



BRINGING ISIS TO JUSTICE

Towards an international tribunal in North East Syria



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Cover photo: ISIS-linked men, women and children walking through the corridor out of Baghouz, among hundreds of other ISIS-linked individuals, Deir-Ezzor, Syria, 14 March 2019.

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Back cover photo: ISIS-linked men walking through a screening point out of Baghouz, Deir-Ezzor, Syria March 2019.

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Rojava Information Center (RIC) is an independent, volunteer-staffed organisation based in North East Syria. So far, RIC has assisted reporters and researchers from: the Wall Street Journal, The Independent, The Guardian and Haaretz; the BBC, ITV, NBC and ABC; news agencies Associated Press, Agence-France Press, DPA, EFE and ANSA; Cambridge, Yale and Madrid Universities; and many other national and international newspapers, websites and news sources with their work.

Some of us are international journalists and media activists who traveled to Rojava with the aim of sharing our skills in a region which has only enjoyed the benefits of a free press since its liberation from the control of the Assad regime in 2012. Our team also includes local people and other foreign volunteers who saw the importance of this project, and have agreed to share their time and expertise.

There is a lack of clear and objective reporting on Rojava, and journalists are often unable to make contact with ordinary civilians and people on the ground.

So we set up the RIC to fill this gap. We aim to provide journalists, researchers and the general public with accurate, well-sourced, transparent information.

We work in partnership with civil and political institutions, journalists and media activists across the region to get journalists the information they need and put them in touch with the peoples of Rojava.

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Introduction: the legal impasse

There is global consensus that action urgently needs to be taken to deal with the thousands of foreign Islamic State (ISIS) fighters and affiliates, plus ISIS-linked children, currently detained in North East Syria. However, there is near-total lack of consensus as to what this action will look like.

This lack of clarity has been well-illustrated in recent weeks by the French government's decision to allow French-national ISIS fighters to be transferred to Iraq and sentenced to death, protesting the decision without taking any concrete action to actually intervene¹. To take another example, one Dutch government official publically stated that it was too dangerous for officials to travel to North East Syria and negotiate with the Autonomous Administration even as another Dutch official was making precisely such a trip². Neither of these incidents suggest the global community has a clear, unified strategy in place for dealing with the ISIS threat.

Repatriation and domestic prosecution; criminal prosecution in North East Syria; criminal prosecution in Iraq; the International Criminal Court; an international tribunal in Iraq; an international tribunal in North East Syria; an international tribunal in a third country such as Jordan; deportation to a third country such as Saudi Arabia; detention in Guantanamo Bay; all of these proposals have been put forward by different regional and international actors.

However, each of these options faces its own unique legal, practical and ethical challenges. This report will examine each of these proposals in turn, with a particular focus on the proposal for an international tribunal in North East Syria. Often disregarded due to significant legal and geopolitical obstacles, this report argues that if realized the international tribunal in North East Syria could form an essential part of a hybrid justice process.

In order to achieve this, the report assesses the successes and failures of previous international justice mechanisms, with reference to the present situation in North East Syria. It draws on original research and original interviews conducted with international legal experts and representatives of the Autonomous Administration as well as a wide range of interviews, studies and legal documents.

It also includes a country-by-country breakdown of the number of ISIS-linked individuals currently held in North East Syria, the state of negotiations and repatriations between these countries and the Autonomous Administration of North East Syria (AANES), and their position on the mooted international tribunal in North East Syria.

This report is not a legal document, but an assessment of the situation as it stands, both in terms of the often-obscure practical realities on the ground and in terms of the multiple conflicting claims, proposals and arguments that have been put forward to deal with the ISIS prisoners currently detained in North East Syria.

It is intended to serve as a resource for journalists, researchers, academics and policy-makers interested in understanding the proposal for an international tribunal in North East Syria in more detail. As such, it concludes with five proposals intended to move the conversation on from the current impasse and illuminate the path ahead for the relevant regional and international parties.

¹ <https://www.theguardian.com/world/2019/may/27/france-opposes-iraq-death-penalty-against-three-french-isis-members>

² <https://www.volkskrant.nl/nieuws-achtergrond/nederland-haalt-twee-kinderen-van-is-strijders-terug-uit-syrie-vanwege-erbarmelijke-leefomstandigheden-b4a891f1/>

ISIS' crimes in an international justice context

ISIS' crimes need little introduction. Of particular relevance for this report's purposes are those crimes which could be prosecuted by an international justice mechanism. The International Criminal Court (ICC), for example, is able to prosecute four types of crime: genocide, crimes against humanity, war crimes and crimes of aggression³. Here, we will briefly outline ISIS' alleged culpability in all four of these fields.

Genocide

The crime of genocide is characterized by the specific intent to destroy in whole or in part a national, ethnic, racial or religious group by killing its members or by other means; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; or forcibly transferring children of the group to another group, per the ICC.

ISIS has been recognized by the United Nations (UN) as the perpetrator of genocide against the Yazidi people⁴. Around 5,000 members of the Yazidi minority are estimated to have died in initial massacres conducted in the Yazidis' ancestral homeland of Shengal (Sinjar)⁵. Up to 500 people died in a single massacre, for example⁶. ISIS has also been accused of genocide against Christians and Shia Muslims⁷.

Crimes against humanity

Crimes against humanity are crimes committed in a widespread or systematic fashion against civilians. Unlike war crimes, they can be committed both in the context of war and in peacetime. Unlike genocide, for example, there is no dedicated treaty codifying what constitutes a crime against humanity⁸.

The UN has found that ISIS is culpable for crimes against humanity for atrocities and killings committed against civilians outside the sphere of combat⁹. The UN recommended the use of international justice mechanisms such as the ICC in order to bring specific ISIS members to justice.

Human Rights Watch are among those who have documented IS's use of civilians as human shields, and widespread use of gender-based violence and sexual violence, as well as killing and injuring countless civilians¹⁰.

The Rome Statute which established the ICC suggests what may be considered a crime against humanity¹¹. Crimes such as enslavement, sexual violence, torture and forcible population transfer known to have been committed by ISIS against Yazidis and other civilians fall under this rubric¹².

War crimes

As opposed to crimes against humanity, carried out against civilians, a war crime is an act carried out by a member of an organized armed group in the context of war which constitutes a serious breach of international humanitarian law. The target can be either civilian or military¹³.

For example, the UN found that photographs of ISIS militants brutalizing Iraqi soldiers and evidence of mass executions of 1,700 soldiers in a single week, and the killing of 1,000 civilians in a 17-day on-

3 <https://www.icc-cpi.int/about/how-the-court-works>

4 <https://www.ohchr.org/FR/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=20113&LangID=F>

5 <https://www.dailymail.co.uk/news/article-2792552/full-horror-yazidis-didn-t-escape-mount-sinjar-confirms-5-000-men-executed-7-000-women-kept-sex-slaves.html>

6 <https://www.reuters.com/article/us-iraq-security-yazidis-killings/exclusive-iraq-says-islamic-state-killed-500-yazidis-buried-some-victims-alive-idUSKBN0GA0FF20140810>

7 <https://www.nbcnews.com/news/us-news/u-s-decries-islamic-state-genocide-christians-other-groups-n792866>

8 <https://www.un.org/en/genocideprevention/crimes-against-humanity.shtml>

9 <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=15295&LangID=F>

10 <https://www.abc.net.au/news/2019-03-14/accountability-for-islamic-state-crimes-after-syria/10891742>

11 <https://www.un.org/en/genocideprevention/crimes-against-humanity.shtml>

12 https://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A_HRC_32_CRP.2_en.pdf

13 <https://www.justsecurity.org/63619/what-is-a-war-crime/>

slaught in Iraq, constituted evidence of war crimes¹⁴¹⁵. Hundreds of soldiers were also executed by ISIS in Syria¹⁶.

War crimes and crimes against humanity between them provide a broad basis for bringing ISIS to justice for crimes committed both on the battlefield and in areas under their control.

Crimes of aggression

A crime of aggression is carried out by a political or military leader in a position to exercise control over the political or military action of a state, who plans, prepares, initiates or executes an act of aggression which constitutes a serious and illegal use of force.¹⁷

As ISIS is a non-state actor, it is unlikely that ISIS, its leader Abu Bakr al-Baghdadi or other senior ISIS commanders would be tried on this basis.

Individual and collective responsibility

The significant difficulties in bringing individuals – particularly low-ranking members or affiliates of a non-state organization such as ISIS – to justice under international law will be discussed below with reference to specific historical examples.

Here, it is sufficient to note that individuals may be held responsible for international crimes such as war crimes, crimes against humanity and genocide¹⁸. Each individual is responsible not only for their own actions, but also for attempting, assisting, facilitating, aiding, abetting, planning or instigating the commission of a war crime.

For example, German woman Jennifer W. is on trial for war crimes on the basis that she allowed her five-year-old Yazidi slave girl die of thirst below the sun, in what is likely the first case in the world brought over international crimes committed by ISIS against the Yazidis¹⁹. This is an instance of direct individual criminal culpability.

However, a Lebanese national who sought asylum in Canada was also found to have committed a crime against humanity by the Immigration and Refugee Board of Canada for fixing ISIS vehicles as a mechanic, in the knowledge they would be used to commit crimes against humanity²⁰. The case is significant in demonstrating the possibility of using international law against ISIS members, supporters and collaborators who were not directly responsible for international crimes, but share culpability owing to the support they directly or indirectly offered to ISIS.

With regards to an ICC prosecution, a group must have committed crimes of the above four kinds and be considered as an 'organization' with regards to the following criteria: Whether the group is under a responsible command, or has an established hierarchy; whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population; whether the group exercises control over part of the territory of a State; whether the group has criminal activities against the civilian population as a primary purpose; whether the group articulates, explicitly or implicitly, an intention to attack a civilian population; and whether the group is part of a larger group, which fulfills some or all of the above-mentioned criteria²¹.

Though ISIS is not part of any wider organization, it closely fits the terms of the first five criteria, opening the door to a prosecution under the legislation used in the ICC22. The ICC is explicitly able to try both state and non-state actors under these criteria, according to the scope of their crimes and the scale of their organization. As such, it can be seen that the evidence base exists for ISIS in toto and individual actors within the organization to be brought to trial under an international justice mechanism.

14 <https://www.cbsnews.com/video/u-n-isis-committing-war-crimes-in-iraq/>

15 <https://www.rttnews.com/2340932/isis-militants-killed-more-than-1000-civilians-in-recent-onslaught-in-iraq-un.aspx>

16 <https://www.reuters.com/article/us-syria-crisis/video-shows-islamic-state-executes-scores-of-syrian-soldiers-idUSKBN0GS10020140828>

17 <https://crimeofaggression.info/role-of-the-icc/definition-of-the-crime-of-aggression/>

18 <https://casebook.icrc.org/glossary/individual-criminal-responsibility>

19 <https://thedefensepost.com/2019/04/09/germany-tries-isis-woman-war-crimes-yazidis/>

20 <https://globalnews.ca/news/5194808/isis-mechanic/>

21 <https://law.fiu.edu/can-isis-be-prosecuted-in-the-international-criminal-court-for-crimes-against-humanity/>

22 <https://law.fiu.edu/can-isis-be-prosecuted-in-the-international-criminal-court-for-crimes-against-humanity/>

ISIS suspects and affiliates in North East Syria: an overview

ISIS was defeated as a military and territorial force in a four-year campaign which came to a culmination in a final battle at Baghouz, where the Syrian Democratic Forces (SDF) and the Global Coalition against ISIS celebrated victory on 23 March 2019.²³ Over 60,000 people were evacuated from Baghouz from December through to the close of the campaign, vastly exceeding expected numbers, with 9,000 people exiting in a single three-day period²⁴. The majority of those evacuated were the families of ISIS fighters.²⁵

In January 2019, the Autonomous Administration of North East (AANES) stated they had just 1,500 ISIS prisoners in detention, but this number grew rapidly throughout the Baghouz operation as thousands of ISIS suspects either surrendered or were evacuated.²⁶ One month after the victory, the AANES Foreign Affairs Bureau stated that 11,000 former armed ISIS members were in detention facilities in North East Syria, plus 72,000 ISIS-affiliated women and children in camps under AANES control. They are made up of individuals from at least 54 countries.²⁷

Men who were thought to be members of ISIS were brought to detention facilities²⁸, while women and children were brought to secure camps. In the detention facilities, suspects are biometrically screened in order to identify them.²⁹ Documents are being compiled on the ISIS suspects, as well as for men, women and children.³⁰ Per lawyer and member of the North East Syria Judicial Committee Loqman Ibrahim, international human rights organizations visited the prisons and affirmed that international human rights standards were being upheld,³¹ and international observers have been officially invited to visit the detention centers in a memo sent to every member state of the Global Coalition against ISIS³².

In a previous visit to North East Syria's prisons, Human Rights Watch observers likewise found that there were improvements to be made in terms of due process and human rights, but that the AANES was open to criticism and improvement in these areas³³.

Of the ISIS suspects held by the SDF, the majority are Syrians and Iraqis. Syrian suspects are tried by the People's Defense Courts, where so far over 7,000 ISIS suspects have been tried and sentenced, and 6,000 more are awaiting trial. There is no death penalty, following its abolition in North East Syria as the region gained autonomy from the Syrian regime, and the maximum punishment is 20 years imprisonment.³⁴ The legal system in North East Syria grants access to a defense lawyer and the right to appeal³⁵, all of which stands in contrast to equivalent tribunals in Iraq. Help has been sought from the international Coalition to deal with the increasing number of suspects being tried in these courts,³⁶ even though foreign ISIS members are not tried in these courts.³⁷

In March alone, 30,000 Iraqis were captured by SDF in ISIS territory. Iraq is now planning to build a detention center for them back in Iraq. 1,700 families at Hol camp have registered with the UN for voluntary repatriation, but per an aid worker at the camp then "Iraqis within the camp itself have started to unregister from returning because of [Iraqi government] rhetoric and concern about what might happen to them."³⁸ The SDF has transferred some hundreds of Iraqi citizens back to their government already, and is slated to transfer many more³⁹, though these transfers have been halted following the

23 <https://www.aljazeera.com/news/2019/03/isil-defeated-syria-sdf-announces-final-victory-190323061233685.html>

24 <http://www.rudaw.net/english/middleeast/syria/14032019>

25 <https://www.dailysabah.com/syrian-crisis/2019/03/07/exodus-from-last-daesh-bastion-of-baghouz-in-syria-continues-as-final-operation-looms>

26 <https://anfkurdi.com/rojawa-sUriye/ji-bo-daIS-iyen-pewisti-bi-avakirina-dadgeheke-navneteweyi-heye-110703>

27 <https://anfenglishmobile.com/features/jailed-isis-members-will-either-be-returned-home-or-tried-here-34430>

28 <https://www.aljazeera.com/news/2019/03/hundreds-isis-fighters-surrender-syria-baghouz-sdf-190306160315079.html>

29 <https://edition.cnn.com/2019/04/17/politics/foreign-isis-fighters-syria/>

30 <https://anfenglishmobile.com/features/the-danger-will-grow-unless-states-take-back-isis-members-33265>

31 <https://anfkurdi.com/rojawa-sUriye/dive-ceteyen-daIS-e-li-dadgeha-navneteweyi-ben-darizandin-112107>

32 <https://anfdeutsch.com/rojawa-syrien/rojawa-punkte-zur-einrichtung-von-internationalem-gerichtshof-11668>

33 <http://rudaw.net/english/interview/02032014>

34 People's Defense Court judge, interview with RIC, May 2019

35 <https://www.npr.org/2019/05/29/727511632/vengeance-is-for-the-weak-kurdish-courts-in-northeastern-syria-take-on-isis-cases>

36 <https://anfkurdi.com/rojawa-sUriye/dive-ceteyen-daIS-e-li-dadgeha-navneteweyi-ben-darizandin-112107>

37 <https://anfkurdi.com/rojawa-sUriye/dive-ceteyen-daIS-e-li-dadgeha-navneteweyi-ben-darizandin-112107>

38 https://www.washingtonpost.com/world/iraq-is-pushing-to-build-an-isolation-camp-for-30000-iraqis-who-lived-under-isis-in-syria/2019/05/02/f714763a-561b-11e9-aa83-504f086bf5d6_story.html

39 <http://www.rudaw.net/english/middleeast/12032019>

Iraqi state's decision to execute some of those transferred into its jurisdiction.⁴⁰

The majority of women and children have been detained in Hol camp, a refugee camp in the Hasakah region of North East Syria. The arrival of thousands of women and children from the last ISIS stronghold pushed the refugee camp to its breaking point.⁴¹ Originally created to house Iraqi refugees, Hol was originally constructed to support just 20,000 people but now houses more than 70,000, nearly double capacity even following recent expansion efforts which brought its capacity up to 40,000.⁴²

The camp's residents include over 30,000 Syrians and over 30,000 Iraqis in the 'mixed' section, comprising both local refugees who fled ISIS and those who lived under ISIS until liberation by the SDF, and ISIS-linked women and children with Syrian or Iraqi nationality. A separate 'annex' houses over 11,500 foreign, ISIS-linked women and children.⁴³⁴⁴

Food, medical care and education are provided in the camps, although severe difficulties have been incurred by the Autonomous Administration in providing for so many children.⁴⁵ The humanitarian crisis in Hol, in particular, has been well-documented. Particularly in the first weeks following Baghouz' liberation, camp authorities struggled to provide basic sanitary care, food and clean water to the thousands of new arrivals. Leishmaniasis, tuberculosis, measles, hepatites, acute diarrhea, bloody diarrhea and severe acute malnutrition (SAM) are most commonly reported diseases.⁴⁶ Over 200 children have died in transit to and at the camp, mostly due to disease, injuries and severe malnutrition carried over from their time living under ISIS' control.⁴⁷

The camp costs over \$700,000 a day just for basic upkeep at \$10 per head, or over \$250,000,000 per annum – a huge sum for the Autonomous Administration to find, and one which has seen wages cut for the SDF and other AANES employees as the AANES struggles to keep the camp working.⁴⁸ Internationally-sponsored aid and expansion efforts are underway in the camp, though these efforts are hampered by limitations on international aid to North East Syria imposed by its lack of political status. For example, medical charities cannot work directly with the Autonomous Administration, meaning they cannot sponsor or support many of the hospitals and medical points inside the camp.⁴⁹

40 <https://www.npr.org/2019/05/29/727511632/vengeance-is-for-the-weak-kurdish-courts-in-northeastern-syria-take-on-isis-cases>

41 <https://www.dw.com/en/hundreds-of-is-fighters-surrender-in-syrias-baghouz-sdf/a-47948320>

42 <https://www.bbc.com/news/world-middle-east-47704464>

43 Interview with camp authorities conducted by RIC, April 2019

44 See below for more information on the number of foreign ISIS suspects and ISIS-linked individuals currently being held in North East Syria in Hol and other camps.

