ADMINISTRATION OF JUSTICE BY ARMED NON-STATE ACTORS

Report from the 2017 Garance Talks

The *Garance* Series: Issue 2

IMPRESSUM

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About Geneva Call

Geneva Call is a neutral and impartial humanitarian organization aiming to promote respect by armed non-state actors (ANSAs) for international humanitarian norms in armed conflict and other situations of violence.[1]

The key tool of engagement that Geneva Call uses is an innovative instrument known as the *Deed of Commitment*, which allows ANSAs — as they cannot sign international treaties — to commit to abide by specific humanitarian norms and to be held accountable for complying with these norms. Three such *Deeds of Commitment* have been developed to date: the *Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Actio*n in 2000, the *Deed of Commitment for the Protection of Children from the Effects of Armed Conflict* in 2010 and the *Deed of Commitment for the Prohibition of Sexual Violence in Situations of Armed Conflict and towards the Elimination of Gender Discrimination* in 2012. A fourth *Deed of Commitment for the Protection of Medical Care in Armed Conflict* is in the process of being developed. Geneva Call also provides training to ANSAs on international humanitarian norms and encourages them to integrate these provisions into their codes of conduct and other internal regulations.

Since its creation in 2000, Geneva Call has engaged in dialogue with more than 120 ANSAs worldwide. More than half of them have signed one or several *Deeds of Commitment* or made similar commitments. Geneva Call monitors and supports the implementation of these humanitarian commitments.

Acknowlegements

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[1] *Geneva Call uses the term 'international humanitarian norms' as including both international humanitarian law and international human rights law.*

In the course of its work, Geneva Call has witnessed several challenges faced by ANSAs in their efforts to comply with international norms. Some of these are due to the lack of clarity in the applicable law, such as with regard to the legal basis for detention;[2] while others can be explained by an insufficient capacity of some groups to fully abide by the requirements of those rules. With these issues in mind, Geneva Call launched the *Garance* Talks, a series of meetings that are held at *Villa Garance*, Geneva Call's office.

The *Garance* Talks bring together ANSAs and experts to discuss the current challenges faced by ANSAs when attempting to comply with humanitarian norms, and to identify possible ways forward in order to enhance their compliance with their obligations under international law. One important added value generated by the *Garance* Talks is an understanding of ANSAs' perspectives on the legal and policy discussions that concern them. They aim to complement on-going international processes which either do not or cannot, for institutional reasons, involve ANSAs[3] or even address issues related to them.

The initiative was launched in September 2014 during a preview session organized by Geneva Call with the support of the International Institute of Humanitarian Law on the occasion of the XXXVII San Remo roundtable on current issues of International Humanitarian Law (IHL). The first edition of the *Garance* Talks was organized in Geneva on 26 November 2015 on the issue of the positive international law obligations of ANSAs.[4]

On 22 November 2017, Geneva Call held its second session on the administration of justice by ANSAs. Fifteen experts from academia and relevant international organizations participated, including members of the Office of the High Commissioner for Human Rights (OHCHR), the International Committee of the Red Cross (ICRC), the European Civil Protection and Humanitarian Aid Operations (ECHO), as well as the Swiss Federal Department of Foreign Affairs, as the main donor of the activity. A former high-level military commander from the *Fuerzas armadas revolucionarias de Colombia – Ejército del Pueblo* (FARC-EP), a judge from an area controlled by the Southern Front in Syria and a judge from the Sudan People's Liberation Movement-North (SPLM-N) were also present and contributed real-life experiences faced by ANSAs.

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Garance Talks 2017, 22 November 2017, Villa Garance.

