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The Syrian Detention Conundrum: International and Comparative Legal Complexities

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Abstract

The phenomenon of battlefield detention by non-state groups is increasingly common and has been recently brought into focus by events in Syria where, as part of the international effort to counter the Islamic State of Iraq and Syria ("ISIS"), the United States and coalition partners have worked "by, with, and through" a non-state armed group called the Syrian Democratic Forces ("SDF"). That successful partnership has resulted in significant battlefield victories—and the resultant detention by SDF of more than 2,000 ISIS foreign fighters. A detention conundrum has, however, been created by the modern reliance by states on non-state actors for counterterrorism operations, and their simultaneous reluctance to accept the return of terrorists captured and detained by non-state actors in the course of those operations. Specifically, SDF partners have signaled that they do not have the capacity or authority for the continued detention of the foreign terrorist fighters captured in the course of the successful counter-ISIS effort. Moreover, the countries of origin of these captured terrorists are reluctant to accept their return, citing to legal obstacles to repatriation. The inability of non-state partners to detain foreign fighters indefinitely, coupled with the refusal of countries to repatriate their nationals, risks the release of dangerous terrorists. To assist in navigating this complex situation, this Article illuminates the international and comparative legal issues associated with the detention of terrorists by non-state armed groups and clarifies the legal issues relating to the repatriation of detained foreign terrorist fighters by the SDF in Syria. Through this analysis, the Article ultimately demonstrates that international law and the domestic law of many international partners generally permits the lawful transfer of foreign fighters from the custody of a non-state entity to government authorities for prosecution, rehabilitation, or other appropriate means of preventing their return to terrorism.

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I. Introduction

In October 2019, almost immediately after the decision to withdraw U.S. military forces from northern Syria, the Turkish military began an offensive against the Kurdish non-state actors that had previously been allied with the United States for years in a relatively successful counterterrorism effort.[1] The manifold impacts of this decision were immediately apparent. Along with the concerns relating to potential war crimes being perpetrated against Kurds,[2] attention quickly turned to the negative effect this decision might have in permitting a resurgence of terrorist groups in Syria.[3] A specific concern was the potential battlefield release of large numbers of foreign terrorist fighters that had been detained by Kurdish non-state forces in Syria, and which the Kurdish forces might no longer be able to effectively guard once the Turkish offensive began.[4] Indeed, within days of the commencement of the Turkish offensive, a small number of detained foreign terrorist fighters began to escape,[5] along with greater numbers of terrorist-affiliated women and their children who had been confined to camps for internally displaced persons.[6] At the time of the writing of this Article, Syrian regime forces and Russian troops have moved into areas where U.S. forces were previously positioned.[7] While the dynamics of the battlefield do not lend themselves to easy prognostication, and though the situation now seems to have stabilized to some degree, one may assess that the release and escape of more detained terrorists and their adherents remains possible.

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[1] *See* David Cohen, *U.S. Withdrawing Last Troops from Northern Syria*, POLITICO (Oct. 13, 2019), https://www.politico.com/news/2019/10/13/american-troops-syria-turkey-045701 [https://perma.cc/32A9-MC97].

[2] *See* Ben Hubbard et al., *Syrian Arab Fighters Backed by Turkey Kill Two Kurdish Prisoners*, N.Y. TIMES (Oct. 13, 2019), https://www.nytimes.com/2019/10/12/world/middleeast/turkey-invasion-syria-kurds.html [https://perma.cc/FZC2-6AA2].

[3] *See* Charlie Savage, *Trump's Green Light to Turkey Raises Fears About ISIS Detainees*, N.Y. TIMES (Oct. 7, 2019), https://www.nytimes.com/2019/10/07/us/politics/isis-prisons-detainees.html [https://perma.cc/M5XD-2MX8] (quoting Christopher Costa, former Special Assistant to the President for Counterterrorism, and others on their concerns that the Turkish military offensive will permit a resurgence of the Islamic State of Iraq and Syria (ISIS) in Syria).

[4] *See id.*

[5] *See* Samuel Osborne, *Isis Militants Break Out of Prison in Syria After Bombing by Turkey*, INDEP. (Oct. 12, 2019), https://www.independent.co.uk/news/world/middle-east/isis-turkey-syria-prison-bombing-kurds-sdf-a9152536.html [https://perma.cc/NB8Z-MESE].

[6] *See* Bethan McKernan, *At Least 750 Isis Affiliates Escape Syria Camp After Turkish Shelling*, GUARDIAN (Oct. 13, 2019), https://www.theguardian.com/world/2019/oct/13/kurds-say-785-isis-affiliates-have-escaped-camp-after-turkish-shelling [https://perma.cc/TB77-8LEY].

[7] *See* Isabel Coles et al., *U.S. to Try Diplomacy in Turkey as Russian Forces Swoop Into Syria*, WALL ST. J. (Oct. 15, 2019), https://www.wsj.com/articles/as-turkey-captures-territory-in-syria-kurds-head-to-iraq-11571140687 [https://perma.cc/H7GD-QFSW]; Anthony Dworkin, *European Foreign Fighters in Syria: The Cost of Inaction*, EUR. COUNCIL ON FOREIGN REL. (Oct. 15, 2019), https://www.ecfr.eu/article/commentary_european_foreign_fighters_in_syria_the_cost_of_inaction [https://perma.cc/V5UT-RBFE] ("As the Turkish incursion unfolds, it is unclear what will happen to the prisons and camps that contain these foreign fighters and ISIS supporters. But, even in the last few days, the operation has had a significant impact on the situation.").

Observers of Syria and the international counterterrorism effort may well question how much of this situation was avoidable. Why were there so many terrorists detained in Syria by non-state actors in such precarious circumstances? Why were those terrorists not previously returned to their home countries for prosecution? While the answers to such questions are irreducibly political and relate, in part, to policy choices made by the governments of the detained terrorists' countries of origin, the answers also implicate important questions of international and comparative law that govern the legal permissibility of the repatriation and subsequent prosecution of terrorists who are captured and detained by non-state armed groups.

A. *Non-State Actors and the Syrian Battlefield*

Non-state actors are an increasingly central part of the global security landscape.[8] This is due to a variety of factors, including the effects of globalization, which "have transformed the process of technological innovation while lowering entry barriers for a wider range of actors to develop and acquire advanced technologies."[9] As early as 2010, the U.S. Department of Defense Quadrennial Defense Review anticipated that "[a]s technological innovation and global information flows accelerate, non-state actors will continue to gain influence and capabilities that, during the previous century, remained largely the purview of states."[10] Likewise, over a decade ago, Efraim Halevy, a former Mossad chief and National Security Advisor to the Prime Minister of Israel, noted that non-state actors are increasingly emerging as key players in the geopolitical arena, that they will be increasingly varied, and that they will test the abilities of sovereigns to respond to the challenges they pose.[11] The relationship between states and non-state actors, however, is not always adversarial. In fact, states increasingly rely on non-state armed groups "to supplement regular armed forces."[12]

An example of a partially advantageous state/non-state relationship can be witnessed in the recent international effort to counter the Islamic State of Iraq and Syria ("ISIS") in Syria,[13] which featured a particularly advantageous partnership between an international coalition of seventy-four nation states (the Global

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[8] *See, e.g.*, U.S. DEP'T OF DEF., QUADRENNIAL DEFENSE REVIEW REPORT 5 (2010), http://archive.defense.gov/qdr/QDR%20as%20of%2029JAN10%201600.pdf [https://perma.cc/724K-H98F] [hereinafter QDR].

[9] *Id.* at iv.

[10] *Id.*

[11] Efraim Halevy, *Non-state Actors Will be Key Players in Future*, OBSERVER RES. FOUND. (Oct. 28, 2009), https://www.orfonline.org/research/non-state-actors-will-be-key-players-in-future/ [https://perma.cc/BN7V-FKSG].

[12] Keith A. Petty, *Veiled Impunity: Iran's Use of Non-State Armed Groups*, 36 DENV. J. INT'L L. & POL'Y 191, 193 (2008).

[13] *See* AARON STEIN, PARTNER OPERATIONS IN SYRIA: LESSONS LEARNED AND THE WAY FORWARD 5, 9–10 (2017), https://www.atlanticcouncil.org/wp-content/uploads/2017/07/Partner_Operations_in_Syria_web_0710.pdf [https://perma.cc/D2MD-XBG4].

Coalition to Defeat ISIS)[14] and a non-state alliance of mainly Kurdish, Arab, Syriac Christian, and Turkmen fighters in Syria called the Syrian Democratic Forces ("SDF").[15] The SDF, which was assembled with the assistance and support of the United States in late 2015,[16] has varied in size and composition since its inception, but generally consists of approximately 60,000 fighters from diverse origins.[17] Working "by, with, and through"[18] this "local, indigenous partner ground combat force,"[19] the Global Coalition to Defeat ISIS has repeatedly prevailed against ISIS on the battlefield and, in early 2019, successfully liberated the physical caliphate that ISIS once controlled.[20] The partnership with the SDF also facilitated the

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[14] *See About Us – The Global Coalition to Defeat ISIS*, U.S. DEP'T OF ST., https://www.state.gov/about-us-the-global-coalition-to-defeat-isis/ [https://perma.cc/WCT3-7BDD].

[15] *See Syrian Democratic Forces*, GLOBALSECURITY.ORG (last updated Sept. 7, 2019), https://www.globalsecurity.org/military/world/para/sdf.htm [https://perma.cc/9HDC-8NMD].

[16] *See* Genevieve Casagrande, *The Road to Ar-Raqqah: Background on the Syrian Democratic Forces*, INST. FOR THE STUDY OF WAR (Nov. 22, 2016), http://www.css.ethz.ch/content/dam/ethz/special-interest/gess/cis/center-for-securities-studies/resources/docs/ISW-The%20Road%20to%20ar-Raqqah%20ID%20FINAL.pdf [https://perma.cc/ZTD6-TC3H].

[17] *See* Elizabeth Dent, *The Unsustainability of ISIS Detentions in Syria*, MIDDLE EAST INST. 1 (Mar. 2019), https://www.mei.edu/sites/default/files/2019-03/The%20Unsustainability%20of%20ISIS%20Detentions%20in%20Syria_reduced_0.pdf [https://perma.cc/ZQ93-W9XZ].

[18] *An Interview with Joseph L. Votel*, 89 JOINT FORCE Q. 34, 35 (2018), https://ndupress.ndu.edu/Portals/68/Documents/jfq/jfq-89/jfq-89_34-39_Votel.pdf?ver=2018-04-11-125441-307 [https://perma.cc/H5DD-RNJ3] (Noting that "what we strive to do through this approach is to keep the ownership of the problem, and its aftermath, with the affected people. In Iraq, it's the Iraqi Security Forces, and in Syria, it's the Syrian Democratic Forces [SDF].").

[19] *See* STEIN, *supra* note 13, at 2.

[20] *See* Michael R. Pompeo, U.S. Sec'y of State, Statement on the Continued Success of Operations to Defeat ISIS in Syria (July 22, 2018), https://www.state.gov/statement-on-the-continued-success-of-operations-to-defeat-isis-in-syria/ [https://perma.cc/8MXT-3YEG]:

> We congratulate the Syrian Democratic Forces (SDF) on their successful operations to liberate al-Dashisha, Syria, from the scourge of ISIS. Dashisha since 2013 has been a key stronghold and transit route for ISIS fighters, weapons, and suicide bombers between Syria and Iraq. The SDF now controls the area, with Iraqi Security Forces controlling the Iraqi side of the border. This is a significant milestone. The SDF ground offensive cleared over 1,200 square kilometers in the Dashisha area. The offensive was part of our Coalition-backed effort to clear the last pockets of ISIS-held territory in the Middle Euphrates River Valley and the Iraq-Syria border region.
>
> We commend the bravery and sacrifice of the Syrian Democratic Forces. We also commend the significant efforts of the Iraqi Security Forces to ensure that ISIS could not flee into Iraq and the artillery and air support provided during key moments of the operation.

See also STEIN, *supra* note 13, at 3.

successful military operations which eliminated senior ISIS leadership, most notably Abu Bakr al-Baghdadi.[21]

Elizabeth Dent of the Middle East Institute has noted, "The U.S.-led operation to defeat ISIS in Syria is the most successful unconventional military campaign in history."[22] By 2019, the SDF controlled almost one-third of the territory of Syria, and maintained a sort of proto-government in areas of relative autonomy in the Kurdish regions of northeastern Syria[23] through the use of "local civilian councils in liberated areas to help meet immediate stabilization needs and ensure internally displaced persons can return home."[24]

Among the ensuing concerns of battlefield victory, however, are the myriad issues associated with detained enemy forces.[25] In the aftermath of battle—when the smell of gunpower has faded, the wounds are bandaged, and the weapons are cleaned—the fighting forces on the ground must still address all the issues associated with the enemy forces they have captured, including their housing, maintenance, and their proper disposition. It is with regard to such second-order affairs that non-state groups and their adherents feel most keenly the limitations of their subaltern status and the legal constraints on their battlefield activity.

Even so, the phenomenon of battlefield detention by non-state groups is increasingly common. Commentators note that in contemporary conflicts, "[d]etention by armed groups is neither infrequent nor, necessarily, small-scale."[26] Despite this increased reliance on non-state armed groups, international law and the domestic law of states seems to struggle with how to provide those detained by non-state armed groups with appropriate dispositions—either through prosecution in their country of origin, prosecution in another country, long-term detention under the law of armed conflict, or simply release.

Though each of these disposition options poses challenges, this Article focuses on the specific problems relating to the repatriation and subsequent prosecution of terrorists who are captured detained by non-state armed groups. This disposition option has been particularly problematic as states have refused to accept repatriation of their nationals who were detained on the battlefield by SDF. To excuse their paralysis on this issue, states cite to a purported hornets' nest of

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[21] *Statement from the President on the Death of Abu Bakr al-Baghdadi*, THE WHITE HOUSE (Oct. 27, 2019), https://www.whitehouse.gov/briefings-statements/statement-president-death-abu-bakr-al-baghdadi/ [https://perma.cc/32YS-L8P6] (in which President Trump stated, "I also want to thank the Syrian Kurds for certain support they were able to give us.").
[22] Dent, *supra* note 17, at 1.
[23] *See* STEIN, *supra* note 13, at 3.
[24] Dent, *supra* note 17, at 1. There are, however, a number of other non-state groups operating in Syria, such as the Free Syrian Army. *See Guide to the Syrian Rebels*, BBC (Dec. 13, 2013), https://www.bbc.com/news/world-middle-east-24403003 [https://perma.cc/G9BW-HR9Q].
[25] *See* David Tuck, *Detention by Armed Groups: Overcoming Challenges to Humanitarian Action*, 93 INT'L REV. RED CROSS 759, 759 (2011) ("Deprivation of liberty by non-state armed groups is a consequence of the predominantly non-international character of contemporary armed conflicts.").
[26] *Id.* at 761.

potential legal and political issues—most of which seem ill-founded.[27] This Article, therefore, seeks to address the Syrian detention conundrum by clarifying the legal issues relating to detained foreign terrorist fighters by the SDF in Syria, and demonstrating that international law (and the domestic law of many international partners) generally permits the lawful transfer of foreign fighters from the custody of a non-state entity to government authorities for prosecution, rehabilitation, or other appropriate means of preventing their return to terrorism.

II. The SDF and the Syrian Detainee Problem

To fully understand the nature of this problem, however, it is critical to examine the nature of the SDF, the current conflict in Syria, and the context of this large-scale detention problem. The SDF was created against the backdrop of a preexisting separatist movement for a preferably independent, or at least autonomous, Kurdish region within Syria (commonly referred to by Kurdish separatists as Rojava). After the Syrian civil war began in 2012, Kurdish groups "were able to negotiate an autonomous existence within the Syrian state with U.S. support."[28] In 2016, Kurdish groups established the Democratic Federation of Northern Syria, since renamed the Autonomous Administration of North and East Syria ("NES").[29] The Kurdish autonomous area—administered by the Partiya Yekîtiya Demokrat ("PYD")—consisted of three cantons: Cezire, Efrin [Afrin], and Kobane, with Afrin now under Turkish military occupation. "Each of these has its legislative, judicial and executive councils and one general coordinating council acting for all the cantons."[30] Thus, each canton has its own government and its own courts.[31]

The SDF's core component, the Syrian Kurdish People's Protection Unit ("YPG"), however, is linked to the Kurdistan Workers Party ("PKK"), a U.S.-designated terrorist organization. This association has limited the international legitimacy of the SDF, particularly in the eyes of Turkey, which has long considered the PKK its top national security threat. Moreover, while separatist in ideology, the YPG has never achieved international recognition of territory it controlled as an independent state, despite its relative functional autonomy. Unlike the neighboring Iraqi Kurdistan Regional Government, which achieved greater legitimacy and legal validity under the Iraqi constitution, the SDF has suffered from

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[27] *See* David Ignatius, Opinion, *A Stunning Case of European Hypocrisy*, WASH. POST (May 23, 2019), https://www.washingtonpost.com/opinions/a-stunning-case-of-european-hypocrisy/2019/05/23/97053c94-7da2-11e9-a5b3-34f3edf1351e_story.html?utm_term=.107031992be2 [https://perma.cc/AB9U-RQFK].

[28] Pinar Tank, *Preserving Kurdish Autonomy*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Jan. 29, 2019), https://carnegieendowment.org/sada/78232 [https://perma.cc/3M9C-VDDK].

[29] *Id.*

[30] Rana Khalaf, *Governing Rojava: Layers of Legitimacy in Syria*, CHATHAM HOUSE 11 (Dec. 8. 2016), https://www.chathamhouse.org/sites/default/files/publications/research/2016-12-08-governing-rojava-khalaf.pdf [https://perma.cc/628X-RYYX].