45 <https://thearabweekly.com/isis-defeat-syria-fuels-debate-over-foreign-fighters-repatriation>

46 [//">https://reliefweb.int/report/syrian-arab-republic/syria-crisis-whos-response-al-hol-camp-al-hasakeh-governorate-issue-8-25 //](https://reliefweb.int/report/syrian-arab-republic/syria-crisis-whos-response-al-hol-camp-al-hasakeh-governorate-issue-8-25)

47 <https://aawsat.com/english/home/article/1672906/children-death-toll-syrias-al-hol-camp-rises-235>

48 Information provided to RIC by camp authorities, April 2019

49 Medical NGO official, interview with Rojava Information Center, Qamishlo, May 2019

Estimating the number of foreign ISIS suspects and affiliates detained in North East Syria

The Autonomous Administration has stated it is still working on recording the nationalities and numbers of those detained in its prisons and held in its camps. However, our best estimate for the number of foreign ISIS suspects and affiliated relatives held in North East Syria is approximately 14,500.

- >11,200 women and children in the 'Annex' (section for foreigners) at Hol camp: 3236 foreign-born women and 7930 children. The majority of Annex inhabitants are foreign-born women and their children. However, the Annex is also home to a number of local women who gave birth to the children of foreign national ISIS fighters and have been permitted to remain with their children.⁵⁰ This includes approximately 200 children, so we can estimate that there are less than a hundred mothers
- >1200 foreign women and children in Roj camp: 354 foreign-born women and 795 children at the last count, though the number has risen slightly following limited transfers from Hol⁵¹
- ~950 foreign women and children in Ain Issa camp: 249 foreign women, with approximately 700 children⁵²
- 1000 foreign fighters in detention: The latest official figure provided by the Autonomous Administration are 1000 foreign fighters still in detention⁵³, though conflicting statements from US and Autonomous Administration officials have given the number of foreign fighters from several hundred through 1000⁵⁴ to 2000⁵⁵

Working with these figures, we arrive at a rough estimate of 14,500.

It is also important to note that these numbers exclude Iraqi ISIS members and ISIS-linked individuals, who are counted alongside Syrians. In Hol camp, for example, 43% of the residents are Syrian nationals, 42% are Iraqi nationals and 15 % are foreign nationals.⁵⁶

Some of those counted as foreign nationals may have Iraqi and Syrian citizenship, but have lived in other regions and travelled to Iraq and Syria with the purpose of joining the jihadist militia. According to a report by the London-based International Centre for the Study of Radicalization, more than 40,000 foreign citizens joined ISIS in Iraq and Syria between 2013 and 2018.⁵⁷

Ascertaining the number of foreigners among ISIS members has been challenging, particularly with regards to their movements once they entered ISIS-held territory. It is asserted that at least 15,000 individuals left ISIS-held territory, two-thirds of whom are likely still at large⁵⁸. In August 2018 the UN reported that another 10,000 fighters are in Iraqi custody. The number is expected to grow as screenings of the foreign nationals are continuing.⁵⁹

It is not known exactly how many children were born to foreigners in ISIS-held territories. According to a 2018 report from the International Centre for the Study of Radicalization (ICSR), at least 3,704 foreign-born children were taken to IS territory by their parents or carers.⁶⁰

50 Hol camp officials, interview with RIC, June 2019

51 Officials of NGO Heyva Sor, interview at Roj Camp, March 2019

52 Ain Issa camp officials, interview with RIC, May 2019

53 Abdulkarim Omar, interview with RIC, June 2019

54 <https://www.aljazeera.com/news/2019/03/sdf-calls-international-tribunal-isil-detainees-190325140845893.html>

55 <https://edition.cnn.com/2019/04/17/politics/foreign-isis-fighters-syria/index.html>

56 <https://news.un.org/en/story/2019/04/1036901>

57 <https://www.rferl.org/a/why-tajikistan-is-fighting-to-bring-its-islamic-state-widows-back-home/29782787.html>

58 <https://www.voanews.com/a/fears-grow-islamic-state-foreign-fighters-ready-to-carry-on/4907281.html>

59 <https://www.voanews.com/a/fears-grow-islamic-state-foreign-fighters-ready-to-carry-on/4907281.html>

60 <https://www.bbc.com/news/world-middle-east-47304399>

Country-by-country information on foreign ISIS suspects in North East Syria

We have compiled the extant information on the number of citizens and nationals of key foreign states currently being held in North East Syria. You can see below for a similar state-by-state breakdown of repatriations of ISIS fighters and ISIS-linked individuals to their home states, and the state of these states' negotiations with North East Syria.

This table does not comprise an exhaustive list. Figures remain unclear for many nations, with neither the majority of governments nor the Autonomous Administration publishing detailed information at this time. The situation also remains unclear - for example, there are many more self-proclaimed Americans than actual Americans among the ISIS detainees⁶¹. The Autonomous Administration has established a commission to try and determine the exact figures⁶².

Known numbers of foreign ISIS-related individuals held in North East Syria, July 2019

Country	Men	Women and children	Total number of nationals
Albania ^{63,64}	-	52 Albanians in Hol comprising 11 women and 41 children	>52
Australia ⁶⁵	-	70 children	>70
Austria ⁶⁶	approx. 30 men detained in both Iraq and Syria	-	>30
Belgium ^{67,68}	>4	>50 children	>54
Canada ⁶⁹	-	30 persons, the majority children	approx. 30
Denmark	10 men in detention in both Iraq and Syria	-	-
Finland ⁷⁰	-	44 in Hol camp, comprising 11 women and 33 children	>44
France ⁷¹	-	-	between 400 and 450
Germany ^{72,73,74}	66 men >40 of whom are believed to have been involved in crimes against humanity	117 children with German citizenship 21 children with a connection to Germany but no German citizenship	>183 (+21)
Indonesia ⁷⁵	-	50 people in Hol camp identified themselves as Indonesians and pled for repatriation	>50
Italy ^{76,77,78}	>2	>4	>6

61 <https://www.newyorker.com/news/news-desk/americas-isis-members-are-coming-home>

62 Asya Abdullah, interview with RIC, March 2019

63 <https://www.tol.org/client/article/28366-balkan-isis-families-trapped-in-syrian-camps.html>

64 <https://balkaninsight.com/2019/04/18/families-of-albanian-isis-fighters-face-long-road-home/>

65 <https://www.theguardian.com/australia-news/2019/apr/15/australian-isis-terrorists-children-reunited-with-grandmother-in-syria>

66 <https://kurier.at/politik/ausland/wie-oesterreich-mit-heimischen-is-kaempfern-umgeht/400410461>

67 <http://www.kurdistan24.net/en/news/7197e86f-4223-47ec-9968-3606453166a1>

68 <https://www.dailysabah.com/politics/2019/06/14/belgium-to-repatriate-children-from-northern-syrian-camps>

69 <https://globalnews.ca/news/5258869/canada-possible-options-bringing-back-isis-members/>

70 <http://tundratabloids.com/2019/05/24/finland-interior-minister-mykkanen-says-finnish-isis-adults-too-radicalized-should-not-be-repatriated-their-children-however-can-be/>

71 <https://www.theguardian.com/world/2019/jun/10/syria-kurds-children-orphans-french-isis-islamic-state-fighters-handed-over-france>

72 <https://anfdeutsch.com/rojawa-syrien/is-kind-an-daenemark-uebergeben-12201>

73 <https://www.merkur.de/politik/junge-is-anhaengerin-aus-konstanz-wegen-sklavenhaltung-angeklagt-zr-11776860.html>

74 <https://anfdeutsch.com/aktuelles/von-ygp-gefangene-deutsche-is-dschihadisten-werden-zum-problem-9675>

75 <https://www.benarnews.org/english/news/indonesian/indonesia-militants-03292019165508.html>

76 https://www.corriere.it/international/19_febbraio_18/italy-forced-to-take-back-is-foreign-fighters-861e7f76-339c-11e9-8ba2-1cae66b0283a.shtml

77 <https://www.reuters.com/article/us-mideast-crisis-islamic-state-italy-ex/exclusive-islamic-state-fighter-wants-to-return-to-italy-warns-of-sleeper-cells-idUSKBN1QQ0MC>

78 https://www.corriere.it/international/19_febbraio_18/italy-forced-to-take-back-is-foreign-fighters-861e7f76-339c-11e9-8ba2-1cae66b0283a.shtml

Country	Men	Women and children	Total number of nationals
Kosovo ⁷⁹	-	48 persons in Hol camp comprising 10 women and 38 children possible 6 women and 21 children in another location	>48 (+27)
Macedonia ⁸⁰	-	8 persons in Hol camp comprising 2 women and 6 children	>8
Malaysia ⁸¹	-	>13 persons identified in camps > 17 children, remain in Syria	>51
Netherlands ⁸²	approx. 13 men	approx. 32 women 85 children	approx. 130
Norway ⁸³	approx. 30 men and women	approx. 30 men and women approx. 40 children born or taken to live inside ISIS' 'Caliphate' in Syria and Iraq, unclear how many of these survive	Some dozens
Serbia ^{84,85}	Out of dozens of Serbian men who joined ISIS most have died or fled but some at least are in SDF detention.	~20 women	>20
Spain ^{86,87}	>1	3 women held in Hol camp	>4
Sweden ^{88,89}	~40 adults captured or surrendered to the SDF	~40 adults captured or surrendered to the SDF ~80 children of Swedish nationals in Hol camp	approx. 120
Switzerland ⁹⁰	-	3 children in Hol camp	-
Tunisia ⁹¹	Dozens	>200 women and children	-
United Kingdom ^{92,93}	approx. 26 men and women	approx. 26 men and women approx. 30 children	approx. 56
USA ^{94,95}	20 individuals including half a dozen fighters, detained by SDF		

79 <https://balkaninsight.com/2019/04/18/families-of-albanian-isis-fighters-face-long-road-home/>

80 <https://balkaninsight.com/2019/04/18/families-of-albanian-isis-fighters-face-long-road-home/>

81 <https://www.aljazeera.com/news/2019/03/malaysia-offers-citizens-conditional-return-isis-crumbles-190312012544910.html>

82 https://www.dutchnews.nl/news/2019/05/more-dutch-women-and-children-in-syrian-camps-as-fighting-continues/?utm_campaign=shareaholic&utm_medium=twitter&utm_source=socialnetwork

83 <https://www.thenational.ae/world/europe/roughly-40-norwegian-children-born-in-isis-territory-say-police-1.822268>

84 <https://balkaninsight.com/2019/04/25/after-isis-collapse-serbian-women-trapped-in-syria/>

85 <https://www.thebaghdadpost.com/en/Story/37557/Serbia-sentences-seven-for-joining-recruiting-ISIS-fighters>

86 https://elpais.com/elpais/2019/04/02/inenglish/1554188473_573194.html

87 https://elpais.com/elpais/2019/06/18/inenglish/1560848590_179213.html

88 <https://anfenglishmobile.com/women/swedish-left-party-we-must-help-kurds-who-provide-our-security-33594>

89 <https://www.thelocal.se/20190412/sweden-will-repatriate-children-of-isis-fighters-if-possible-foreign-minister>

90 <https://www.bernerzeitung.ch/schweiz/standard/drei-schweizer-maedchen-stecken-in-der-hoelle-fest/story/31797937>

91 <https://www.hrw.org/news/2019/02/12/tunisia-scant-help-bring-home-isis-members-children>

92 <https://www.independent.co.uk/news/world/middle-east/isis-children-shamima-begum-syria-foreign-islamic-state-un-a8925601.html>

93 <https://www.telegraph.co.uk/news/2019/04/10/iraq-offers-try-isis-prisoners-held-syria-multi-billion-pound/>

94 <https://www.newyorker.com/news/news-desk/americas-isis-members-are-coming-home>

95 <https://edition.cnn.com/2019/04/17/politics/foreign-isis-fighters-syria/>

Repatriation as a solution for foreign ISIS suspects

Survivors of ISIS atrocities in Syria and Iraq have been calling for international justice mechanisms for the last five years. However, there has been little movement towards such a solution, with piecemeal repatriation and prosecution of returning ISIS fighters by individual nations taking place in the absence of any cohesive global response. Following the military defeat of ISIS at Baghouz in March 2019, discussions have begun in earnest about how to deal with the thousands of ISIS fighters, plus women and children, currently detained in both North East Syria and Iraq. The following sections of the report will examine a number of these proposals in more detail.

North East Syria's position on repatriation

From early 2015 onwards, ISIS members surrendered themselves to or were captured by the SDF. As ISIS' area of territorial control shrank, the number of foreign suspects grew. Since then, the SDF has been urging countries to take back their citizens, citing among other factors the severe financial burden placed on the AANES. Even before the final operation against ISIS in North East Syria repatriations of captured foreign fighters were successfully carried out: for example, citizens of Indonesia, Russia, the United States, Lebanon and France were all returned to their states of origin.⁹⁶

These demands were repeated by the SDF and AANES throughout the final operations against ISIS in the Deir-ez-Zor region. However, the topic became a subject of wider public debate in February 2019 after United States President Donald Trump called on European countries via Twitter to repatriate their citizens and put them on trial.⁹⁷ Various European countries took positions for and against this demand in the aftermath. Several AANES representatives also publicly repeated the demand for repatriation through local media at this time, such as Abdulkarim Omar, Co-Chair of the Foreign Relations Bureau. Speaking in late February, he added that women and children should be repatriated, rehabilitated and returned to their societies, in the case that their culpability in ISIS' crimes could not be proved.

Though meetings were held on the international level between the countries of origin of foreign ISIS members and the Autonomous Administration, repatriations were not carried out in this period, and there appeared to be little public appetite for such repatriations in the West.⁹⁸ In France, for example, President Emmanuel Macron announced the repatriation of men, women and children, then quietly shelved the plans following mass domestic outcry against the proposal⁹⁹.

Two days after the military defeat over ISIS in Baghouz, a commission was set up by the Autonomous Administration to deal with foreign detainees. Diplomatic work was intensified with the concerned states, in particularly leading members of the Global Coalition against ISIS.¹⁰⁰ Following the sharp decline in humanitarian conditions in Hol camp precipitated by the arrival of thousands of new arrivals from Baghouz, the UN urged the international community to take responsibility. The UN's humanitarian envoy for Syria warned that the people in the camps were in a desperate situation and called on the international community to take responsibility for its own citizens.¹⁰¹

Dr. Abdulkarim Omar indicated April 2019 that antipathy towards repatriation on behalf of the countries of the ISIS suspects' origin led to the decision to pursue internationally-backed prosecution in North East Syria:

"At the moment there are two options: one is that the countries take back their citizens. But there is no country at the moment that acts accordingly. The other option is to bring these people to justice here and carry out the rehabilitation of women and children here. This also requires international support. The problem is much bigger than commonly thought. If both options are rejected, an alternative must be proposed. But as far as we can tell, no alternative has been developed so far."¹⁰²

96 <https://thedefensepost.com/2018/09/20/syria-sudan-woman-isis-custody/>

97 <https://twitter.com/realdonaldtrump/status/1096980408401625088>

98 <https://anfenglishmobile.com/features/the-danger-will-grow-unless-states-take-back-isis-members-33265>

99 https://www.liberation.fr/france/2019/04/04/etat-islamique-un-rapatriement-programme-prepare-mais-gele_1719480

100 <https://anfenglishmobile.com/features/jailed-isis-members-will-either-be-returned-home-or-tried-here-34430>

101 <https://www.independent.co.uk/news/world/middle-east/isis-syria-shamima-begum-children-isis-camps-un-a8877861.html>

102 <https://www.independent.co.uk/news/world/middle-east/isis-children-shamima-begum-syria-foreign-islamic-state-un-a8925601.html>

This demand for international help was echoed in many quarters. “Even though we would asses the SDF had done an absolutely admirable job in managing the situation, an idea of, in some cases, 60,000ish numbers of ISIS affiliates and fighters being held by a non-state actor. This means that they are going to need significant help,”¹⁰³ a senior US defense official said in mid-April. National and international human rights organizations supported the call for repatriation and international help, accusing the international community of failing to take responsibility over foreign national ISIS detainees held in North East Syria. The Syrian Observatory for Human Rights demanded European countries to repatriate their citizens and put them on trial in their home countries,¹⁰⁴ while Nadim Houry from the New York-based watchdog Human Rights Watch stated:

“The call (...) is really a call for help by the authorities in northeast Syria. (...) They have been abandoned by the international community to deal with the aftermath of ISIS.”¹⁰⁵

The SDF further warned of the security risk if they were left in the present situation without any long-term political perspective to solve the problem.¹⁰⁶ It was also noted that the constant threat of Turkish invasion meant the further security of ISIS prisoners could not be guaranteed, with the Kurdish politician Fawza Yousef saying:

“Our region faces threats from various directions, especially the Turkish state. Should there be a tiny security gap here, there would be a great danger... It would be like a hand grenade from which the security pin was pulled.”¹⁰⁷

After repeated demands in this direction, a handful of countries took action to repatriate their citizens – a full list of those who’ve taken such action can be found below. However, repatriations remained on a piecemeal basis, with a few European powers bringing back a select few vulnerable children and a couple of Eastern European countries putting full repatriation programmes in place. The situation for the vast majority of ISIS detainees in North East Syria remained unchanged. SDF spokesperson Mustafa Bali said he was “glad to see more countries are taking responsibility for their citizens”, but added: “this must be extended to men and women in our camps and prisons, not only children”.¹⁰⁸

International positions on repatriation

Repatriation became the subject of vigorous debate in suspected ISIS members’ countries of origin, with the public mood – in Western nations especially – strongly against the return of ISIS members. Different approaches were discussed both in the public sphere and between different political tendencies, and even within the same government or administration. In ascending order, public mood proved progressively more hostile against the repatriation of: orphans; children with parents alive and detained in North East Syria; women; and men.

