sudan Report of the Special Rapporteur, Mr. Gáspár Bíró, submitted in accordance with Commission on Human Rights resolution 1995/77 (20 February 1996) UN Doc E/CN.4/1996/62, para 87

[64] *Supra* No.5, 689; *Supra* No.4 Fight for Humanity Expert Meeting, 3.

[65] *Ilaşcu and others v Moldova and Russia* (Judgment) Case no 48787/99 (8 July 2004) para 436.

[66] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules* (Cambridge Univeristy Press, Camebridge 2005) 324, 391, 394, 431-432, 546, 554 & footnotes 23, 25, 37, 44, 46, 49, 52, 63, 84, 95, 99, 109, 118, 139, 140, 212, 227, 281, 328, 343, 344, 360, 370, 378, 379, 420, 432, 440, 450, 457, 465, 474, 486, 495, 508.

guarantees and *ius cogens*,[67] NSAGs are arguably also bound by the guarantees under international human rights law.[68] Similarly, Andrew Murrison stated in the UK Parliament that ISIS' fighters "*should face justice through a fair trial in the most appropriate jurisdiction*" and that "*any internationally-supported justice mechanism must respect human rights and the rule of law as well as ensure fair trials and due process*."[69] However, not everyone agrees on the blank applicability of human rights considerations. For instance, Somer argues that the fair trial guarantees under IHL do not import international human rights law *qua* human rights, but by analogy in order to respect the equality of belligerents.[70]

B. Court Established by Law

After establishing the entitlement to organize trials (*supra*), the next important consideration to reflect upon is the requirement that the competent court concerned should be 'established by law'. This requirement is explicitly stated in the 'right to fair trial'-provision in Article 14 of the International Covenant on Civil and Political Rights ('ICCPR').[71] Arguably, looking into the ICCPR for clarification and interpretation is justified here since Article 6 APII, which further develops and explains CA3 (*infra*), "*is largely based on the International Covenant on Civil and Political Rights, particularly Article 15*" as explained in the ICRC commentary.[72] Nevertheless, analogies between IHL and international human rights law have to be nuanced. CA3(1)(d) notably only requires a "*regularly constituted court*" instead of a "*court established by law*". According to the ICRC Customary Law Study, a court is "*regularly constituted*" if it has been established and organised in accordance with the laws and procedures already in force in a country.[73] As a NSAG opposing the central government, the SDF could impossibly comply with

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[67] UNHRC 'CCPR General Comment No.29: Article 4: Derogations during a State of Emergency' (31 August 2001) UN Doc CCPR/C/21/Rev.1/Add.11, para11.
[68] Article 14 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); Geneva Call, 'Administration of Justice by Armed Non-State Actors' (*Report from the 2017 Garance Talks*, August 2018) 8 <https://genevacall.org/wp-content/uploads/dlm_uploads/2018/09/GaranceTalks_Issue02_Report_2018_web.pdf> accessed 20 September 2021; *Supra* No.55, Doswald-Beck, paras 78-80.
[69] Andrew Murrison, 'Syria : Britisch Nationals Abroad Question for Foreign and Commonwealth Office' (*UK Parliament*, 23 October 2019) <https://questions-statements.parliament.uk/written-questions/detail/2019-10-23/4299> accessed 7 July 2020.
[70] *Supra* No.56, 688.
[71] Article 14(1) ICCPR.
[72] *Supra* No.58 ICRC, para 4597.
[73] ICRC, 'Commentary to Customary Rule 100' (2005) <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule100> accessed 7 July 2020>; *Supra* No.67, para 692.

the Syrian national laws and procedures. Moreover, such requirement does not align with the battlefield reality that many NSAGs establish courts and try people. This contradiction between law and practice was taken up during the drafting of APII and resulted in the removal of the 'by law'-requirement from the final text of Article 6 APII.[74] The ICRC Commentary also explains that it may be argued that courts are regularly constituted as long as they are constituted in accordance with the 'laws' of the NSAG in order to guarantee the *effet utile* of Article 6 APII.[75] Sivakumaran, similarly, points out that the 'regularly constituted court'-requirement should not be construed too literally with regard to NSAGs. The test should rather be one of appropriateness, meaning that the court should be created by the appropriate authorities which are acting under the appropriate powers and according to the appropriate standards.[76] Therefore, when accepting such interpretation, the court itself would not have to be established prior to the start of the hostilities, nor established by a state entity.[77] Also Element 4 of the International Criminal Court's Elements of Crimes on Art.8(2)(c)(iv) provides a nuanced definition of 'regularly constituted' in the context of CA3. Element 4 only requires that the court affords the essential guarantees of independence and impartiality.[78] Even if caution is required when relying on international criminal law to interpret IHL, one cannot ignore that the content of Article 8(2)(c)(iv) Rome State was largely influenced by Article 6(2) APII,[79] which *"supplements and develops common Article 3, paragraph 1, sub-paragraph (1)(d)"* and clarifies the general prohibition in CA3 *"to strengthen the prohibition of summary justice and of convictions without trial"*.[80] Based on these arguments, NSAGs are arguably bound by less strict requirements than a state under Article 14 ICCPR. This was also confirmed by the European Court of Human Rights in *Ilaşcu and others v Moldova and Russia* when the Court observed that *"in certain circumstances, a court belonging to the judicial system of an entity not recognised under international law may be regarded as a tribunal "established by law" provided that it forms part of a judicial system operating on a "constitutional and legal basis"*