[2] *The question of whether IHL provides authority or power to detain during non-international armed conflicts for both States and ANSAs is still subject to debate. See ICRC, 2016 Commentary on Common Article 3 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, para. 727.*

[3] *For instance, between 2012 and 2015 the ICRC and Switzerland conducted a consultation process with States on how to improve compliance with IHL. Currently, they are facilitating a State-driven intergovernmental process. The outcome of this process will be submitted to the 33rd International Conference of the Red Cross and Red Crescent in 2019. ICRC,* Strengthening compliance with international humanitarian law: The work of the ICRC and the Swiss government, *available at https://www.icrc.org/en/document/strengthening-compliance-international-humanitarian-law-ihl-work-icrc-and-swiss-government (all internet references were accessed in August 2018).*

[4] *Geneva Call,* The Garance Series: Issue 1, Positive Obligations of Armed Non-State Actors: Legal and Policy Issues, *available at http://genevacall.org/wp-content/uploads/dlm_uploads/2016/08/GaranceTalks_Issue01_Report.pdf*

Administration of justice by ANSAs

Geneva Call engages with ANSAs on the administration of justice from a variety of perspectives. The three *Deeds of Commitment* include obligations on disciplinary sanctions and internal investigations in cases of non-compliance. Furthermore, ANSAs which are signatories to the *Deed of Commitment for the Protection of Children from the Effects of Armed Conflict* commit to not pronounce or execute the death penalty on a person for any offence committed while the individual was still a child. *The Deed for the Prohibition of Sexual Violence and Towards the Elimination of Gender Discrimination* binds ANSAs to take concrete measures to refrain from any act or practice discriminating between men and women, including equal protection before the law, and equal enjoyment of rights and remedies. The administration of justice in armed conflicts is also addressed when Geneva Call engages ANSAs on other humanitarian rules, including the respect of the rights of detainees and the prohibition of summary executions. In Geneva Call's view, engaging with ANSAs on international humanitarian norms is an important step in creating a sense of ownership of the law, and to acknowledge the responsibility that ANSAs have in relation to the protection of those individuals under their control.

The administration of justice by ANSAs is far from a merely academic exercise, and real-world examples demonstrate its importance. For instance, in February 2003, the *Mouvement de Libération du Congo* (MLC) tried twenty-seven of its members for extortion, rape, assassination, looting and disobeying orders.[5] In Sri Lanka, the Liberation Tigers of Tamil Eelam had established a judicial system involving six district courts, two high courts, and an appeal court.[6] More recently, a former member of a Syrian ANSA was sentenced to life imprisonment by a Swedish court for violating IHL through his participation in the killing of seven individuals. The defence argued that the killings were the result of a death sentence by an ANSA court, following a trial.[7] In Syria, local opposition authorities claimed to have appointed judicial councils 'that review accusations against detainees and issue sentences'. While in certain towns the councils relied on Sharia law for civil matters, for criminal issues they referred to Syrian criminal law.[8]

Issues related to the administration of justice have been included in several ANSAs' internal rules. The *Frente Farabundo Martí para la Liberación Nacional* (FMNL) in El Salvador issued a document where it established certain rules for its own penal system.[9] The Taliban's code of conduct specifically deals with district and provincial judges. It affirms that 'each person responsible in the province should set up a Sharia court at the provincial level, comprising one judge and two prominent theologians who will solve complicated issues at the provincial level which seem to be difficult to solve for theologians and those responsible at the district and village levels'.[10] The Sudan People's Liberation Army (SPLA) Act also provided the basis for the establishment of martial courts.[11]

Despite the existence of these rules, ANSAs may lack the capacity or resources to implement all their respective obligations accordingly, which could in turn discourage them from undertaking any action at all. Many of these ANSAs, in particular those with a lower level of organization, have less potential to guarantee an administration of justice in accordance with international standards.[12] Some authors have explained that this is due to the fact that they devote a large amount of their resources to their military,[13] but it could also come as a consequence of their lack of knowledge of these safeguards. Since in any given society only a few people

[5] *Interview with MCL leader Jean-Pierre Bemba', Integrated Regional Information Networks (IRIN), 6 February 2003, available at http://www.irinnews.org/q-and/2003/02/06/interview-mlc-leader-jean-pierre-bemba.*

[6] *'Thamil Eelam judiciary said a basis for rebuilding northeast', TamilNet, 30 October 2003, available at http://www.tamilnet.com/art.html?catid=79&artid=10277.*