A summary follows of different countries’ stance on the repatriation of their foreign nationals currently being held in North East Syria.

In favor of taking back all citizens

Just four countries have stated on record that they are willing to repatriate all their citizens.

The Kosovar justice minister Abelard Tahiri has said that **Kosovo** will not stop before every citizen is returned, arguing that he will not allow that their citizens will be a danger for others, and ensuring that they are returned to Kosovo where they will face justice.¹⁰⁹

The foreign minister of **Sudan**, Badr al-Deen Ali, has stated that Sudan is willing to bring back all of their citizens that have been ISIS members and are now detained in North East Syria.¹¹⁰ However, it is unclear how this will be affected by the present political upheaval in the East African nation.

103 <https://edition.cnn.com/2019/04/17/politics/foreign-isis-fighters-syria/>

104 <https://www.mdr.de/nachrichten/politik/ausland/siebentausend-is-kaempfer-in-kurdenhand-100.html>

105 <https://the arabweekly.com/world-court-isis-crimes-needed-unlikely>

106 <https://www.theguardian.com/world/2019/jun/15/belgium-takes-back-six-children-of-isis-fighters-from-syrian-camps>

107 <https://www.theguardian.com/world/2019/jun/15/belgium-takes-back-six-children-of-isis-fighters-from-syrian-camps>

108 <https://www.theweek.co.uk/100114/what-will-happen-to-children-of-british-jihadis>

109 <https://www.independent.co.uk/news/world/europe/kosovo-syria-citizens-jihadists-families-pristina-a8879356.html>

110 <https://anfddeutsch.com/rojava-syrien/fuenf-kinder-aus-nordsyrien-in-den-sudan-zurueckgefuehrt-10932>

Morocco's Ministry of Interior will allow Moroccan nationals to return safely and make them subjects of judicial investigations, seeing this as a contribution to international efforts in the fight against terrorism.¹¹¹

Citizens from **Malaysia** will also be allowed to return provided they comply with checks and enforcement. Those not served with terror offences – in practice, women – must complete a one-month government-run rehabilitation program.¹¹²

In addition, though they have not explicitly stated their intention to bring back every one of their nationals from North East Syria, **Kazakhstan** have repatriated over 200 men, women and children likely making up most if not all of their nationals held in North East Syria, detaining some on arrival back in Kazakhstan.

Though admirable in their example, of these five nations only Morocco was a major exporter of ISIS fighters, and none can be said to be major players on the world diplomatic stage. The example set by Malaysia, with its program of psychological assessment, rehabilitation and deradicalization even for those not convicted of any crime, in some sense makes it the world leader for dealing with the return of foreign ISIS fighters – though this must be considered in the context of a poor human rights record in Malaysia's prisons.

In favor of repatriating combatants

In contrast to general trends favoring the repatriation of women and children over male combatants, two states in particular have focused on the repatriation of male fighters.

Up to February 2019, the **United States of America** had repatriated most of their captured male fighters¹¹³ who fell into SDF hands. Per spokesman of the Defense Department, Cdr. Sean Robertson, repatriating foreign fighters is seen as the best solution to prevent them from returning to the battlefield.¹¹⁴ America had taken a hard line against non-combatants, most notably refusing to repatriate high-profile female ISIS member Hoda Muthana, though it recently repatriated a small group of women and children – Ms. Muthana not among them.¹¹⁵

Canada has also been seeking multiple avenues to repatriate and prosecute any Canadian involved in terrorism, stating that this is their top priority.¹¹⁶

In addition, **Slovakia's** Foreign Minister Miroslav Lajcak recommended that Europe should take back European fighters, calling for a pan-European consensus on the issue.¹¹⁷

Italy, a state with very low numbers of foreign fighters, has repatriated a single suspected ISIS fighter¹¹⁸.

The most significant case here is the United States, whose focus on repatriating its own combatants has been echoed in President Trump's demand for European powers to do likewise. There has been little movement in response to President Trump's demands, and nor has his threat to 'release' ISIS combatants been realized, provoking a search for alternative solutions among European states¹¹⁹.

In favor of taking back women and/or children

There are two main groups of nations which have proved willing to repatriate ISIS-linked women and children, either unconditionally or on a case-by-case basis. These form two major groups: Eastern European and West Asian states bringing back women and children wholesale, and Western powers bringing back a select few orphans and highly vulnerable cases.

Russia and its federal subject **Chechnya** have carried out large numbers of repatriations for minors from Iraq and Syria in recent years. The program stopped abruptly in 2017 after complaints from senior

111 <https://www.morocoworldnews.com/2019/03/267647/authorities-repatriate-8-moroccans-terrorism-syria/>

112 <https://www.aljazeera.com/news/2019/03/malaysia-offers-citizens-conditional-return-isil-crumbles-190312012544910.html>

113 <https://blogs.prio.org/2019/02/isis-women-hoping-to-return-home-are-met-with-a-cold-shoulder-from-state-officials/>

114 <https://edition.cnn.com/2019/04/17/politics/foreign-isis-fighters-syria/>

115 <https://time.com/5601885/american-women-children-repatriated-us-syria/>

116 <https://globalnews.ca/news/5258869/canada-possible-options-bringing-back-isis-members/>

117 <https://www.nbcnews.com/news/world/trump-wants-europe-take-back-isis-fighters-s-tricky-n972696>

118 <https://www.alaraby.co.uk/english/news/2019/6/29/italian-is-member-repatriated-at-romes-request-sdf>

119 <https://www.politico.eu/article/donald-trump-syria-isis-threatens-to-release-isis-fighters-if-eu-doesnt-take-them/>

officials in Russia's security services, but resumed in December 2018. However, in the current repatriations women are not being repatriated.¹²⁰ Chechen President Ramzan Kadyrov has confirmed that Chechnya will repatriate all children that were taken to ISIS.¹²¹ He stated that Chechnya "will not stop the search and return of Russian citizens while there is at least one child and one woman in Iraq and Syria."¹²² Russia's President Vladimir Putin has likewise declared himself in favor of repatriating children while at the same time failing to mention the fate of women, and stating that he did not welcome the return of Russian foreign fighters¹²³.

Uzbekistan likewise brought back 148 women and children repatriated in May 2019.¹²⁴ **Tajikistan's** Foreign Minister, Sirojiddin Muhridin, has announced that he will ensure that no Tajik child is left in Syria. He has stated he is in contact with the Syrian authorities, international aid agencies, as well as the Kurdish Administration to discuss access to the Tajik nationals in the camps.¹²⁵

In the second group, the French government announced its attention to bring back fighters, before backtracking following public outcry. Thereafter, **France** has addressed the issue of repatriating IS related children on a case-by-case basis, bringing back orphaned children of fighters¹²⁶ while refusing to bring back those whose parents are still living¹²⁷. France has also attracted criticism for allowing its citizens to be deported from North East Syria to Iraq and sentenced to death there, then protesting the verdict without actually intervening¹²⁸.

20

The **Netherlands** didn't wish to repatriate adult fighters, but has cooperated with the authorities in North East Syria for the return of two ISIS-linked children, following the visit of a delegation, and is exploring the possibility of bringing back ISIS-accused women as well.¹²⁹¹³⁰

Sweden has repatriated seven orphan children following protracted negotiations and the visit of a Swedish delegation to North East Syria¹³¹. Although children have been repatriated, per Interior Minister Mikael Damberg, there are no plans to repatriate any Swedish ISIS members.¹³²

Belgium repatriated seven orphaned children following a similar visit¹³³. The minister in charge of migration policy, Maggie De Block, said that a distinction has to be made between the mothers and the children¹³⁴, and it has been indicated that Belgium will not welcome the return of ISIS-linked mothers.¹³⁵ Belgium has stated they are willing to return children under the age of ten in general, and those older on a case-by-case basis.¹³⁶

Australia has also brought back eight orphans in similar fashion, following a diplomatic visit to North East Syria¹³⁷. In general, Australia has indicated that they want to deal with relatives joined ISIS "as far from Australia as possible."¹³⁸

Although the Federal Council of **Switzerland** does not want to spend resources on repatriating adults, they see taking back children as a beneficial step.¹³⁹

The Spanish government has stated its desire to bring back women and minors to **Spain**, out of human-

120 <https://www.theguardian.com/world/2019/mar/02/we-arent-dangerous-why-chechnya-has-welcomed-women-who-joined-isis>

121 <http://www.rudaw.net/english/world/310320191>

122 <https://lenta.ru/articles/2019/02/21/isis/>

123 https://www.washingtonpost.com/politics/2019/04/09/why-is-russia-insisting-bringing-home-isis-fighters-children/?utm_term=.a6e782720f1f

124 <https://thedefensepost.com/2019/05/30/uzbekistan-repatriate-isis-women-children-syria/>

125 <https://www.rferl.org/a/why-tajikistan-is-fighting-to-bring-its-islamic-state-widows-back-home/29782787.html>

126 <https://www.theguardian.com/world/2019/jun/10/syria-kurds-children-orphans-french-isis-islamic-state-fighters-handed-over-france>

127 <http://www.rudaw.net/english/world/13062019>

128 <https://www.npr.org/2019/05/27/727358705/france-wont-take-its-isis-fighters-back-but-it-doesnt-want-them-executed-either>

129 <https://www.kurdistan24.net/en/news/c5156815-1d72-4421-a8c3-0142567d7aab>

130 <https://www.kurdistan24.net/en/news/1f74d5d2-896b-4d27-9c83-2921ed203f84>

131 <https://www.kurdistan24.net/en/news/dba9a72e-f08f-439d-bcfe-dc396c5815b8>

132 <https://www.thelocal.se/20190218/terror-expert-warns-sweden-against-repatriating-syria-jihadists>

133 <https://www.theguardian.com/world/2019/jun/15/belgium-takes-back-six-children-of-isis-fighters-from-syrian-camps>

134 <https://globalnews.ca/news/4802293/belgium-islamic-state-militant-women-repatriation/>

135 <https://anfenglishmobile.com/features/daesh-prisoners-exist-they-are-people-and-a-solution-is-needed-33555>

136 <http://www.kurdistan24.net/en/news/7197e86f-4223-47ec-9968-3606453166a1>

137 <https://www.ft.com/content/33b71286-9637-11e9-8cfb-30c211dcd229>

138 <https://www.hrw.org/news/2019/04/17/australian-children-are-trapped-syria-and-government-must-bring-them-home>

139 <https://www.thelocal.se/20190412/sweden-will-repatriate-children-of-isis-fighters-if-possible-foreign-minister>

itarian reasons. However, no firm decision or action has been taken to this end.¹⁴⁰

Finland has also stated that it will not repatriate adult ISIS members, but Minister of the Interior Kai Mykkänen has said that Finland will find ways to bring children to Finland and place them in the care of the Finnish authorities.¹⁴¹

Like other nations, **Austria** has stated that the security of its own population is its highest priority. At first, government representatives refused repatriation outright.¹⁴² Following a case in which an Austrian woman who is together with her 2-year-old son in North East Syria requested repatriation, however, the Austrian authorities have said that they are looking for a way to take back the child.¹⁴³

One interesting case is **Denmark**, whose approach has reversed throughout the last half a decade. In 2014, Denmark offered citizens who fought abroad the opportunity to return and receive rehabilitation without prosecution.¹⁴⁴ However, Danish politicians later stated that they didn't wish for the return of Danish ISIS suspects. Moreover, the children of Danish national ISIS suspects will no longer be automatically granted Danish citizenship, according to a new agreement between the government and the right-wing Danish People's Party.¹⁴⁵ Yet despite this, in June Denmark repatriated a single Danish child, who was reportedly heavily injured.¹⁴⁶

Some other states outside of these two groups have taken similar action, repatriating women and children only. For example, **Saudi Arabia's** policy is to take back victims and family members who had been kidnapped and taken to join ISIS.¹⁴⁷

Tunisia initially sought to repatriate women and children, but having assessed women as a potential security risk, is now focusing on repatriation of children.¹⁴⁸ Tunisia was a top global contributor to ISIS' ranks, but although over a thousand of the many Tunisians who travelled to join ISIS have since returned to the nation of their own volition, it has been accused of dragging its heels over the repatriation of ISIS-linked children from North East Syria¹⁴⁹.

The Danish case is illustrative of the conundrum faced by many Western powers, in particular. States like Denmark are trying to tread a fine line between appeasing populist, nationalist currents in their home countries which are fiercely against any perceived concession to ISIS-linked individuals on the one side, and their own professed commitment to human rights, humanitarian action and the rule of law. As such, it appears that many global powers are carrying out severely limited repatriations of the most vulnerable children in North East Syria, while still keeping themselves far from any more wide-ranging deal to bring back ISIS fighters and adult ISIS members, both male and female.

Opposed to repatriation or yet to clarify position

The United Kingdom is perhaps the global power most vocally opposed to repatriation, refusing to countenance any return of ISIS fighters and stripping citizenship from suspected ISIS members, most notably high-profile teenager Shamima Beghum.¹⁵⁰ The UK has also used a technique common to several other European nations of requiring its citizens detained in North East Syria to make the impossible trip to an embassy outside of Syria, from where it says it can offer assistance. "If a British child who has been in Syria is able to seek consular assistance outside of Syria, then we would work with local and UK authorities to facilitate their return if requested,"¹⁵¹ per Home Office minister Baroness Williams of Trafford.

The same demand that its citizens first visit a consulate or embassy has been used by the **Netherlands**

140 https://elpais.com/elpais/2019/04/02/inenglish/1554188473_573194.html

141 <http://tundratabloids.com/2019/05/24/finland-interior-minister-mykkanen-says-finnish-isis-adults-too-radicalized-should-not-be-repatriated-their-children-however-can-be/>

142 <https://www.kleinezeitung.at/service/newsticker/5581779/Kurz-zurueckhaltend-zu-Ruecknahme-von-ISKaempfern>

143 <https://www.derstandard.at/story/2000098498167/kickl-will-is-tribunale-im-nahen-osten>

144 <https://www.cfr.org/blog/guest-post-booking-return-flight>

145 https://sputniknews.com/europe/201903281073619896-denmark-daesh-citizenship/?fbclid=IwAR0qlyvw0tqhSau_A57MFWiKOE8vWhZC0-QoFHE5EFcyDJXNF1Qc82xO1g

146 <http://www.rudaw.net/english/middleeast/23062019>

147 <https://www.thenational.ae/world/gcc/saudi-children-kidnapped-to-join-isis-return-home-1.843451>

148 <https://www.hrw.org/news/2019/02/12/tunisia-scant-help-bring-home-isis-members-children>

149 <https://www.hrw.org/news/2019/02/12/tunisia-scant-help-bring-home-isis-members-children>

150 <https://anfdeutsch.com/aktuelles/von-ypg-gefangene-deutsche-is-dschihadisten-werden-zum-problem-9675>

151 <https://www.bbc.com/news/uk-47885484>

government with regards to adult jihadi fighters¹⁵², and **Germany** has said the same for its own fighters.

Likewise, **Norway** has stated that its citizens must return on their own, to face prosecution when they arrive¹⁵³. The government has indicated that it has no intention to take steps to repatriate families.

Jordan forbids the return of their citizens. Those who return of own volition will face imprisonment when arriving.¹⁵⁴

Authorities in **Serbia** appear to be taking no steps to repatriate women who are currently in camps in North East Syria.¹⁵⁵

In **Indonesia**, President Béji Caïd Essebsi in 2016 proposed an amnesty for returning ISIS fighters and families – what would have been the world's most generous policy towards ISIS-linked individuals. However, after negative media and protests he retreated,¹⁵⁶ and the Indonesian government is still unclear what to do with Indonesian ISIS suspects now in North East Syria.¹⁵⁷

Germany has repatriated a handful of children from Iraq, but none to date from North East Syria. After the grandparents of two orphans currently in Hol camp sued the German state for repatriation, the German authorities have made some moves toward repatriation. The Foreign Ministry has stated that though that they will not directly engage with the Autonomous Administration, they will attempt to extract the children through the intermediation of NGOs.¹⁵⁸

Some nations have engaged with Iraq to repatriate fighters, but refused to do the same with North East Syria, referring their nationals to embassies out of reach beyond North East Syria's borders. These embassies are unreachable even for ordinary civilian residents of the autonomous region, which is surrounded by hostile powers, let alone those detained in prison or secure camps. This indicates that as well as the assessment of the threat factor in any individual case, there is a political motivation behind states like Germany's refusal to engage with the Autonomous Administration over repatriation – especially since the Autonomous Administration has demonstrated its willingness to deliver children to the border crossing with Iraq, acknowledging foreign powers' safety concerns over travel into Iraq.

Revoking citizenship

The most extreme reaction against ISIS detainees in North East Syria has come from those states which have discussed or actively moved towards revoking the citizenship of their citizens held in North East Syria. In the **United Kingdom**¹⁵⁹, **Germany**¹⁶⁰, **Austria**¹⁶¹, **Finland**¹⁶², **Denmark**¹⁶³ and **Kyrgyzstan**¹⁶⁴ discussions were held over stripping the citizenship of citizens found to have joined ISIS. Laws that forbid citizens from fighting for foreign armies or militias exist in many nations' constitutions.¹⁶⁵ Typically, citizenship can only be revoked if the concerned people are not made stateless through this action – that is, if they hold or are able to obtain a second passport as a citizen of another country. As such, this option has most commonly been explored by Western powers seeking to pass responsibility for their citizens to poorer countries outside the West, even when the individual in question was born and raised in the country seeking to remove their citizenship, and have never visited or developed ties to the third country in question.¹⁶⁶

Revoking citizenship makes it easy for powerful nation-states to absolve themselves of responsibility over trying their citizens, but only passes on the security issue to less powerful nations – or to the Autonomous Administration in North East Syria.