[31] *Id.*

legal ambiguity within the still unsettled Syrian civil war, with no major state supporting separate or fully autonomous status.

Even so, although Rojava has not been recognized as an independent sovereign by any other state,[32] it is not quite a rogue territory. Rather, its existence was the result of what Rana Khalaf has called a "non-aggression pact with the [Syrian] regime," which provided that, "[i]n return for preventing rebellion against the regime, the [Kurdish authorities] would assume responsibility for governing areas in northern Syria."[33] The relationship between the Syrian regime and Kurdish authorities is complex and amorphous; the Syrian regime is current militarily unable to restore Syrian sovereignty over SDF-controlled areas, allowing Kurdish authorities to operate and exist. Kurdish and Syrian authorities likely have some degree of understanding regarding the areas in which the Kurds operate.[34] The Syrian regime, however, is committed to restoring state control over the area when it is militarily feasible, and has granted no meaningful political concessions regarding autonomy to the Kurds, despite negotiations by Kurdish groups seeking that outcome. Similarly, it is fair to say that the Syrian regime's relationship with the SDF is equally complicated,[35] and its view of the SDF has vacillated from disfavor, to reluctant toleration, to a desire to accommodate.[36]

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[32] *See* Loqman Radpey, *Kurdish Regional Self-rule Administration in Syria: A new Model of Statehood and its Status in International Law Compared to the Kurdistan Regional Government (KRG) in Iraq*, 17 JAPANESE J. POL. SCI. 468, 473 (2016).

[33] Khalaf, *supra* note 30, at 8.

[34] *Rojava At 4: Examining The Experiment in Western Kurdistan*, MIDDLE EAST CTR. 9 (Ribale Sleiman Haidar ed., 2016), http://eprints.lse.ac.uk/67515/1/Rojavaat4.pdf [https://perma.cc/ABT4-EYEG]; *see also* Radpey, *supra* note 32, at 474–76 (noting that "[i]t is not clear why the regime allowed the PYD to control the Kurdish region and cities were handed over to the Kurds, but some believe that Assad withdrew from northern Syria and gave the north to the PYD in order to counter Turkish influence in northern Syria. Assad did not want to fight several fronts at the same time. Although the Kurds and Syrian army are jointly fighting ISIS on some fronts, the Syrian government is still opposed to any Kurdish stability – for example, the Syrian army attacked a Kurdish checkpoint and their forces in Hasake on 19 May 2014. The Syrian government did not back the Kurds, but preferred to remain neutral.").

[35] *See Alliances Shift as Syrian Kurdish Alliance Holds Talks with Assad Regime*, FRANCE24 (July 27, 2018), https://www.france24.com/en/20180727-syria-kurds-assad-talks-damascus-alliances [https://perma.cc/4SJZ-CRPF]; Zaman Al Wasl, *SDF Officials Met with Assad in Damascus*, SYRIAN OBSERVER (Aug. 20, 2018) https://syrianobserver.com/EN/news/46075/sdf_officials_met_with_assad_damascus.html [https://perma.cc/XY5E-ELAS]; *see also* Tank, *supra* note 28 ("Discussions between the SDF and the Assad regime, already begun in May 2018, are tackling the issues of the constitution and negotiating over a final settlement.").

[36] *See Syria Calls on Security Council to Stop Attacks of US-backed SDF Militias*, SYRIAN ARAB NEWS AGENCY (May 13, 2019), https://sana.sy/en/?p=165513 [https://perma.cc/MFV5-VMXG]; *see also President al-Assad: We Will Liberate Every Part of Syria . . . The Americans Should Leave; Somehow They're Going to Leave . . . Israel is Losing the Dear Ones of al-Nusra and ISIS and That's Why it is Panicking*, SYRIAN ARAB NEWS AGENCY (May 31, 2018), https://sana.sy/en/?p=139186 [https://perma.cc/QL9Q-KYNT] (quoting President al-Assad as saying, "We're going to deal with [the SDF] by two options: the first one, we started now opening doors for negotiations, because the majority of them are Syrians, and supposedly they like their

Among its rudimentary institutions, Rojava has a nascent judicial architecture. Although loosely based on "Rojava's secular, socialist-influenced constitution,"[37] and Syrian civil law,[38] Rojava's legal architecture appears rather fluid and subject to variation—a looseness that one might expect in the context of legal organs that exist without the skeletal advantages of an organized government. Commentators, nonetheless, have sketched out a general morphology of the Rojavan legal system which, at the lowest level, consists of Peace and Consensus Committees which seek to resolve minor cases on the basis of consensus.[39] The next level consists of people's courts or district courts (*dadgeha gel*), and then appellate courts (*dadgeha istinaf*).[40] Courts specifically focused on counterterrorism prosecutions are referred to as "Defense of the People Courts."[41] There are indications that these legal bodies emphasize "conflict resolution rather than punishment,"[42] and have adopted a more lenient approach.[43] Without the

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country, they don't like to be puppets to any foreigners, that's what we suppose, so we have the same basis.").

[37] Jane Arraf, *"Revenge is for the Weak": Kurdish Courts in Northeastern Syria Take on ISIS Cases*, NPR (May 29, 2019), https://www.npr.org/2019/05/29/727511632/revenge-is-for-the-weak-kurdish-courts-in-northeastern-syria-take-on-isis-cases [https://perma.cc/NUY4-NDFW].

[38] *Id. See also* Matthew Krause, *Northeastern Syria: Complex Criminal Law in a Complicated Battlespace*, JUST SECURITY (Oct. 28, 2019), https://www.justsecurity.org/66725/northeastern-syria-complex-criminal-law-in-a-complicated-battlespace/?fbclid=IwAR3o8oSWr07x_4jGiTT8Gg5fux-bYn6KpMcbg1q9mB8L5V01h35_KZNErjM [https://perma.cc/B6H5-PSWV] (noting that "Rojava has a constitution and a legal system that notably features a ban on the death penalty, female judges, a ban on extradition to death penalty countries like Iraq, and creative restorative justice. The courts have already tried thousands of Syrian ISIS suspects."). For more on Syrian civil law, see Dan E. Stigall, *The Civil Codes of Libya and Syria: Hybridity, Durability, and Post-Revolution Viability in the Aftermath of the Arab Spring*, 28 EMORY INT'L L. REV. 283 (2014).

[39] *See* Katherine Finn, *Rojava is an Unexpected Oasis of Progress in Syria*, LAW SOC'Y GAZETTE (Nov. 23, 2018), https://www.lawsociety.ie/gazette/legal-analysis/rojava-an-oasis-of-progress-in-syria/ [https://perma.cc/66PM-VEZ3].

[40] *See* Ercan Ayboğa, *Consensus is Key: New Justice System in Rojava*, NEW COMPASS (Oct. 13, 2014), http://new-compass.net/articles/consensus-key-new-justice-system-rojava [https://perma.cc/Y8BV-9CV2].

[41] *See also* The Associated Press, *Syria's Kurds Put ISIS on Trial with Focus on Reconciliation*, HAARETZ (May 8, 2018), https://www.haaretz.com/middle-east-news/syria/syria-s-kurds-put-isis-on-trial-with-focus-on-reconciliation-1.6071212 [https://perma.cc/76TG-B5PV]. Such legal fora exist in Qamishli, north Syria. *Id. See also* Liz Sly, *Captured ISIS Fighters Get Short Sentences and Art Therapy in Syria*, WASH. POST (Aug. 14, 2019), https://www.washingtonpost.com/world/2019/08/14/captured-isis-fighters-get-short-sentences-art-therapy-syria/?arc404=true [https://perma.cc/7LGF-9QZ2] ("In the past five years, the three terrorism courts established by the Kurds have tried some 1,500 cases, according to Hassan Hassan, an administrator at one of the courts in the city of Qamishli.").

[42] *See* Arraf, *supra* note 37 (noting, for instance, that "[th]ere is no prison for women convicted of terrorism, so several Syrian women found to have worked within ISIS, including as enforcers, were released.").

[43] *See* Arraf, *supra* note 37; *see also* Associated Press, *Syria's Kurds Put ISIS on Trial with Focus on Reconciliation*, HAARETZ (May 8, 2018), https://www.haaretz.com/middle-east-news/syria/syria-s-kurds-put-isis-on-trial-with-focus-on-reconciliation-1.6071212 [https://perma.cc/76TG-B5PV] (noting that "the Kurds abolished the death sentence and offered reduced sentences to ISIS members who hand themselves in. The harshest sentence is life in prison, which is actually a 20-year sentence. They organized reconciliation and mediation efforts with major

moorings of a recognized, permanent government, these rudimentary legal structures face significant operational impediments, limited institutional capacity (including prison space),[44] and the myriad challenges associated with the lack of an established legal framework. With regard to substantive law, as one Kurdish official noted, "'The foundation is Syrian criminal law, but we use other sources when it suits us, like Swiss or German law.' . . . 'We also use customary law, but this may vary between different places and ethnic communities.'"[45] With regard to procedure, Nadim Houry, Director of Human Rights Watch's Terrorism/Counter Terrorism Program, has posited that "the proceedings are deeply flawed. There are no defense lawyers to represent suspects and no appeals process."[46]

In light of such shortcomings, SDF personnel have noted that this rudimentary legal structure is not adequate to the task of providing dispositions for detained foreign terrorist fighters,[47] and reports indicate that the SDF have not yet attempted to subject foreign terrorist fighters to their law.[48] This is a notable gap given the large numbers of foreign fighters that the SDF detained (and continue to

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Arab tribes and offered more than 80 [ISIS] fighters amnesty last year to foster good tribal relations and convince others to turn themselves in.").

[44] *See What to do with Foreign Militants Captured in Iraq and Syria? Their Fates Greatly Vary*, STRAITS TIMES (Feb. 23, 2018), https://www.straitstimes.com/world/middle-east/what-to-do-with-foreign-militants-captured-in-iraq-and-syria-their-fates-greatly [https://perma.cc/P9K4-ERHQ] ("'According to which law can we sentence them?' [a senior Kurdish spokesperson] asked, adding: 'We don't have big prisons.'").

[45] *See* Carl Drott, *Syrian Kurdish Areas Under the Rule of Law?*, CARNEGIE MIDDLE EAST CTR. (May 7, 2014), https://carnegie-mec.org/diwan/55526 [https://perma.cc/5BAA-YMQ6]. In addition, at a discussion at Chatham House, experts noted the wide array of legal sources being used in Syrian legal or quasi-legal proceedings, including Sharia law and the "Unified Arab Code." *See The Syrian Justice System: What Role do Non-State Courts Play*?, CHATHAM HOUSE (Oct. 25, 2017), https://www.chathamhouse.org/event/syrian-justice-system-what-role-do-non-state-courts-play# [https://perma.cc/4XBN-EYB7].

[46] Nadim Houry, *Bringing ISIS to Justice: Running Out of Time?*, JUST SECURITY (Feb. 5, 2019), https://www.justsecurity.org/62483/bringing-isis-justice-running-time/ [https://perma.cc/GA66-PW4Z] (Notably, Houry also states, "The SDF's makeshift courts are not recognized by the Syrian government or the international community – including the group's own international partners – raising doubts about the long-term impact and enforceability of the rulings. Meanwhile, hundreds of foreign ISIS members – from 46 countries – remain in custody with no legal process because the SDF would like their home countries to take them back – a request that most home countries have rejected so far.").

[47] *See* Helen Maguire & Khalil Hamlo, *Syria's Kurdish Forces Call for UN Tribunal for Foreign IS Fighters*, DPA INT'L (Feb. 18, 2019), http://www.dpa-international.com/topic/syria-kurdish-forces-call-un-tribunal-foreign-fighters-190218-99-41024 [https://perma.cc/JTU4-VAQZ]. *See also* Krause, supra note 38 (noting that "Although [the Rojavan system] is successfully convicting thousands of ISIS members, it remains rudimentary in a number of respects. For example, it lacks forensic, fingerprinting, and DNA capability. This means defendants are convicted for violations of terrorism laws that are easy to prove (laws against the state) instead of more substantive crimes like rape, murder, and slavery (laws against people) that require more evidence than just membership in a terrorist organization. Further, trial and conviction for international crimes that capture the full extent of ISIS brutality, like war crimes and genocide, are impractical within that system.").

[48] Jonathan Horowitz, *The Challenge of Foreign Assistance for Anti-ISIS Detention Operations*, JUST SECURITY (July 23, 2018), https://www.justsecurity.org/59644/challenge-foreign-assistance-anti-isis-detention-operations/ [https://perma.cc/F56E-S78Z].

detain) in the course of the conflict.[49] Reports indicate that the SDF has detained more than 2,000 ISIS foreign fighters—and roughly 10,000 Syrian and foreign fighters combined.[50] In warning that it does not have the capacity or authority for the continued detention of these captured terrorists,[51] SDF leaders have emphasized their inability to address the large number of detainees using the basic institutions available to them in Rojava.[52] For instance, an SDF spokesperson recently noted, "We have asked the different countries to repatriate their own citizens, since there is no recognized legal infrastructure in northern Syria, but there has been no response, and the terrorists and their families are still in our camps."[53] The international community has been slow to respond to this call.

> While repatriations of fighters have occurred, they've been slow, inconsistent, and minimal in number. Several countries, such as the United Kingdom and France, refuse to repatriate fighters because they are worried that their laws at home will prevent the judicial system from properly pursuing charges against them. So far, only a few countries have admitted to repatriating fighters (mostly from Iraq), and in February Iraq announced it had received over 200 repatriated citizens from Syria, out of an estimated total of 500.[54]

Indeed, many countries—even key coalition partners—have been extremely reluctant to repatriate their nationals who are detained in SDF custody.[55] For example, while the SDF has established its own "Ministry of Justice" that administers detainee affairs, other nations do not consider this institution a full and legal counterpart with which to fully interact. David Ignatius has noted that, "Europeans protest that they don't have adequate laws to try their nationals who committed terrorist offenses on foreign soil, and that they don't have evidence that would stand up in court. They worry, too, that Islamist extremists in European prisons would radicalize other Muslim prisoners and then be released back into society in a few years, perhaps to commit new terrorist acts."[56] Some countries have even stripped foreign terrorist fighters of their citizenship, or "advocated that the fighters — despite their citizenship — should be tried locally, where the crimes

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[49] *See SDF Calls for International Tribunal for ISIL Detainees*, AL JAZEERA (Mar. 25, 2019), https://www.aljazeera.com/news/2019/03/sdf-calls-international-tribunal-isil-detainees-190325140845893.html [https://perma.cc/585P-QVNY].
[50] *Warner & Collins Express Concerns about Escape of ISIS Detainees in Syria*, MARK R. WARNER (Nov. 5, 2019), https://www.warner.senate.gov/public/index.cfm/2019/11/warner-collins-express-concerns-about-escape-of-isis-detainees-in-syria [https://perma.cc/NU6V-U4U7]; *see also* Ryan Browne & Jennifer Hansler, *US Officials Say More Than 2,000 Suspected Foreign ISIS Fighters Being Held in Syria*, CNN (Apr. 17, 2019), https://www.cnn.com/2019/04/17/politics/foreign-isis-fighters-syria/index.html [https://perma.cc/6X4R-PJC4].
[51] *SDF Calls for International Tribunal for ISIL Detainees*, *supra* note 49.
[52] *See* Maguire & Hamlo, *supra* note 47.
[53] *See* Maguire & Hamlo, *supra* note 47.
[54] *See* Dent, *supra* note 17, at 3.
[55] *See* Dent, *supra* note 17, at 3–4.
[56] *See* Ignatius, *supra* note 27.

occurred."[57] On that score, the French Minister of Justice and the French Foreign Minister have publicly taken the position that France will categorically refuse to take back fighters and their wives because they are "enemies" of the nation who should face justice either in Syria or Iraq.[58] As noted above, however, the Kurdish authorities to whom these European countries would outsource the responsibility of prosecution and detention simply do not have the appropriate legal framework or capacity to do it.

Complicating all of this is the fact that the U.S. withdrawal from northern Syria and the subsequent Turkish military offensive may have the effect of obliterating the radical experiment in Middle Eastern democracy called Rojava. Despite its shortcomings, the Kurdish proto-state was able to support a fragile framework which allowed the detention of ISIS fighters detained on the Syrian battlefield and occasionally provided means for their limited, quasi-judicial disposition.[59] At a minimum, it allowed for a space where captured terrorists could be housed and guarded so that they could not engage in further terrorist activity. Both Turkish bombardments and the political will of a murderous, authoritarian Syrian regime, however, threaten the Kurdish dream of Rojava, along with its nascent institutional capability.[60] Accordingly, the international community must now act quickly or else resign itself to passively watch as the fate of large numbers of detained terrorists is determined by the elemental forces of chaos.

This situation highlights the Syrian detention conundrum that has plagued the international community from the earliest moments of the counterterrorism effort in Syria. It is a problem caused by the modern reliance by states on non-state actors for counterterrorism operations, and their simultaneous reluctance to accept the return of terrorists captured and detained by non-state actors in the course of those operations.

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[57] *See* Dent, *supra* note 17, at 4.

[58] *France Snubs Trump's Appeal to Repatriate IS Fighters en Masse, for Now*, REUTERS (Feb. 18, 2019), https://www.reuters.com/article/us-mideast-crisis-syria-france/france-snubs-trumps-appeal-to-repatriate-is-fighters-en-masse-for-now-idUSKCN1Q70KV [https://perma.cc/KPC3-3BTL] (internal quotation marks omitted).