[7] *'Swedish court hands life sentence to Syrian for war crimes', The Local, 16 February 2017, available at https://www.thelocal.se/20170216/swedish-court-hands-life-sentence-to-syrian-for-war-crimes. The ICRC has recently included this decision as part of the online version of the* How Does Law Protect in War?, *available at https://casebook.icrc.org/case-study/swedensyria-can-armed-groups-issue-judgments.*

[8] *'Syria: End Opposition Use of Torture, Executions. Abuses Show Need for Accountability', Human Rights Watch, 17 September 2012, available at https://www.hrw.org/news/2012/09/17/syria-end-opposition-use-torture-executions.*

[9] *FMNL,* Principios, Normativos y Medidas Dispuestas por el FMLN en el Transcurso de la Guerra, *1991.*

[10] The *Islamic Emirate of Afghanistan.* The Layha [code of conduct] for Mujahids *(2010), available at https://www.icrc.org/eng/assets/files/review/2011/irrc-881-munir-annex.pdf, at p. 112, Art. 38.*

[11] The Sudan People's Liberation Army (SPLA) Act (2003), *available online at http://theirwords.org/media/transfer/doc/1_sd splm_a_2003_03-5fd4e4fabf407e670f236c8d3ecaf381.pdf, Arts. 60 and ff. For other examples of ANSAs' internal regulations on the administration of justice, see www.theirwords.org.*

[12] *This could be the case, for instance, of community-embedded or decentralized ANSAs. For a recent analysis on these types of ANSAs, see ICRC,* The Roots of Restraint in War, *2018, pp. 45-60.*

[13] *J. Willms, 'Courts of Armed Groups – a tool for inducing higher compliance with international humanitarian law?', in H. Krieger (ed.),* Inducing Compliance with International Humanitarian Law. Lessons from the African great Lakes Region, *2015, p. 175.*

are well aware of legal concepts, it should not be surprising that ANSAs' members do not come from this specific group of individuals.[14] Also, ANSAs' understanding of administration of justice may not be the same as the one foreseen in international law. Moreover, according to their level of organization, ANSAs might not have a proper civil authority to ensure due processes or specific agencies prepared to carry out law enforcement operations. These scenarios raise certain difficult questions involving a number of legal and policy considerations. The ICRC has addressed these challenges by affirming that '[n]o trial should be held, whether by State authorities or by non-State armed groups, if [the minimum] guarantees cannot be provided. Whether an armed group can hold trials providing these guarantees is a question of fact and needs to be determined on a case-by-case basis'.[15] In light of these facts, a key *policy question* is to *what extent the international community would support ANSAs in order to enhance their capacity to respect international humanitarian norms in a given territory and for a given group of individuals under their control*. Addressing this issue is essential and often underestimated, even when several ANSAs have expressed their concern about their lack of preparation with respect to maintaining the law and order in the territory they control (see box 1).

Box 1: Prosecution of foreign fighters by ANSAs in Syria

An important concern has been recently raised in Syria. The French government declared that French fighters who had joined the Islamic State (IS) group, and who had been detained by the People's Protection Units (YPG/YPJ) in Syria, could be tried at courts established by this group through its civilian administration.[16] To date, the government has decided against 'an active policy of repatriation'.[17] The report of the Independent International Commission of Inquiry on Syria, published in February 2018, provided more information on the topic, although focusing on the Syrian Democratic Forces (SDF): 'While [it] had indicated that it was seeking to return foreign fighters […] to their country of origin, they reported that States had thus far declined to repatriate their nationals, which left them in legal and administrative limbo. Syrian nationals held as ISIL fighters will reportedly be "judged" by "courts" affiliated with Syrian Democratic Forces'.[18] Human Rights Watch, however, expressed its concerns by affirming that those detainees would face unfair procedures: 'It shall be noted that we are talking about a rather rudimentary judicial system: there is no right to defence nor court of appeals'.[19] Similar criticisms have been presented with respect to the lack of trained prosecutors and judges.[20] In a recent piece, a commentator affirmed that in order for SDF and the Kurdish authorities to carry out detentions in humane and sustainable conditions, advice and assistance from foreign states and other international organizations is necessary. Some might claim, as he argues, that 'such an investment will only exacerbate the complex problem […] [b]ut whether the detention sites are sustainable or not, fighting forces will capture and detain people'.[21] The New York Times published some pieces in this respect, claiming that the United States military is providing assistance for the SDF in order to upgrade and improve their detention facilities. American Special Operations Forces, it is pointed out, 'visit the prisons multiple times a week to offer expertise about how to secure and run them, and to help process new captives using biometrics and interrogation'.[22]