152 https://www.dutchnews.nl/news/2019/05/more-dutch-women-and-children-in-syrian-camps-as-fighting-continues/?utm_campaign=shareaholic&utm_medium=twitter&utm_source=socialnetwork

153 <https://blogs.prio.org/2019/02/isis-women-hoping-to-return-home-are-met-with-a-cold-shoulder-from-state-officials/>

154 <https://thearabweekly.com/jordanians-continue-struggle-jihadist-threats>

155 <https://balkaninsight.com/2019/04/25/after-isis-collapse-serbian-women-trapped-in-syria/>

156 <https://www.hrw.org/news/2019/02/12/tunisia-scant-help-bring-home-isis-members-children>

157 <https://www.thejakartapost.com/news/2019/03/25/indonesia-unclear-repatriation-jihadists.html>

158 <https://anfdeutsch.com/rojava-syrien/is-kind-an-daenemark-uebergeben-12201>

159 <https://www.theguardian.com/world/2019/mar/12/ministers-urged-to-help-uk-families-of-foreign-fighters-in-syria>

160 <https://www.merkur.de/politik/junge-is-anhaengerin-aus-konstanz-wegen-sklavenhaltung-angeklagt-zr-11776860.html>

161 <https://www.kleinezeitung.at/service/newsticker/5581779/Kurz-zurueckhaltend-zu-Ruecknahme-von-ISKaempfern>

162 <https://anfenglishmobile.com/news/sweden-and-finland-don-t-want-isis-members-back-33405>

163 <https://www.thelocal.dk/20190328/danish-government-reaches-agreement-to-revoke-passports-of-isis-fighters>

164 [https://www.undp.org/content/dam/unct/kyrgyzstan/docs/General/UN%20PBF_UNW_ECA_KYRG%20chapter%20FINAL%20\(1\).pdf](https://www.undp.org/content/dam/unct/kyrgyzstan/docs/General/UN%20PBF_UNW_ECA_KYRG%20chapter%20FINAL%20(1).pdf)

165 <https://www.loc.gov/law/help/foreign-fighters/country-surveys.php>

166 <https://www.nytimes.com/2019/02/22/world/middleeast/isis-shamima-begum-citizenship-stateless.html>

Country-by-country information on completed repatriations

Here follows a country-by-country list of those nations known to have repatriated ISIS members or ISIS-linked individuals following the final operation against ISIS in Baghouz that started in February 2019. US officials have further noted that fighters have been repatriated by several countries that have chosen not to make this public due to domestic political concerns.¹⁶⁷

Known number of foreign nationals repatriated from North East Syria from January to July 2019

Country	Adults	Children	Total
Australia ¹⁶⁸	-	8 presumed orphans, belonging to two families, repatriated following a visit to North East Syria by Australian diplomat John Philp, in the end of June 2019	8
Belgium ¹⁶⁹	-	6 orphans handed over to Belgian authorities on 13 June 2019	6
Bosnia ¹⁷⁰	One suspected Bosnian ISIS fighter has been repatriated with the assistance of the USA	-	1
Denmark ¹⁷¹	-	One injured child repatriated on 24 June 2019	1
France ^{172,173}	-	5 orphaned children, all under five years old, were handed over to a French delegation on the 14 March 2019 12 orphaned children of French jihadists were flown home on 10 June 2019	17
Indonesia ¹⁷⁴	27 members of a family, who were reportedly imprisoned by ISIS after male family members refused to fight for ISIS, before escaping and surrendering to the SDF	also children among the 27 members of the family	27
Italy ¹⁷⁵	One adult fighter repatriated at the end of June 2019	-	1
Kazakhstan ^{176, 177}	5 men and 11 women repatriated on 6 January 2019 75 adults repatriated between 7 and 9 May	30 children on 6 January 2019 156 children repatriated between 7 and 9 May	277
Kosovo ¹⁷⁸	4 men, 32 women on the 20 April 2019	74 children (including 9 orphans), on the 20 April 2019	110
Morocco ¹⁷⁹	8 Moroccans aged between 21 and 36 on 10 March 2019	-	8
Netherlands ¹⁸⁰	-	2 orphans transferred to a Dutch government delegation in Ain Issa in North East Syria on 9 June 2019	2
Russia ^{181,182}	50 women towards the end of 2018	3 children whose parents were members of ISIS, were given to a delegation from the Douma, Russian parliament, on the 25 March	53
Saudi Arabia ¹⁸³	-	2 children who were kidnapped by their father and taken to join ISIS repatriated at the end of March 2019	2

167 <https://www.hrw.org/news/2019/04/17/australian-children-are-trapped-syria-and-government-must-bring-them-home>

168 <https://www.aljazeera.com/news/2019/06/australia-repatriating-children-isil-families-190624060953027.html>

169 <https://www.euronews.com/2019/06/15/belgium-repatriates-six-islamic-state-children-from-syrian-camps>

170 <https://english.alarabiya.net/en/News/middle-east/2019/04/21/Bosnia-brings-back-detains-ISIS-fighter-from-Syria.html>

171 <http://www.rudaw.net/english/middleeast/230620191>

172 <http://www.kurdistan24.net/en/news/d26834b1-f618-4e65-92bd-0260dff255a>

173 <https://www.theguardian.com/world/2019/jun/10/syria-kurds-children-orphans-french-isis-islamic-state-fighters-handed-over-france>

174 <https://anfenglishmobile.com/features/the-danger-will-grow-unless-states-take-back-isis-members-33265>

175 <http://www.rudaw.net/english/middleeast/syria/30062019>

176 <https://thedefensepost.com/2019/01/09/kazakhstan-evacuates-30-children-of-isis-fighters-from-syria/>

177 <https://thedefensepost.com/2019/05/10/kazakhstan-repatriates-156-isis-children/>

178 <https://www.independent.co.uk/news/world/europe/kosovo-syria-citizens-jihadists-families-pristina-a8879356.html>

179 <https://www.moroccoworldnews.com/2019/03/267647/authorities-repatriate-8-moroccans-terrorism-syria/>

180 <https://nltimes.nl/2019/06/10/netherlands-bringing-back-two-isis-orphans-syria-report>

181 <https://anfdeutsch.com/rojava-syrien/drei-kinder-aus-nordsyrien-nach-russland-zurueckgefuehrt-10361>

182 <https://www.heise.de/tp/features/Deutscher-IS-Kaempfer-in-Nordsyrien-festgenommen-4270512.html>

183 <http://www.rudaw.net/english/middleeast/02042019>

Sudan ¹⁸⁴ ¹⁸⁵	-	5 children were handed over to the Sudanese foreign ministry.	5
Sweden ¹⁸⁶	-	7 orphans handed over to a Swedish delegation on the 7 May 2019, all of them children (aged between one and eight) of dead ISIS fighter Michael Skrãm	7
USA ¹⁸⁷ ¹⁸⁸ ¹⁸⁹ ¹⁹⁰	No precise numbers, but several of its citizens brought to face trial in US courts	2 US women and 6 children repatriated in June 2019 A family of 4 Americans repatriated from Roj camp, also in June	>12
Uzbekistan ¹⁹¹	148 women and children repatriated in May 2019.	148 women and children repatriated in May 2019.	148

Working with the extant information, it can be estimated that perhaps 500 ISIS-linked individuals have been repatriated from North East Syria in the months following ISIS' defeat – or 3% of the total number of foreign nationals detained in the region. The rate of return for foreign fighters, moreover, is likely close to 1%. As such, it is clear that these repatriations, while beneficial in themselves and in terms of the individual cases involved, can only ever present a partial solution to the crisis in North East Syria.

24 *Obstacles to repatriation*

There are a number of reasons commonly cited by the large majority of nation-states who have either refused to repatriate ISIS suspects outright, or brought back only a select few children or mothers.

Chief among these is the domestic security threat presented by returning ISIS fighters. Governments may feel their own laws are insufficient to vet, try and detain ISIS fighters, or more broadly don't wish to heighten public anxieties about taking ISIS jihadists into their countries.¹⁹² The public opinion in Europe is overwhelmingly against the return of ISIS-linked citizens, in a trend which is especially pronounced in countries where ISIS-claimed attacks took place.¹⁹³ Danish Premier Lars Løkke Rasmussen, for example, described ISIS-linked terrorists as "the most dangerous people in the world"¹⁹⁴. Whether based on legitimate security concerns or fear of angering electorates who want their leaders to be tough on terror, the effect is much the same.

Not repatriating ISIS fighters also functions as a punishment, which meets with wide public endorsement.¹⁹⁵ This is based on the understanding that remaining in North East Syria constitutes a punishment in itself, with Western newspapers framing ISIS fighters' desire to return home as the desire for a 'soft option' in Western detention or justice processes. Reports along these lines typically frame the suspects in simplistic terms as detained in "Syria's hellhole prisons", eliding the difference between the Assad regime and North East Syria¹⁹⁶. The 'Kurds' in general, and the YPG and YPJ in particular, enjoy a wide base of support for their leading role in the fight against ISIS. Stories framed in this way prevent Western audiences from making the connection between these prisoners detained far away in Syria, and the burden placed on the 'Kurds' who they notionally support.

On the other side, relatives of detained ISIS suspects have carried out protests in the home countries, as happened on the 29 April in Germany. Their main argument is that the children should not be punished for the parents' mistakes.¹⁹⁷

184 <https://anfenglishmobile.com/features/daesh-prisoners-exist-they-are-people-and-a-solution-is-needed-33555>

185 <https://anfdeutsch.com/rojava-syrien/fuenf-kinder-aus-nordsyrien-in-den-sudan-zurueckgefuehrt-10932>

186 <https://anfdeutsch.com/rojava-syrien/kinder-schwedischer-is-anhaenger-zurueckgefuehrt-11244>

187 <https://blogs.prio.org/2019/02/isis-women-hoping-to-return-home-are-met-with-a-cold-shoulder-from-state-officials/>

188 <https://edition.cnn.com/2019/04/17/politics/foreign-isis-fighters-syria/>

189 <https://twitter.com/DanWilliams/status/1136192735206170625>

190 <https://www.theguardian.com/world/2019/may/22/us-repatriates-family-from-syrian-camp-for-isis-suspects>

191 <https://thedefensepost.com/2019/05/30/uzbekistan-repatriate-isis-women-children-syria/>

192 <https://www.dw.com/en/berlin-ready-to-fetch-is-german-children-after-court-case/a-48996448>

193 https://www.washingtonpost.com/world/europe/after-caliphate-collapsed-europe-has-done-little-to-take-back-those-who-joined-isis/2019/06/20/4bab9cc2-8bc4-11e9-b6f4-033356502dce_story.html

194 <https://www.kleinezeitung.at/service/newsticker/5581779/Kurz-zurueckhaltend-zu-Ruecknahme-von-ISKaempfern>

195 <https://www.internationalaffairs.org.au/australianoutlook/isis-foreign-fighters-keep-enemies-closer/>

196 <https://www.thesun.co.uk/news/6754344/whinging-western-isis-fanatics-beg-to-be-transferred-to-european-jails-as-theyre-left-to-rot-in-syrias-hellhole-prisons/>

197 <https://www.aljazeera.com/news/2019/04/isis-fighters-families-stage-german-protest-return-190429195153509.html>

Some countries also argue that foreign fighters don't deserve repatriation. The United Kingdom's government, for example, argues that travel warnings to Syria and Iraq have been published by the Home Office. People who dismissed this warning have to face the consequences of their decisions.¹⁹⁸

Countries are also reluctant to bring ISIS suspects home because of the difficulties in domestic prosecution. In cases of war crimes or other crimes of international interest, states can try perpetrators in national courts. According to the Rome Statute – an international treaty of the UN ratified by 123 nation-states and Palestine – national courts have the primary responsibility to prosecute their citizens.¹⁹⁹ However, many states face difficulties over prosecuting repatriated citizens with their legal systems, due to inadequate implementation of national law as well as the lack of juridical cooperation between the treaty parties. In particular, a lack of sufficient evidence leads to the fear that repatriated ISIS members will not be sentenced at all, or that they will not be handed a sentence commensurate with their alleged crimes. In many cases, citizens have been captured on a foreign field of battle with no further concrete evidence.²⁰⁰

The USA, for example, doesn't want to repatriate suspected ISIS members until it has sufficient evidence to prosecute them after their arrival. As elsewhere in the world, citizens in the USA can't be jailed indefinitely without violating their constitutional rights. Finding evidence to justify imprisonment for each individual is a time-consuming challenge.²⁰¹ Gaps or absences in the law as it stands also hinder governments from prosecuting returned ISIS suspects. Many countries, like Sweden, did not criminalize traveling to Syria. This causes obstacles in prosecuting returnees for association with ISIS.²⁰² As Magnus Ranstorp, a Swedish expert on terrorism, says: "The main problem is that Sweden doesn't yet have the laws in place, and so we can't prosecute them [here yet]."²⁰³

The legal infrastructure has also been found lacking. For example, the German Public Prosecutor General stated that trials for German ISIS returnees could not be conducted with the current staff at the court, which he described as insufficient.²⁰⁴ Again, this creates a double standard where governments are happy for their citizens to be detained without trial overseas in North East Syria, but shy away from such detentions at home. If the legal and practical infrastructure is lacking to try, judge and detain foreign ISIS fighters at home in Germany, for example, it is even more lacking in North East Syria.

National prosecutions mean that every country who has ISIS members and wants to prosecute them needs to collect evidence itself to prove that their nationals were involved in genocide or other war crimes.²⁰⁵ A common mechanism has not yet been set up, so every country faces its own problems in domestic prosecution. Relatively few returning ISIS suspects have been prosecuted in their home countries.²⁰⁶ In the UK, for example, hundreds of ISIS fighters have returned to walk free, with only one in eight being detained and tried²⁰⁷. This creates the contradictory situation where those that return of their own volition are able to walk free, while detained fighters offered up for secure transfer back into the government's hands by the Autonomous Administration are turned away.

Many governments also have restricted or unclear jurisdictions on facilitating repatriations. For example the Serbian Interior Ministry has stated that Serbian women in camps in North East Syria fall under the competence of the UN, and that they themselves have no contact to their nationals detained in the region.²⁰⁸ Macedonia's Ministry of interior similarly stated that it had no jurisdiction to facilitate the return of its citizens from Syria.²⁰⁹ To take another example, in Bosnia a coordination body of the government that was meant to deal with return of the ISIS fighters and their families has not yet materialized²¹⁰. The Canadian Security Intelligence Service also said that there is no direct contact with their citizens who are in camps and seeking repatriations.²¹¹ Discussions have also been undertaken as to whether repatriation is a European or national question. EU foreign policy chief Federica Mogherini

198 <https://www.independent.co.uk/news/world/middle-east/isis-children-shamima-begum-syria-foreign-islamic-state-un-a8925601.html>

199 <http://www.coalitionfortheicc.org/news/20150423/isis-out-iccs-reach>

200 <https://cis.org/Cadman/Repatriating-ISIS-Foreign-Fighters-their-Countries-Nationality-Wise>

201 <https://www.newyorker.com/news/news-desk/americas-isis-members-are-coming-home>

202 https://www.washingtonpost.com/world/europe/after-caliphate-collapsed-europe-has-done-little-to-take-back-those-who-joined-isis/2019/06/20/4bab9cc2-8bc4-11e9-b6f4-033356502dce_story.html

203 <https://www.thelocal.se/20190307/sweden-calls-for-international-tribunal-to-investigate-returning-isis-fighters>

204 <https://www.merkur.de/politik/junge-is-anhaengerin-aus-konstanz-wegen-sklavenhaltung-angeklagt-zr-11776860.html>

205 <https://www.ibtimes.com/us-says-isis-crimes-amount-genocide-prosecution-difficult-2338504>

206 <https://www.independent.co.uk/voices/isis-genocide-crime-atrocities-justice-council-of-europe-un-a8448146.html>

207 <https://www.telegraph.co.uk/news/2016/05/21/only-one-in-eight-jihadists-returning-to-uk-is-caught-and-convic/>

208 <https://www.tol.org/client/article/28366-balkan-isis-families-trapped-in-syrian-camps.html>

209 <https://balkaninsight.com/2019/04/18/families-of-albanian-isis-fighters-face-long-road-home/>

210 <https://www.tol.org/client/article/28366-balkan-isis-families-trapped-in-syrian-camps.html>

211 <https://globalnews.ca/news/5258869/canada-possible-options-bringing-back-isis-members/>

responded to President Trump's demand of repatriation by saying that no decisions can be taken at the European level, arguing that it remains a national competence.²¹²

Some politicians, including those from France²¹³ and Germany²¹⁴ have stated that repatriations are not seen as an urgent priority. Knowing that their citizens are detained by the authorities in North East Syria makes it less urgent to them to find a solution.