[59] *See Trial of ISIS Jihadists Begins in Northeast Syria*, ANF NEWS (Oct. 2, 2019), https://anfenglish.com/rojava-syria/trial-of-isis-jihadists-begins-in-northeast-syria-38020 [https://perma.cc/RNB2-BUQS] ("The People's Defense Court was established in 2014 on the decision of the Legislative Council and hears those involved in crimes against the people of northern and eastern Syria.").

[60] *See* Arwa Ibrahim, *Syria's Kurds Forge "Costly Deal" with al-Assad as US Pulls Out*, AL JAZEERA (Oct. 14, 2019), https://www.aljazeera.com/news/2019/10/pullout-syria-kurds-costly-deal-assad-191015122222288.html [https://perma.cc/Y9W2-KKNT] (noting that "[w]hile the details of the Syrian-Kurdish pact to repel the Turkish offensive are unclear, analysts said it was likely 'very costly' for the SDF," and that the Syrian regime "wants to reassert his rule over Syrian territories lost during the course of the country's eight-year-civil-war, was unlikely to allow the Kurdish-led administration to maintain autonomy in those areas.").

III. The International and Comparative Law of Detaining and Transferring Foreign Terrorist Fighters

Central to an analysis of the Syrian detention conundrum is the question of whether international law somehow limits or prohibits the transfer of detained terrorists from the custody of non-state actors to their countries of origin for purposes of investigation, criminal prosecution, and/or reintegration. A related question is whether international law requires states to take any action vis-à-vis detained foreign terrorist fighters—especially with regard to their own nationals who travelled to join terrorist groups but are now detained by a non-state entity on the battlefield. And, even if no international legal rule yet exists in that regard, in the protean sea of international law, can we discern subtle currents that lead state actors inexorably to a correct course of action?

Similarly, it is critical to review the practices of domestic and international courts to examine the circumstances under which judicial bodies have limited or prohibited the exercise of jurisdiction over persons brought to the court by means other than through a standard extradition. Intertwined with this inquiry is the vacillating normative force of the legal principle *male captus, bene detentus*—"improperly captured, properly detained"—which states that a court may exercise jurisdiction over an accused person regardless of how that person has come into the jurisdiction of the court.[61] Though some commentators have described this principle as a "potent customary norm" in international law,[62] it has been subject to reexamination in recent scholarship, decisions by international tribunals,[63] and domestic judicial decisions in various countries[64]—all of which require further exploration.

A. *The Law of Non-International Armed Conflict*

Commentators note that the questions relating to the battlefield detention of terrorism suspects are largely (though not entirely) regulated by the law of armed conflict.[65] This category of international law, however, is not monolithic. Differing rules apply depending on the nature of the conflict in question. In that regard, the conflicts in Syria and Iraq have been classified as non-international armed

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[61] *See generally* Prosecutor v. Dragan Nikolić, Case No. IT-94-2-AR73, Decision on Interlocutory Appeal Concerning Legality of Arrest (June 5, 2003), https://www.icty.org/x/cases/dragan_nikolic/acdec/en/030605.pdf [https://perma.cc/7HT5-DM2V] [hereinafter Nikolić Interlocutory Appeal].

[62] Jonathan A. Bush, *How Did We Get Here? Foreign Abduction After Alvarez-Machain*, 45 STAN. L. REV. 939, 952 (1993).

[63] *See, e.g.*, Nikolić Interlocutory Appeal, *supra* note 61; Barayagwiza v. Prosecutor, Case No. ICTR-97-19-AR92, ¶ 11 (Nov. 3, 1999).

[64] Stephan Wilske & Teresa Schiller, *Jurisdiction Over Persons Abducted in Violation of International Law in the Aftermath of* United States v Alvarez-Machain, 5 U. CHI. L. SCH. ROUNDTABLE 205, 217 (1998) (noting departures from the rule of *male captus, bene detentus* in England, South Africa, Zimbabwe, and Australia).

[65] Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide*, 33 YALE J. INT'L L. 369, 375 (2008).

conflicts[66]—or "armed confrontations occurring within the territory of a single State and in which the armed forces of no other State are engaged against the central government."[67] While the international legal rules governing such conflicts are thinner than those pertaining to fully international conflicts,[68] a core group of international legal principles (known, descriptively, as the law of non-international armed conflict)[69] still applies in such circumstances.

The law of non-international armed conflict consists of both treaty and customary international law. The existing body of treaty-based law is scant, consisting mainly of Common Article 3 of the 1949 Geneva Conventions ("Common Article 3") and the Second 1977 Additional Protocol ("Additional Protocol II").[70] Also applicable, albeit more narrowly, are thematic conventions such as the 1954 Hague Convention for the Protection of Cultural Property.[71] When

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[66] U.N. OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, REPORT ON THE PROTECTION OF CIVILIANS IN THE NON-INTERNATIONAL ARMED CONFLICT IN IRAQ 1, n.3 (2014), https://www.ohchr.org/Documents/Countries/IQ/UNAMI_OHCHR_POC%20Report_FINAL_18July2014A.pdf [https://perma.cc/6ALW-EUS2]; *see also* YORAM DINSTEIN, NON-INTERNATIONAL ARMED CONFLICTS IN INTERNATIONAL LAW 18 (2015) (noting that the conflict ongoing in Syria since 2011 is a non-international armed conflict.).

[67] MICHAEL N. SCHMITT, CHARLES H.B. GARRAWAY & YORAM DINSTEIN, INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW, THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT WITH COMMENTARY 2 (2006); *see also* U.S. DEP'T OF DEF., LAW OF WAR MANUAL 73–74 (June 2015), https://archive.defense.gov/pubs/law-of-war-manual-june-2015.pdf [https://perma.cc/4L7F-CL5K] ("3.3.1 International Armed Conflict and Non-International Armed Conflict. The law of war treats situations of "war," "hostilities," or "armed conflict" differently based on the legal status of parties to the conflict. If two or more States oppose one another, then this type of armed conflict is known as an "international armed conflict" because it takes place between States. However, a state of war can exist when States are not on opposite sides of the conflict. These other types of conflict are described as "not of an international character" or "non-international armed conflict." For example, two non-State armed groups warring against one another or States warring against non-State armed groups may be described as "non-international armed conflict," even if international borders are crossed in the fighting.").

[68] INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE JUDGE ADVOCATE GENERAL SCHOOL, U.S. ARMY, LAW OF WAR WORKSHOP DESKBOOK 30 (Brian J. Bill ed., 2000) (noting that there is less international legal regulation of such non-international armed conflicts due to their internal nature. "[T]he internal nature of these conflicts explains the limited scope of international regulation.").

[69] *See* SCHMITT, *supra* note 67, at 2–3; *see also* DINSTEIN, *supra* note 66 ("Since [1949], the international regulation of [non-international armed conflicts] has undergone tremendous growth, becoming the fulcrum of contemporary interest. In large measure, the normative corpus apposite to [non-international armed conflicts] may be seen as an extrapolation of the more robust *jus in bello* applicable in [international armed conflicts].").

[70] *See* Sasha Radin, *Global Armed Conflict? The Threshold of Extraterritorial Non-International Armed Conflicts*, 89 INT'L L. STUD. 696, 705 (2013).

[71] *See* Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 19(1), May 14, 1954, 249 U.N.T.S. 240, 256 ("In the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as, a minimum, the provisions of the present Convention which relate to respect for cultural property."); Sandesh Sivakumaran, *Re-envisaging the International Law of Internal Armed Conflict*, 22 EUR. J. INT'L L. 219, 223 (2011). Aside from Additional Protocol II and Common Article 3, Dinstein delineates a number of other treaties which are applicable to non-international armed conflicts, such as the Convention for the Protection of Cultural Property;

analyzing the international law related to battlefield detention, Common Article 3 and Additional Protocol II are the most relevant international legal sources. Each of these, however, only becomes applicable in different, context-specific situations.

Common Article 3 applies, "[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties,"[72] and establishes basic rules that govern the conduct of parties to such a conflict. These are "fundamental rules from which no derogation is permitted."[73] They include requirements for humane treatment of persons not actively participating in the conflict (including armed forces which have surrendered or are *hors de combat*).[74] The article specifically prohibits, with regard to such persons, "violence to life and person," including murder, mutilation, cruel treatment, and torture.[75] It also prohibits the taking of hostages, outrages upon human dignity, and the imposition of sentences and executions without the judgment of a regularly constituted court with appropriate judicial guarantees.[76] In addition, Common Article 3 provides that, "the wounded and sick shall be collected and cared for," and that "[a]n impartial humanitarian body, such as the International Committee for the Red Cross, may offer its services to the Parties to the conflict."[77]

Additional Protocol II, in turn, is a supplement to Common Article 3 and provides more specific protections for civilians. These include protections against "violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment," as well as "taking of hostages."[78] Additional Protocol II also extends protections to include prohibitions against collective punishments, acts of terrorism, outrages upon personal dignity—in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault, slavery and the slave trade, pillage, and threats to commit any of the prohibited acts.[79]

In order to apply, Additional Protocol II requires that hostilities take place "in the territory of a High Contracting Party between its armed forces and dissident

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the Convention on Certain Chemical Weapons; the 1989 Convention on the Rights of the Child; the 2006 International Convention for the Protection of All Persons from Enforced Disappearances; the 1972 Biological Weapons Convention; and the 1993 Chemical Weapons Convention. DINSTEIN, *supra* note 66, at 154–61.

[72] Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III].

[73] *The Geneva Conventions of 1949 and their Additional Protocols*, INT'L COMM. OF THE RED CROSS (Jan. 1, 2014), https://www.icrc.org/en/document/geneva-conventions-1949-additional-protocols [https://perma.cc/RDQ6-VARX].

[74] Geneva Convention III, *supra* note 72.

[75] Geneva Convention III, *supra* note 72, art. 31(a).

[76] Geneva Convention III, *supra* note 72, arts. 3(1)(b)–(d).

[77] Geneva Convention III, *supra* note 72, art. 3(2).

[78] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 4, June 8, 1977, 1125 U.N.T.S. 609.

[79] *Id.* arts. 4(2)(b), (d)–(h).

armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."[80] Syria, however, is not party to Additional Protocol II of the Geneva Conventions and therefore is not a "High Contracting Party." Accordingly, the only provisions of the law of armed conflict applicable to the non-international armed conflict in Syria are Common Article 3 and customary international law.[81]

Some protections initially developed for international armed conflicts have now attained the status of customary international law and apply equally in both international and non-international armed conflict. For example, carrying out a disproportionate attack would violate international law in either type of conflict.[82] Protections applicable regardless of the classification of the conflict also include the prohibition on targeting civilians;[83] attacking civilian objects;[84] indiscriminate attacks that strike both military objectives and civilians or civilian objects without distinction; the prohibition on acts designed to cause unnecessary suffering;[85] and the requirements of humane treatment.[86] Commentators have also argued that these protections include the right of detained persons to challenge their detention and certain fair trial guarantees.[87] As Jonathan Horowitz noted, international law "prohibits non-state armed groups from conducting arbitrary detention."[88] Accordingly, "such groups are barred from detaining a person without criminal charge unless that person poses an exceptional conflict-related security threat."[89]

The law of non-international armed conflict contains provisions that are

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[80] *Id.* art. 1(1).
[81] *See* Tilman Rodenhauser, *International Legal Obligations of Armed Opposition Groups in Syria*, 2015 INT'L REV. L. 1, 7 (2015).
[82] *See* SCHMITT ET AL., *supra* note 69, at 22 ("An attack is forbidden if it may be expected to cause incidental loss to civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. It is recognized that incidental injury to civilians and collateral damage to civilian objects may occur as a result of a lawful attack against fighters or military objectives.").
[83] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 51(3), June 8, 1977, 1125 U.N.T.S. 3; *see also* Michael N. Schmitt, *The Law of Cyber Warfare: Quo Vadis?*, 25 STAN. L. & POL'Y REV. 269, 294 (2014) (explaining that the Additional Protocol I "bans attacks on civilian objects").
[84] *See* SCHMITT ET AL., *supra* note 67, at 18.
[85] *See* SCHMITT ET AL., *supra* note 67, at 8.
[86] *See* SCHMITT ET AL., *supra* note 67, at 8. Dinstein notes that, "Since the 1990s we have witnessed the inexorable emergence of a new customary [law of non-international armed conflict], going well beyond existing treaty law and in fact filling some of its gaps." *See also* DINSTEIN, *supra* note 66, at 205. Dinstein goes on to identify a number of international legal norms which have become part of the customary law of non-international armed conflict, such as the protection of civilians; the prohibition against forced displacement of civilians; the prohibition on collective punishments; the prohibition of rape; the prohibition of slavery; and the injunction against the recruitment and use of child soldiers. DINSTEIN, *supra* note 66, at 207–08.
[87] Andrew Clapham, *Detention by Armed Groups Under International Law*, 93 INT'L L. STUD. 1, 14–15 (2017).
[88] *See* Horowitz, *supra* note 48.
[89] *See* Horowitz, *supra* note 48.

significant but rudimentary when compared to the far more elaborate and expansive rules for international armed conflicts. Of those provisions, only a few apply to the SDF. At most, the law affords foreign terrorist fighters detained by the SDF protections against arbitrary detention, along with certain minimum standards of treatment and care.[90] SDF personnel must, therefore, ensure there is a permissible basis for the detention of persons captured on the battlefield and once detained, ensure that foreign terrorist fighters are treated humanely.

1. Can Non-State Armed Groups Lawfully Detain Terrorists During A Non-International Armed Conflict?

While the legal authority for state forces to detain persons in the course of a non-international armed conflict (under both domestic and international law) is a relatively settled matter, the authority of non-state armed groups to detain is less clear.[91] The body of international law governing non-international armed conflict, "is utterly silent on the question of who can be interned, for what reasons, for how long and in accordance with which procedures."[92] The core instruments comprising the law of armed conflict neither permit nor prohibit the detention of captured individuals by non-state actors in non-international armed conflicts.[93] This legal lacuna has led to great uncertainty in international law regarding whether non-state armed groups can lawfully detain in the course of a non-international armed conflict.[94] Two schools of thought have emerged among international legal scholars: (1) non-state armed groups have no international legal authority to detain during the course of a non-international armed conflict; and (2) international law does provide such authority.

Commentators positing that non-stated armed groups have no detention authority under international law look mainly to the absence of any treaty language expressly granting such authority, and similarly posit that customary international law is also silent on the matter. This juridical void, according to this school of thought, means that there is no legal authority for non-state armed groups to detain during a non-international armed conflict. Without a clear grant of international legal authority, these writers see the only remaining detention authority as remaining with the domestic legal system of the relevant state.[95] Such a view also

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[90] *See* Horowitz, *supra* note 48.
[91] *See* Oona A. Hathaway et al., *Consent Is Not Enough: Why States Must Respect the Intensity Threshold in Transnational Conflict*, 165 U. PA. L. REV. 1, 30 (2016).
[92] ELS DEBUF, CAPTURED IN WAR: LAWFUL INTERNMENT IN ARMED CONFLICT 451 (2013); *see also* Kevin Jon Heller, *IHL Does Not Authorise Detention in NIAC: A Response to Murray*, OPINIOJURIS (Mar. 22, 2017), http://opiniojuris.org/2017/03/22/33037/ [https://perma.cc/8MTY-W8MV].
[93] Emily Chertoff et al., *State Responsibility for Non-State Actors that Detain in the Course of a NIAC*, YALE CTR. FOR GLOBAL LEGAL CHALLENGES (Dec. 7, 2015), https://law.yale.edu/sites/default/files/yls_glc_state_responsibility_for_nsas_that_detain_2015.pdf [https://perma.cc/69E5-8BP3].
[94] *See* Clapham, *supra* note 87, at 9.
[95] Gabor Rona, *Is There a Way Out of the NonInternational Armed Conflict Detention Dilemma?*, 91 INT'L L. STUD. 32, 34 (2015) ("Some claim that if IHL neither prohibits nor authorizes detention in NIACs, then NIAC detention is permitted only where grounds and procedures are articulated in

comports with the historic trend in international law by which states have sought to avoid conferring any sort of right, privilege, or legitimacy to non-state armed groups engaged in a conflict. As noted by Frédéric Mégret:

> The idea that [non-state armed groups] have an authority to detain (and perhaps more, for example an authority to kill or capture enemy combatants) is clearly among the most controversial in international law. It is a step towards conceiving such groups as legitimate participants in warfare, whereas the international community has traditionally sought to ensure that the privileges of war (killing and capturing) are a prerogative only of States.[96]

Commentators on the other side of the argument, however, find penumbral support for a right on the part of non-state armed groups to detain in the course of a non-international armed conflict. These writers infer a legal basis from related international legal obligations such as those articulated in Common Article 3 and Additional Protocol II, which refer to the need to treat detainees humanely and the need to pass sentences only consequent to a proper process.

> In the alternative, international humanitarian law (IHL) can be understood implicitly to confer an authority to deprive people of liberty upon parties to NIAC. Indeed, reference to 'persons, hors de combat by . . . detention' and 'regularly constituted courts' in Common Article 3, and to persons 'interned' in the Second Additional Protocol, Articles 5 and 6, are superfluous if not understood to be accompanied by an authority to detain or intern respectively. That this authority would extend to armed groups is, furthermore, secured by the principle of the 'equality of belligerents', by which humanitarian law sets equal parameters for each party to the conflict, regardless of the overarching (il)legality of the conflict or the nature of the parties.[97]

This view seems to have gained some traction in recent years, and its advocates found inspiration in a decision of the United Kingdom Supreme Court entitled *Serdar Mohammed v Ministry of Defence*—a notable case that involved the authority of state forces to detain in the course of a non-international armed conflict.