[14] *O. Bangerter, 'Comment – persuading armed groups to better respect international humanitarian law', in H. Krieger (ed.),* Inducing Compliance with International Humanitarian Law. Lessons from the African great Lakes Region, *2015, p. 113.*

[15] *ICRC, 2016* Commentary on Common Article 3 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *para. 694.*

[16] *Une centaine de jihadistes français sont détenus en Syrie, selon Le Drian', France 24, available at http://www.france24.com/fr/20180207-jihadistes-francais-centaine-detenus-syrie-le-drian-irak-familles-rapatriement-justice.*

[17] *'Daech: quel sort pour les djihadistes français détenus en Irak et en Syrie ?', L'Express, available at https://www.lexpress.fr/actualite/monde/proche-moyen-orient/daech-quel-sort-pour-les-djihadistes-francais-detenus-en-irak-et-en-syrie_1959684.html.*

[18] *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, A/HRC/37/72, 1 February 2018, available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A-HRC-37-72_EN.pdf, para 68. See also Independent International Commission of Inquiry on the Syrian Arab Republic, 'Detention in the Syrian Arab Republic : A Way Forward', 8 March 2018, available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/AWayForward_DetentionInSyria.pdf, para 17.*

[19] *'Jihadistes occidentaux détenus en Syrie: un "fardeau" pour les Kurdes', France 24, available at http://m.france24.com/fr/20180201-syrie-irak-juger-rejoint-daech-pas-priorite-kurdes-syriens-jihadistes-etat-islamique-france.*

[20] *M. Ekman (ed.),* ILAC Rule of Law Assessment Report: Syria 2017, *available at http://www.ilacnet.org/wp-content/uploads/2017/04/Syria2017.pdf, pp. 117 and 125.*

[21] *J. Horowitz, 'The Challenge of Foreign Assistance for Anti-ISIS Detention Operations', Just Security, 23 July 2018, available at https://www.justsecurity.org/59644/challenge-foreign-assistance-anti-isis-detention-operations/*

[22] *C. Savage, 'As ISIS Fighters Fill Prisons in Syria, Their Home Nations Look Away', The New York Times, 18 July 2018, available at https://www.nytimes.com/2018/07/18/world/middleeast/islamic-state-detainees-syria-prisons.html*

The administration of justice by ANSAs is a frequent feature in armed conflicts and has existed for decades. ANSAs often try their own forces, enemies and civilians. Some of these groups may be willing to provide certain guarantees in the judicial processes they carry out.[23] As the ICRC has noted, '[a]lthough the establishment of [ANSAs'] courts may raise issues of legitimacy, trial by such means may constitute an alternative to summary justice and a way for armed groups to maintain "law and order" and to ensure respect for humanitarian law'.[24]

While the administration of justice is a governmental function par excellence, international law asserts that all parties to an armed conflict must respect certain guarantees when exercising this prerogative. In terms of non-international armed conflicts (NIACs), Common Article 3 to the Geneva Conventions of 1949 (CA3), which constitutes a reflection of the most basic elements of humanity,[25] affirms that 'the passing of sentences and the carrying out of executions without previous judgements pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized people' is prohibited with respect to persons taking no active part in hostilities 'without any adverse distinction'. The ICRC's Customary IHL Study has described a 'regularly constituted court' as those that 'have been established and organised in accordance with the laws and procedures already in force in a country'.[26] When assessing the obligations of ANSAs, the ICRC recently explained in the Commentary to CA3 that if this would refer exclusively to State courts constituted according to their domestic law, then ANSAs 'would not be able to comply with this requirement. The application of this rule in CA3 to 'each Party to the conflict' would then be without effect. Therefore, to give effect to this provision, it may be argued that courts are regularly constituted as long as they are constituted in accordance with the 'laws' of the armed group. Alternatively, armed groups could continue to operate existing courts applying existing legislation'.[27]