Another barrier is the lack of clarity over citizenship and status. For children in the camps, it is difficult to determine their nationality because of scarce documentation. Birth certificates may be held on file by their home governments, but for those born within the so-called 'caliphate' citizenship is an open question. The question about who is responsible for Syria-born children of foreign fighters - especially if the parents are from two different countries outside of Syria and Iraq - has found no clear answer. It is also assumed that many orphans have been unofficially adopted by other members of ISIS. DNA testing has been proposed as a method to identify children's heritage and thus their citizenships, following which a government can decide on repatriation, but this would be a long and expensive process.²¹⁵

Bosnia, for example, has no clear policy on repatriating citizens who gave birth to children in ISIS-held territory because the children do not hold Bosnian citizenship.²¹⁶ Germany has likewise stated that it is difficult to prove peoples' citizenship. Although the German security service BND is conducting interrogations in North East Syria, German Foreign Minister Heiko Maas said it is difficult to prove if those ISIS suspects who claimed German nationality are "real Germans."²¹⁷ This problem is particularly acute concerning United States citizens. There are many more self-proclaimed Americans than actual Americans among fighters detained in North East Syria, with many people claiming citizenship but offering no proof.²¹⁸

There is also a lack of clarity over women's role inside ISIS, further complicating the question of repatriation in their case as opposed to that of their male counterparts, whose role in ISIS' crimes was often more public, visible or direct. Countries face even greater challenges in repatriating and trying female ISIS affiliates because their actual participation in violence is difficult to prove. Women held in refugee camps are typically portrayed as victims, particularly in the liberal press, even if they have aided in atrocities committed by ISIS.²¹⁹ Mothers, in particular, are viewed as less threatening. ISIS-affiliated women have been afforded many interviews by the Western press, in which they have expressed their regrets and their innocence. Critics have observed that this approach divorces the women from the organization, reducing the likelihood that they are seen as participants in jihadi terrorism.²²⁰

In fact, women played a key role in ensuring and replicating ISIS' ideology inside the so-called caliphate through their childbearing and childrearing responsibilities. Their role was to guide their children towards jihad, creating a multi-generational terror organization.²²¹ It is also known that women played an active role in enslaving Yazidis, as in the case of Umm Sayyaf who locked Yazidi slaves in a room and put make up on them to 'prepare' them for rape.²²² In opposition to other jihadist organizations ISIS officially declared that it was obligatory for women to take up arms for the sake of jihad. As members of ISIS, women have been involved more in planning, supporting and perpetrating attacks than in any other jihadi group.²²³ But it is also a reality that not all women affiliated with ISIS are necessarily guilty of committing atrocities. Leaving them in refugee camps is seen by many human rights organizations as unconscionable.²²⁴ As such, different states have taken different approaches towards female ISIS affiliates. Morocco, for example, did not take any legal proceedings against wives of repatriated fighters. They stated that they did not intend to join the jihadi movement but accompanied their husbands.²²⁵ On the other hand, the Head of Russia's Federal Security Service, Alexander Bortnikov, sees a danger in bringing women back because they will be used by ISIS leaders as recruiters, suicide attackers, in the

212 <https://www.dpa-international.com/topic/syria-kurdish-forces-call-un-tribunal-foreign-fighters-190218-99-41024>

213 <https://anfenglishmobile.com/news/france-insists-on-in-situ-trials-for-isis-members-34135>

214 <https://anfdeutsch.com/aktuelles/von-ypg-gefangene-deutsche-is-dschihadisten-werden-zum-problem-9675>

215 <https://warontherocks.com/2019/03/can-the-children-of-the-isis-caliphate-ever-come-home/>

216 <https://english.alarabiya.net/en/News/middle-east/2019/04/21/Bosnia-brings-back-detains-ISIS-fighter-from-Syria.html>

217 <https://www.voanews.com/a/fears-grow-islamic-state-foreign-fighters-ready-to-carry-on/4907281.html>

218 <https://edition.cnn.com/2019/04/17/politics/foreign-isis-fighters-syria/>

219 <https://www.pbs.org/newshour/world/should-thousands-of-isis-fighters-and-their-families-be-allowed-to-return-home>

220 <https://www.lowyinstitute.org/the-interpretor/behind-mujahid-mujahidi>

221 <https://www.lowyinstitute.org/the-interpretor/behind-mujahid-mujahidi>

222 <https://www.doughtystreet.co.uk/sites/default/files/media/document/FINAL%20Security%20Council%20speech%20230419%20.pdf>

223 <https://www.lowyinstitute.org/the-interpretor/repatriating-female-foreign-fighters-political-personal>

224 <https://www.pbs.org/newshour/world/should-thousands-of-isis-fighters-and-their-families-be-allowed-to-return-home>

225 <https://www.moroccoworldnews.com/2019/03/267647/authorities-repatriate-8-moroccans-terrorism-syria/>

perpetration of terrorist attacks and as go-betweens.²²⁶

The situation is also complicated when it comes to the large number of women with children, due to concerns over dividing mothers from their children. Belgium, for example, at first wanted to repatriate women but not children. The North East Syrian authorities said that they wouldn't allow for this separation, stating that either the children and their mothers should be repatriated together, or another solution needed to be found.²²⁷ There was also a domestic debate in France along opposite lines. The French Minister of Foreign Affairs, Jean-Yves Le Drian, said that children could be repatriated alone if their mothers gave permission, or if they were orphans.²²⁸ But the French Defense minister Florence Parly shot the idea down, saying: "When there are parents, they still have rights over their children. And regarding families being held in camps run by the Syrian Democratic Forces, the Kurds have decided to respect this right."²²⁹

Finally, a number of diplomatic concerns influence the repatriation issue on a political level. As noted above, these factors are brought most clearly to light in terms of those countries which have repatriated fighters or ISIS members from Iraq, but failed to pursue similar processes with North East Syria. Some politicians have directly stated that repatriations are difficult to realize due to the lack of diplomatic relations with the Autonomous Administration in North East Syria. A UK government spokesperson said the government does not have a consular presence within Syria from which they could provide consular assistance.²³⁰ German defense minister Ursula von der Leyen likewise said there is no contact to the Syrian Kurds.²³¹ Since the German Federal Foreign Office closed its embassy in Damascus, there is no consular support.²³² This is despite the fact that the AANES spokesperson in Germany, Ibrahim Murad, has said that the AANES would guarantee representatives from the German government immediate access to their territories.²³³ Mahmut Erdem, a lawyer in the German city of Hamburg, is advocating for four families whose sons and daughters are in detention in North East Syria. He accused the German government of inactivity, saying that the Syrian Kurds are ready for direct discussion with the German government. He added that the German reluctance towards repatriation was connected to its strong ties to Turkey, arguing that Berlin had rejected repatriations because of Turkish reservations.²³⁴

The case over three Spanish women who are seeking repatriation from North East Syria is likewise beset by diplomatic problems. While the women have requested repatriation and their relatives in Spain have tried to push the Spanish authorities to act on this, there has been no contact by the Spanish authorities to the Autonomous Administration. As such, the women have been moved from one camp to another with no clear indication as to if or when they will get repatriated.²³⁵ Though the need to establish diplomatic relations with the SDF or the AANES is cited as an obstacle, routes can and have been found around this to the satisfaction of both parties involved. For example the US military, which works closely with the SDF, has facilitated the return of foreign fighters to other countries, like Kazakhstan, Macedonia and Morocco.²³⁶ Likewise, Jordan has been proposed as third country for repatriation elsewhere in the world, enabling foreign states to repatriate their citizens even if they chose not to engage in diplomatic relations directly with the Autonomous Administration²³⁷.

226 <https://www.theguardian.com/world/2019/mar/02/we-arent-dangerous-why-chechnya-has-welcomed-women-who-joined-isis>

227 <https://anfenglishmobile.com/features/daesh-prisoners-exist-they-are-people-and-a-solution-is-needed-33555>

228 <https://www.france24.com/en/20190528-syria-isis-france-nationals-detained-hundreds-kurds-le-drian-idlib-terrorism-death-row>

229 <https://www.express.co.uk/news/world/1124680/france-news-isis-islamic-state-children>

230 <https://www.independent.co.uk/news/world/middle-east/isis-children-shamima-begum-syria-foreign-islamic-state-un-a8925601.html>

231 <https://www.tagesspiegel.de/politik/trump-forderung-maas-nennt-ruecknahme-von-is-kaempfern-schwierig/24006814.html>

232 <http://mediathek.daserste.de/FAKT/Deutsche-IS-Kinder/Video?bcastId=310854&documentId=61504188>

233 <http://mediathek.daserste.de/FAKT/Deutsche-IS-Kinder/Video?bcastId=310854&documentId=61504188>

234 <https://www.tagesspiegel.de/politik/trump-forderung-maas-nennt-ruecknahme-von-is-kaempfern-schwierig/24006814.html>

235 https://elpais.com/elpais/2019/06/18/inenglish/1560848590_179213.html

236 <https://edition.cnn.com/2019/04/17/politics/foreign-isis-fighters-syria/>

237 <https://www.irishcentral.com/news/lisa-smith-repatriation-efforts-fast-tracked>

International justice mechanisms as a solution for foreign ISIS suspects

Given the scattered, inconsistent response of individual nation-states and the effective impossibility of securing repatriation of all ISIS members to all or even a significant number of the 54 nations with citizens currently in SDF custody, interest has developed in pursuing ISIS through an international justice mechanism.

There are also moral, legal and ethical imperatives to taking on ISIS through such a mechanism: “Such a collective endeavor would bring a much more potent justice response than when it is delivered locally,” per Joel Hubrecht of the Institute for Advanced Legal Studies.²³⁸ ISIS’ case is too large and complex to handle through ordinary criminal justice measures, and requires justice on an international scale owing to its international dimensions.

It was with such crimes in mind, exceeding the reach of any ordinary national court, that the International Criminal Court was established.

28

The International Criminal Court at The Hague

The International Criminal Court (ICC) started its work in 2002 and was established to prosecute individuals for the crimes of gravest concern to the international community like war crimes, genocide, crimes against humanity and aggression – if functioning as it was intended to function, in other words, it would be the natural home for trying ISIS’ crimes.

Sexual and gender related crimes like rape, sexual slavery, enforced pregnancy and so forth also form part of the ICC’s mandate. The ICC was built to prosecute state actors, like presidents or other members of a government, for crimes committed on a mass scale. The ICC is not set up to prosecute simple soldiers or members of militias – these individuals should be prosecuted in ordinary criminal justice processes.²³⁹

The ICC is governed by an international treaty known as the Rome Statute. Those who ratified the treaty or have otherwise become party to the Rome Statute are known as State Parties to the Rome Statute. The Rome Statute was ratified by 123 nation states, plus Palestine. Additionally, 27 states signed the Rome Statute but did not ratify it. Eight states rejected the Statute: China, Iraq, Israel, Qatar, Libya, Russia, Sudan and the USA. USA, Israel, Sudan and Russia firstly signed the Rome Statute but later revoked their signature.²⁴⁰

The ICC is only able to prosecute cases when one of the crimes detailed above was committed by a State Party national, in the territory of a State Party or in a State that has accepted the jurisdiction of the court. Additionally, it can prosecute when crimes are referred to the ICC Prosecutor by the United Nations Security Council (UNSC). The ICC is not a replacement of national court systems but intended to complement them. It can only prosecute cases when states are failing or unable to do so. The jurisdiction of the ICC is only binding for those states that have ratified the Rome Statute. Those states have an obligation to cooperate with the ICC. Countries that are not yet State Parties may also provide ad-hoc voluntary cooperation.²⁴¹

If an individual from a non-member state commits any of the crimes within the ICC’s jurisdiction, this can only be investigated if the UNSC refers this issue. This requires consensus from the UNSC’s five permanent member states – France, the United Kingdom, the United States, China and Russia – all of which have the power to veto UN Security Council resolutions.²⁴²

Though intended to be the world’s first port of call for pursuing international justice for major crimes,

238 <https://thearabweekly.com/world-court-isis-crimes-needed-unlikely>

239 <https://www.ibtimes.com/us-says-isis-crimes-amount-genocide-prosecution-difficult-2338504>

240 <https://www.bpb.de/nachschlagen/zahlen-und-fakten/globalisierung/52814/internationale-gerichtsbarkeit>

241 <https://www.icc-cpi.int/about>

242 <https://www.murdoch.edu.au/news/articles/isis-foreign-fighters-and-the-international-criminal-court>

it appears unlikely that the ICC could prosecute the crimes committed by ISIS in Syria and Iraq. The ICC does not have jurisdiction over either of these territories. Syria did not ratify the Rome Statute²⁴³, and Iraq is not an ICC member²⁴⁴.

Syrian ISIS suspects could only be tried at the ICC if Syria were to join and accept its jurisdiction. This is more than unlikely, since Syrian President Bashar al-Assad is himself accused of war crimes and the ICC would be interested in prosecuting him.²⁴⁵ In any case, the ISIS detainees in question are being held by the AANES which is politically independent from the Syrian government.²⁴⁶

Another route toward justice via the ICC would be through personal jurisdiction, trying crimes committed by nationals of ICC members. The ICC could conduct trials in the case that the national courts of the ISIS suspects' countries of origin are unable or unwilling to act. Member states of the ICC could refer cases of their foreign fighters to the ICC.²⁴⁷ In earlier discussions on prosecuting ISIS through the ICC, however, observers noted that ISIS's leadership primarily hailed from Iraq and Syria. Since the ICC is constituted to try leading war criminals and so forth, the personal jurisdiction for foreign ISIS suspects is limited.²⁴⁸

Another possibility is that the UN Security Council refers ISIS to the ICC, but this seems equally unlikely. USA and Russia, both veto-powers in the Security Council, are hostile towards the ICC. The national security adviser of the United States of America, John Bolton, referred to the ICC as an illegitimate court and suggested that people supporting ICC investigations can be denied entry to the United States or may even face arrest, following the ICC's stated intention to pursue war crimes committed in Afghanistan by actors including the US Armed Forces.²⁴⁹ Russia, wary over its own record of alleged war crimes in Syria, has stated that they wouldn't support an ICC investigation into the Syrian conflict.²⁵⁰ Since 2012, Russia – often with China's backing – has been blocking demands to send investigation about Syria to the ICC. As such, the UN Security Council has failed to reach any consensus concerning war crimes committed in Syria,²⁵¹ prompting the high-profile resignation of the UN's commission for Syria, Carla del Ponte²⁵².

A fourth route toward justice via the ICC seems a little more viable, if limited in scope. If a nation-state referred its national ISIS members currently held in North East Syria to the ICC, the Prosecutor of the ICC would be obliged to open an examination and consider the possibility of an investigation. This process could be undertaken by any nation with foreign nationals held in Syria which is also a member of the ICC, and while it might not lead to direct or wide-spread accountability, it would at least enable the ICC to formally assess the situation and have its say on the Syrian crisis.²⁵³

Per one paper on the viability of the ICC as a justice mechanism for ISIS, this is the least-worst option:

“despite the possible criticism of the international community, the ICC should prosecute lower-ranking ISIS's leaders who are nationals of a State Party to the Rome Statute. The ICC should pursue such prosecution in order to set an example that the international community should do everything in its power to stop such widespread atrocities, even if it only has a limited impact.”²⁵⁴

In 2016, it should also be noted, the UN General Assembly established a mechanism to collect and preserve evidence on the atrocities committed in the Syrian Civil War, including those committed by ISIS. This was followed in 2017 by the establishment of an equivalent mechanism for documenting ISIS' atrocities in Iraq. However, this mechanism has no power to carry out legal procedures and can only passively compile information, in the absence of any juridical body being established²⁵⁵.

Even in the unlikely eventuality that ISIS' crimes were brought before the ICC, multiple difficulties would lie before the court – many of them common to any international justice mechanism which might seek

243 <http://www.coalitionfortheicc.org/country/syria>

244 <http://www.coalitionfortheicc.org/country/iraq>

245 https://diepresse.com/home/premium/5600491/Carla-del-Ponte_Es-herrscht-totale-Straflosigkeit?from=suche.intern.portal

246 <https://www.sueddeutsche.de/politik/terrorismus-europaeische-is-kaempfer-neuer-gerichtshof-nahost-1.4380742>

247 <https://www.internationalaffairs.org.au/australianoutlook/isis-foreign-fighters-syria-icc/>

248 <http://www.coalitionfortheicc.org/news/20150423/isis-out-iccs-reach>

249 <https://www.dw.com/en/us-threatens-to-arrest-icc-judges-over-war-crimes-probe/a-45435900>

250 <https://www.doughtystreet.co.uk/sites/default/files/media/document/FINAL%20Security%20Council%20speech%20230419%20.pdf>

251 <http://arno.uvt.nl/show.cgi?fid=144945>

252 https://www.swissinfo.ch/eng/stalemate_un-syrian-commissioner-del-ponte-to-resign-over-lack-of-political-will/43391828

253 <https://www.murdoch.edu.au/news/articles/isis-foreign-fighters-and-the-international-criminal-court>

254 <https://arno.uvt.nl/show.cgi?fid=144945>

255 <https://www.independent.co.uk/voices/isis-genocide-crime-atrocities-justice-council-of-europe-un-a8448146.html>

to take on ISIS.

The ICC takes a long time and a lot of resources to reach its verdicts. Since ISIS is such a large and complex organization, and responsible for such widespread and varied crimes, the ICC would not have the resources to try all or even most of the foreign fighters currently in SDF custody.²⁵⁶ The ICC would need international support to, for example, house prisoners following conviction – something international states would likely be loath to do, given that the political and security ramifications would not be vastly different from putting these suspected ISIS members on trial domestically.²⁵⁷

Other proposals

Besides the ICC, a number of other alternatives have been put forward. The right of “universal jurisdiction” allows states to put any accused person on trial for serious crimes committed anywhere in the world, regardless of their nationality or country of residence. However, world powers’ lack of interest in trying even their own nationals for crimes committed under ISIS means there is unlikely to be any movement to bring ISIS members to justice through this mechanism²⁵⁸.

The USA’s detention center at Guantanamo was seen as one possibility for dealing with ISIS members, as proposed by a leading group of Republican senators to the Trump administration.²⁵⁹ This was posited as a solution in which ISIS suspects were detained without being repatriated to their home countries, where they might pose a security threat even if in detention.²⁶⁰

According to the legal principles on which Guantanamo is established, it has a mandate to detain al-Qaida and associated forces. It is not at all clear whether ISIS would fit this definition.²⁶¹ Strong moral doubts have been expressed over the proposal to detain ISIS fighters in Guantanamo, which has long been criticized over its human rights record and failure to grant fair trials to its inmates.²⁶²

Another model which has been proposed is to expatriate foreign fighters to other countries, like Saudi Arabia. In Saudi Arabia terrorists are put into reintegration and deradicalization centers, which Saudi Arabia claims to be astoundingly successful. However, commentators have cast doubt on these centers’ true effectiveness, especially given that former inmates have gone on to commit terror attacks elsewhere in the world. With processes occurring in secrecy, it is impossible to objectively assess their success.²⁶³ At least one former detainee has stated to US interrogators that the Saudi centers actually serve to radicalize inmates in favor of the Wahhabi regime in Saudi Arabia²⁶⁴.