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[74] *Supra* No.6, 144.
[75] *Supra* No.73, para 692.
[76] Sandesh Sivakumaran, 'Courts of Armed Opposition Groups: Fair Trials or Summary Justice?' (2009) Journal of International Criminal Justice 489, 499
[77] *Supra* No.6, 146.
[78] In his commentary to the Rome Statute, Dörmann includes a list, though not exhaustively, of all guarantees which the court and the tribunal ought to respect in order to speak of a 'regular court affording all judicial guarantees which are generally recognized as being indispensable' (Knut Dörmann, Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary (Cambridge University Press, 2003) 410-411).
[79] *Supra* No.78 Dörmann, 408.
[80] *Supra* No.58 ICRC, para 4597

reflecting a judicial tradition compatible with the Convention, in order to enable individuals to enjoy the Convention guarantees."[81]

In concreto, Rojava's legal structure is rather fluid and varied. It is based on Rojava's constitution and Syrian civil law.[82] At the centre of the judicial system are the Peace and Consensus Committees, which are quasi-judicial councils. They replace the Syrian governmental courts and settle civil and criminal cases in Rojava. Some of these Committees date back to the 1990s and operated underground since then until the start of the Syrian Civil War in 2012. Once the territory of Rojava was liberated from ISIS, the SDF established regional Justice Councils to implement a broader and more organised justice system.[83] The SDF also established the Defence of the People Courts to deal with terrorism prosecutions of foreign fighters.[84] However, it remains unclear through which procedure these courts were established.[85] This unclarity makes it difficult to assess whether the SDF's Defence of the People Courts satisfy the first criterion of 'court established by law'. If, however, these courts were established by the competent Justice Councils, one can assume that they have been created in accordance with the internal rules of the SDF and, therefore, meet the requirement of 'regularly constituted court'.

C. Judicial Guarantees and The SDF's Trial Practice

Third, one should assess the judicial guarantees that the SDF's Defence of the People Courts should respect. As explained above, CA3, Article 75 API and Article 6 APII – the latter two articles both apply *qua* customary law – include substantive guarantees that the SDF's trials need to respect.[86] Even more, as highlighted in the ICRC Commentary, the question of whether

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[81] *Ilaşcu and others v Moldova and Russia* (Judgment) Case no 48787/99 (8 July 2004) para 460.
[82] *Supra* No.25 Stigall, 63.
[83] *Supra* No.6, 146-147.
[84] *Supra* No.25 Stigall, 63.
[85] Human Rights Watch, 'Northeast Syria: Boys, Men Held in Inhumane Conditions' (*Human Rights Watch*, 8 October 2019) <https://www.hrw.org/news/2019/10/08/northeast-syria-boys-men-held-inhumane-conditions> accessed 20 July 2020.
[86] CA3 only includes the general reference to "judicial guarantees which are recognized as indispensable by civilized peoples" whereas both Article 75 Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (API) and Article 6 APII refer to specific guarantees that ought to be respected. Especially the open reference in CA3 allows for different

NSAGs can impose sentences depends on their abilities to respect these fair trial guarantees.[87] Somer even argues that those NSAGs who are capable of fulfilling these guarantees, should be granted the right to hold trials and prosecute, irrelevant of the procedure through which the courts are established.[88] This reasoning is also echoed elsewhere.[89] *In abstracto*, since Rojava's constitution proclaims the separation of powers, these courts are arguably independent.[90] Furthermore, the right to be tried by a competent and impartial tribunal during a fair and public hearing in full equality is explicitly acknowledged in Rojava's constitution.[91] A proper analysis of the SDF's respect for fair trial guarantees, however, requires an assessment of how the SDF are conducting trials and which sentences are imposed *in concreto*.