Additional Protocol II of 1977 to the Geneva Conventions of 1949 (AP II) develops and supplements CA3 without modifying its scope of application. In particular, its Article 4 establishes certain fundamental guarantees applicable to all those persons 'who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted'. Article 5 of AP II includes more detailed rules regarding individuals who have been deprived of their liberty for reasons related to the armed conflict, whether they have been interned or detained. Finally, Article 6 applies 'to the prosecution and punishment of criminal offences related to the armed conflict'. It reads as follows:

> no sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality. In particular:
>
> a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;
>
> b) no one shall be convicted of an offence except on the basis of individual penal responsibility;
>
> c) no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under the law, at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;
>
> d) anyone charged with an offence is presumed innocent until proved guilty according to law;
>
> e) anyone charged with an offence shall have the right to be tried in his presence;
>
> f) no one shall be compelled to testify against himself or to confess guilt.

[23] *It shall be noted, however, that conclusions derived from ANSAs' internal laws must be treated with caution, as these may not be properly enforced in the actual practice of the groups. In certain situations, ANSAs may not be willing to comply with judicial guarantees, either partially or totally, denying any link whatsoever with international law in the first place.*

[24] *ICRC, 2016* Commentary on Common Article 3 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *para. 689.*

[25] *As the International Court of Justice (ICJ) in its* Nicaragua *judgment asserted that CA3's provisions 'constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which in the Court's opinion, reflect what the Court in 1949 called "elementary considerations of humanity"'. ICJ,* Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment, *ICJ Reports 1986, para. 218.*

[26] *J.-M. Henckaerts and L. Doswald-Beck,* Customary International Humanitarian Law, *2005, p. 355.*

[27] *ICRC, 2016* Commentary on Common Article 3 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *para. 692.*

3. A convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits which they may be exercised. […].

As can be seen, this provision no longer refers to the 'regularly constituted' requirement but instead prohibits convictions that are not pronounced by 'a court offering the essential guarantees of independence and impartiality'. The ICRC Commentary to this provision recognized the possible 'co-existence of two sorts of national legislation, namely, that of the State and that of the insurgents'.[28]

In its Customary IHL Study, the ICRC has also identified certain rules on this topic as applicable in international armed conflicts (IACs) and NIACs, thus binding both States and ANSAs.[29] While Rule 99 affirms that '[a]rbitrary deprivation of liberty is prohibited', Rule 100 points out that '[n]o one may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees'. Among those safeguards that have attained customary status according to the ICRC, the Study listed the following: i) trial by an independent, impartial and regularly constituted court; ii) presumption of innocence; iii) information on the nature and cause of the accusation; iv) necessary rights and means of defence; v) trial without undue delay; vi) examination of witnesses; vii) assistance of an interpreter; viii) presence of the accused at the trial; ix) compelling accused persons to testify against themselves or to confess guilty is forbidden; x) public proceedings; xi) advising convicted persons of available remedies and of their time limits; xii) *non bis in idem*, which implies that an individual cannot be tried twice for the same behaviour.[30]

Finally, in the Elements of Crimes of the Statute of the International Criminal Court, a 'regularly constituted court' in the context of CA3 is considered to be a court which affords 'the essential guarantees of independence and impartiality'.[31]