256 https://diepresse.com/home/premium/5600491/Carla-del-Ponte_Es-herrscht-totale-Straflosigkeit?from=suche.intern.portal

257 <https://www.derstandard.at/story/2000099071751/was-tun-mit-is-rueckkehrern>

258 <https://icct.nl/publication/bringing-foreign-terrorist-fighters-to-justice-in-a-post-isis-landscape-part-ii-prosecution-by-foreign-national-courts/>

259 <https://freebeacon.com/national-security/senators-want-captured-isis-fighters-sent-to-guantanamo-bay-prison-camp/>

260 <https://www.sueddeutsche.de/politik/terrorismus-europaeische-is-kaempfer-neuer-gerichtshof-nahost-1.4380742>

261 <https://www.militarytimes.com/flashpoints/2019/02/08/guantanamo-prison-looms-as-option-for-detained-isis-fighters-as-us-withdraws-from-syria/>

262 <https://www.tagesspiegel.de/politik/trump-forderung-maas-nennt-ruecknahme-von-is-kaempfern-schwierig/24006814.html>

263 <https://cis.org/Cadman/Repatriating-ISIS-Foreign-Fighters-their-Countries-Nationality-Wise>

264 <https://www.independent.co.uk/news/world/middle-east/saudi-arabia-terrorist-rehab-secret-hidden-radicalisation-programme-guantanamo-prisoner-claim-a7449191.html>

An international tribunal as a solution for foreign ISIS suspects

Given the apparent unsuitability of the ICC for bringing ISIS and other actors in the Syrian Civil War to justice, interest has developed in pursuing an international tribunal in the region where ISIS' crimes were committed – in other words, in North East Syria or Iraq. Holding an ad-hoc tribunal in the region would enable the global community to bypass several of the obstacles which face the ICC or state-by-state domestic justice procedures. However, any such tribunal would also face significant logistical, juridical and security challenges.

Historical examples of international tribunals

Fortunately, there exist two historical examples of international tribunals created on an ad-hoc basis, whose examples are instructive when considering the challenges facing any putative international justice mechanism for ISIS. The International Criminal Tribunal for Rwanda (ICTR) and that for the former Yugoslavia (ICTY) were created by the UN Security Council and were mandated to deal only with crimes committed in those regions during specific periods of time.²⁶⁵ In both cases the UN Security Council created the court without the agreements of the states in question.²⁶⁶

The ICC was created to supersede such ad-hoc measures, but given the ICC's limited reach and effectiveness, alternative international justice mechanisms have continued to be set up, such as the recently-opened 'hybrid' Kosovar Justice Chambers at The Hague²⁶⁷.

The International Criminal Tribunal for the former Yugoslavia

The International Criminal Tribunal for the former Yugoslavia (ICTY) was set up in 1993 to judge crimes committed during the conflict following the break-up of the former Yugoslavia, which claimed the lives of an estimated 130,000 people²⁶⁸, and was marked by atrocities including the Bosnian genocide, torture, and use of rape as a weapon of war.

The ICTY was established by resolution 827 of the UN Security Council²⁶⁹, and located in The Hague – separate to and predating the ICC, which is also located in the Dutch city. It had the power to impose sentences of up to life imprisonment for breaches of the Geneva Convention, breaches of military law, genocide and crimes against humanity, with various states signing agreements that they would carry out custodial sentences as a result.

It carried out 111 trials, which resulted in 90 convictions and sentences, along with 21 acquittals²⁷⁰. It was the ICTY which found that genocide had been committed at Srebrenica²⁷¹. As the first ever international tribunal for criminal justice, and a major step for global justice efforts marked by significant flaws, the so-called "ad-hoc tribunal" for the former Yugoslavia serves as an instructive blueprint for the putative international tribunal for ISIS.

Lessons for the ISIS tribunal

As the first such ad-hoc international tribunal, the ICTY necessarily had to establish its own legal foundations, some of which will be relevant in the establishment of a tribunal for ISIS fighters.

For example, the ICTY indicates how the ISIS tribunal may be able to work alongside national courts and governments elsewhere in the world. The ICTY had primacy over national courts and could formally request national courts to defer cases to the tribunal²⁷². However, national courts also had the right to prosecute people for crimes committed on the territory of the former Yugoslavia if this was not done. In this way, the proposed ISIS tribunal could serve to mop up those ISIS fighters whose countries have

265 http://www.iccnw.org/documents/FS_ICC_QA.pdf

266 <https://www.sueddeutsche.de/politik/terrorismus-europaeische-is-kaempfer-neuer-gerichtshof-nahost-1.4380742>

267 <https://www.rferl.org/a/explainer-new-hague-tribunal-looks-to-avoid-mistakes-of-past-kosovo-prosecutions/29718149.html>

268 <https://balkaninsight.com/2018/12/20/the-map-of-the-1991-2001-war-victims-presented-in-zagreb-12-20-2018/>

269 <http://unscr.com/en/resolutions/827>

270 <http://www.icty.org/en/cases/key-figures-cases>

271 <http://www.worldlii.org/int/cases/ICTY/2001/8.html>

272 <http://www.icty.org/en/about/tribunal/mandate-and-crimes-under-icty-jurisdiction>

shown no interest in repatriating them while still allowing for global repatriations wherever possible to ease the burden on North East Syria.

The tribunal was limited in scope considering the scale of crimes committed in the Yugoslavian conflict, serving 161 indictments²⁷³. Setting aside the feasibility of scaling up from 161 to potentially over 1000 foreign indictees alone in the putative ISIS tribunal, the model of the ICTY is instructive in terms of its relationship with the Special War Crimes Chamber in a Belgrade court²⁷⁴, which could try ordinary soldiers and those found to have committed crimes. Working in parallel with a regional criminal court, without attempting to find an evidence base to prosecute all 2000 for war crimes, could open the way to finding a solution for the thousands of foreign fighters currently detained without trial in North East Syria.

The ICTY was also open about the limits of its jurisdiction. Speaking after the closure of the ICTY, president Carmel Agius said:

*"We are giving you the truth about what happened. We are not offering reconciliation, because it has not been the mandate of this court to do it. We have not dealt with it at all. All the citizens in the countries in the region have the responsibility for reconciliation."*²⁷⁵

An international justice mechanism is a step towards reconciliation, providing the raw material necessary for a chapter in the region's history to be closed: but it must be accompanied by wider reconciliation and education programs, like those which the Autonomous Administration has mooted and is beginning to carry out in regions newly-liberated from ISIS.

Failures and challenges

At home, the ICTY was widely seen as opaque²⁷⁶, conducted far away from the former Yugoslavia itself. Locating the tribunal in North East Syria itself, with local representation within the judiciary and throughout the structures of the court, would go some way toward assuaging this – though open trials must be balanced with the need to protect witnesses and ensure the security of the court.

Likewise, the ICTY failed to achieve local legitimacy, being seen as an anti-Serb conspiracy by both the public and many of those involved, with former Yugoslavian President Slobodan Milošević among those who refused its legitimacy even as it found him guilty²⁷⁷. In the case of a group like ISIS, whose voice is far from the mainstream international consensus, it will be easy to wave away claims of illegitimacy: but an international tribunal for ISIS must think not only of its reputation among ISIS supporters, but in wider Muslim and Arab communities in Syria and across the region.

In this light, the use of both local members of the judiciary and local witnesses is also important, in order to build legitimacy and indicate that this court is not a foreign imposition, but carried out with and on behalf of the local people who suffered under ISIS. This must necessarily be accompanied by a comprehensive witness protection program, which was missing in the former Yugoslavia with the result that witnesses were intimidated before trials and threatened, ostracized and forced to move home thereafter²⁷⁸.

The International Criminal Tribunal for Rwanda

The International Criminal Tribunal for Rwanda (ICTR) opened in 1995, after the genocide in Rwanda in which Hutu militants killed some 800,000 Tutsis along with politically moderate Hutu.²⁷⁹ The court was established as an ad-hoc tribunal by the UN Security Council with the aim to "prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and neighboring States (...)"²⁸⁰.

Rwanda alone voted against the establishment of the ICTR, disagreeing with the period covered by the court, which it considered insufficient, the absence of death penalty, the imprisonment of prosecuted

273 <http://www.icty.org/en/cases/key-figures-cases>

274 <https://www.hrw.org/legacy/backgrounder/eca/serbia0607/1.htm>

275 <https://balkaninsight.com/2017/06/21/hague-tribunal-president-we-offered-truth-not-reconciliation-06-21-2017/>

276 <http://web.isanet.org/Web/Conferences/CEEISA-ISA-LBJ2016/Archive/75ef6e44-349e-4d20-8153-ed1477b3afe6.pdf>

277 <http://web.isanet.org/Web/Conferences/CEEISA-ISA-LBJ2016/Archive/75ef6e44-349e-4d20-8153-ed1477b3afe6.pdf>

278 <https://balkaninsight.com/2016/09/26/un-court-clashes-with-serbia-over-witness-intimidation-09-25-2016-1/>

279 <http://legal.un.org/avl/ha/icttr/icttr.html>

280 <http://unictr.irmct.org/en/tribunal>

people in third countries and a number of other legal technicalities.²⁸¹

The Tribunal was located in Tanzania with offices in Rwanda and was working until 2015, when it was dissolved. The Tribunal indicted 93 individuals whom it considered responsible for serious violations of international humanitarian law. Of 93 persons, 62 were sentenced, 14 acquitted, 10 referred to national jurisdiction for trial. Those indicted include high-ranking military and government officials, politicians, businessmen, as well as religious, militia, and media leaders. For the first time in history, an international tribunal delivered verdicts against persons responsible for committing genocide. The ICTR was also the first institution to recognize rape as a means of perpetrating genocide.²⁸²

Lessons for the ISIS tribunal

Firstly, the Rwanda tribunal met with a number of the same criticisms as the ICTY in terms of opacity, length and access to justice. Survivors of the genocide reportedly found the tribunal distant and indifferent to their lot. Internal bureaucratic conflicts and the geographical split of the offices between Arusha, Kigali and The Hague caused problems and impeded the investigations. Long absences of judges and defense lawyers, inconsistent leadership, inexperienced attorneys, ineffective prosecution strategy and pressure from Washington to wind up its investigations by September 2004, and all trials by 2008, caused serious instabilities inside the court.

Some of these problems could be mitigated by holding the court in North East Syria. Jean Flamme, a lawyer with experience both in the ICTR and in the ICC, underlined the importance of holding the proposed ISIS tribunal in North East Syria on the grounds that in such a tribunal, “justice is much more visible to the people who have suffered.... justice must be seen.”²⁸³

However, he also noted that the infrastructure in North East Syria would require significant expansion in order to handle an international tribunal held according to international standards. Some bureaucratic problems would be solved by proximity to witnesses and evidence, but just as many would be opened by hosting the tribunal in a region like North East Syria which faces significant security threats and currently lacks basic infrastructure such as women’s prisons to house those women convicted of ISIS membership and related crimes²⁸⁴.

Secondly, Flamme noted that an international tribunal could only target “big fish” tied to war crimes, genocide and crimes against humanity, and not “lower executants,” ordinary soldiers who must be tried in “specialized, mixed-composition local chambers ... with one or two international, together with national, judges.”²⁸⁵ In Rwanda, this was not done. Traditional ‘gacaca’ courts set up to handle the overwhelming post-genocide caseload failed to respect basic legal norms²⁸⁶, meaning justice was not adequately delivered.

In North East Syria, on the other hand, there is a young but functioning judiciary providing defense lawyers and the right to appeal²⁸⁷, which has tried around 7000 local ISIS fighters to date. With international support and training, this system could become a viable partner organization, trying low-ranking international fighters on criminal charges. Again, this would require significant training and support from outside. The justice system in North East Syria, though aspiring to international human rights standards, is not currently recognized outside the areas of Autonomous Administration control due to North East Syria’s lack of political status.

Thirdly and perhaps most significantly, the ICTR’s jurisdiction was limited solely to crimes committed in 1994, while prosecutors elected not to seek prosecution of Tutsis such as Paul Kagame, subsequently president of Rwanda, though they also stood accused of war crimes²⁸⁸. They gave priority to securing further cooperation with the Rwandan government rather than prosecuting cases linked to members of the government who formerly took leading roles in atrocities and crimes committed by the Rwandan Patriotic Forces.²⁸⁹ Per Flamme, the result was “a victor’s justice... it’s not objective. Innocent people

281 <http://webtv.un.org/watch/statute-of-the-international-criminal-tribunal-for-rwanda-security-council-3453rdmeeting/2605997882001?page=4>

282 <http://unictr.irmct.org/en/ictr-milestones>

283 Jean Flamme, interview with RIC, June 2019

284 <https://www.npr.org/2019/05/29/727511632/revenge-is-for-the-weak-kurdish-courts-in-northeastern-syria-take-on-isis-cases>

285 Jean Flamme, interview with RIC, June 2019

286 <https://www.washingtonpost.com/news/monkey-cage/wp/2017/06/02/59162/>

287 <https://www.npr.org/2019/05/29/727511632/revenge-is-for-the-weak-kurdish-courts-in-northeastern-syria-take-on-isis-cases>

288 <http://www.france-rwanda.info/2018/05/paul-kagame-s-war-crimes-crimes-against-humanity-and-crimes-of-genocide.html>

289 <https://www.voanews.com/africa/retrospect-rwanda-genocide-tribunal-mostly-hailed>

have been convicted. Justice must be complete, or it should not exist.”²⁹⁰

To this end, Flamme has emphasized that any international justice mechanism in North East Syria should not be limited to ISIS, but rather prosecute all actors in the Syrian Civil War suspected of war crimes and crimes against humanity – in particular the Syrian regime and their Russian backers. Given the legal obstacles being placed before international justice mechanisms in Syria by Russia, as outlined above, this would appear to be a near-impossibility.

As Flamme notes, indictees’ refusal to accept the legality of the ICTR and ICTY didn’t keep them from getting convicted; nor has the USA’s refusal to recognize the ICC stopped it from securing convictions. Even if some states or parties refuse to recognize the tribunal, it can still serve purpose, with trials in absentia serving to lay out the crimes of other parties to the conflict and place international sanctions on those convicted. (Flamme gives the example of the upcoming tribunal in Holland for those suspected of shooting down flight MH17, going ahead despite Russian protestations.)²⁹¹

Despite Western – and regional – opprobrium against ISIS it must be recognized that a court solely targeting the organization runs the risk of overlooking or diminishing the importance of other atrocities committed in Syria.

34 *An international tribunal in Iraq*

Besides North East Syria, there is another option for trying ISIS on the soil where they committed their crimes. Iraq made a well-publicized proposition to expatriate foreign ISIS fighters from North East Syria and try them in a special tribunal in Baghdad, for which the Iraqi government are demanding \$10bn up front, then \$1bn annually for the duration of the tribunal and detention. For every ISIS suspect they proposed a rate of \$2 million per year, based on the average cost of supporting an inmate in Guantanamo Bay.²⁹² So far there was no official public reaction to this proposal.

In fact, foreign ISIS suspects are already being tried in Iraq. Hundreds of foreign ISIS suspects have already been tried and sentenced and many are in detention in Baghdad.²⁹³ Death sentences have been issued to foreign nationals, including German²⁹⁴ and French citizens. There are over 100 foreign nationals on Iraq’s Death Row – including members of a small group of French nationals handed over by the SDF in their first transfer of foreign prisoners to Iraq – but no executions of foreign ISIS suspects have taken place so far.²⁹⁵

These have been efforts under ordinary criminal law, without reference to war crimes, genocide or crimes against humanity. International crimes like war crimes and genocide are currently not incorporated into Iraqi law.²⁹⁶

Another possibility would be to set up a hybrid court. This type of court combines national and international law and is based on bilateral treaties with the concerning states and the UN.²⁹⁷ In this way, a hybrid Iraqi-international tribunal could prosecute crimes carried out by ISIS under Iraqi law and therefore include mere membership of ISIS as an offence.²⁹⁸ In Iraq’s 2005 constitution, however, it is stated that “special or exceptional courts may not be established”. Establishing a hybrid-court would violate this law.

Beyond these legal difficulties, the biggest problem with Iraq trying ISIS suspects is the country’s poor standards of criminal justice, with death sentences handed down following sub-ten-minute trials without access to a lawyer, evidence or right of appeal.²⁹⁹ Iraq’s approach has been to give ISIS cooks the same punishment as ISIS fighters accused of rapes or beheadings.³⁰⁰ The voices of victims of ISIS,

290 Jean Flamme, interview with RIC, June 2019

291 Jean Flamme, interview with RIC, June 2019

292 <https://www.france24.com/en/20190410-iraq-offers-try-all-foreigners-fee-officials>

293 <https://www.france24.com/en/20190410-iraq-offers-try-all-foreigners-fee-officials>

294 <https://www.sueddeutsche.de/politik/terrorismus-europaeische-is-kaempfer-neuer-gerichtshof-nahost-1.4380742>

295 <https://www.kurdistan24.net/en/news/2ad76668-df11-430c-97a9-d7dab3aa98f7>

296 https://www.ecfr.eu/article/commentary_a_tribunal_for_isis_fighters

297 <https://libguides.graduateinstitute.ch/icl/hybrid>

298 https://www.ecfr.eu/article/commentary_a_tribunal_for_isis_fighters

299 <https://www.sueddeutsche.de/politik/terrorismus-europaeische-is-kaempfer-neuer-gerichtshof-nahost-1.4380742>

300 <https://www.hrw.org/news/2019/02/05/bringing-isis-justice-running-out-time>

like Yazidis, have been ignored in the courts.³⁰¹ Human Rights Watch stated that trials in Iraq are often based on circumstantial evidence and confessions based on torture.³⁰² Speeding up trials can lead to the execution of innocent people, as the UN has also warned.³⁰³

In addition, the parties interested in ISIS prosecution, like European countries and the UN, do not accept the use of the death penalty, which is permitted under Iraqi law and has been applied to suspected ISIS members on a widespread and reportedly arbitrary basis.³⁰⁴ The UN policy prohibits supporting or assisting unfair trials or processes that could lead to death penalties,³⁰⁵ and Iraq has flatly stated it is unwilling to give up the death penalty in any putative international tribunal held on its soil³⁰⁶.

In this Iraq stands in opposition to the Autonomous Administration, which outlawed the death penalty following its declaration of autonomy and now hands down maximum 20-year sentences for any criminals, including local ISIS members. Iraq has also stated it is unwilling to allow international humanitarian agencies access to its detention centers. In contrast, in its eight-point plan for achieving an international tribunal in North East Syria, the Autonomous Administration has welcomed international observers to its detention centers and courts to help it improve the standard of justice it offers.