Starting with the law on which these proceedings are based, the SDF are prosecuting ISIS' fighters based on counter-terrorism legislation adopted by the autonomous Kurdish administration in 2014.[92] Since NSAGs have the capacity to legislate under IHL,[93] one can assume that the adoption of criminal law is as such not a problem. Especially since the SDF have exclusive territorial control over Rojava to the exclusion of state authorities, this legislative power is justified by analogy with situations of occupation in which the occupying power enjoys the authority to legislate based on the *de facto* need for legislation to maintain proper administration and order in the region concerned.[94] However, this analogous legislative power

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interpretations as to which guarantees are comprised in the provision. Those of APII, IHL of international armed conflict, or even international human rights law? Sivakumaran makes the important remark that "relying on rules that are inherently beyond the reach of armed groups and which they have no hope of meeting serve little useful purpose" with which he means that the application of very stringent requirements would be detached from the reality that NSAGs hold and will hold trials. Therefore, humanitarian considerations should not incline us to impose rules that are too stringent and impossible to live up to by NSAGs. In his opinion, irrelevant of the approach taken, the guarantees applicable to NSAGs should be interpreted in such a way which both respects their substance and makes compliance with them by NSAGs possible. Furthermore, he finds that the approach to interpret CA3 based on Article 6 APII most compelling (*Supra* No.73, 501-503)

[87] *Supra* No.73, para 691.

[88] *Supra* No.56, 671&687.

[89] *Supra* No.73, paras 678&694; *Supra* No. 61 *Sweden v Syria*, paras 27-28.

[90] Articles 13 & 63 Social Contract of Rojava Cantons in Syria <https://civiroglu.net/the-constitution-of-the-rojava-cantons/>.

[91] Articles 64 & 72 Social Contract of Rojava Cantons in Syria <https://civiroglu.net/the-constitution-of-the-rojava-cantons/>.

[92] Amnesty International, 'Syria: Arbitrary detentions and blatantly unfair trial mark PYD fight against terrorism' (*Amnesty International*, 7 September 2015) <https://www.amnesty.org/en/latest/news/2015/09/syria-abuses-mar-pyd-fight-against-terrorism/> accessed 20 July 2020.

[93] *Supra* No.58 ICRC, para 4605; *Supra* No.76, 507-508.

[94] See e.g. Articles 50, 64 & 65 Convention (IV) relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (GCIV).

would arguably be limited to what is absolutely necessary and allowed under the law of occupation. In addition, the SDF's laws should arguably be limited to the period of the NIAC and cases with a nexus to the NIAC.[95]

In 2016, the UN General Assembly has urged states to ensure that laws criminalizing terrorism are accessible, formulated with precision, non-discrimination, non-retroactivity and in accordance with international law, including international human rights law.[96] Considering the open-ended reference to judicial guarantees in CA3, the imposition of international human rights law obligations onto NSAGs cannot automatically be excluded.[97] Since the SDF have exclusive territorial control over Rojava, it can be argued that they must ensure that their counter-terror legislation meets these UN imposed requirements as well. Moreover, Rojava's constitution adheres to international human rights law and states that its laws cannot contradict international human rights law.[98] Based on the above, it is fair to state that the SDF's counter-terror law should comply with the legality principle; be accessible to the public; and be formulated with sufficient precision to enable individuals to adapt their conduct accordingly.[99]

The SDF's criminal counter-terrorism legislation was adopted at the beginning of the NIAC between ISIS and the SDF and, arguably, prior the commission of many of the offences for which ISIS' foreign fighters would be tried. Therefore, SDF's proceedings might respect the legality principle. Nevertheless, the requirements of accessibility and sufficient precision raise questions. How can one NSAG make its legislation sufficiently accessible to the members of an opposing NSAG and to what extent are ISIS' members expected to adapt their behaviour to regulations not coming from the Syrian State? Since there is no international definition of terrorism (*supra*), the SDF cannot transpose such international definition into their *own* law to remedy these concerns. The only way out of such impasse would be for the SDF to either limit their terrorist offences to internationally recognised war crimes or to refer in its own regulations to the pre-existing Syrian domestic criminal law. Regarding the latter, despite implementing a

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[95] By analogy, one can look into the treatment of laws adopted by *de facto* governments and the limited legitimacy that should be awarded to them. For further reading on this see e.g. Tim Dockery, 'The Rule of Law Over the Law of Rulers: The Treatment of De Facto Laws in Argentina' (1995) Fordham International Law Journal 1578.

[96] UNGA Res 70/148 (25 February 2016) UN Doc A/RES/70/148, para 6(o).

[97] *Supra* No.76, 501.

[98] Articles 20-22 & 88 The Social Contract of Rojava Cantons in Syria <https://civiroglu.net/the-constitution-of-the-rojava-cantons/>.