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domestic law that conform with international human rights law"); *id*. at 41 ("By and large, States that do detain in NIACs do so pursuant to domestic law. The United States, for example, was quick to enact legislation authorizing the detention of "enemy combatants" once it began hostilities against Al Qaeda and the Taliban in Afghanistan, choosing not to rely on a bald claim of customary IHL authority. Likewise, the UK's military doctrine leans heavily on authority from the host nation's domestic law or Security Council authorization for NIAC detention abroad."); *see also* Tuck, *supra* note 25, at 765.

[96] Frédéric Mégret, *Detention by Non-State Armed Groups in Non-International Armed Conflicts: International Humanitarian Law, International Human Rights Law and the Question of Right Authority* (Mar. 20, 2019) *in* INTERNATIONAL HUMANITARIAN LAW AND NON-STATE ACTORS: DEBATES, LAW AND PRACTICE (Ezequiel Heffes et al. eds., 2019).

[97] *See* Tuck, *supra* note 25, at 765.

The U.K. court found that British military forces participating in the International Security Assistance Force, a multinational force present in Afghanistan, had the legal authority to capture and detain members of opposing forces for periods exceeding 96 hours if it was necessary for imperative reasons of security.[98] The court did not find such authority existed under customary international law,[99] but instead held that such legal authority to capture and detain persons suspected of insurgency for imperative reasons of security derived from United Nations Security Council Resolutions 1546 (2004) and 1386 (2001).[100] Such rulings—recognizing the ability of states to detain during non-international armed conflict—have led some commentators to argue for a "corresponding authority to detain for non-State armed groups on the basis of 'equality of arms,' arguing that this would promote the coherent application of IHL for all parties to an armed conflict."[101] As Mégret has observed:

> If IHRL applies to [non-state armed groups], then it must take a position on whether such groups have a fundamental privilege to detain, because one cannot legally detain under IHRL without a right to detain. In a context where it is all but clear that [non-state armed groups] can even be subjects of IHRL, the requirement of non-arbitrariness also includes that the actor be itself in some way authorized to proceed with the detention.[102]

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[98] Serdar Mohammed and Others v Secretary of State for Defense, [2015] EWCA (Civ) 843, (Eng.) ("SM was captured by UK armed forces in April 2010 as part of a planned ISAF mission. He was suspected of being a Taliban commander and his continued detention after 96 hours for the purposes of interrogation was authorised by UK Ministers. He was interrogated over a further 25 days. At the end of this period the Afghan authorities said that they wished to accept SM into their custody but did not have the capacity to do so due to prison overcrowding. SM was kept in detention on British military bases for this 'logistical' reason for a further 81 days before he was transferred to the Afghan authorities. During the 110 days in total for which SM was detained by UK armed forces he was given no opportunity to make any representations or to have the lawfulness of his detention decided by a judge.").

[99] Serdar Mohammed (Respondent) v Ministry of Defence (Appellant) [2017] UKSC 2, 158 (appeal taken from EWCA) ("The reasons why there may as yet be no recognised customary international law power to detain in a NIAC are closely associated with member states' wish to avoid recognising or giving reciprocal rights to insurgent groups. These are precisely the reasons why a host state may request, and the Security Council may under Chapter VII of the UN Charter confer, a unilateral power to detain to a friendly third state helping the host state to resist the insurgency.").

[100] *Id.* [38] ("It followed that although British forces had their own chain of command leading ultimately to ministers in London, compliance with ISAF's detention policy was a condition of any authority to detain conferred by the Security Council Resolutions. In my opinion they were mistaken about this. The Security Council Resolution has to be interpreted in the light of the realities of forming a multinational force and deploying it in a situation of armed conflict. ISAF is simply the expression used in the Resolutions to describe the multinational force and the central organisation charged with coordinating the operations of its national components ["liaison and co-ordination", to use the judge's phrase].").

[101] Zelalem Mogessie Teferra, *National Security and the Right to Liberty in Armed Conflict: The Legality and Limits of Security Detention in International Humanitarian Law*, 98 INT'L REV. RED CROSS 961, 971 (2016).

[102] *See* Mégret, *supra* note 96, at 22.

Recent state practice may provide an inflection point on this question of international law. Specifically, the United States and members of the Global Coalition to Defeat ISIS have helped support SDF-run detention centers in Syria.[103] Rather than generating disapproval, this facilitation of non-state detention has generally been viewed as a necessary action. Notably, the Ministers of the Global Coalition To Defeat ISIS—a coalition consisting of seventy-four countries—issued a joint statement declaring, "For those detained foreign terrorist fighters that remain in the region, the Coalition should seek to enable their continued secure, fair, and humane detention."[104] In other words, seventy-four countries in the world jointly and publicly stated that the detention of terrorists by the SDF—a non-state entity—must be supported and not decried. One might observe a degree of international consensus forming in favor of the permissibility of non-state detention of terrorists subjects in the course of a non-international armed conflict. The development of *lex ferenda* favoring an evolution toward more permissible action would be consistent with the overall evolution of international law which has slowly but perceptibly abandoned outdated prohibitions in order to more effectively permit counterterrorism operations.[105]

2. The Law of Armed Conflict, Detention, and Repatriation

There are three other notable aspects of the law of non-international armed conflict that are worth highlighting: the requirement for some lawful basis for detention; the need for an ability to challenge that detention; and the assumption of repatriation. Regarding the first, the UN High Commissioner for Human Rights ("OHCHR") has opined:

> Under customary international law, any security related detention must be justified by the existence of a present, direct and imperative threat by the individual concerned, and is subject to strict procedural requirements including that the person may effectively challenge the lawfulness of the detention, that the detention does not last any longer than absolutely necessary, and that there be initial and

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[103] *See* Dent, *supra* note 17, at 4; Eric Schmitt, *Pentagon Wades Deeper Into Detainee Operations in Syria*, N.Y. TIMES (Apr. 5, 2018), https://www.nytimes.com/2018/04/05/world/middleeast/pentagon-detainees-syria-islamic-state.html [https://perma.cc/L5W5-S92X]; *Statement by Ministers of the Global Coalition To Defeat ISIS/DAESH*, U.S. EMBASSY & CONSULATES IN TURK. (Feb. 6, 2019), https://tr.usembassy.gov/statement-by-ministers-of-the-global-coalition-to-defeat-isis-daesh/ [https://perma.cc/2A4D-6CRS].

[104] *Statement by Ministers of the Global Coalition to Defeat ISIS/DAESH*, U.S. EMBASSY & CONSULATES IN TURK. (Feb. 6, 2019), https://tr.usembassy.gov/statement-by-ministers-of-the-global-coalition-to-defeat-isis-daesh/ [https://perma.cc/72GW-V8YG].

[105] S*ee* Dan E. Stigall, *The French Military Intervention in Mali, Counter-Terrorism, and the Law of Armed Conflict*, 223 MIL. L. REV. 1, 2 (2015); *see generally* Dan E. Stigall, *Counterterrorism, Ungoverned Spaces, and the Role of International Law*, 36 SAIS REV. INT'L AFFAIRS 47 (2016).

> periodic reviews by an independent body possessing the same attributes of independence and impartiality as the judiciary.[106]

As a result, the international rule is that "[a]ny detention in an armed conflict must be open to challenge."[107] Of course, the present, direct and imperative threat posed by detained ISIS fighters is not difficult to discern. Both media reports and expert commentary indicate that SDF authorities seem to be making efforts in this regard.

> According to the New York Times, Kurdish authorities have been trying to sort out which detainees to hold onto, such as Islamic State fighters, and which ones to release, such as local civilians who the Islamic State pressured into administrative or medical jobs. There is an underlying question of whether those local civilians (as well as suspected Islamic State family members) should have been detained in the first place, but the fact that the SDF is making such category distinctions reflects, at a minimum, that it recognizes that there are limits on whom it can and can't detain.[108]

Once the detention is no longer necessary, the obligation to repatriate persons detained during the course of both international and non-international armed conflicts is widely recognized. On that score, the International Committee of the Red Cross ("ICRC") Study on Customary International Humanitarian Law emphasizes that, in both international and non-international armed conflict, persons detained must be repatriated unless they are pending criminal proceedings by the detaining authority.[109]

> Rule 128. Release and Return of Persons Deprived of Their Liberty
>
> A. Prisoners of war must be released and repatriated without delay after the cessation of active hostilities.
>
> B. Civilian internees must be released as soon as the reasons which necessitated internment no longer exist, but at the latest as soon as possible after the close of active hostilities.

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[106] Office of the United Nations High Commissioner for Human Rights on Libya, *Investigation by the Office of the United Nations High Commissioner for Human Rights on Libya: Detailed Findings*, ¶ 130, U.N. Doc. A/HRC/31/CRP.3 (Feb. 15, 2016).
[107] *See* Clapham, *supra* note 87, at 15.
[108] *See* Jonathan Horowitz, *Kurdish-Held Detainees in Syria Are Not in a "Legal Gray Area"*, JUST SECURITY (Apr. 13, 2018), https://www.justsecurity.org/54866/kurdish-held-detainees-syria-legal-gray-area/ [https://perma.cc/6MBY-5LRM].
[109] *Rule 128. Release and Return of People Deprived of their Liberty*, INT'L COMM. OF THE RED CROSS (last visited Oct. 24, 2019), https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule128 [https://perma.cc/W3UN-DXMP].

> C. Persons deprived of their liberty in relation to a non-international armed conflict must be released as soon as the reasons for the deprivation of their liberty cease to exist.
>
> The persons referred to may continue to be deprived of their liberty if penal proceedings are pending against them or if they are serving a sentence lawfully imposed.[110]

This rule is based on a number of legal instruments, such as Article 20 of the 1899 Hague Regulations, which provides: "After the conclusion of peace, the repatriation of prisoners of war shall take place as speedily as possible."[111] Such provisions highlight the fact that the general idea in international law is that, no matter the type of conflict in question, and barring an issue of *non-refoulement*, detained individuals are to be repatriated (sent back to their respective countries of origin) when their detention is no longer necessary. This sort of repatriation is precisely what SDF personnel—citing to their inability to deal with foreign terrorist fighters—have been seeking to effect,[112] and the refusal of international partners to facilitate the repatriation of detained foreign terrorist fighters only frustrates the obvious intent of the international legal schema for battlefield detentions.

B. *International Human Rights Law and Detention*

Another relevant body of international law to the detention of foreign terrorist fighters is international human rights law, or "the law concerned with the protection of individuals and groups against violations of their internationally guaranteed rights, and with the promotion of these rights."[113] Although the law of armed conflict generally displaces international human rights law, this is not so when the law of armed conflict is silent on a point of law as it is during non-international armed conflicts, when the applicable rules of the law of armed conflict are far less expansive.[114]

The legal core of international human rights law is comprised of the United Nations Charter and related instruments. Three instruments are among the most important: the Universal Declaration of Human Rights of 1948; the International Covenant on Civil and Political Rights ("ICCPR"); and the International Covenant on Economic, Social, and Cultural Rights ("ICESCR").[115] Other regional instruments, such as the European Convention on Human Rights ("ECHR"), also

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[110] *Id.*
[111] Laws and Customs of War on Land (Hague, II) art. 20, July 29, 1899, 32 Stat. 1803.
[112] *See* Maguire & Hamlo, *supra* note 47.
[113] *See* Thomas Buergenthal, Dinah Shelton, & David P. Stewart, *International Human Rights in a Nutshell*, *in* INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL 1 (4th ed. 2009); H. Victor Condä, A HANDBOOK OF INTERNATIONAL HUMAN RIGHTS TERMINOLOGY 133–34 (2004) (citing Buergenthal, Shelton, and Stewart's slightly modified earlier definition).
[114] *See* David Kretzmer, *Targeted Killing of Terrorists: Extra-Judicial Executions or Legitimate Means of Defence*?, 16 EUR. J. INT'L L. 171, 201 (2005).
[115] *See* HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 136 (2d ed. 2000).

play an important role. The most salient instruments regarding a state's power to detain individuals are the ICCPR and the ECHR.

SDF and Rojavan authorities are, of course, neither states, nor are they parties to the core international instruments that comprise international human rights law. Even so, Peter Tzeng has noted that "courts, tribunals, and commentators generally agree that non-state actors can hold obligations under international law,"[116] under the following conditions:

> (1) the non-state actor acquires an obligation because the non-state actor is a national of, on the territory of, or within the jurisdiction of a state that is bound by the obligation; (2) the non-state actor acquires an obligation because the non-state actor consented to the obligation; (3) the non-state actor acquires an obligation because customary law directly binds that non-state actor; and (4) the non-state actor acquires an obligation because the obligation corresponds to a right established in international law.[117]

Relatedly, the United Nations Independent International Commission of Inquiry on the Syrian Arab Republic ("Commission of Inquiry") concluded that the crisis in Syria amounted to a non-international armed conflict and that non-state armed groups in Syria must "respect the fundamental human rights of persons forming customary international law."[118] Although the Commission of Inquiry did not specify which human rights obligations bind non-state armed groups in Syria, it has determined groups like the SDF do, in theory, have such obligations.

In addition, the international law of state responsibility could potentially implicate states for the acts of non-state armed groups in certain circumstances. For instance, Article 8 of the International Law Commission ("ILC") Draft Articles on State Responsibility, considered to be the most authoritative statement on state responsibility in international law,[119] states that "[t]he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."[120] International human rights

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[116] Peter Tzeng, *Non-State Actors as Respondents Before International Judicial Bodies*, 24 ILSA J. INT'L & COMP. L. 397, 404 (2018).
[117] *Id.* at 410.
[118] U.N. Human Rights Comm'n, *Rep. of the Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic*, U.N. Doc. A/21/50 (2012), http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-50_en.pdf [https://perma.cc/N7ZN-T4H9].
[119] Oona A. Hathaway et al., *Ensuring Responsibility: Common Article 1 and State Responsibility for Non-State Actors*, 95 TEX. L. REV. 539, 547 (2017); *see also* J. Patrick Kelly, *The International Law of Force and the Fight Against Terrorism*, DEL. L. REV. 18, 19 (2003).
[120] U.N. International Law Comm'n, *Rep. of the Int'l Law Comm'n on the Work of Its Fifty-Third Session*, U.N. Doc. A/56/10, 26 (2001), https://legal.un.org/docs/?path=../ilc/documentation/english/reports/a_56_10.pdf [https://perma.cc/9EB6-V58J]; *see also* Jonathan Horowitz, *Kurdish-Held Detainees in Syria Are*

law is far from irrelevant when analyzing the legality of battlefield detention of terrorists by non-state armed groups like the SDF.

1. The International Covenant on Civil and Political Rights

The ICCPR, adopted in New York on December 16, 1966, has been ratified by 165 states, including Syria.[121] As its name implies, it focuses on those international human rights which are "essentially those civil and political rights reflected in the Western, liberal, democratic tradition,"[122] and are "primarily limitations upon the power of the State to impose its will upon the people under its jurisdiction."[123] As noted it its preamble, the animating object and purpose of the ICCPR is "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."[124] Specific rights enumerated in the ICCPR include:

> [F]reedom of thought, conscience, and religion; freedom of opinion and expression; freedom of association; the right of peaceful assembly; the right to vote; equal protection of the law; the right to liberty and security of the person; the right to a fair trial, including the presumption of innocence; the right of privacy; freedom of movement, residence, and immigration; freedom from slavery and forced labor; protection from torture or cruel, inhumane, or degrading treatment or punishment; and the right to life.[125]

Article 9 of the ICCPR most directly touches on the subject of detention. The first paragraph states, "everyone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."[126] That same article goes on to spell out specific requirements that must be met when detaining an individual, including the requirement that detention must not be arbitrary.

Not in a "Legal Gray Area", JUST SECURITY (Apr. 13, 2018), https://www.justsecurity.org/54866/kurdish-held-detainees-syria-legal-gray-area/ [https://perma.cc/BT9R-K4T7] ("If it can be shown that the United States has a sufficient level of control over the SDF generally, or the SDF's treatment of the detainees specifically, then the United States would be responsible for the treatment of the detainees under its own international human rights law (IHRL) and its IHL obligations.").

[121] Chris Jenks, *Notice Otherwise Given: Will in Absentia Trials at the Special Tribunal for Lebanon Violate Human Rights?*, 33 FORDHAM INT'L L.J. 57, 74 (2009).

[122] *See* Brenda Sue Thornton, *The New International Jurisprudence on the Right to Privacy: A Head-On Collision with* Bowers v. Hardwick, 58 ALB. L. REV. 725, 734–35 (1995).

[123] *Id.*

[124] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S, 171 [hereinafter ICCPR], https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx [https://perma.cc/EJ78-SGZ7].

[125] *See* Thorton, *supra* note 122, at 735.

[126] ICCPR, *supra* note 124, art. 9(1).