The UN's Resolution 2379 identified Iraqi courts as the primary location for prosecuting ISIS fighters, but with humanitarian conditions in Iraqi detention and courts coming under increasing criticism – for example, following the highly-publicized decision to execute French nationals – there is an increasing impetus to explore other options³⁰⁷.

For their part, the Autonomous Administration transferred some hundreds of Iraqi ISIS fighters back to their home country to face justice, as well as a limited number of foreign fighters wanted for crimes on Iraqi soil. However, following Iraq's imposition of the death sentence on the French fighters, the AANES has halted all transfers to Iraq³⁰⁸.

An international tribunal in North East Syria

In light of the international community's lack of movement on repatriation or the establishment of an effective international justice mechanism, the AANES began to issue calls for an international tribunal on its own soil. It specifically addressed those countries that have nationals detained in their territories, calling on them to support the idea with legal and logistical cooperation and coordination.³⁰⁹

Proposal and position of North East Syria

The first official call by the Autonomous Administration for an international tribunal in North East Syria was issued on 25 March at a press conference in Ain Issa, two days after the military victory over the ISIS caliphate. AANES spokesperson Loqman Ahmi demanded that a special international tribunal was established in North East Syria such that crimes could be tried on the soil where they were committed, according to international human rights standards.

Mr. Ahmi especially directed his words to the states whose citizens became ISIS members, demanding that they take leading roles in this process.³¹⁰ Building on this, leading Kurdish politician Fawza Yusuf stressed the need of support from the UN, the ICC and international civil society.³¹¹

The Co-Chair of the Foreign Relations Bureau in the Autonomous Administration, Dr. Abdulkarim Omar, stated in February that discussions were ongoing on establishing an international tribunal but that any official decision would depend on international participation. He indicated that any court would have to be internationally recognized, and that the international community would have to offer support for building prisons, provide daily needs for the prisoners and the people living in camps, and also provide

301 <https://www.hrw.org/news/2019/02/05/bringing-isis-justice-running-out-time>

302 <https://anfdeutsch.com/aktuelles/irak-bereits-mehr-als-500-auslaendischen-is-dschihadisten-verurte-11279>

303 <http://www.kurdistan24.net/en/news/8eb89926-d871-4199-81da-18c842819898>

304 https://www.ecfr.eu/article/commentary_a_tribunal_for_isis_fighters

305 <https://www.hrw.org/news/2019/02/05/bringing-isis-justice-running-out-time>

306 <https://www.theguardian.com/world/2019/apr/10/iraq-seeks-multibillion-fee-to-receive-isis-prisoners-from-syria>

307 <https://www.hrw.org/news/2019/05/31/iraq-french-citizens-allege-torture-coercion>

308 <https://www.npr.org/2019/05/29/727511632/revenge-is-for-the-weak-kurdish-courts-in-northeastern-syria-take-on-isis-cases>

309 <https://www.dw.com/cda/de/welches-gericht-soll-is-k%C3%A4mpfer-anklagen/a-47629335>

310 <https://anfenglishmobile.com/rojawa-northern-syria/autonomous-administration-call-for-an-international-court-33859>

311 <https://anfenglishmobile.com/features/foza-yusif-isis-is-not-only-our-problem-34279>

legal support and training – for example, in providing defense lawyers for suspected ISIS members tried in the court.³¹²

On the 24 March the idea of an international tribunal was formally presented to the Global Coalition against ISIS by the Foreign Relations Bureau of the AANES.³¹³ Discussions with the International Coalition and states with citizens among the detained ISIS suspects are ongoing.³¹⁴ On the 25 March a commission for the creation of an international tribunal was established³¹⁵, and a common committee was proposed between the Coalition and the AANES through which cooperative work can be done in terms of collecting evidence, providing for the needs of the detainees, expanding the prisons and finding paths toward prosecution.³¹⁶ Furthermore, the Autonomous Administration also proposed to hold an international congress on the topic,³¹⁷ and a provisional proposal was put forward to hold the court in Kobane.³¹⁸

Different demands have been put forward by different officials of the Autonomous Administration at different times, with SDF spokesperson Mustafa Bali calling for a court and subsequent detention system under the auspices of the UN³¹⁹, for example, while Loqman Ahmi pointed beyond the Hague to previous ad-hoc international tribunals as a model for North East Syria.

The commission set up to work on the international tribunal proposal from inside North East Syria is drawn from those working in the People's Defense Courts which have tried around 7000 local ISIS members to date. They published a list of eight demands for the international tribunal, which they also sent to all governments who form part of the Global Coalition Against ISIS³²⁰.

36

Their demands were:

- That the international community ensures prisoners are tried before an international tribunal in North East Syria under the supervision of the UN Security Council
- That legal and logistical support is given to the People's Defense Courts and their officials
- That international powers investigate conditions of detention in North East Syria
- That accommodation, hospitals and health centers for convicts are established, with logistical support provided from outside
- That rehabilitation centers for imprisoned ISIS members and their families are established
- That special rehabilitation centers for children are established
- That information and logistical support is shared to target ISIS sleeper cells
- That a joint committee of law enforcement, lawyers and security experts is formed to work on the tribunal

These demands have shed some more light on how the Autonomous Administration is conceptualizing the international tribunal, but among other factors it remains unclear who precisely would be tried in the court – Autonomous Administration officials have talked about the court in reference to foreign fighters, and proceeded with trials for local fighters, but any court following international justice norms would have to bring both local and foreign commanders to trial, working not on the basis of nationality but on the basis of culpability for war crimes, crimes against humanity and genocide.

In an interview with the Rojava Information Center, Dr. Abdulkarim Omar indicated that “only humanitarian cases, such as orphans,” were being repatriated following the decision to pursue an international tribunal, continuing: “following our decision to set up an international tribunal for ISIS members & women who worked inside ISIS, we don't hand them over as we will send them to court.”³²¹ However, at least one known international ISIS fighter has been repatriated since these remarks.

More clarity on the structure of the proposed court is needed in order to understand its viability and how it would work alongside or in place of existing local and international justice efforts over ISIS.

312 <https://anfenglishmobile.com/features/the-danger-will-grow-unless-states-take-back-isis-members-332656>

313 <https://anfdeutsch.com/rojava-syrien/ein-internationales-tribunal-fuer-die-gefangenen-is-mitglieder-10864>

314 <https://anfenglishmobile.com/features/daesh-prisoners-exist-they-are-people-and-a-solution-is-needed-33555>

315 <https://anfenglishmobile.com/features/jailed-isis-members-will-either-be-returned-home-or-tried-here-34430>

316 <https://anfkurdi.com/rojava-sUriye/dive-ceteyen-daIS-e-li-dadgeha-navneteweyi-ben-darizandin-112107>

317 <https://anfenglishmobile.com/rojava-northern-syria/autonomous-administration-proposes-congress-on-isis-prisoners-34132>

318 <https://anfdeutsch.com/rojava-syrien/ein-internationales-tribunal-fuer-die-gefangenen-is-mitglieder-10864>

319 <https://www.dpa-international.com/topic/syria-kurdish-forces-call-un-tribunal-foreign-fighters-190218-99-41024>

320 <https://anfdeutsch.com/rojava-syrien/rojava-punkte-zur-einrichtung-von-internationalem-gerichtshof-11668>

321 Dr. Abdulkarim Omar, interview with RIC, June 2019

Benefits

Given the lack of international movement on repatriation; legal obstacles between ISIS and The Hague; and Iraq's human rights record foreclosing the possibility of securing meaningful justice for ISIS on Iraqi territory; an ad-hoc tribunal of some sort in North East Syria begins to appear an attractive option.

The obstacles facing the establishment of such a court will be discussed below, but there are also particular benefits which would accrue to the establishment of an international tribunal in North East Syria.

Paramount among these is the proximity of the court to the scenes of ISIS' worst crimes, providing the locally-rooted accountability and justice – in coordination with a reputable local justice system which has stated its openness to international support and observation – which was missing in previous international justice efforts. A local court with local witnesses would have far more legitimacy in the eyes of restive, ISIS-sympathetic sections of the population than an opaque process far away in The Hague, for example.

A successful tribunal could achieve what the ICTY's post-tribunal assessment described as a "shift from impunity to accountability... bringing justice to thousands of witnesses and giving them a voice," allowing for the "establishment of facts" for the historical record. Like the ICTY, it could run in parallel both with local criminal justice mechanisms for those fighters not tied to war crimes, and with foreign nations' own justice efforts. Unlike the ICTY, it could be accompanied by local deradicalization and reconciliation programs, and easily be accessible to local communities.

It should also be noted that a number of Yazidi organizations, including the Democratic Autonomous Council of Shengal and the provisional Administration council of Shengal, have lent their voice to calls for an international tribunal. In a call issued to the AANES, the Iraqi government and judiciary, and the international coalition, they demanded Yazidi participation in any international tribunal which is built up, as well as compensation and reparation for the victims³²².

In addition, it would be easier to hear the voices of witnesses and gather evidence in North East Syria than it would be in an international justice mechanism elsewhere. Proving involvement in violence is one of the main reasons why most countries whose citizens are now detained in North East Syria are not repatriating them, in fear that they would not have enough evidence to prosecute them at home.³²³ Holding trials in the region makes it much easier to collect evidence. Witnesses and those affected by the atrocities of ISIS, like the Yezidis, can be heard and participate more easily in the trials when they are in the region. Justice will become more visible, present and seen.

The same is technically true in Iraq, but the justice system there has missed out the voices of local witnesses and the gathering of meaningful evidence altogether in its haste to rush through ten-minute kangaroo-court sentences (see above). Again, in North East Syria, the justice system has professed its openness to work alongside international experts to improve the depth and quality of the justice it delivers. North East Syria offers the best opportunity for in-depth witness involvement and evidence gathering.

The Autonomous Administration has also put in place reconciliation processes in partnership with local Arab communities, most notably a community-negotiated return of 800 women and children from Hol camp, including former ISIS members³²⁴. Male ISIS members not suspected of the most serious crimes have also been returned to their communities under similar arrangements³²⁵. Such processes, put in place with the surety of Arab community leaders that the women in question will sever all ties with ISIS, indicate the possibility of putting in place an international justice mechanism in tandem with broader community-based justice efforts. Such steps will be necessary for any justice mechanism to achieve local legitimacy and a net positive effect beyond merely driving further radicalisation.

The international tribunal in North East Syria can also be a solution for the ISIS suspects whose repatriation was refused by their states of origin. European countries have been reluctant to repatriate ISIS suspects so far and non-European countries that have repatriated their citizens have poor human rights records, raising concerns over torture and their access to a fair trial.³²⁶ An international tribunal in North

322 <https://anfenglish.com/kurdistan/shengal-isis-prisoners-should-be-tried-at-international-court-34154>

323 https://www.ecfr.eu/article/commentary_a_tribunal_for_isis_fighters

324 <https://www.telegraph.co.uk/news/2019/06/02/isis-relatives-among-800-syrian-women-children-released-notorious/>

325 People's Defense Court judge, interview with RIC, May 2019

326 <https://www.hrw.org/news/2019/02/05/bringing-isis-justice-running-out-time>

East Syria could be a solution for both cases – both suspects whose states refused to repatriate them and those that would face torture or unfair trials in their states of origin.

Moreover, the establishment of an international tribunal in North East Syria could counteract any further delay in prosecuting ISIS crimes.³²⁷ With international powers and political organs unwilling or unable to take any step to meet the urgent need for justice over ISIS, the Autonomous Administration's admitted willingness to take any steps it can to support the establishment of an international justice mechanism in the region means it is worth considering seriously as a partner. As noted above, in contrast to Iraq the the Autonomous Administration has a young but functioning judicial system, aspiring to international human rights standards; it has scrapped the death penalty; and it is actively seeking international observers and support to help it improve the standards of its detention centers and the justice it can offer.

In general, the Autonomous Administration and the SDF proved themselves the world's most trusted partners on the ground in the fight against ISIS, "the best irregular partner-force" in the United States' history per former US Special Envoy to Syria Brett McGurk³²⁸. They should be taken seriously as a partner for the next stage of the struggle against ISIS as well.

The Syrian Democratic Forces, in particular, have demonstrated their commitment to international law throughout the campaign against ISIS, when compared both to other actors in the Syrian Civil War and to the actions of victorious parties following previous instances of crimes against humanity perpetuated against other communities.

The SDF have been accused of human rights violations during the campaign against ISIS, most significantly forced displacement of select communities for mine-clearing operations and the recruitment of underage soldiers.³²⁹ The reports where these violations are mentioned detail a litany of war crimes ascribable to all other parties in the Syrian conflict, including widespread mass killings, torture, maiming, forced disappearances, summary executions, stoning of women and other violence against women.³³⁰ More importantly, the SDF has shown willingness to address those violations its forces have committed, most recently signing an agreement with the UN to end the recruitment of underage soldiers.³³¹

The key comparison here is not with ISIS or other actors in the Syrian Civil War, however, but with the victorious actors in previous conflicts where similar atrocities have been conducted. In Rwanda, for example, victorious Tutsi forces carried out widespread massacres in vengeance for the genocide committed against their kin³³². Likewise, victorious combatants in Iraq and Iraqi Kurdistan carried out widespread summary executions of ISIS fighters³³³, in violation of international human rights law. In contrast, in Baghouz the SDF's restraint allowed thousands of fighters and tens of thousands of civilians and non-combatants to cross over to SDF lines and surrender or claim refuge.

Despite ongoing media and public pressure calling for ISIS prisoners to be executed or worse,³³⁴ the SDF has largely refrained from arbitrary justice, preserving international norms in the hope of a just solution in line with these standards, and demonstrating their capability and willingness to take part in an internationally-ratified justice process.

Challenges

However, all the political will in the world cannot change certain legal realities. This report is not intended as a legal roadmap pointing the way forward, but will provide a summary of some expert responses to these challenges and how they could be overcome before making some proposals intended to facilitate the development of a meaningful legal proposition as to how ISIS can be brought to justice through an international justice mechanism in North East Syria.

There are three major obstacles to the establishment of an international tribunal in North East Syria, all of which feed into one another. The first of these is the legal veto discussed above, through which Russia has blocked any attempts to bring ISIS to justice via the UN Security Council; the second is the

327 <https://www.independent.co.uk/voices/isis-genocide-crime-atrocities-justice-council-of-europe-un-a8448146.html>

328 <https://www.newyorker.com/news/dispatch/how-trump-betrayed-the-general-who-defeated-isis>

329 https://www.ohchr.org/Documents/Countries/SY/A_HRC_34_CRP.3_E.docx

330 https://www.ohchr.org/Documents/Countries/SY/A_HRC_34_CRP.3_E.docx

331 <https://news.un.org/en/story/2019/07/1041672>

332 <https://www.independent.co.uk/news/world/revange-killings-by-troops-in-rwanda-1374561.html>

333 <https://www.hrw.org/video-photos/video/2018/02/08/video-kurdish-forces-executed-dozens-suspected-isis-fighters-iraq>

334 <https://www.thesun.co.uk/news/9106681/isis-beatles-jihadi-john-execution-death-penalty/>

tribunal's proposed focus solely on ISIS' crimes, due to these factors; and the third is the infrastructure challenges presented by North East Syria's precarious status, the economic embargo which surrounds the Autonomous Region, and the threats being issued against North East Syria by Turkey.

As noted above, Assad's ally Russia has been blocking any efforts via the UN Security Council to prosecute war crimes in Syria. This would mean that the proposed tribunal would have to find a way to gain territorial legitimacy in spite of Assad and Russia, or that it would have to reach an agreement with the Syrian regime and Russia to the effect that it would focus only on securing justice over ISIS, while leaving other actors' alleged crimes in Syria untouched.

Former ICTR and ICC lawyer Jean Flamme proposed two routes toward establishing an international tribunal without the Russians' approval: the first would be to push for the establishment of a tribunal via the General Assembly of the European Union, in which case the UN Security Council would not be able to exercise its veto. The second would be for the EU to create a tribunal under its own competency³³⁵, perhaps in a parallel to the process currently underway to create a hybrid court in The Hague to deal with war crimes committed in Kosovo.³³⁶

Of course, such a court would not be recognized by Russia: but nor would proceedings in the ICC be recognized by America, for example. Even if some parties are tried in absentia or some states refuse to recognize the tribunal, it can still serve a valuable purpose in opening international justice proceedings over at least some of the crimes in question and framing them in an international context as crimes against the human race. Per Flamme, "even an international tribunal doesn't have to be recognized by every country in the world."

It currently seems an impossibility that such a tribunal, established against both Russia and the Syrian regime's will, could ever be set up in North East Syria. There are two ways forward here. The first would be for world powers to recognize North East Syria's political status as an autonomous part of Syria, as its representatives have long been requesting. If North East Syria was recognized as a political as well as a military ally in the fight against ISIS, and the verdicts of its courts recognized as legitimate, the tribunal could go ahead despite Russian protests under the surety of the international forces currently stationed in North East Syria.

The second approach would be to establish an ad-hoc tribunal in North East Syria, focusing on ISIS crimes and not on crimes carried out by the Syrian regime. The statute of such a tribunal could be modified such that it excludes non-ISIS-linked actors from being prosecuted.³³⁷ This would mean sacrificing the wide-frame perspective advocated for by Flamme and others. Seven Syrian and European rights and law groups are among those to have expressed their reservations about proposals to set up an international tribunal exclusively focused on crimes committed by ISIS. In an open letter they state that they "advise against designing any accountability mechanism whose purpose is to deal only with crimes perpetrated by one faction in a conflict"³³⁸. They argue the court's credibility and legitimacy would suffer.³³⁹

However, with no end in sight to the regime's frozen victory over two-thirds of Syrian soil, the world will soon be faced with a choice between acting on ISIS alone, or giving up on international justice altogether. Prosecuting these crimes separately from other actors' atrocities could even open the door to further international prosecution on war crimes committed by other actors in the region, should the political situation develop.³⁴⁰ European officials have suggested that the tribunal's backers could widen its remit later if the circumstances allowed³⁴¹.