[99] The legality principle and non-retroactivity principle are also part of IHL of NIAC since Article 6(2)(c) APII stipulates that "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 when it was committed" and is inspired by Article 15 of the ICCPR. Therefore, it is adequate to also look into the more detailed standards of international human rights law (*Supra* No.58 ICRC, para 4604).

new justice system in Rojava, as noted by Coble, the Justice Councils and Kurdish courts are known to use and refer to the existing Syrian laws. Even more, the SDF have taken measures to answer the inconsistencies of Syrian law with international human rights law such as the abolishment of the death penalty, a focus on rehabilitation of convicts, and the creation of women's councils in the judicial system to prevent discrimination of women.[100]

Despite these promising measures *in abstracto*, very little information is available on past SDF's trials of non-foreign/Syrian ISIS fighters. Recalling that trials have been suspended due to the Covid-19 pandemic and the Turkish offences near and in north-eastern Syria, few conclusions can be drawn. In theory, a trial before the People's Defence Courts has two stages. In a first stage, the Court records the defendant's statements and identifies the offences. In the second stage, after the accused is found guilty, a decision will be made that corresponds to the deeds committed. If ISIS fighters do not confess their crimes, the Court relies on witness statements and concrete evidence. The defendants have the right to appeal against their sentences.[101] Moreover, the SDF's ideology does not allow for the imposition of death penalties.[102] At first glance, these practices seem to comply with both IHL and international human rights law.

In practice, however, accused are not having defence lawyers and trials take as much as a few minutes.[103] This clearly violates the right to defence as foreseen in Article 6(2)(a) APII, Article 75(4)(a) API, and Article 14(3)(b) ICCPR. Most likely, the trials' limited duration also violates the right to defend oneself during trial hearings in Article14(3)(d) ICCPR. Furthermore, there exists no appeals procedure, which is clearly a violation of Article 14(5) ICCPR.[104] However, the right to appeal was deliberately not included in Article 6 APII during its drafting process.[105] Therefore, the lack of appeals procedure is not per se problematic. With regard to legal representation, trained legal staff is scare in Rojava and the system appears to be haphazard.[106] By August 2019, 4,000 ISIS fighters, including fighters with Syrian nationality, were still awaiting trial. It is estimated that it would take an additional 13 years for the SDF to

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[100] *Supra* No.6, 149-151.
[101] ANF, 'Trial of ISIS jihadists begins in Northeast Syria' *ANF News* (Qamishlo, 2 October 2019) <https://anfenglish.com/rojava-syria/trial-of-isis-jihadists-begins-in-northeast-syria-38020> accessed 10 July 2020.
[102] *Supra* No.33.
[103] *Supra* No.33; Nadim Houry, 'Bringing ISIS to Justice: Running Out of Time?' (*Just Security*, 5 February 2019) <https://www.justsecurity.org/62483/bringing-isis-justice-running-time/> accessed 20 September 2021.
[104] *Supra* No.25 Stigall, 64; *Supra* No.103 Houry.
[105] *Supra* No.76, 508.
[106] *Supra* No.33.

try all of them.[107] By April 2020, ISIS' foreign fighters were still detained without formal charges and their trials had not commenced yet. The trials of the more than 10,000 suspected ISIS' affiliates were indefinitely suspended due to the Covid-19 pandemic.[108] Question raises whether such a long period of awaiting trial is conform the right to be tried without undue delay.[109] Based on the above, one cannot but conclude that the SDF's trials of ISIS fighters are in violation of their own constitution,[110] and the applicable rules of IHL and international human rights law. Local authorities have, however, acknowledged that they lack the necessary infrastructure to prosecute foreign fighters conform the international standards of due process and have asked home states to repatriate their nationals.[111] For these reasons, this working paper will also assess the home states' obligations to try their nationals. This working paper will not further assess the poor living conditions in the detention facilities operated by the SDF.

D. Prosecution for War Crimes?

As indicated before, the SDF are trying and sentencing ISIS' fighters for terrorist crimes. Even if the conflict between the SDF and ISIS classifies as a NIAC, no prosecutions are brought for violations of IHL amounting to war crimes. Nevertheless, parallel prosecutions for war crimes and terrorist crimes are not as a matter of principle excluded. For instance, the national legislation of several countries allows for one act to be prosecuted simultaneously as a terrorist crime and as a war crimes.[112] Examples of parallel prosecutions in national case law are *legio.*[113] Considering the nexus with the NIAC in Syria, the conduct of these foreign fighters should also be assessed under IHL. Hence, the nexus requirement does not require a causal link between the armed conflict and the terrorist offence. The "*existence of the armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit the crime, his decision to commit it, the manner in which it was committed or the purpose for which*

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[107] *Supra* No.33.
[108] *Supra* No.7.
[109] *Supra* No.73para 688; Article 14(3)(c) ICCPR.
[110] Article 66 The Social Contract of Rojava Cantons in Syria <https://civiroglu.net/the-constitution-of-the-rojava-cantons/>.
[111] *Supra* No.85.
[112] *Supra* No.2,16.
[113] Examples can be found in recent German case law e.g. Higher Regional Court of Frankfurt, 5-2 StE 10/16-9-2/16 (8 November 2016); Higher Regional Court of Stuttgart, 5-2 StE 11/18 (5 July 2019); Higher Regional Court of Dusseldorf, III-2 StS 2/19 (4 December 2019); Federal Court of Justice, BGH AK 22/19 (15 May 2019); Federal Court of Justice, BGH AK 12/19 (4 April 2019). In the Netherlands e.g. District Court of The Hague, 09/748003-18&09/748003-19 (23 July 2019). In other countries such as France and Hungary similar cases of parallel prosecution were still pending (*Supra* No.2, 16-24).