According to the UN Working Group on Arbitrary Detention, the deprivation of liberty is arbitrary when a case falls into three categories.[127] The first category is when there is no legal basis to justify the deprivation of liberty. The second category is when the deprivation of liberty violates certain articles of the Universal Declaration of Human Rights or the ICCPR, namely when it is used to infringe upon a person's freedom of thought, conscience and religion; freedom of opinion and expression; or the right of peaceful assembly and association.[128] The third category is when international norms relating to the right to fair trial are so ignored or abused that it confers on the deprivation of freedom, of whatever kind, an arbitrary character.[129]

Another provision is Article 14 of the ICCPR, which lays out the principal obligations regarding due process in criminal trials. Pursuant to Article 14, state parties must ensure criminal defendants receive a fair and public hearing before a "competent, independent and impartial tribunal established by law."[130] In addition, Article 14 requires numerous substantive rights such as the presumption of innocence; due process rights; and the right to appeal a conviction to a "higher tribunal according to law."[131] On that score, it is worth recalling reports that Rojavan legal proceedings lack both defense lawyers and a fulsome appellate process.[132]

Nothing in the ICCPR requires a state to extradite a fugitive in its custody, nor does anything in the treaty require a state to seek extradition. Because the seeking and granting of extradition are matters that are inexorably intertwined with antecedent questions of sufficient proof, proper legal process, and the rule of law, etc., it makes sense that international obligations in this realm are largely phrased in the negative: i.e., obligations to abstain from extradition where there are substantial grounds for believing that there is a real risk of irreparable harm in the receiving state.[133] Even so, it is worth noting that the chief aim of the ICCPR is clearly to prevent the person detained from being deprived of appropriate process or subjected to abusive or degrading treatment.[134] One may reasonably question

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[127] United Nations Commission on Human Rights, Working Group on Arbitrary Detention, *Fact Sheet No. 26*, www.ohchr.org/english/about/publications/docs/fs26.htm [https://perma.cc/ZV3Z-BBQK].
[128] *Id.*
[129] *Id.*
[130] *Id.* art. 14(1).
[131] *Id.* art. 14(2)–(5).
[132] Houry, *supra* note 46; *see also* Arraf, *supra* note 37 (noting the following exchange in a Rojavan court proceeding between a female judge and a suspected ISIS fighter: She asks him details about when he joined ISIS, how much money he made, why he surrendered to Kurdish-Syrian forces and whether he requests anything from the court. "I want you to ask my family to hire a defense lawyer for me," he tells her. "I am talking to you — raise your head.").
[133] Human Rights Committee, General Comment 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 12 U.N. Doc. CCPR/C/21/Rev.1/Add.13, (May 26, 2004); *see also* Joanna Harrington, *The Absent Dialogue: Extradition and the International Covenant on Civil and Political Rights*, 32 QUEEN'S L.J. 82 (2007).
[134] *Id.*

whether this aim is best served by refusing to seek or accept the custody of a suspect detained by non-state forces in a battle zone.

Though SDF and Rojavan authorities are neither states nor parties to the ICCPR, there are international legal theories that posit non-state groups could be obligated to uphold the ICCPR if that group occupies the territory of a State party to the ICCPR[135]—and because Syria is a party to the ICCPR[136]—it can be plausibly argued that the SDF are also obligated to uphold the rights articulated in that international instrument. In addition, to the extent that the ICCPR is considered customary international law, its provisions would be considered binding on SDF personnel. Relatedly, the ICCPR prohibits any "state, group or person . . . to engage in any activity . . . aimed at the destruction of any of the rights and freedoms recognized [in the treaty]."[137] Thus, "non-state agents may not violate human rights, and states must remedy such unofficial violations when they occur."[138] Colorable legal arguments, therefore, exist that could lead courts in some countries to require the SDF to adhere to the provisions of the ICCPR.

2. The European Convention on Human Rights

A separate instrument which pertains exclusively to European States is the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") which was signed in 1950 and entered into force in 1953.[139] This convention was, in part, a response to the human rights atrocities committed during the Second World War and represented an attempt to integrate European powers in a way that would prevent repetition of such violence.[140]

While there is no hierarchy of rights under the ECHR, commentators distinguish between those rights in the Convention which are "unqualified" and those which are "qualified."[141] Those which are unqualified are the right to life; the prohibition on torture, inhuman, or degrading treatment; the prohibition on slavery and forced labor; the right to liberty and security; the right to a fair trial; the prohibition on punishment without law; the right to marry; the right to an effective

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[135] Christine Byron, *A Blurring of the Boundaries: The Application of International Humanitarian Law by Human Rights Bodies*, 47 VA. J. INT'L L. 839, 869 (2007).
[136] ICCPR, *supra* note 124; *see also* Chris Jenks, *Notice Otherwise Given: Will in Absentia Trials at the Special Tribunal for Lebanon Violate Human Rights?*, 33 FORDHAM INT'L L.J. 57, 74 (2009) ("The ICCPR reflects basic civil and political rights and has been ratified by 165 states, including Lebanon and Syria.").
[137] ICCPR, *supra* note 124, art. 5(1).
[138] Jennifer Moore, *From Nation State to Failed State: International Protection from Human Rights Abuses by Non-State Agents*, 31 COLUM. HUM. RTS. L. REV. 81, 93 (1999).
[139] *See* HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 786 (2d ed., 2000).
[140] *Id.* at 787.
[141] CLARE OVEY & ROBIN WHITE, JACOBS AND WHITE, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 7 (4th ed., 2006).

remedy; the prohibition on discrimination; the right to education and the right to free elections; and the prohibition on the death penalty.[142]

Article 5, the fountainhead for the right to liberty and security of the person, is the primary article impacting detention under the ECHR.[143] Article 5 states that no one shall be deprived of his liberty save in certain enumerated cases such as lawful detention after conviction by a competent court; the lawful arrest or detention of a person for non-compliance with the lawful order of a court; and, "the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonable considered necessary to prevent his committing an offence or fleeing after having done so."[144]

The purpose of Article 5 is to limit detention to those circumstances where it is strictly necessary in the public interest and to provide guarantees against arbitrariness.[145] Article 5(1)(c) of the ECHR allows the "lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offense."[146] Further, Article 5(3) of the ECHR requires that those arrested and charged with any offense be brought "promptly" before a court.[147] In interpreting this provision, the European Court of Human Rights ("ECtHR") has held that the initial arrest and the continuing detention must be justified, so long as it lasts, by adequate grounds. In that regard, the duration of the detention must not exceed a reasonable time.[148] In the specific case of terrorism, the ECtHR has demonstrated a degree of flexibility in defining reasonableness, noting:

> Because of the attendant risk of loss of life and human suffering, the police are obliged to act with utmost urgency in following up all information, including information from secret sources. Further, the police may frequently have to arrest a suspected terrorist on the basis of information which is reliable but which cannot, without putting in jeopardy the source of the information, be revealed to the suspect or produced in court to support a charge.[149]

Another key provision is Article 6, which lays out substantive requirements in the criminal process such as the presumption of innocence; the right to be promptly informed of the charges; and the right to legal assistance. Article 15(1) of the ECHR, however, provides that "in times of war or other public emergency

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[142] *Id.*
[143] *See* Convention for the Protection of Human Rights and Fundamental Freedoms art. 5(1), Nov. 4, 1950, E.T.S. 5 [hereinafter ECHR] (noting "everyone has the right to liberty and security of the person.").
[144] *Id.* art. 5.
[145] OVEY & WHITE, *supra* note 141, at 134.
[146] *See* ECHR, *supra* note 143, art. 5(1)(c).
[147] *See* ECHR, *supra* note 143, art. 5(3).
[148] *See* OVEY & WHITE, *supra* note 141, at 134.
[149] *See* Fox, Campbell and Hartley v. United Kingdom, 182 Eur. Ct. H.R. (ser. A) at 12 (1990).

threatening the life of the nation, any High Contracting Party may take measure derogating from its obligations under this Convention to the extent strictly required by the situation . . . ."[150]

Like the ICCPR, the ECHR does not require member states to seek or grant extradition, but does impose negative obligations designed to protect the fundamental human rights of detained persons.[151] Such rights were highlighted by the ECtHR in the landmark case of *Soering v. United Kingdom*,[152] in which the ECtHR stated:

> [I]nherent in the whole of the [European] Convention [on Human Rights] is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interests of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition. These considerations must also be included among the factors to be taken into account in the interpretation and application of the notions of inhuman and degrading treatment or punishment in extradition cases.[153]

As it concerns the extradition of fugitives abroad, the ECHR aims to provide for the general interest of the community—e.g., security—and for the protection of the individual's fundamental rights—e.g., right to be brought before a competent legal authority.[154] All of these objectives are properly met by repatriating detained terrorist suspects from non-state custody and subjecting them to fair investigations and prosecutions in properly established courts of the various member states. Conversely, none of them are advanced by ignoring the pleas of SDF personnel and leaving these suspects in battle zone detention facilities.

Because the SDF is a non-state armed group operating in Syria (who is not a party to the ECHR) there are fewer colorable arguments for the applicability of this legal instrument to the SDF. Even so, the international law of state

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[150] *See* ECHR, *supra* note 143, at 3.
[151] For an excellent discussion of extradition and international human rights law, see Christopher L. Blakesley, *Autumn of the Patriarch: The Pinochet Extradition Debacle and Beyond-Human Rights Clauses Compared to Traditional Derivative Protections Such As Double Criminality*, 91 J. CRIM. L. & CRIMINOLOGY 1, 64–65 (2000).
[152] Soering v. United Kingdom, 161 Eur. Ct. H.R. (Ser. A) (1989) (reprinted in, 11 Eur. Hum. Rts. Rep. 439 (1989)); Breitenmoser & Wilms, *Human Rights v. Extradition: The Soering Case*, 11 MICH. J. INT'L L. 845 (1990).
[153] *Soering*, 161 Eur. Ct. H.R. (ser. A) (1989), ¶ 89.
[154] *Id.*

responsibility[155] and the domestic jurisprudence of European courts could make its provisions relevant in a matter relating to the prosecution of a foreign terrorist fighter. Moreover, as detailed below, both the ICCPR and ECHR have been relevant to judicial decisions relating to the legality of capture and return of criminals (including terrorists) for the purpose of prosecution before domestic courts.

C. *International Law, Multilateral Treaties, UN Security Council Resolutions, and the Obligation of States to Accept Repatriation of Foreign Terrorist Fighters*

Another area of international law relevant to this query is that body of law created by multilateral treaties, bilateral treaties, and the United Nations ("UN") Security Council. Among the important concepts found within this nest of international legal instruments is that of *aut dedere aut judicare*—a legal maxim standing for the principle that states must either (a) surrender a criminal found within their jurisdiction to a state that wishes to prosecute the criminal; or (b) prosecute the offender in their own domestic courts.[156] A notably wide array of multilateral treaties enshrine the principle of *aut dedere aut judicare*.[157] For instance, such language is contained in all four 1949 Geneva Conventions,[158] the UN Convention for the Suppression of Terrorist Bombings,[159] the UN Convention Against Corruption,[160] the Convention for the Suppression of the Unlawful Seizure

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[155] U.N. International Law Commission, *Report of the International Law Commission on the work of its fifty-third session*, U.N. Doc. A/CN.4/SER.A/2001/Add. 1 (2001).

[156] CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW 104 (2008).

[157] Lee A. Steven, *Genocide and the Duty to Extradite or Prosecute: Why the United States Is in Breach of Its International Obligations*, 39 VA. J. INT'L L. 425, 447 (1999).

[158] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter, collectively, Geneva Conventions].

[159] International Convention for the Suppression of Terrorist Bombings art. 6(4), Dec. 15, 1997, T.I.A.S. No. 02-726, 2149 U.N.T.S. 256 ("Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 in cases where the alleged offender is present in its territory and it does not extradite that person to any of the States Parties which have established their jurisdiction . . . .").

[159] United Nations Convention Against Corruption art. 42(3), Oct. 31, 2003, T.I.A.S. No. 06-1129, 2349 U.N.T.S. 41 ("For the purposes of article 44 of this Convention, each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite such person solely on the ground that he or she is one of its nationals.").

[160] Convention Against Corruption art. 42(3), *opened for signature* Dec. 9, 2003, 43 I.L.M. 37 ("For the purposes of Article 44 of this Convention, each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite such person solely on the ground that he or she is one of its nationals.").

of Aircraft,[161] the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[162] the Convention for the Protection of Cultural Property in the Event of an Armed Conflict,[163] and the International Convention for the Suppression and Punishment of the Crime of Apartheid.[164] Due to its prevalence and wide acceptance, some commentators have even posited that *aut dedere aut judicare* is now a customary norm of international law.[165]

To the extent the principle of *aut dedere aut judicare*, operating as a customary norm, also binds the SDF, that non-state group is placed in a unique legal position vis-à-vis the wider international community.[166] They are admittedly unable to effectively prosecute the thousands of ISIS fighters they have detained. These are terrorists who have committed a wide range of crimes, including *jus cogens* offenses such as slavery, genocide, war crimes, and heinous acts of terrorism.[167] Thus, if *aut dedere aut judicare* is a customary international legal norm equally applicable to both states and non-state groups, then the SDF have an international legal obligation to extradite or otherwise transfer these ISIS fighters to the various countries that can prosecute them. Yet, many of those countries refuse to either seek or accept them.

Thus, the principle of *aut dedere aut judicare* imposes countervailing juridical forces—push and pull factors. The principle pushes a detaining state to make a choice: either prosecute or surrender the fugitive. However, the dynamics of the pull factor are somewhat less clear. For example, one might expect a prosecuting state to make an affirmative request for a fugitive's surrender. But, are prosecuting states compelled by international law to seek custody of such fugitives? This brings us to the question of what positive obligations states may have to seek the return of detained ISIS foreign fighters for purposes of prosecution.

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[161] Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105.
[162] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.
[163] Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240.
[164] Convention for the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, 1015 U.N.T.S. 243.
[165] *See, e.g*, Colleen Enache-Brown & Ari Fried, *Universal Crime, Jurisdiction and Duty: The Obligation of* Aut Dedere Aut Judicare *in International Law*, 43 MCGILL L.J. 613, 627 (1998); Michael J. Kelly, *Cheating Justice by Cheating Death: The Doctrinal Collusion for Prosecuting Foreign Terrorists—Passage of* Aut Dedere Aut Judicare *into Customary Law & Refusal to Extradite Based on the Death Penalty*, 20 ARIZ. J. INT'L & COMP. L. 491, 500 (2003) ("At a minimum, *aut dedere aut judicare* exists as a general norm of law, theoretically binding on all states.").
[166] As a general rule customary international law binds non state parties. *See* Rodenhauser, *supra* note 81, at 7 n.45. It also appears that *aut dedere aut judicare* exists as a general norm of international law law. *See, e.g*, Enache-Brown & Fried, *supra* note 165, at 627; Kelly, *supra* note 165, at 500.
[167] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1987).

In the aftermath of September 11, 2001, the UN Security Council took steps to counter terrorism, including the adoption of UN Security Council Resolution ("UNSCR") 1373 on September 28, 2001.[168] Pursuant to this UNSCR, the Security Council "imposed a series of obligations on all States, requiring them to take various measures to enhance their capacity to combat terrorism."[169] These included requirements "to criminalize terrorist financing activity, freeze terrorist funds, refrain from providing 'active or passive' support to terrorists, and deny safe haven to terrorists and their supporters."[170] Importantly, UNSCR 1373 imposed obligations on all UN Member States to do the following:

> (e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts;
>
> (f) Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings.[171]

Eric Rosand has noted the novelty of UNSCR 1373 in the way it used "the [Security] Council's authority under Chapter VII of the UN Charter to impose far-reaching binding obligations on all States."[172]

Thirteen years later, on September 24, 2014, as the problems associated with foreign terrorist fighters began to mount, the Security Council unanimously adopted UNSCR 2178, a resolution designed to counter the foreign terrorist fighter phenomenon.[173] Michael Plachta notes that UNSCR 2178 was adopted, "[i]n a rare session of the Security Council attended by heads of state–only the sixth of its kind in the organ's 68-year history" and that "all 15 member states voted for a US-backed resolution that seeks to step up the battle against 'foreign terrorist fighters.'"[174] Like its international legal antecedent, UNSCR 2178 imposes obligations on all UN Member states and requires, in relevant part:

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[168] Eric Rosand, *The Security Council As "Global Legislator":* Ultra Vires *or Ultra Innovative?*, 28 FORDHAM INT'L L.J. 542, 546–47 (2005).
[169] *See id.*
[170] *Id.* at 542, 547.
[171] S.C. Res. 1373, ¶ 2, U.N. Doc. S/RES/1373 (Sept. 28, 2001).
[172] *See* Rosand, *supra* note 168, at 542, 547.
[173] Michael Plachta, *Security Council Adopts Resolution on Foreign Terrorist Fighters*, 30 No. 13 INT'L ENFORCEMENT L. REP. 500 (2014).
[174] *Id.*

> 6. *Recalls* its decision, in resolution 1373 (2001), that all Member States shall ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice, and *decides* that all States shall ensure that their domestic laws and regulations establish serious criminal offenses sufficient to provide the ability to prosecute and to penalize in a manner duly reflecting the seriousness of the offense:
>
> (a) their nationals who travel or attempt to travel to a State other than their States of residence or nationality, and other individuals who travel or attempt to travel from their territories to a State other than their States of residence or nationality, for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts, or the providing or receiving of terrorist training[.][175]

Even more recently, in 2017, the UN Security Council adopted UNSCR 2396, "which updates UN Security Council Resolution 2178 (2014), and provides greater focus on measures to address returning and relocating foreign terrorist fighters ("FTFs") and transnational terrorist groups."[176] The new resolution creates new international obligations and other provisions to counter the threat posed by foreign terrorist fighters, including many provisions regarding the exchanged of needed law enforcement information and to "ensure appropriate prosecution, rehabilitation, and reintegration of FTFs and their accompanying family members."[177]

> *Recalls* its decision, in resolution 1373 (2001), that all Member States shall ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in support of terrorist acts is brought to justice, and further *recalls* its decision that all States shall ensure that their domestic laws and regulations establish serious criminal offenses sufficient to provide the ability to prosecute and to penalize the activities described in paragraph 6 of resolution 2178 in a manner duly reflecting the seriousness of the offense.[178]

Because the obligations imposed under these UNSCRs under Chapter VII of the United Nations Charter create legally binding obligations on all UN Member

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[175] S.C. Res. 2178, ¶ 6, U.N. Doc. S/RES/2178 (Sept. 24, 2014).
[176] *FACT SHEET: Resolution 2396 (2017) on Foreign Terrorist Fighters (Returnees and Relocators)*, U.S. Mission to the United Nations (Dec. 21, 2017), https://usun.usmission.gov/fact-sheet-resolution-2396-2017-on-foreign-terrorist-fighters-returnees-and-relocators/ [https://perma.cc/W69A-R5Q8].
[177] *Id.*
[178] S.C. Res. 2396, ¶ 17, U.N. Doc. S/RES/2396 (Dec. 21, 2017).