A further set of problems speak more to the general difficulties faced by North East Syria for so long as its political status is uncertain and it stands at the mercy of hostile neighbors, particularly Turkey. Erdogan has long threatened to launch an assault on the regions east of the Euphrates. Turkey's invasion of and installation of jihadist proxies in Afrin totally destabilized the region, allowing sharia law, extortion,

335 Jean Flamme, interview with RIC, June 2019

336 <https://www.doughtystreet.co.uk/sites/default/files/media/document/FINAL%20Security%20Council%20speech%20230419%20.pdf>

337 <https://arno.uvt.nl/show.cgi?fid=144945>

338 <https://www.ijmonitor.org/2019/06/ngos-challenge-swedens-proposal-for-an-isis-only-war-crimes-tribunal/>

339 <https://www.ijmonitor.org/2019/06/ngos-challenge-swedens-proposal-for-an-isis-only-war-crimes-tribunal/>

340 https://www.ecfr.eu/article/commentary_a_tribunal_for_isis_fighters

341 https://www.ecfr.eu/article/commentary_a_tribunal_for_isis_fighters

kidnapping, torture and gender-based violence to thrive in a previously secular region³⁴². Erdogan's threatened repeat of the invasion, and installation of thousands of jihadist proxies in the region from Manbij through to Jazira, would similarly destabilise regions newly-liberated from ISIS, making it impossible to guarantee the continued secure detainment of thousands of ISIS prisoners.

The granting of political status to North East Syria, and the surety provided by international allies' presence in the region, would create the security and stability necessary for a tribunal of this magnitude to take place free from the threat of invasion. This would also enable the consular access which some Western powers see as a prerequisite for the initiation of justice processes against their citizens currently being held in North East Syria³⁴³, and facilitate the sharing of legal expertise and evidence with North East Syria which local officials in turn demand as a condition for the establishment of an international tribunal in the region.

More broadly, political status would allow North East Syria to open up to international aid, trade and investment, and put infrastructure in place both for the tribunal and long-term regional security. Experts are assessing that it could take years until the first cases are heard.³⁴⁴ The court would be an expensive undertaking, since ad-hoc tribunals on this scale inevitably run on for years and incur expenses that could go into the billions.³⁴⁵

Per Dr. Abdulkarim Omar, the aid provided by international organizations has not reached 5% of what would be needed to care for the arrested ISIS suspects and their families.³⁴⁶ Ordinary SDF members' wages have been docked just to meet running costs for Hol camp, let alone the costs of putting on an international tribunal. Mahir Farghali, an Egyptian expert on terrorism, has similarly noted the need for international economic support in order to create a functional justice system to deal with the ISIS prisoners currently held in North East Syria.³⁴⁷ Yet the political and economic embargo on North East Syria means all aid must be routed via Damascus and prevents NGOs from dealing directly with the Autonomous Administration to handle the humanitarian situation at Hol³⁴⁸, while the British government cut all cash aid to the region in the moment of worst crisis following ISIS' defeat³⁴⁹.

Despite these difficulties, the Autonomous Administration is already putting in place wide-ranging programs to deal with the terror threat on a wider basis. There are education programs being carried out by women's organizations linked to the Autonomous Administration in newly-liberated regions from Deir-ez-Zor to Raqqa³⁵⁰, as well as in the refugee camps themselves³⁵¹. The significant advances made in North East Syria following the declaration of autonomy in terms of women's rights and opportunities in life, secularism and co-existence of different peoples have been well documented elsewhere: what is important for the purposes of this report is to note that a North East Syria secure from the threat of Turkish invasion and open to international aid, diplomatic relations and trade is one best equipped to meet the ISIS threat both in and outside the courtroom.

International reactions

These difficulties notwithstanding, there has been a measure of international support for the idea of an international tribunal for ISIS prisoners in the region where their crimes were committed – though whether this means North East Syria or Iraq is often left unspecified, and of the two it is Iraq's name which is heard more often.

Austria favors a tribunal supported by the European Commission in the region, not specifying further if this means in Syria or Iraq. Austria's Minister of the interior, Herbert Kickl, spoke to the three responsible European Commissioners with the stated aim of making the international tribunal into a common European project, with co-operation between the European Union, the European Commission and the

342 <https://www.bellingcat.com/news/mena/2019/06/25/remnants-of-the-deiri-opposition-contention-and-controversy-in-north-aleppo/>

343 <https://www.mdr.de/nachrichten/politik/inland/deutschland-verhandelt-probleme-bei-rueckkehr-is-dschihadisten100.html>

344 <http://www.kurdistan24.net/en/news/7197e86f-4223-47ec-9968-3606453166a1>

345 <https://www.derstandard.at/story/2000099071751/was-tun-mit-is-rueckkehrern>

346 <https://anfenglishmobile.com/features/the-danger-will-grow-unless-states-take-back-isis-members-33265>

347 <https://anfdeutsch.com/rojawa-syrien/der-is-bereitet-neue-angriffe-in-syrien-vor-10760>

348 <https://www.thenewhumanitarian.org/news/2019/04/23/outcry-un-plans-consolidate-syria-aid-operations-damascus>

349 <https://www.thenational.ae/world/mena/uk-cuts-cash-aid-to-northeast-syria-citing-fear-of-funding-isis-1.851970>

350 <https://anfenglish.com/women/education-for-women-in-raqqa-s-academy-26316>

351 You can see RIC's forthcoming report on the refugee camps of North East Syria for an overview of women's and political programmes in Hol, Ayn Issa and other refugee camps

UN.³⁵² Austria is ready to give financial support to build up an international tribunal.³⁵³

The government of **Belgium** stated that it wants an international tribunal to prosecute all adult ISIS suspects with Belgian nationality. The country favors a court that brings justice to all European fighters captured by Iraqi government or the SDF,³⁵⁴ though many Belgian ISIS fighters themselves have been tried in absentia and sentenced to prison and so cannot be tried again for the same facts.³⁵⁵

The government of **Finland** called for the establishment of an international tribunal in the Middle East, taking the ICTY as an example.³⁵⁶

French Minister of Justice, Nicole Belloubet, proposed trials for ISIS suspects in North East Syria.³⁵⁷ The French Foreign Ministry stated that a creation of an international tribunal is a complex operation and that an implementation would give rise to legal and practical difficulties. However, **France** favors the prosecution of ISIS suspects in the place where they committed their crimes.³⁵⁸

According to the Federal Ministry of the Interior, **Germany** respects the aim of carrying out prosecution inside the states in which ISIS committed their crimes. Conditions imposed by the German government are ensuring German constitutional standards, the absence of the death penalty and consular access to the suspects. German prosecution interests in Syria cannot be realized because of lack of jurisdiction and consular access.³⁵⁹ German's foreign ministry has stated that the creation of such a tribunal would "raise many political and legal issues, which would require careful evaluation by the international community," while at the same time noting that bringing detained German militants home would be "extraordinarily difficult."³⁶⁰

The **Netherlands** called for an establishment of a tribunal to prosecute ISIS suspects. The Dutch Foreign Minister, Stef Blok, brought the proposal to a UN Security Council meeting. He argued for a prosecution in the region, if feasible by an ad hoc or hybrid international criminal tribunal. The Netherlands will organize a ministerial meeting on the prosecution of ISIS-fighters at the annual meeting of world leaders at the General Assembly in September.³⁶¹

The Swedish government is in favor of an international tribunal that should be established in cooperation with other countries.³⁶² The Minister of Justice and Immigration, Morgon Johansson, said Swedish citizens who joined ISIS should be tried in an international tribunal with international jurisdiction.³⁶³ The Swedish plan is currently looking towards an Iraq-based tribunal that is properly funded and staffed and has both the authority and capacity to conduct a trial process.³⁶⁴ **Sweden's** interior minister has been promoting the proposal in European capitals and hosted a meeting with participants from Sweden, Norway, Finland, Denmark, Austria, Germany, Belgium, the Netherlands, France, Switzerland and the UK. Representatives of the EU and UNITAD (United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL) participated, and topics related to accountability for crimes committed in the conflicts in Syria and Iraq were discussed.³⁶⁵ As many aspects remained unclear, especially regarding access to evidence, the implementation of national and international law and respecting international norms in the execution of the sentences, clear and binding decisions were not made, but further discussions are planned with the countries in the region. Sweden has asked for the Netherlands' backing to set up an international tribunal to try IS fighters of European origin in the region.³⁶⁶

The Federal Council of **Switzerland** will support the establishment of a special international tribunal for ISIS fighters' prosecution in situ. The Swiss justice minister, Karin Keller-Sutter, has said that it would

352 <https://anfdeutsch.com/aktuelles/Oesterreich-will-europaeische-initiative-fuer-is-tribunale-10755>

353 <https://derstandard.at/2000099610084/Kickl-will-Aberkennungen-von-Staatsbuergerschaft-ausweiten>

354 <http://www.kurdistan24.net/en/news/7197e86f-4223-47ec-9968-3606453166a1>

355 <http://www.kurdistan24.net/en/news/7197e86f-4223-47ec-9968-3606453166a1>

356 https://yle.fi/uutiset/osasto/news/finland_seeks_international_court_to_try_isis_fighters/10678248

357 <https://www.humanite.fr/justice-un-tribunal-penal-international-pour-juger-les-djihadistes-de-lei-kobane-671033>

358 <https://www.diplomatie.gouv.fr/en/country-files/syria/events/article/fight-against-daesh-q-a-excerpts-from-the-daily-press-briefing-26-03-19>

359 <https://www.mdr.de/nachrichten/politik/inland/deutschland-verhandelt-probleme-bei-rueckkehr-is-dschihadisten100.html>

360 <https://www.militarytimes.com/flashpoints/2019/03/25/us-backed-kurdish-fighters-want-international-tribunal-for-isis-detainees/>

361 <https://the arabweekly.com/netherlands-wants-tribunal-try-some-isis-members>

362 <https://anfenglish.com/human-rights/swedish-left-party-we-must-help-kurds-who-provide-our-security-33594>

363 <https://anfenglishmobile.com/news/sweden-and-finland-don-t-want-isis-members-back-33405>

364 <https://the arabweekly.com/international-tribunal-isis-fighters>

365 <https://www.government.se/press-releases/2019/06/sweden-hosted-expert-meeting-on-tribunal/>

366 <https://www.dutchnews.nl/news/2019/05/sweden-asks-the-netherlands-to-back-isis-tribunal-plan-nrc/>

be better if Swiss ISIS suspects are tried in Syria and Iraq.³⁶⁷ Switzerland's Federal Council said they will continue to actively participate in the discussions to set up a special court.³⁶⁸

The US Special Ambassador for Syria, James Jeffrey, has said that the **USA** is not considering the idea of an international tribunal at the moment but rather renewed their call for countries to repatriate their citizens.³⁶⁹

At least eight European governments have expressed partial or total support for the idea of an international ISIS court, however this might be realized.³⁷⁰ Besides the states listed above, various human-rights organizations have given their support to the idea of an international tribunal for ISIS suspects.³⁷¹ For example, the head of legal aid charity Reprieve, Clive Stafford-Smith, said the international community should support the Kurds to set up a local court respecting international standards of law.³⁷²

Perhaps most encouraging are the ongoing, pan-European discussions on the feasibility of establishing an international justice mechanism to approach ISIS on an international, cooperative level.

367 <https://anfenglishmobile.com/news/switzerland-isis-should-be-tried-where-they-committed-crimes-33521>

368 <https://anfenglish.com/news/international-court-for-isis-taking-shape-35417>

369 <https://alshahidwitness.com/sdf-tribunal-isis-militants/>

370 <https://thearabweekly.com/international-tribunal-isis-fighters>

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372 <https://thearabweekly.com/world-court-isis-crimes-needed-unlikely>

Conclusion and proposals: opening the route to justice

The purpose of this report is not to provide a direct legal road-map to or to advocate for the immediate creation of an international tribunal for ISIS prisoners in North East Syria, but to give a picture of the current legal and political situation and suggest what steps can be taken to move forward from the current legal impasse over ISIS detainees. As such, the report closes with a number of recommendations:

- North East Syrian officials should clarify their position and proposals over the international tribunal for ISIS fighters
- International legal experts should take responsibility for exploring routes toward an international justice mechanism for ISIS fighters, in light of the circumstances raised in this report
- International legal experts and policy-makers should explore hybrid solutions for trying ISIS prisoners
- Global powers should ensure that North East Syrian officials take their place in negotiations over the future of the ISIS prisoners currently detained in North East Syria
- Global powers should recognize North East Syria's claims to political status as an autonomous region of Syria, both to mitigate against the risk of destabilizing invasion and to facilitate any future justice process over ISIS-linked individuals currently detained in North East Syria, either in North East Syria or elsewhere
- Regional and international political leaders should include women in negotiations over an international justice mechanism for ISIS members

North East Syrian officials should clarify their position and proposals over the international tribunal for ISIS fighters:

In order to facilitate the ongoing global conversation over the ISIS fighters detained in the region as best they can. Certain key points as to how the international tribunal is being envisaged have been addressed differently by different officials, for example as to which international bodies should oversee the project, and other points remain unclear in general, for example as to precisely which ISIS members should be tried in the proposed international tribunal. Following and expanding the eight-point plan developed by the committee working on this subject, and sharing this information with the outside world, will enable this discussion to move ahead in the most productive way possible.

International legal experts should take responsibility for exploring routes toward an international justice mechanism for ISIS fighters, in light of the circumstances raised in this report:

Since their responsibility does not only begin once the putative international tribunal is opened, and trials are begun. As international lawyers and judicial experts will need to share their abilities in terms of the tribunal's interior judicial processes, so too their expertise is needed to clarify the mechanisms by which an international tribunal can be established in toto. It is increasingly clear that a unique legal mechanism will be needed to deal with the unique problems posed by ISIS, and as North East Syrian officials have noted then the knowledge base is not in place in North East Syria to establish what this legal mechanism would look like in practice.

International legal experts and policy-makers should explore hybrid solutions for trying ISIS prisoners:

As it is clear that no one of the solutions examined in this report – criminal justice proceedings in North East Syria or Iraq, repatriation and domestic prosecution, extradition to a third country, the ICC, an ad-hoc tribunal in North East Syria, Iraq or elsewhere, an EU-backed court – can provide a comprehensive solution to the ISIS question. All options are limited by extenuating factors, and legal experts and policy-makers should expand the conversation to include hybrid local and international solutions. In this way, for example, the admitted benefits of an international tribunal in North East Syria could be married with more comprehensive global justice mechanisms, even if the tribunal in actu were to be limited in scope by the extenuating circumstances in North East Syria detailed above.

Global powers should ensure that North East Syrian officials take their place in negotiations over the future of the ISIS prisoners currently detained in North East Syria:

As those who were trusted to lead the military campaign against ISIS on the ground, and to arrest and detain thousands of ISIS fighters in a humane fashion, the AANES also have a right to take their place in negotiations over the future of these fighters. That they have been and continued to be excluded from meetings of the Global Coalition to Defeat ISIS and the Geneva process over Syria means that international officials cannot access the full understanding of realities on the ground that they need in order to overcome the continued ISIS threat. Whether concerning an international tribunal in North East Syria, another justice mechanism like those outlined above, or any other strategic, political, legal and military aspects of the next phase of anti-ISIS cooperation, the AANES and SDF must be granted a seat at the table in all future negotiations.

Global powers should recognize North East Syria's claims to political status as an autonomous region of Syria, both to ensure the immediate security of ISIS fighters detained there and to facilitate any future justice process over these fighters, either in North East Syria or elsewhere:

As political status for North East Syria would enable a putative international tribunal for ISIS prisoners to go ahead in the region despite an expected Russian veto, under the surety of the international forces currently stationed in North East Syria. It would also enable the consular access which some Western powers see as a prerequisite for the initiation of justice processes against their citizens currently being held in North East Syria, and facilitate the sharing of legal expertise, evidence and so forth with North East Syria which local officials in turn demand as a condition for the establishment of an international tribunal in the region. Political status would create the security and stability necessary for an international tribunal to take place, free from the threat of invasion.

Even if another option is preferred or negotiations continue in the long-term over the thousands of ISIS detainees still being held in North East Syria, political status would allow North East Syria to open up to international aid, trade and investment, and put infrastructure, education and reconciliation programs in place in order to secure long-term regional security. A North East Syria secure from the threat of destabilizing Turkish invasion and open to international aid, diplomatic relations and trade is one best equipped to meet the ISIS threat both in and outside the courtroom.

Regional and international political leaders should include female ISIS members in negotiations over an international justice mechanism for ISIS members:

It has been particularly difficult to achieve domestic prosecutions over women who travelled to join ISIS. However, women played a key role in ISIS in terms of recruitment, replication of ISIS' ideology, the sexual and physical abuse of enslaved Yazidi women, torture and enforcement of ISIS' stringent laws limiting women's freedom as part of the so-called 'morality police'³⁷³. As one researcher observed: "It can be difficult... to successfully prosecute [female ISIS members] because of issues relating to sufficient admissible evidence, chain of custody questions, and appropriate charges."³⁷⁴

The inclusion of female suspects in a putative international justice mechanism in North East Syria would be made easier by the presence, in particular, of Yazidi witnesses who could attest to their crimes: "The women were worse than the men... if you bring them before us, we will tell you who did what," in the words of one Yazidi victim of female ISIS members' violence³⁷⁵. The inclusion of the many active female ISIS members in an international tribunal is a necessary step towards achieving true justice and reconciliation, and most likely to be achieved in the region where these women's victims still live.

If enacted, these five proposals will not bring an international tribunal for ISIS prisoners in North East Syria to life. What they will do is allow the discussion over these prisoners' future to continue on the best footing possible, granting all parties the best possible access to the facts on the ground and the legal realities of the situation, with the international tribunal in North East Syria as one viable answer to a serious question which the world presently seems unable to answer.

373 <https://www.atlanticcouncil.org/blogs/syriasource/the-risks-of-ignoring-former-isis-women-members>

374 <https://www.lowyinstitute.org/the-interpretor/case-prosecute-jihadi-brides-home>

375 Yazidi former ISIS captive, interview with Rojava Information Center, March 2019



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