it was committed."[114] IHL applies to foreign fighters in the same way as it applies to other belligerent parties.[115] This section will elaborate upon the relationship between IHL and terrorism. It explains why it would be desirable to prosecute ISIS' foreign fighters not just for terrorism but also/exclusively for war crimes. It will address issues relating to NSAGs prosecuting enemy fighters based on self-adopted counter-terrorism legislation and the suitability of terrorism prosecution.

1. The Relationship between Terrorism and IHL

As stated before, 'terrorism' is not universally defined, especially not when committed in times of armed conflict.[116] As Bartels explains, IHL and terrorism are not mutually exclusive.[117] Terrorism as such does not impede the existence of a NIAC, nor is it excluded from the scope of IHL. The unlawfulness or illegality of terrorism as a means or method of warfare does not

[114] *Prosecutor v Dragoljub Kunarac et al.* (Appeal Judgement) ICTY Case No. IT-96-23&IT-96-23/1-A (12 June 2002) para 58 as referred to in *Prosecutor v Rutaganda George* (Appeal Judgement) ICTR Case No. ICTR-96-3-A (26 May 2003) para 569; *Prosecutor v Stakić Milomir* (Appeal Judgement) ICTY Case No; IT-97-24-A (22 March 2006) para 342; *Prosecutor v Setako Ephrem* (Appeal Judgement) ICTR Case No. ICTR-04-81-A (28 September 2011) para 249.

[115] *Supra* No. 11 Cuyckens Paulussen, 4.

[116] Multiple international treaties each have their own substantive definition of terrorism which application is limited to the scope of application of the specific treaty concerned, usually limited to times of peace e.g. Article 19(2) of the International Convention for the Suppression of Terrorist Bombings (15 December 1997) UN Doc A/RES/52/164. Furthermore, it is unclear whether the UN conventions against terrorism are applicable in situations of armed conflict (Alejandro Sánchez Frías, 'Bringing Terrorists to Justice in the Context of Armed Conflict: Interaction between International Humanitarian Law and the UN Conventions against Terrorism' (2020) Israel Law Review, 71, 74). Even UNSC Resolution 2178 cited above, which provides a definition for foreign terrorist fighter, does not include a definition of terrorism as such, nor does it refer to UNSC Resolution 1566 which provides a definition of acts of terror in paragraph 3. (*Supra* Frías, 75). The definition of the Special Tribunal for Lebanon, although considered authoritative, has to be approached with caution. The Special Tribunal for Lebanon is a mixed tribunal, created to deal with the specific attack on Mr Hariri, applying both national and international law (*Prosecutor v Ayyash et al.* (Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging) STL-11-01/1/AC/R176bis (16 February 2011) paras 34-40). When analyzing the case, one can observe that the definition provided under Lebanese national law was quite modified by the Tribunal based on international law (Prakash Puchooa, 'Defining Terrorism at the Special Tribunal for Lebanon' (2011) Journal of Terrorism Research 34, 40-42). Furthermore, the Tribunal concluded that customary international law only provides a definition of terrorism in times of peace (*Supra* Ayyash Interlocutory Decision, para 85) even if at the time academic literature was divided as to whether such definition existed under customary international law, many arguing such a definition was still premature (*Supra* Puchooa, 40). The case at hand in this article concerns acts of terrorism committed during times of armed conflict.

[117] *Supra* No.11 Bartels, 6.

impede the application of IHL.[118] The paragraph in Tadić which assesses the criteria of intensity and organisation to distinguish an armed conflict "from banditry, unorganised and short-lived insurrections, or *terrorist activities*" [emphasis added],[119] should not be interpretated as establishing the contrary. In Boškoski, the Court later clarified that this reference to terrorism should not be interpreted as excluding terrorist activities from the notion of armed conflict. Hence, the paragraph's aim was to exclude terrorist activities in times of peace from the scope of CA3.[120] In addition, the Trial Chamber clarified that "*while isolated acts of terrorism may not reach the threshold of armed conflict, when there is protracted violence of this type, especially where they require the engagement of the armed forces in hostilities, such acts are relevant to assessing the level of intensity with regard to the existence of an armed conflict*".[121] Moreover, as explained by Cuyckens and Paulussen, IHL itself contains both general and specific prohibitions of terrorism. The general prohibitions refer to acts such as execution of civilians and persons *hors de combat*; hostage taking; and deliberate attacks against civilians and civilians objects. These acts constitute war crimes even when they lack a terrorist objective.[122] The specific prohibitions, on the other hand, refer to the explicit prohibition of acts and threats of terrorism with the primary purpose of spreading terror among the civilian population.[123] Violations of the general or the specific prohibitions are considered war crimes.[124]