States,[179] they should, at a minimum, be interpreted to impose on all member states obligations of "best efforts" to investigate and, when legally permissible, take custody of a detained foreign terrorist fighter.[180] Accordingly, while it is too soon to definitively say the degree to which the principle of *aut dedere aut judicare* applies to non-state armed groups or how far international law requires states to go in seeking the return of foreign terrorist fighters, one can discern that the forces of international law are generally pulling in a direction that would favor the repatriation of detained ISIS fighters to their countries of origin for purposes of investigation, prosecution, or other lawful and appropriate measures to mitigate against the threat they pose.

D. *Exercising and Declining Jurisdiction: Judicial Practice and the Comparative Law of Detention*

The discussion above demonstrates that international law does not require a state to refuse jurisdiction over a defendant due to procedural irregularity preceding his or her appearance before that state's court.[181] In contrast, international law seems to favor such a course of action. Even so, a trend can be discerned in both domestic state and international judicial fora in which some courts refuse to exercise jurisdiction based on some preexisting irregularity or illegality in the capture or transfer of a subject. Given that such judicial trends may impact a country's decision to seek or accept the return of a detained foreign terrorist fighter, they are worth exploring.

1. International Law and Exercising Jurisdiction

The issue of jurisdiction is a threshold issue for any discussion of the legal propriety of prosecuting a terrorist who had been previously detained by a non-state armed group. The cornerstone of the international law of jurisdiction is the *SS Lotus* case, which was decided in 1927 by the Permanent Court of International Justice ("PCIJ")—the League of Nations forerunner to the current International Court of Justice.[182] In that decision, the PCIJ noted that "[f]ar from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory," international law leaves states "a wide measure of discretion, which is only limited in certain cases by prohibitive rules."[183] The PCIJ thus articulated the basic rule that

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[179] *See* Myriam Feinberg, *Terrorism Inside Out: Legislating for Humanity to Cooperate Against Terrorism*, 42 N.C.J. OF INT'L L. 505, 513 (2017).
[180] *See, e.g.*, Alejandro Piera & Michael Gill, *Will the New Icao-Beijing Instruments Build A Chinese Wall for International Aviation Security*?, 47 VAND. J. TRANSNAT'L L. 145, 208 (2014).
[181] *See* Christian Henderson, *The Extraterritorial Seizure of Individuals under International Law – The Case of al-Liby*, EUROPEAN JOURNAL OF INTERNATIONAL LAW, Part II (Nov. 7, 2013), https://www.ejiltalk.org/the-extraterritorial-seizure-of-individuals-under-international-law-the-case-of-al-liby-part-two/ [https://perma.cc/N4UU-ABUP] (noting that, "international law does not provide prescriptive rules on this issue," and that "there is also no discernible rule of customary international law prohibiting" the criminal prosecution of a person apprehended overseas.).
[182] *See* S.S. Lotus (Fr. v. Turk.), Judgement, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).
[183] *Id.* ¶ 19.

prescriptive jurisdiction is permissive in international law and, unless a prohibition to prescriptive jurisdiction is proved, a state may properly claim jurisdiction.[184]

Under international law, therefore, one assumes that jurisdiction can be legitimately exercised unless some specific legal challenge can be raised. Whether assertions of jurisdiction in particular cases will strain international or domestic law will depend on the facts of each case, as questions of jurisdiction must be analyzed individually.

While the various permutations of fact patterns that may or may not lead to individual jurisdictional challenges are beyond the scope of this Article, it is worth noting that international law permits the assertion of extraterritorial jurisdiction over a range of criminal activity (including terrorism). Courts and commentators have demonstrated this rather comprehensively.[185] This Article, therefore, assumes the legitimacy of state assertions of jurisdiction and explores whether any other international or domestic legal impediments exist to the transfer of foreign terrorists.

2. Domestic Law and Exercising Jurisdiction

Despite the permissiveness of international law, the practice of domestic courts reveals trends that can complicate prosecutions, notably the concept of abuse of process, an ascending juridical concept that has served to erode *male captus, bene detentus* in the domestic courts of certain countries. The idea of abuse of process is not sharply defined, but is generally considered to be "the improper use of the court process (including inordinate delay therein), using the court process where it is improper to do so (as when the circumstances in which the accused is bought before the court are an affront to the rule of law), or to improper ends (such as political purposes)."[186]

Commentators have recognized that the abuse of process doctrine (though widely recognized in numerous legal systems)[187] typically does not divest courts of jurisdiction.[188] Instead, it is generally conceived as a discretionary doctrine, "that courts may apply in situations when the exercise of jurisdiction would run counter

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[184] *Id.* ¶ 44.
[185] *See generally* Erin Creegan, *A Permanent Hybrid Court for Terrorism*, 26 AM. U. L. REV. 237 (2011).
[186] Atli Stannard, Case Note, *Extradition on Long-Delayed Charges*, 1 J. COMMONWEALTH CRIM. L. 322, 331–32 (2011) (citing The State v. Aneal Maharaj [2011] FJHC 573 (Sep. 20, 2011)). *See also* Prosecutor v. Sam Hinga Norman, Moinina Fofana, Allieu Kondewa, Case No.SCSL-04-14-T, Decision on Norman Counsel's Request For Leave to Appeal Under Rule 46(h), ¶ 29 (Special Court for Sierra Leonne Aug. 2, 2007) (citing *abuse of process*, BLACK'S LAW DICTIONARY 7th ed., 1999) (defining abuse of process as "[t]he improper and tortuous use of a legitimately issued court process to obtain a result that is either unlawful or beyond the process's scope.").
[187] Carolyn Forstein, *Challenging Extradition: The Doctrine of Specialty in Customary International Law*, 53 COLUM. J. TRANSNAT'L L. 363, 392 (2015) ("International criminal tribunals have likewise considered, and in one case applied, the abuse of process doctrine.").
[188] *Id.*

to the rule of law, such as transnational abductions or other circumventions of extradition procedures."[189]

One may conceive of the practice of states as a continuum along which *male captus, bene detentus* and the doctrine of abuse of process occupy opposing poles. On that continuum, the United States occupies a place far closer to *male captus, bene detentus*, and generally holds that a U.S. court maintains jurisdiction over an individual who has been abducted from abroad and brought before the court—even if that abduction is considered a violation of international law.[190] In U.S. jurisprudence, this is known as the *Ker-Frisbee* Doctrine—"a long-settled rule from two United States Supreme Court cases . . . that allows the exercise of domestic criminal jurisdiction over a defendant irrespective of the methods utilized by the government to bring the defendant into the jurisdiction of a court."[191]

But even in its American bastion, the notion of *male captus, bene detentus* has limitations which have evolved through judicial decisions extending the requirements of due process to the pretrial conduct of law enforcement authorities,[192] and holding that due process requires "a court to divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights."[193] Though U.S. jurisprudence has made it clear that only extreme conduct on the part of government agents will result in relief, far more than simply an illegal or unauthorized capture, the fact remains that U.S. law does not view the rule of *male captus, bene detentus* to be impenetrable.

The U.S. jurisprudential trend to soften the idea of *male captus, bene detentus* is not unique. The doctrine of abuse of process, which exists in common law, civil law (*abus de droit*), and international law,[194] has garnered increasing force. Indeed, in most modern legal systems, it is now accepted that "[a]buse of process in extradition proceedings is capable of rendering the detention of the person whose extradition is sought unlawful."[195] The most common examples of state activity that might be considered an abuse of process are state-sponsored

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[189] *Id.*
[190] *See generally United States v. Alvarez-Machain*, 504 U.S. 655 (1992).
[191] Geoffrey S. Corn & Sharon G. Finegan, *America's Longest Held Prisoner of War: Lessons Learned from the Capture, Prosecution, and Extradition of General Manuel Noriega*, 71 LA. L. REV. 1111, 1130 (2011).
[192] *See, e.g., United States v. Toscanino*, 500 F.2d 267, 274 (2d Cir. 1974).
[193] *Id.* at 275.
[194] M. C. Bassiouni, *Ideologically Motivated Offenses and the Political Offenses Exception in Extradition - A Proposed Juridical Standard for an Unruly Problem*, 19 DEPAUL L. REV. 217, 226 n.21 (1969) (noting "corollary to that principle is the theory of *abus de droit*, or abuse of right, which is recognized in international law and prohibits states who are required and presumed to act in 'good faith' from abusing their 'rights.'").
[195] Stannard, *supra* note 186, at 328–29 (quoting Rhett Allen Fuller v. The Attorney General of Belize [2011] UKPC 23, [7]).

abductions, unlawful deportations, and prosecutorial or investigative malfeasance.[196]

Other jurisdictions may also refuse exercise jurisdiction if state authorities engaged in illegal conduct or otherwise sought to undermine established legal procedures.[197] For instance, in contrast to the U.S. rule, the South African Supreme Court has refused to assert jurisdiction over a defendant who was abducted in Swaziland by agents of the South African state, reasoning that "[w]hen the state is a party to a dispute . . . it must come to court with 'clean hands.' When the state itself is involved in an abduction across international borders, as in the present case, its hands are not clean."[198] Similarly, the Supreme Court of Zimbabwe has declined jurisdiction in the case of a defendant whose appearance was facilitated by an act of abduction.[199] The United Kingdom, however, provides what may be the most extensive jurisprudential record by which we may examine the abuse of process doctrine and its philosophical undergirding.

(i) The United Kingdom and Ex Parte Bennett

UK courts have the power to stay proceedings in two categories: (1) cases in which it would be impossible to give the accused a fair trial, and (2) cases in which "it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case."[200] The first category is of less relevance to the matter at hand as it relates to the opportunity of the accused to receive a fair trial in the place to which he or she is transferred.[201] The second category relates to the responsibility of the court to protect the integrity of the criminal justice system. "Here a stay will be granted where the court concludes that in all the circumstances a trial will 'offend the court's sense of justice and propriety'[202] or will 'undermine public confidence in the criminal justice system and bring it into disrepute.'"[203]

Regarding the second category, *Ex Parte Bennett* was a pivotal judicial decision.[204] That case concerned a New Zealand citizen (Bennett) who was wanted

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[196] *See* COLIN WELLS, ABUSE OF PROCESS 172–73 (2017).
[197] Ben Shea, *What More Can Be Done to Secure the Arrest and Surrender of Persons Subject to Arrest Warrants Issued by the International Criminal Court?*, ICC FORUM (Oct. 23, 2019), https://iccforum.com/forum/permalink/93/4083#Shea20140301_fn24 [https://perma.cc/LGA3-8TWQ].
[198] *Id.* (quoting *State v. Ebrahim* 1991 (2) SALR 553 (S. Afr.)).
[199] *Id.* (quoting *State v. Beahan* 1991 (103) I.L.R. 293 (Zim.)).
[200] R v Maxwell [2010] UKSC 48 [13] (appeal taken from EWCA).
[201] This category is of less relevance for purposes of the Syrian detention conundrum in which the terrorists in question are detained by non-state forces in Syria pending their transfer to their countries of origin.
[202] R v Maxwell, *supra* note 200 (quoting R v Horseferry Road Magistrates' Court, Ex p Bennett [1994] 1 AC 42, (appeal taken from QB)).
[203] R v Maxwell, *supra* note 200 (quoting R v Latif and Shahzad [1996] 1 W.L.R. 104, 112F (Eng.)).
[204] R v. Horseferry Road Magistrates' Court, ex-parte Bennett [1994] 1 A.C. 42 [hereinafter *Bennett*].

in England for crimes related to fraud and who was located in South Africa.[205] At the time, there was no extradition treaty in force between the United Kingdom and South Africa, though England's 1989 Extradition Act did allow special arrangements for extradition to be made in the absence of a treaty.[206] Instead of pursuing an extradition, however, "the defendant claimed that he had been kidnapped from the Republic of South Africa as a result of collusion between the South African and British police and returned to England, where he was arrested and brought before a magistrates' court to be committed to the Crown Court for trial."[207] At trial, Bennett challenged the jurisdiction of the court and, initially, the Queen's Bench Division Court held that there was no judicial power to inquire into how a person is brought before a court.[208] On appeal the House of Lords reversed that opinion and found:

> [W]here a defendant in a criminal matter had been brought back to the United Kingdom in disregard of available extradition process and in breach of international law and the laws of the state where the defendant had been found, the courts in the United Kingdom should take cognizance of those circumstances and refuse to try the defendant; and that, accordingly, the High Court, in the exercise of its supervisory jurisdiction, had power to inquire into the circumstances by which a person had been brought within the jurisdiction and, if satisfied that there had been a disregard of extradition procedures, it might stay the prosecution as an abuse of process and order the release of the defendant.[209]

In its rationale, the House of Lords noted that there was no question regarding whether or not Bennett could obtain a fair trial in the United Kingdom, nor was there a question of whether his trial would have been fair had he been returned pursuant to the ordinary extradition process. To the contrary, the question was not about fairness, but the responsibility of the court to uphold the rule of law. "If the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accepts a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behavior that threatens either basic human rights or the rule of law."[210] Accordingly, it was held that "where process of law is available to return an accused to this country through extradition procedures," [211]

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[205] Ruth Wedgwood, R. v. Horseferry Road Magistrates' Court, ex-parte Bennett, 89 AM. J. INT'L L. 142, 142–43 (1995).
[206] *Id.*
[207] *See Bennett*, *supra* note 204.
[208] *See* Wedgwood, *supra* note 205.
[209] *See* R v. Horseferry Road Magistrates' Court, ex-parte Bennett [1994] 1 A.C. 42
[210] *Id.*
[211] *Id.*

U.K. courts could refuse to exercise jurisdiction in cases in which a defendant was forcibly brought before the court.[212]

The decision in *Ex Parte Bennett* thus establishes the discretionary power of U.K. courts to refuse to entertain jurisdiction over a matter "where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place."[213] It does not, however, set forth a hard and fast rule that jurisdiction will always be declined in such cases—and determining when a declination of jurisdiction is appropriate requires a careful balancing of several factors. As the U.K. Supreme Court noted, "the judge must weigh in the balance the public interest in ensuring that those that are charged with grave crimes should be tried and the competing public interest in not conveying the impression that the court will adopt the approach that the end justifies any means."[214]

An interesting test of the rule in *Ex Parte Bennett*, arose in the matter of Mohamed Ahmed Mohamed and "CF"—British citizens whom Somali authorities in Somaliland arrested and detained on or about January 13, 2011, then deported to the United Kingdom (allegedly with the collusion of the United Kingdom authorities).[215] Mohamed Ahmed Mohamed and CF claimed that "they were arrested and detained in Somaliland and were later deported to the United Kingdom unlawfully and with the collusion of the United Kingdom authorities."[216] Thereafter, they were subjected to what are known as "control orders" under U.K. law and, subsequently, to terrorism prevention and investigation measures ("TPIMs"), legal restraints that U.K. courts imposed on terrorist subjects that include restrictions on travel.[217] At trial, Mohamed and CF contended that the control orders and TPIMs should be quashed because they were obtained by an abuse of process—namely, the allegedly unlawful way Mohamed and CF were brought to the United Kingdom.[218]

The Administrative Court initially considered and upheld the control orders and the TPIMs.[219] During the Administrative Court proceedings, Lord Justice Lloyd Jones assumed "for present purposes" that the arrest, detention and deportation of the appellants were not in accordance with Somaliland law, but concluded that, "having regard to the entirety of the open and closed evidence,"

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[212] *Id.*
[213] R v. Mullen [2000] QB 520 (Eng.).
[214] R v Latif and Shahzad [1996] 1 W.L.R. 104, 112F (Eng.).
[215] Mohamed v. Secretary of State for the Home Department [2014] EWCA (Civ) 559, [2014] WLR(D) 187 (appeal taken from EWHC) (noting that "[a]lthough Somaliland is not a sovereign state in international law, the United Kingdom and many other states and international organizations, including the United Nations, have direct dealings with the administration there which operates independently of Somalia. Mohamed Ahmed Mohamed (to whom I shall now refer to as MAM) and CF are persons who were reasonably suspected by the Secretary of State to be, or to have been, involved in terrorism-related activity.").
[216] *Id.* ¶ 1.
[217] *Id.*
[218] *Id.* ¶ 2.
[219] *Id.*

neither the control orders nor the TPIMs were "offensive to the court's sense of justice and propriety," nor would upholding them "undermine public confidence in the legal system or bring it into disrepute."[220]

Mohamed Ahmed Mohamed and CF appealed and sought to have the control orders and the TPIMs quashed, alleging again that they were obtained by an abuse of process. The Court of Appeal did not decide whether or not there was an abuse of process, but upheld the Appellants' complaints due to a lack of disclosure and remitted the issue to the High Court for further consideration.[221] The control orders were later quashed,[222] and Mohamed Ahmed Mohamed eventually absconded to Somalia where, in 2018, he was among five people shot dead in a public execution for alleged espionage on behalf of Britain, the United States, and Somalia.[223]

(ii) Examining the Practices of International Tribunals

One can also analyze the question of whether international law prohibits prosecution of persons first detained by non-state armed groups by examining international tribunal cases in which non-state armed groups have detained subjects wanted for various crimes.