A broader discussion under IHRL should not be ruled out in this context, as the abovementioned fair trial guarantees which are essential for the proper administration of justice are in fact rooted within this legal framework. Although the first question that arises in this sense is whether ANSAs are bound by IHRL at all,[32] it suffices to say at this stage that in the opinion of the Human Rights Committee, fair trial guarantees have been qualified as *jus cogens* norms, and therefore are arguably also binding upon ANSAs.[33]

[28] *Y. Sandoz, C. Swinarski and B. Zimmerman,* Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, *1987, para. 4605. Importantly, the Commentary also states that during the negotiations of the protocols, 'some experts argued that it was unlikely that a court could be "regularly constituted" under national law by an insurgent party', and the current formula was 'accepted without opposition', para. 4600.*

[29] *J.-M. Henckaerts and L. Doswald-Beck,* Customary International Humanitarian Law, *2005.*

[30] *Ibid., pp. 344-371.*

[31] *ICC,* Elements of Crimes, *2010, available at https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf, p. 34.*

[32] *ICRC, 2016* Commentary on Common Article 3 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *para. 517. For recent discussions on this issue, see D. Murray,* Human Rights Obligations of Non-State Armed Groups, *2016; and K. Fortin,* The Accountability of Armed Groups under Human Rights Law, *2017.*

[33] *UN Human Rights Committee,* General Comment on States of Emergency (General Comment 29), *31 August 2001, UN Doc. CCPR/C/21/Rev.1/Add.11. Although not addressed in this report, the notion of nexus to the armed conflict certainly deserves further attention, as it has been argued that detentions for the commission of common crimes and not related to the armed conflict could be regulated by IHRL. Fortin, ibid., p. 38.*

Box 2: Meaning of "independent" and "impartial"

The notions of independence and impartiality for an ANSA's judicial body can be extremely challenging. While the former refers to the ability of judges to decide cases independently from the executive wing, the latter has been described as including two aspects *(subjective impartiality and objective impartiality)*. With respect to the requirement of independence, the Human Rights Committee defined this concept as follows: 'A situation where the functions and competences of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal'.[34] It then listed certain factors that help to ensure the independence of a tribunal, such as the following: procedure and qualifications for the appointment of judges; guarantees relating to their security of tenure until a mandatory retirement age of the expiry of their term of office; conditions governing promotion, transfer, suspension, and cessation of their functions; lack of political interference by the executive branch and legislature; protection against conflicts of interest and intimidation.[35] When dealing with impartiality, different human rights bodies have specified that there are two aspects of this requirement, the first referring to a 'subjective impartiality', which has been described in the following terms: 'judges must not allow their judgment to be influenced by personal bias or prejudice, nor harbor preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other'.[36] By 'objective impartiality', the Human Rights Committee affirmed that 'the tribunal must also appear to a reasonable observer to be impartial'.[37] Importantly, some commentators have argued that 'tribunals which include members of the military have frequently been perceived as lacking in objective impartiality because, in trials of rebels, it is often the military that is involved in fighting such rebels'.[38] Considering the level of organization required by international law for an entity to be an ANSA, a key question is whether all these requirements can realistically be respected. As one expert mentioned, this issue deserves a reflection on the structural links within the ANSAs with regard to the 'judicial' and other parts of the group. Indeed, some of the discussions undertaken during the 2017 *Garance* Talks showed that the distinction between ANSAs' different branches is not always clear, with it sometimes being the military commander who is responsible for administering justice.

[34] *UN Human Rights Committee,* General Comment on the Right to equality before courts and tribunals and to a fair trial (General Comment 32), *23 August 2007, UN Doc. CCPR/C/GC/32, para. 19.*

[35] *Ibid.*

[36] *Ibid., para. 21.*

[37] *Ibid.*

[38] *L. Doswald-Beck, 'Judicial Guarantees', in A. Clapham, P. Gaeta and M. Sassòli (eds.),* The 1949 Geneva Conventions. A Commentary, 2015, *p. 473*