In NIAC, members of NSAGs do not enjoy combatant immunity and their mere participation in hostilities can be criminalised under domestic law. In 2014, the District Court of The Hague

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[118] Illustrations can be found in the cases of the Kosovo Liberation Army, the Macedonian National Liberation Army, and the RUF/Armed Forces Revolutionary Council (AFRC) which were NSAGs involved in NIACs with Kosovo, Macedonia, and Sierra Leone respectively as expressly confirmed by the ICTY and SCSL despite being classified as terrorists or undertaking a campaign of terror against the civilian population (*Supra* No.17, 23-24).

[119] *Prosecutor v Duško Tadić* (Judgement) ICTY-94-IT (7 May 1997) para 562.

[120] *Prosecutor v Ljube Boškoski and Johan Tarčulovski* (Trial Judgment) IT-04-82-T (10 July 2008) para 185; *Supra* No.11 Bartels, 17.

[121] *Supra* No.120 Boškoski, paras 187-190.

[122] *Supra* No.11 Cuyckens and Paulussen, 6-7.

[123] Rule 2 ICRC Customary IHL Study; Articles 4(2)(d) & 13(2) APII *qua* customary IHL; The definition of the corresponding war crime can be found in *Prosecutor v Stanislav Galić* (Judgement) ICTY-98-29-T (5 December 2003) para 133. Article 33 GCIV and Article 51(2) Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (API) also include explicit prohibitions of terrorism in cases of international armed conflict.

[124] *Supra* No.11 Cuyckens and Paulussen, 7. As a side note, it is important to keep in mind that not all violations of rules under international humanitarian law treaties and customary law, which impose obligations upon States, necessarily also imply individual criminal responsibility. A distinct criminalisation is required under treaty, domestic or international customary law. Such criminalisation can be found in e.g. Article 4 or 20 of the Statute of the ICTR (UN Res 955 (8 November 1994) UN Doc S/RES/955) (*Supra* No.116 Frías, 78).

confirmed that national criminal law continues to apply during armed conflict, including the national provisions on terrorist offences.[125] Therefore, foreign fighters' acts that comply with IHL e.g. targeting legitimate objectives, can still be prosecuted and punished as terrorist offence under national criminal law. Instead of prosecuting such acts as a terrorist offence, Cuyckens and Paulussen argue that it would be better to prosecute them as a national offence with a less political connotation e.g. murder or manslaughter. Doing so avoids blurring the line between IHL and counter-terrorism law. Further, it avoids suggesting that mere participation in hostilities as a member of *any* NSAG amounts to a terrorist offence.[126] Similarly, the ICRC stated that acts which do not violate IHL should not be called 'terrorist'.[127]

On the other hand, prosecuting ISIS' fighters for terrorist offences would be convenient for the SDF since they would only have to prove a connection between the accused and ISIS.[128] This connection requirement is also much more inclusive than the notion of direct participation in hostilities or continuous combat function that is used to conclude whether someone has the status of fighter. The connection requirement, for instance, includes persons engaged in fundraising for ISIS.[129]

2. Parallel or rather Exclusive Prosecution for War Crimes

As stated before, ISIS' crimes are not only terrorist offences, but also war crimes.[130] The SDF could, however, opt for parallel prosecutions or prosecution for war crimes alone. This section will explain why the prosecution for war crimes should not be overlooked. It will also explain why it is less controversial for the SDF to prosecute ISIS fighters for war crimes alone. Nevertheless, it is important to keep in mind that it remains uncertain whether the SDF are obliged to investigate and prosecute war crimes. Customary Rule 139 obliges NSAGs to ensure respect for IHL. However, Customary Rule 158 only targets states as the bearer of the obligation to investigate and prosecute war crimes. Yet, when accepting that only states bear such obligation, this arguably infringes the equality of belligerents.[131] Hence, to avoid any

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[125] *Prosecutor v Maher H.* (Judgement) District Court of The Hague Case No.09/767116-14 (1 December 2014) para 3.3.8.
[126] *Supra* No.11 Cuyckens and Paulussen, 10-11.
[127] ICRC, 'International humanitarian law and the challenges of contemporary armed conflicts'(*Report*, 31 October 2015) 18 <file:///C:/Users/pauli/Downloads/32ic-report-on-ihl-and-challenges-of-armed-conflicts.pdf> accessed 5 August 2020. Similarly see *Supra* No.15, 502.
[128] *Supra* No.103 Houry.
[129] *Supra* No. 11 Bartels, 22.
[130] It will not be assessed which specific violations of IHL were committed.
[131] *Supra* No.56, 684.