a. Prosecutor v. Dragan Nikolić

The most paradigmatic example of an international tribunal addressing such a matters is the 2003 decision of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") in the case of *Prosecutor v. Dragan Nikolić*.[224] Nikolić, who was indicted by the ICTY for war crimes committed while he was commander of a Bosnian-Serb detention center in eastern Bosnia, had been abducted from the Former Republic of Yugoslavia ("FRY") by unknown persons, put into the trunk of a car, and then taken across the border into Bosnia and Herzegovina, where he was arrested by members of the Stabilization Force in Bosnia and Herzegovina ("SFOR")—the NATO-led multinational peacekeeping

[220] *Id.* ¶ 5 (internal quotation marks omitted).
[221] *Id.* ¶ 47–48.
[222] Paul F. Scott, THE NATIONAL SECURITY CONSTITUTION 309 n.189 (2018) (*citing* Mohamed v. Secretary of State for the Home Department [2014] EWCA (Civ) 559). In his discussion of this matter, Scott also notes that "the claim of abuse of process was rejected." *Id.*
[223] Paul Peachey, *Terror Suspect Who Fled Britain 'Executed' in Somalia*, NAT'L (Oct. 12, 2018), https://www.thenational.ae/world/europe/terror-suspect-who-fled-britain-executed-in-somalia-1.779747 [https://perma.cc/4HST-PAHB].
[224] *See* Nikolić Interlocutory Appeal, *supra* note 61; *see also* Prosecutor v. Dragan Nikolić, Case No. IT-94-2-I, Indictment, (1994), http://www.icty.org/x/cases/dragan_nikolic/ind/en/nik-ii941104e.pdf [https://perma.cc/K7YT-SHZ5].

force deployed to Bosnia and Herzegovina after the Bosnian war.[225] "Most notably, there was no connection between SFOR, the Prosecution, and the abductors."[226]

At trial, Nikolić argued that his arrest violated both the sovereignty of FRY—international human rights law—and that it constituted an abuse of process.[227] Nikolić asserted that the appropriate remedy for these violations was dismissal of his indictment and that he be permitted to return to Serbia and Montenegro.[228] Neither the Trial Chamber nor the Appeals Chamber of the ICTY, however, found that the irregular circumstances of Nikolić's arrest and subsequent delivery to SFOR personnel required the ICTY to refuse to exercise jurisdiction.[229]

With regard to the effect of violation of an accused's human rights on jurisdiction, the Trial Chamber noted that, while it could decline to exercise jurisdiction as the result of an abuse of process, for such a claim to succeed, ''it needs to be clear that the rights of the accused have been egregiously violated.''[230] The Trial Chamber found that, under a balancing of all the circumstances, the rights of the accused had not been so "egregiously violated" as to warrant refusing to exercise jurisdiction.[231]

With regard to the effect of violation of FRY's sovereignty on jurisdiction, the Trial Chamber noted that when courts refuse to exercise jurisdiction on such grounds, it is generally because the authorities of the forum state—the state where the accused is being prosecuted—had some role in facilitating the illegal or irregular capture. Because there was no involvement by SFOR or the prosecutors before the tribunal in Nikolić's initial capture,[232] the Trial Chamber found that there was no reason to refrain from exercising jurisdiction over Nikolić.[233]

The Appellate Chamber, upon further consideration of the matter, examined the question and added an additional layer for the analysis, requiring that courts also take into consideration the gravity of the offense. "[F]or universally condemned offenses such as genocide, war crimes, and crimes against humanity,

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[225] *See* Nikolić Interlocutory Appeal, *supra* note 61, at 2.
[226] Robert J. Currie, *Abducted Fugitives Before the International Criminal Court: Problems and Prospects*, 18 CRIM. L.F. 349, 366 (2007), https://ssrn.com/abstract=2114312 [https://perma.cc/5QFV-7UHY].
[227] Prosecutor v. Dragan Nikolić, No. IT-94-2-PT, Decision on Defense Motion Challenging the Exercise of Jurisdiction by the Tribunal, Oct. 9, 2002 [hereinafter Nikolić Trial Court Order] ¶ 25, http://www.icty.org/x/cases/dragan_nikolic/tdec/en/10131553.htm [https://perma.cc/TL2W-6UM8]; *see also* Currie, *supra* note 226, at 366.
[228] Nikolić Trial Court Order, *supra* note 227, ¶ 25.
[229] Nikolić Trial Court Order, *supra* note 227, ¶ 115.
[230] Nikolić Trial Court Order, *supra* note 227, ¶ 111; *see also* Currie, *supra* note 226, at 367.
[231] Nikolić Trial Court Order, *supra* note 227, ¶¶ 111–12, 115; *see also* Aparna Sridhar, *The International Criminal Tribunal for the Former Yugoslavia's Response to the Problem of Transnational Abduction*, 42 STAN. J. INT'L L. 343, 354 (2006).
[232] Nikolić Trial Court Order, *supra* note 227, ¶ 101; *see also* Sridhar, *supra* note 231, at 353–54.
[233] Nikolić Trial Court Order, *supra* note 227, ¶ 67; *see also* Gregory S. Gordon, *Toward an International Criminal Procedure: Due Process Aspirations and Limitations*, 45 COLUM. J. TRANSNAT'L L. 635, 676 (2007).

violations of state sovereignty would not in themselves justify setting aside personal jurisdiction."[234] The appropriate analysis, per the reasoning of the Appeals Chamber, is a balancing of interests and "the damage caused to international justice by not apprehending fugitives accused of serious violations of international humanitarian law is comparatively higher than the injury, if any, caused to the sovereignty of a State by a limited intrusion in its territory, particularly when the intrusion occurs in default of the State's cooperation."[235]

With regard to the issue of a "State's cooperation," the Appeals Chamber noted that, where the State whose sovereignty has allegedly been breached has not lodged any complaint and thereby acquiesces in the exercise of jurisdiction, then "the exercise of jurisdiction should not be declined in cases of abductions carried out by private individuals whose actions, unless instigated, acknowledged or condoned by a State, or an international organization, or other entity, do not necessarily in themselves violate State sovereignty."[236]

The Appeals Chamber did allow, however, that an egregious violation of the defendant's human rights could call for setting aside jurisdiction, though such violations would have to be quite serious in nature.[237]

> Although the assessment of the seriousness of the human rights violations depends on the circumstances of each case and cannot be made *in abstracto*, certain human rights violations are of such a serious nature that they require that the exercise of jurisdiction be declined. It would be inappropriate for a court of law to try the victims of these abuses. Apart from such exceptional cases, however, the remedy of setting aside jurisdiction will, in the Appeals Chamber's view, usually be disproportionate. The correct balance must, therefore be maintained between the fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law.[238]

The Appeals Chamber, however, held that because Nikolić's rights were not egregiously violated in the process of his arrest, "the procedure adopted for his arrest did not disable the Trial Chamber from exercising its jurisdiction."[239]

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[234] Melinda Taylor & Charles Chernor Jalloh, *Provisional Arrest and Incarceration in the International Criminal Tribunals*, 11 SANTA CLARA J. INT'L L. 303, 313 (2013).
[235] Prosecutor v. Dragan Nikolić, Case No. IT-94-2-AR73, Decision on Interlocutory Appeal Concerning Legality of Arrest ¶ 26 (June 5, 2003), https://www.icty.org/x/cases/dragan_nikolic/acdec/en/030605.pdf [https://perma.cc/7HT5-DM2V] [hereinafter Nikolić Interlocutory Appeal].
[236] *Id.*
[237] *Id.*
[238] *Id.* ¶ 30.
[239] *Id.* ¶ 32.

This case is highly relevant to the matter of detained foreign terrorist fighters on a number of levels. First, SDF personnel operate independently and autonomously in Syria, and sometimes with the tacit consent of Syrian regime authorities.[240] Their apprehension of foreign terrorist fighters, therefore, should neither be considered at the direction of the country seek to exercise jurisdiction for purposes of prosecution, nor necessarily without the consent of Syrian authorities.[241] Secondly, many foreign terrorist fighters have already been repatriated and those repatriations have not occasioned any complaint by Syrian authorities. To the contrary, recent statements by the Syrian regime seem to welcome the assistance.[242] Given that Syria has not lodged any complaint, it must be deemed to have acquiesced in these repatriations. International law does not disfavor the exercise of jurisdiction by the national courts before which these foreign fighters must be prosecuted.[243] Lastly, as the Appeals Chamber noted, the severity of the crimes associated with ISIS and these detained foreign terrorist fighters requires that the balance tip in favor of the exercise of jurisdiction.[244] In March 2016, U.S. Secretary of State John Kerry declared crimes committed by ISIS in Iraq and Syria against minorities were genocide[245]—the same sort of crimes for which the Appeals Chamber found that "the remedy of setting aside jurisdiction will . . . usually be disproportionate."[246] The logic of *Prosecutor v. Dragan Nikolić* would require domestic courts to exercise jurisdiction over repatriated ISIS foreign terrorist fighters who had been captured and held by the SDF.

b. Prosecutor v. Saif Al-Islam Gaddafi

Another excellent example of the recognition under international law of the propriety of repatriation of criminals from non-state groups for purposes of prosecution arose in the context of Libya, where thousands of persons remain in

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[240] *See Alliances Shift as Syrian Kurdish Alliance Holds Talks with Assad Regime*, FRANCE24 (July 27, 2018), https://www.france24.com/en/20180727-syria-kurds-assad-talks-damascus-alliances [https://perma.cc/9KFN-KKVQ] (noting, "Kurdish-led forces have been reaching agreements on the ground with Syrian army units.")

[241] Nikolić Trial Court Order, *supra* note 227, ¶ 101; *see also* Sridhar, *supra* note 230, at 353–54.

[242] *President al-Assad: The War Was Between us Syrians and Terrorism, We Triumph Together Not Against Each Other*, SYRIAN ARAB NEWS AGENCY (Feb. 17, 2019), https://sana.sy/en/?p=158819 [https://perma.cc/VY3S-X5BR] ("President Bashar al-Assad stressed that thanks to our armed forces, the supporting forces, allies, friends and brothers, Syria managed to defeat terrorism, stressing that protecting the homeland would not have been achieved without a unified popular will of all the elements of the Syrian society.").

[243] *See* Prosecutor v. Dragan Nikolić, Case No. IT-94-2-AR73, Decision on Interlocutory Appeal Concerning Legality of Arrest ¶ 26 (June 5, 2003), https://www.icty.org/x/cases/dragan_nikolic/acdec/en/030605.pdf [https://perma.cc/7HT5-DM2V] [hereinafter Nikolić Interlocutory Appeal].

[244] *Id.*; *see also* Taylor & Jalloh, *supra* note 234, at 313.

[245] Amanda Holpuch, Harriet Sherwood & Owen Bowcott, *John Kerry: ISIS is Committing Genocide in Syria and Iraq*, GUARDIAN (May 17, 2016), https://www.theguardian.com/world/2016/mar/17/john-kerry-isis-genocide-syria-iraq [https://perma.cc/5M57-GABW]; *see also* Caroline E. Nabity, *It's Genocide, Now What: The Obligations of the United States Under the Convention to Prevent and Punish Genocide Being Committed at the Hands of ISIS*, 8 CREIGHTON INT'L & COMP. L.J. 70 (2016).

[246] *See* Nikolić Interlocutory Appeal, *supra* note 61, ¶ 30.

custody, "held in a variety of irregular places of detention, including homes and schools, for extended periods" by non-state armed groups.[247] Among those detained in such circumstances is Saif Al Islam Gaddafi who was wanted by the International Criminal Court ("ICC") for crimes against humanity committed in Libya.[248] Gaddafi was captured by a non-state armed group (the Zintan Brigade) in 2011 and was held for some time in its custody.[249] The ICC, nonetheless, issued a warrant for Gaddafi's arrest and ordered him to stand trial at the Hague.[250]

Libya's transitional authorities who wanted to prosecute Gaddafi in Libya challenged the admissibility of the case in the ICC, arguing that "denying Libya the chance to prosecute Gaddafi 'would be manifestly at variance with the principle of complementarity,' despite indications that Libya was able to carry out a prosecution with international assistance."[251] The ICC's Office of Public Counsel for the Defense ("OPCD"), however, argued against this admissibility challenge, asserting, among other arguments, that Libya's transitional authorities, "did not have effective custody over Gaddafi because he was held by the Zintan militia."[252] In an Admissibility Decision on May 31, 2013, the ICC pre-trial chamber ordered Libya to extradite Saif to the ICC because Libya was, "unable genuinely to carry out the investigation or prosecution against [Saif]."[253] "The Court reasoned that the case was admissible before the ICC under Article 17(3) of the Rome Statute in part because Libya is unable to try Saif in accordance with fair trial considerations as laid out in both Libyan law and international human rights instruments ratified by Libya."[254] Importantly, the fact that Gaddafi was in the custody of a non-state armed group did not serve as an argument against his transfer to the ICC for prosecution. To the contrary, it served as a primary reason why he should be transferred.[255]

By a parity of reasoning, following the rulings in *Prosecutor v. Saif Al-Islam Gaddafi*, domestic courts should find no legal barrier in international law to the exercise of jurisdiction over repatriated ISIS foreign terrorist fighters who had been captured and held by the SDF.

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[247] REDRESS, TORTURE IN THE MIDDLE EAST: THE LAW AND PRACTICE, REGIONAL CONFERENCE REPORT 22 (2013), https://www.refworld.org/pdfid/5232e5bd4.pdf [https://perma.cc/TY7F-MK9M].
[248] *See generally* Prosecutor v. Gaddafi, Case No. ICC-01/11-01/11, Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi (May 31, 2013).
[249] *Id.* ¶ 152.
[250] John J. Liolos, *Justice for Tyrants: International Criminal Court Warrants for Gaddafi Regime Crimes*, 35 B.C. INT'L & COMP. L. REV. 589, 590 (2012).
[251] M. Christopher Pitts, *Being Able to Prosecute Saif al-Islam Gaddafi: Applying Article 17(3) of the Rome Statute to Libya*, 27 EMORY INT'L L. REV. 1291, 1298–99 (2013).
[252] *Id.* at 1300–01.
[253] Prosecutor v. Gaddafi, Case No. ICC-01/11-01/11, Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi, ¶ 45 (May 31, 2013).
[254] Angela Walker, *The ICC Versus Libya: How to End the Cycle of Impunity for Atrocity Crimes by Protecting Due Process*, 18 UCLA J. INT'L L. & FOREIGN AFF. 303, 311 (2014).
[255] *See Id.* at 354, n.40 (noting, "in determining 'inability,' PTC I emphasized Libya's inability to secure the transfer of Saif's custody from the Zintan militia to State authority.").

c. Stocké v. Germany

The jurisprudence of the European Commission on Human Rights ("European Commission") is also illuminative.[256] For example, in *Stocké v. Germany*,[257] the European Commission considered the case of Walter Stocké, a German citizen wanted in Germany for offenses related to fraud alleged that he had been induced to return from his residence in France to Germany by a German police agent in the course of what is commonly called a "lure operation."[258] The lure operation involved an elaborate ruse in which Stocké boarded a private airplane in France in order to travel to Luxembourg for a meeting. The airplane, however, landed in Germany for a contrived stop-over, at which time Stocké was arrested and brought before the German courts. Stocké unsuccessfully challenged his arrest and conviction before German courts, and then brought his matter before the Commission, arguing that the lure was tantamount to kidnapping, in violation Articles 5(1) and 6 of the Convention.[259] Though his challenge failed, the European Commission indicated that a violation of article 5(1) could have been established had his arrest not been the result of collaboration between both the German government, which sought his arrest, and the government of France, where the arrest took place.[260]

> Article 5 para. 1 of the Convention requires that any measure depriving a person of his liberty must be in accordance with the domestic law of the High Contracting Party where the deprivation of liberty takes place. Accordingly, a person who is on the territory of a High Contracting Party may only be arrested according to the law of that State. An arrest made by the authorities of one State on the territory of another State, without the prior consent of the State concerned, does not, therefore, only involve State responsibility vis-à-vis the other State, but also affects that person's individual right to security under Article 5 para. 1.[261]

Thus, the European Commission held that, in addition to issues related to the human rights violated in the course of such an arrest, an arrest made by the authorities of one State on the territory of another State, without the consent of the latter, can violate an individual's human rights under Article 5(1).[262] Even so, nothing in that ruling would serve to prohibit the exercise of jurisdiction by a European domestic court over a repatriated ISIS foreign terrorist fighter who had

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[256] This entity—which ceased operations in 1988—previously served in tandem with the ECtHR to resolve claims of human rights violations. The ECtHR gained exclusive jurisdiction over such claims when the Commission ceased operations in 1988. *See* DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES § 7:9 (2018 ed.).
[257] Stocké v. Germany, 13 Eur. H.R. Rep. 839 (1991) (Eur. Ct. H.R.).
[258] *Id.*
[259] *Id.*
[260] *Id.* ¶¶ 168–69.
[261] *Id.* ¶ 167.
[262] *See* Paul Michell, *English-Speaking Justice: Evolving Responses to Transnational Forcible Abduction After Alvarez-Machain*, 29 CORNELL INT'L L.J. 383, 445 (1996).

been captured and detained by the SDF. This is because the issue of concern for the European Commission in *Stocké v. Germany* was state-sponsored abduction.[263] As noted above, SDF personnel operate independently and autonomously in Syria and, therefore, their apprehension of foreign terrorist fighters is not at the direction of the country seeking to exercise jurisdiction for purposes of prosecution. Moreover, even if a domestic court were to take issue with the apprehension of foreign fighters by a non-state armed group as a matter of international law, the overwhelming consensus of tribunals and commentators is that domestic courts should still exercise jurisdiction in matters regarding serious crimes such as those associated with ISIS: torture, genocide, destruction of cultural property, etc.[264] European domestic courts should find no legal barrier in international law to the exercise of jurisdiction over repatriated ISIS foreign terrorist fighters who had been captured and held by the SDF.