The core sessions of the 2017 *Garance* Talks addressed three related issues: i) the legal basis for the establishment of courts and judicial processes by ANSAs and in territories controlled by ANSAs; ii) deprivation of liberty by ANSAs, including the treatment of detainees; and iii) the procedural safeguards — rights and protection of detainees. The seminar included different presentations and Q&A sessions by Mr. Edgar Lopez Gomez, a former high-level military commander from the FARC-EP; Mr. Esmat Alabsi, a judge from an area controlled by the Southern Front in Syria; and Mr. Kara Abass Billo, a judge from the SPLM-N. These presentations appear below.[39]

THE LEGAL BASIS FOR THE ESTABLISHMENT OF COURTS AND JUDICIAL PROCESSES BY ANSAS AND IN TERRITORIES CONTROLLED BY ANSAS

Edgar Lopez Gomez (FARC-EP)

The FARC-EP would only intervene when there was a grave danger to the population, and when the situation was particularly serious.

To resolve situations not amounting to such a level of gravity, a local assembly would be created by the communities. This body would nominate a president and civilians would bring their complaints before it, which would be shared publicly within the community. When the assembly had taken a decision, the FARC-EP would support it.

The FARC-EP had a differentiated system between disciplinary and judicial processes, and also between their members and civilians. Regarding the former, and in cases of extreme gravity, such as murder, raping or spying, a 'Council of War' formed by fighters taking on the judicial roles would be set up.[40]

Punishment could take the form of community services, but more extreme cases would be tried with the possibility of execution, or alternative extreme punishments.

Esmat Alabsi (Southern Region of Syria)

The House of Justice in Houran, which was established in collaboration with the Free Syrian Army's (FSA) armed factions, is in charge of administering justice. This body uses the Arab Unified Law as the legal source of judicial procedures (see box 3 below). This system is independent and not related to the Syrian governmental judicial system.

Most judges are volunteers, and do not receive any compensation for their work. Even though at the time the system was created all factions of the Free Syrian Army committed to assist in the financial costs of the courts, they stopped doing so after the courts expelled individuals who were affiliated with some of the factions. One of the requirements to join the judicial system is that the individual should not be affiliated to any armed faction, thus respecting the criterion of independence.

Members of governmental forces can be prosecuted. Individuals affiliated to the Islamic State group are detained for three months and are subject to 're-education' to deal with radicalization. The Islamic State group's members are subject to a special law and not to the regular one the courts use for war crimes.

Criminal cases are assessed based on the Arab Unified Law, but they had to formulate some provisions that did not exist before, such as laws related to the detention of Islamic State group's members, drug-trafficking and currency-related financial disputes.

Although the House of Justice has to a certain extent the power to try members of the armed factions of the FSA, they usually rely on a different faction to do it. There is currently a case in which a head of one of the factions is being tried for torture leading to the death of a member of the governmental forces.

They are still trying to establish a police system, so the judges can be involved in the investigation, even going to the crime scene if this is necessary for criminal procedures.

[39] *The text included here is not an exact quotation of the discussion, but rather the main findings as expressed by each representative. The questions asked during the session can be found in the agenda, which is included as an annex to this report.*

[40] *For further information on the 'Council of War', see* Estatuto, FARC-EP. *Available at http://theirwords.org/media/transfer/doc/estatutos-34339485fd5d10f2b8c321f1ddca0380.pdf.*

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Kara Abass Billo (SPLM-N)

The SPLM-N's judicial system includes three types of courts: High Courts, Supreme Courts and General Courts. In the latter, there are Custom Courts dealing with cases among civilians (private life issues and small criminal cases). There is a separation between civilian and military courts. People can present individual complaints before the local police.

Although the courts are permanent, judges only exercise their functions approximately every three months. As they are not paid, they therefore need to work in parallel to these functions.

There is a lack of individuals with a legal background in the areas under the control of the SPLM-N, therefore all those with law degrees work as judges and there are no lawyers available for detainees.

The SPLM-N has written laws inherited from the SPLM/A, particularly a Penal Code Act of 2003,[41] *as well as a procedural norm, which is the basis for the judicial branch. They have not yet tried persons for violations of IHL or IHRL, even when these have been foreseen in their internal rules.*

DEPRIVATION OF LIBERTY BY ANSAs

Edgar Lopez Gomez (FARC-EP)

The FARC-EP did not have detention facilities, but designated areas for custody.