potential responsibility for breaching the obligation to prosecute violations of IHL, the SDF should prosecute foreign fighters for war crimes as well. Furthermore, merely sentencing foreign fighters based on counter-terrorism law fails to capture the full range of the crimes committed.[132] Parallel prosecution for both war crimes and terrorist offences allows to better tailor the sentence and captures the full picture of the individual's offences and criminal responsibility.[133] These arguments illustrate that parallel proseuctions seem desirable. However, the sections above have already voiced concerns about the SDF prosecuting foreign fighters based on their *own* counter-terrorism laws. As explained, CA3 can serve as a legal basis for the prosecution of war crimes by NSAGs, whereas there is no international legal basis for the prosecution of terrorist offences.[134] The crime of terrorism and its prosecution are rather dealt with in domestic law. Since the SDF are not a recognised government, they do not hold the sovereign right to prosecute suspects for the crimes committed on their territory.[135] For these reasons, the Geneva Academy expert meeting was of the opinion that the SDF should focus on the prosecution of war crimes instead.[136] Additionally, the exclusive prosecution for war crimes avoids the discussion of whether the exclusion clauses in counter-terrorism instruments also exclude NSAGs' fighters in armed conflict.[137] Furthermore, the legality principle in criminal proceedings enshrined in Customary Rule 101 potentially impedes prosecution for terrorist offences. As explained before, the SDF could honour this principle by relying on international law, in particular IHL, to prosecute ISIS' fighters for war crimes. It is, however, uncertain whether the SDF can prosecute these fighters based on their *own* counter-terrorism provisions while respecting the legality principle.[138] States have the possibility to legislate and criminalize acts by foreign fighters, but too what extent do NSAGs possess this capacity (*supra*)? Especially since NSAGs have a functional international legal personality that is limited to what is necessary under IHL, whereas the counter-terrorism framework is not part

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[132] *Supra* No.11 Cuyckens and Paulussen, 18-19.
[133] Alicia Medina, 'What do we miss when we only go after ISIS fighters as terrorists?' (*Syria Direct*, 24 June 2020) <https://syriadirect.org/news/prosecute-isis-members-for-war-crimes-not-just-terrorism-charges-say-european-prosecutors?utm_content=&utm_source=linkedin&utm_campaign=social&utm_medium=TRIAL+International> 14 July 2020.
[134] *Supra* No.4 Fight for Humanity Expert Meeting, 6.
[135] Tanya Mehra and Christophe Paulussen, 'The Repatriation of Foreign Fighters and Their Families: Options, Obligations, Morality and Long-Term Thinking' (*ICCT*, 6 March 2019) <https://icct.nl/publication/the-repatriation-of-foreign-fighters-and-their-families-options-obligations-morality-and-long-term-thinking/> 14 July 2020.
[136] *Supra* No.4 Fight for Humanity Expert Meeting, 9.
[137] For illustration *Supra* No.11 Cuyckens and Paulussen, 12-18.
[138] *Supra* No.56, 676.

of IHL. Nevertheless, the SDF's law is based on Syrian domestic law (*supra*) and UN member states are under an obligation to ensure that their criminal legislation is sufficient to properly prosecute and penalize the "*travel or attempting to travel to a state other than the perpetrator's state of residence or nationality for the purpose of terrorism*"; "*the wilful provision or collection of funds for terrorist purposes*" and "*the wilful organisation, or other facilitation, of these acts*" per UNSC Resolution 2178.[139] This Resolution was adopted in 2014, way before many of the acts at trial wher committed. Therefore, it is not entirely excluded that the SDF's law respects the legality principle in itself by referring to the relevant domestic Syrian legislation. However, international law does not only require legitimacy or legality in substance, but also in procedure. The lack of authorisation and legal basis to criminalise terrorism, leaves the SDF's trials as they stand on thin ice.

E. Home States' Obligations to Prosecute

As explained in the previous section, under UN Security Council Resolution 2178, UN member states have the duty to prosecute foreign fighters.[140] This obligation is confirmed in Resolutions 1373, 2396 and 2249.[141] As highlighted by Stigall, the current counter-terrorism Resolutions manifest a clear focus on home states' responsibility and a pull in the "*direction that would favour the repatriation of detained ISIS fighters to their countries of origin for the purposes of investigation, prosecution, or other lawful and appropriate measures to mitigate against the threat they pose*".[142] Moreover, the obligation to prosecute is not limited to the prosecution of foreign terrorist fighters, also IHL obliges states to investigate and prosecute war crimes allegedly committed by their nationals.[143] Furthermore, the Rome Statute provides in its preamble that "*it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes*" and that "*the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international*