d. Ramirez-Sanchez v. France

Likewise, in 1996, the European Commission considered the matter of Ilich Ramirez Sanchez, an international terrorist known as "Carlos the Jackal" who, among other legal challenges, asserted that the unusual method by which he was brought before French courts (an extraterritorial "snatch and grab" operation) was in violation of the European Convention on Human Rights.[265] The record indicates that Sanchez was recovering from surgery in a villa in Khartoum, Sudan under the protection of the Sudanese national security forces when, on the night of August 14, 1994, he was attacked by a dozen or so men, handcuffed, given an injection of some sort, and hooded.[266] He was then thrown into a van and taken to an airplane to a French airbase where he was released into the custody of the French Intelligence Service, the *Direction de la surveillance du territoire* ("DST").[267]

The European Commission noted that there was no extradition treaty between Sudan and France, and that there had been no effort on the part of French authorities to use any extradition procedures.[268] The Commission recounted the finding of the French courts that "case-law also provides that the circumstances in which someone, against whom proceedings are lawfully being taken and against whom a valid arrest warrant has been issued, has been apprehended and handed over to the French legal authorities are not in themselves sufficient to render the proceedings void, provided that they have not vitiated the search for and process of establishing the truth, nor made it impossible for the defense to exercise its rights before the investigating authorities and the trial courts."[269] The French Court of Cassation, likewise, held that the ability to bring criminal proceedings against a

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[263] *See* Stocké v. Germany, 13 Eur. H.R. Rep. 839, ¶ 3 (1991) (Eur. Ct. H.R.).
[264] *See* ALEXANDER ORAKHELASHVILI, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 215 (8th ed. 2018).
[265] *See* Ramirez Sanchez v. France, App. No. 28780/95, Eur. Comm'n H.R. 155, 157 (1996).
[266] *Id.* at 156.
[267] *Id.*
[268] *Id.* at 158.
[269] *Id.*

person who has fled abroad was is in no way dependent on that person returning voluntarily to France or on the use of extradition proceedings.[270] "Moreover, the national courts have no jurisdiction to examine the circumstances in which a person is arrested abroad by the local authorities acting alone and in the exercise of their sovereign powers and handed over to French police officers."[271]

The European Commission was no more inclined than the French courts to find a violation of the Convention based on the irregular manner in which this terrorist was brought to justice. It held:

> To the extent that the applicant complains about the fact that France did not bring extradition proceedings, the Commission recalls that, in any event the Convention contains no provisions either concerning the circumstances in which extradition may be granted, or the procedure to be followed before extradition may be granted. It follows that even assuming that the circumstances in which the applicant arrived in France could be described as a disguised extradition could not, as such, constitute a breach of the Convention.[272]

Thus, the irregular capture and return of a suspect to French courts did not violate Article 5 of the Convention, "particularly in the field of the fight against terrorism, which frequently necessitates cooperation between States."[273]

e. Öcalan v. Turkey

Likewise, in *Öcalan v. Turkey*, the ECtHR considered the case of Kurdish Workers Party leader Abdullah Öcalan, an individual who was considered a terrorist by the Turkish Government.[274] Öcalan, who was expelled from Syria in 1998, was staying at the Greek Ambassador's residence in Nairobi, Kenya when, in 1999, he alleged that Turkish agents abducted him in Kenya without authorization. Specifically, he alleged that "Kenyan officials intervened and separated him from the Greek ambassador" and then "took him to [an] aircraft in which Turkish officials were waiting to arrest him.[275] Öcalan was, thereafter, transferred to Turkey, interrogated by members of the Turkish security forces, and brought before the Ankara National Security Court, which ordered his detention pending trial.[276]

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[270] *Id.*
[271] *Id.* at 160.
[272] *Id.*
[273] *Id.* at 162.
[274] *See* Öcalan v. Turkey, App. No. 46221/99, Eur. Ct. H.R. (2005), http://hudoc.echr.coe.int/eng?i=001-69022 [https://perma.cc/RP3Q-H6RU].
[275] *Id.* ¶ 94.
[276] *Id.* ¶¶ 17–25 (also noting that "[t]he Turkish courts had issued seven warrants for Mr. Öcalan's arrest and a wanted notice (Red Notice) had been circulated by Interpol.").

Among his many arguments before the ECtHR, Öcalan challenged the legality of his appearance before the Turkish Court, arguing that Turkey had violated Article 5(1) of the Convention because he had been deprived of his liberty without adherence to the procedures prescribed by law, including the formal extradition process.[277] He argued that "[m]ere collusion between Kenyan officials operating without authority and the Turkish Government could not constitute inter-State cooperation."[278] The ECtHR, however, rejected this argument and held that, even though Turkey had violated several provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms in its treatment and trial of Öcalan, his arrest in Kenya did not violate Article 5(1) because "Kenyan officials had played a role" in his transfer to Turkish authorities.[279] Thus, no "violation [by Turkey] of Kenyan sovereignty" had occurred.[280] Notably, citing to the *Sánchez Ramirez* case, the ECtHR stated:

> The Convention contains no provisions concerning the circumstances in which extradition may be granted, or the procedure to be followed before extradition may be granted. Subject to it being the result of cooperation between the States concerned and provided that the legal basis for the order for the fugitive's arrest is an arrest warrant issued by the authorities of the fugitive's State of origin, even an atypical extradition cannot as such be regarded as being contrary to the Convention.[281]

Importantly, the ECtHR found that it would require proof that the authorities of the State to which the applicant has been transferred, "acted extra-territorially in a manner that is inconsistent with the sovereignty of the host State and therefore contrary to international law."[282] If such proof is submitted, then the "burden of proving that the sovereignty of the host State and international law have been complied with shift to the respondent Government."[283] Thus, for the ECtHR, because Kenya did not view the defendant's arrest as a violation of its sovereignty, Turkey was not in violation of international law, and Öcalan's arrest and transfer to Turkey "could not be considered in breach of Article 5(1) on this basis alone."[284]

In this case, as discussed above, Syria has not lodged any complaint relating to the capture and detention of ISIS fighters, nor has it made any complaint relating

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[277] *See* Öcalan v. Turkey, App. No. 46221/99, Eur. Ct. H.R. (2005), http://hudoc.echr.coe.int/eng?i=001-69022 [https://perma.cc/RP3Q-H6RU].
[278] *See supra* note 274, ¶ 75.
[279] *Id.* ¶ 98.
[280] *Id.* ¶ 95.
[281] *Id.* ¶ 89.
[282] *Id.* ¶ 90.
[283] *Id.*
[284] Erik Roxstrom et al., *The Nato Bombing Case (*Bankovic et al. v. Belgium et al.*) and the Limits of Western Human Rights Protection*, 23 B.U. INT'L L.J. 55, 90 (2005).

to the repatriations that have occurred.[285] Syria cannot be seen as objecting to these repatriations of battlefield detainees,[286] and should even be viewed as having acquiesced in having these terrorists removed from its territory and transferred to their countries of origin.

f. Summary

A summary of these cases reveals that some courts—both domestic and international—reserve the right to use the power of the judiciary to regulate abuses of state power. These cases, however, should not serve as an obstacle for countries seeking to repatriate their nationals who traveled to join ISIS and were captured by non-state groups on the battlefield in Syria. The SDF are dependent on the United States for support, but they are not directed or controlled by the United States.[287] As such, there is no state abuse of power to be regulated and, therefore, no basis for a court to abstain from exercising jurisdiction and performing its necessary duty of brining justice to the victims of ISIS's atrocities. Not only does the state accepting repatriation of a national detained by a non-state group come before its courts with "clean hands," it does so in a manner that vindicates the rule of law and the ultimate humanitarian aims of both the law of armed conflict and international human rights law.[288]

IV. Conclusion

There are many practical lessons to be learned from the detention situation in Syria. For instance, the situation has underscored that a policy of reliance on (or partnership with) non-state armed groups in counterterrorism efforts has some significant limitations, such as the problematic status of non-state actors on the

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[285] *President al-Assad: The War Was Between Us Syrians and Terrorism, We Triumph Together Not Against Each Other*, SYRIAN ARAB NEWS AGENCY (Feb. 17, 2019), https://sana.sy/en/?p=158819 [https://perma.cc/2P8C-YMQY].

[286] *See US-Backed Syrian Kurds Agree to "Roadmap" with Assad Government*, AL JAZEERA (July 28, 2018), https://www.aljazeera.com/news/2018/07/backed-syrian-kurds-agree-roadmap-assad-government-180728082610203.html [https://perma.cc/7JYE-4L3Y] (noting that "[t]he Syrian government has been open to negotiations with the SDF since last year."); *see also Kosovo Foreign Fighters: 110 Citizens Repatriated from Syria*, AL JAZEERA (Apr. 21, 2019), https://www.aljazeera.com/news/2019/04/kosovo-foreign-fighters-110-citizens-repatriated-syria-190421150820639.html [https://perma.cc/T6C8-YPAU].

[287] *See, e.g.*, Phil Stewart, *U.S. Cannot Back Syrian Forces Who Align with Assad: U.S. Commander*, REUTERS (Feb. 17, 2019), https://www.reuters.com/article/us-mideast-crisis-syria-usa/us-cannot-back-syrian-forces-who-align-with-assad-us-commander-idUSKCN1Q60OI [https://perma.cc/8ZJ4-PQ9W].

[288] Recently, the UN High Commissioner for Human Rights Michelle Bachelet noted the detention of "thousands of suspected foreign ISIL fighters and their families" and urged that they must be "treated fairly by their captors and taken back by their own countries." She urged at the U.N. Human Rights Council in Geneva that states "must assume responsibility for their nationals" and should not inflict statelessness on fighters' children who have already suffered so much. *see also* Stephanie Nebehay, *U.N.'s Bachelet Says 55,000 Linked to IS in Syria, Iraq Should Be Tried or Freed*, REUTERS (June 24, 2019), https://www.reuters.com/article/us-syria-islamic-state-un/uns-bachelet-says-55000-linked-to-is-in-syria-iraq-should-be-tried-or-freed-idUSKCN1TP0PS [https://perma.cc/7ZFR-JQZY].

world stage, their inherent institutional frailty, and their potential for impermanence.[289] In addition, the situation has highlighted that the many legal, policy, and operational challenges relating to the ultimate disposition of detained terrorists must be addressed early in the planning phases of any counterterrorism effort – and commitments from international partners to assist in repatriation efforts (or other disposition options) must be obtained at the outset rather than hoped for in the aftermath. The detention situation in Syria has also, however, provided an opportunity to explore international legal issues relating to the repatriation of foreign terrorist fighters detained by non-state armed groups on the battlefield and to clarify the reasons such repatriations are permissible.

The challenges discussed in this article illuminate how our ancient international rules based on the practices of states increasingly struggle to provide guidance in a modern era that is increasingly characterized by non-state activity. As the Westphalian order further shifts and non-state groups become both partners and targets in counterterrorism operations, a more prominent dissonance arises between a state-based system and a world increasingly reliant on non-state activity. Questions relating to the battlefield detention of terrorists by non-state groups underscore this contextual intensity.[290] A nebula exists in this area of international law which envelops decision-makers and leaves some states stymied without clear guidance. Other states, alternatively, may opportunistically exploit the lack of clarity for political reasons and refuse to take on the difficult task of accepting custody of terrorists, even those that are their own nationals, for purposes of investigation, prosecution, and/or reintegration.

Even so, a careful analysis of the legal contours of this issue reveals that while the brume of international law may not easily reveal a path, neither does it pose an obstacle—and states are free to venture forth into the mists unconstrained. In fact, nothing in international law would serve to prohibit the transfer of a detained terrorist from non-state custody to state authorities. Within the law of non-international armed conflict, there are no provisions which prohibit the transfer of battlefield detainees to their countries of origin. In fact, a review of relevant international law demonstrates that an underlying premise of the rules governing

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[289] *See* Joshua Keating, *The Foreseeable Tragedy of Rojava*, SLATE (Oct. 14, 2019), https://slate.com/news-and-politics/2019/10/rojava-kurdish-enclave-syria-doomed-start-turkey-trump.html [https://perma.cc/7MWR-AABH] (noting that "It was unlikely to last forever. But the fact that this tragedy was so foreseeable doesn't make it any less tragic."); *but see* Volker Boege, Anne Brown, Kevin Clements & Anna Nola, *On Hybrid Political Orders and Emerging States: State Formation in the Context of 'Fragility'*, BERGHOF RESEARCH CENTER FOR CONSTRUCTIVE CONFLICT MANAGEMENT 6–7, https://www.berghof-foundation.org/fileadmin/redaktion/Publications/Handbook/Articles/boege_etal_handbook.pdf [https://perma.cc/9KJX-CN38] ("In many places, customary non-state institutions of governance that had existed prior to the era of colonial rule have survived the onslaught of colonialism and 'national liberation'. They have, of course, been subject to considerable change and have had to adapt to new circumstances, yet they have shown remarkable resilience.").

[290] HARALD KREBS, FANTASY PIECES: METRICAL DISSONANCE IN THE MUSIC OF ROBERT SCHUMANN 58 (2003) ("The general principle determining contextual intensity is perceptibility or prominence of the dissonance[.]").

battlefield detention is that detainees will, in fact, eventually be repatriated. On that score, a decision to permit battlefield detainees to linger in the custody of non-state groups is antithetical to the underlying logic of international law. Similarly, although the law of non-international armed conflict is ambiguous regarding whether non-state groups may lawfully detain during the course of a conflict, the practice of states and the opinions of authoritative commentators fall in favor of the legality of such detention. International law is now at an inflection point after which detention by non-state armed groups in furtherance of a counterterrorism effort will likely be considered legally permissible. Moreover, even if one were to consider the battlefield detention of terrorists by the SDF to be unlawful, then their subsequent transfer to state authorities would seem to be a curative to this problem and, therefore, required rather than discouraged.

Regarding international human rights law, which has limited applicability to non-state groups, nothing prohibits the transfer of a detained terrorist from non-state custody to the custody of state authorities, nor does international human rights law prevent the irregular transfer of a subject to state authorities for purposes of investigation, prosecution, or reintegration.[291] Additionally, where the crimes at issue are significant, such as terrorism, war crimes, and crimes against humanity, the weight of international law favors the exercise of jurisdiction even when illegalities in the transfer or detention have occurred. More poignantly, putting aside the finer points of disputed law, none of the chief aims of international human rights law are served by refusing to accept custody of an individual detained by a non-state armed group in Syria and instead leaving that person in the precarious situation of being held by an entity that has repeatedly noted its lack of resources and inability to provide for continued detention. Given the realities of battlefield detention, it is no surprise that international human rights law does not prohibit the transfer of a detained terrorist from non-state custody to the custody of state authorities, even in the absence of a formal extradition.

Lastly, a review of the comparative domestic law of states demonstrates that, though national courts may refuse to exercise jurisdiction over a subject when state authorities abuse legal processes in the capture or transfer of the subject, no such grounds should be deemed to exist when the relevant state authorities were not a part of the initial capture. When non-state groups such as the SDF operate independently and their battlefield detentions are not directed by any state authority, the line of cases relating to abuse of process should not serve as an obstacle to the transfer of ISIS foreign terrorist fighters from SDF custody to the authorities of their countries of origin.

The analysis above, therefore, demonstrates that international law (and the domestic law of many international partners) generally permits the lawful transfer of foreign fighters from the custody of a non-state entity to government authorities for prosecution, rehabilitation, or other appropriate means of preventing their return

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[291] *See* Öcalan v. Turkey, App. No. 46221/99, Eur. Ct. H.R. (2005), http://hudoc.echr.coe.int/eng?i=001-69022 [https://perma.cc/RP3Q-H6RU].

to terrorism. While political reasons may still serve to stymie repatriations, the law should not be invoked or blamed for the failure of states to take action. In fact, as the analysis above demonstrates, the weight of international law seems to compel rather than discourage repatriation. Accordingly, given the clear nature of the threat posed by these detained fighters, the uncertainty of their fate, and the lack of effective alternative dispositions,[292] the international community must thrust aside vague complaints of legal difficulty—the empty simulacra of legal arguments that are too often the currency of the unwilling—and take action to ensure that dangerous terrorists detained on the battlefield by non-state actors are brought to justice so that they no longer pose a threat to the wider world.

[292] Various international actors have called for solutions that do not require states to do the hard work of repatriating, investigating, and prosecuting detained foreign terrorist fighters. Such proposals have included the creation of international tribunals and/or large-scale prosecutions by third countries. *See, e.g.*, Helen Warrell, *Sweden Proposes International Tribunal to Try Isis Fighters*, FINANCIAL TIMES (May 19, 2019), https://www.ft.com/content/9086250e-7802-11e9-bbad-7c18c0ea0201 [https://perma.cc/7RQU-ZQMK]; *see also* Dent, *supra* note 17, at 4. Given the impracticality of setting up a full-blown tribunal; the obvious lack of any existing international facility to detain over 2,000 foreign fighters who might be prosecuted by such a tribunal; and the unlikely prospect of any one country agreeing to prosecute over 2,000 foreign terrorist fighters (especially given the resistance countries have shown to prosecuting even their own nationals) such proposals seem highly unrealistic. In addition, commentators have noted that the prospect of Syrian regime prosecutions remains problematic on multiple levels. *See* Krause, *supra* note 38.