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[139] *Supra* No.9, para 6.
[140] *Ibid*.
[141] UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373, para 2(e); UNSC Res 2396 (21 December 2017) UN Doc S/RES/2396, paras 17 & 2; UNSC Res 2249 (20 November 2015) UN Doc S/RES/2249, para 5; Dan E. Stigall, 'Repatriating Foreign Fighters from Syria: International Law and Political Will (Part 1)' (*Just Security*, 18 March 2020) <https://www.justsecurity.org/69244/repatriating-foreign-fighters-from-syria-international-law-and-political-will-part-1/> accessed 20 September 2021.
[142] *Supra* No.25 Stigall, 83-87.
[143] Rule 158 ICRC Study on Customary IHL.

cooperation".[144] Therefore, the states that are parties to the Rome Statute are under an obligation to prosecute, among others, war crimes committed by its nationals.[145]

Question raises whether states answer their duties explained above when the SDF prosecute ISIS' fighters, even if offering assistance to the SDF. Moreover, whereas the delegation of judiciary powers to supranational and international bodies is quite common, it is doubtful whether states can delegate judicial decision making, a part of their sovereignty, to a NSAG.[146] In addition, home states arguably overstep the limits to their adjudicatory jurisdiction and infringe Syria's territorial integrity when delivering decisions and operating courts in Syria through the SDF.[147] Even more, there is a substantial risk that the SDF's trials and convictions will be declared null and void. The SDF are a militia without any legal status under international law. Therefore, the SDF's trials do not have any legal value beyond the SDF's territory of control.[148] CA3, moreover, does not oblige states to recognize or give legal effect to NSAGs' judicial decisions.[149] It is highly unlikely that the territorial State, Syria, will recognize any of the SDF's acts since the Syrian government classifies the SDF as terrorists and denies that Rojava has any legal personality or capacity.[150] Lastly, since many ISIS' fighters are already tried *in absentia* by their home states, the principle of *non bis in idem* comes into play. Given the fact that the SDF and western home states can be considered 'the same party' in the armed conflict against ISIS due to the US lead coalition's support, the SDF are prevented to try foreign fighters a second time.[151] In summary, this section illustrates that in the end, the SDF's trials might not be desirable at all.

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[144] UN General Assembly, Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS. 90 Preamble.
[145] *Supra* No.2, 5.
[146] Jan Wouters, Cedric Ryngaert, Tom Ruys and Geert De Baere, *International Law: A European Perspective* (Hart Publishing, London 2019) 421.
[147] *Supra* No.146, 423.
[148] *Supra* No.52.
[149] *Supra* No.73, para 695.
[150] UNSC 'Identical letters dated 16 May 2019 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council' (20 May 2019) UN Doc S/2019/403; UNSC 'Identical letters dated 16 September 2019 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council' (19 September 2019) UN Doc S/2019/750; UNSC 'Letter dated 2 March 2020 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the President of the Security Council' (5 March 2020) UN Doc S/2020/168.
[151] *Supra* No.73, para 687; *Supra* No.52.

Conclusion

After providing some insight into the factual background of the conflict, this working paper has made a legality assessment of the trial of ISIS' foreign fighters by the SDF. As is clear from the above, current IHL is casting uncertainty. First of all, it is unclear whether NSAGs possess the legal capacity to try individuals. Even if one presumes that the SDF enjoy the authority to try ISIS' fighters, the concrete modalities of such trials are far from settled. Scholarship is quarrelled about which legal regime ought to serve as the source of interpretation for these trials: IHL of international armed conflict (occupation) or international human rights law. In addition, there is very little information available on how the SDF have established the Defence of the People Courts. Therefore, it remains largely unresolved whether the SDF are currently authorized to establish courts to try fighters *in abstracto*. Moreover, *in concreto* the SDF's trial practice is clearly in violation of the judicial guarantees that trials are expected to respect, both under IHL of international armed conflict and international human rights. The fact that the SDF are currently trying ISIS' fighters based on their own counter-terrorism legislation poses issues as well. Terrorism does not have an internationally accepted definition and, whereas trying foreign fighters for terrorist acts has important advantages, it also risks rendering SDF's trials null and void. Prosecutions for war crimes would be resting on more solid foundations legally. Yet, perhaps most importantly, this working paper has touched upon the obligations of foreign fighters' home states to prosecute war crimes and home states' obligations under the UN Security Council counter-terrorism framework. Home states most likely do not live up to their international obligations when leaving the burden to try ISIS' foreign fighters to the SDF. After careful legal analysis, one has, therefore, to conclude that the trials by the SDF are on thin ice legally. Home states should, therefore, rather take up their responsibility and prosecute their own nationals themselves. However, it remains to be seen how states will go about the trial of their foreign fighters. All in all, the SDF's trials do not seem as desirable as international and national politics would like us to believe.

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