Detentions were only carried out when there was a danger to the community. Then an investigation would be undertaken.

The FARC-EP detained different categories of individuals, including those who were considered to be enemies and civilians. There were also persons detained for political reasons, such as the 12 deputies of the Valle del Cauca Department (Cali). In selected situations such decisions were approved at the highest level of the 'Secretariat'.

Sometimes the FARC-EP exchanged prisoners, but this experience did not prove to be a positive one.

The FARC-EP would give priority medical treatment to wounded detainees. This was the same regardless of whether the person was a fighter or not. Medical treatment was provided by the ANSA's members and not by doctors or humanitarian organisations.

Detainees did not have the possibility to have family visits.

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[41] Laws of the New Sudan. The Penal Code, 2003. *Available at http://theirwords.org/media/transfer/doc/penal_code_sudan_2003-a6cbd30eabd1b8116a008512477ac5d6.pdf.*

Esmat Alabsi (Southern Region of Syria)

Not all detentions are related to the conflict, only a small percentage of alleged crimes are in connection with the hostilities. Most of the crimes are robberies, murder, domestic violence and drug dealing. Other crimes that can lead to prison include not paying alimony for children.

In order to carry out a detention, the judges send an arrest warrant to a 'judicial police force', in charge of the arrest. Sometimes they can also rely on the Free Syrian Army, as the capacity of this police still remains weak. There is a right to complain if the ANSA uses excessive force when arresting an individual.

There are permanent and temporary detention facilities, the latter being occupied by those individuals waiting for judicial decisions. Detention centres are the same regardless of whether the person was convicted for war or ordinary crimes.

All detention facilities have health centers, with nurses and doctors. As often this is not enough, they also rely on hospitals located in the areas under the control of the Free Syrian Army. They have sent prisoners there who were in need of an operation or a specific medical treatment.

Families can visit their relatives who have been detained. There are specific hours and places for this. Detainees can also contact their families. Prisons have been visited by several local leaders and members of the Free Lawyers Association. They have also invited the ICRC to carry out a visit.

Detaining children below the age of 15 years old is prohibited. For those between the age of 15 and 18 there are separate detention facilities.

Kara Abass Billo (SPLM-N)

The SPLM-N does not have regular prisons. The only detention centres available are for their own fighters. Sentences are mostly fines. If individuals fall sick in those facilities, they would receive medical care provided by humanitarian organisations.

In the case of 'prisoners of war',[42] they are detained in the military prison until the ICRC collects them, or they are released, which usually occurs. This is not a prison per se, but rather a field with a demarcation around it and armed persons guarding it.

If individuals commit a serious social-related crime, they can be convicted, with their punishment being their transfer to a different location: in this way they are 'ostracized from the society where they have committed the crime'. This is enforced by the chiefs of the community. Serious crimes are rarely committed, and most cases are related to family disputes, divorce, and sexual abuse or domestic violence. Informants collaborating with the enemy are usually punished by being sent to the refugee camps in South Sudan.

All judicial processes are public. If the accused is a civilian, he or she appears before a civilian court, while if it is a fighter, the individual shall appear before a military one.

[42] *This term was used by the judge Abass during the discussion.*

PROCEDURAL SAFEGUARDS – RIGHTS AND PROTECTION OF DETAINEES

Edgar Lopez Gomez (FARC-EP)

Detainees had the opportunity to challenge the reasons for their detention, but they did not have access to lawyers except if it was a serious case in which a lawyer could be chosen by a detainee from among the FARC-EP's members.

Detainees could call witnesses to provide evidence regarding their cases.

The FARC-EP has always been concerned about the impartiality of its processes, but they recognize that mistakes were committed. In several cases the information they had was not accurate, and individuals were punished when impartially was not respected.

There was a general lack of training for judicial issues, however some expertise was gained over time, in particular with respect to internal discipline.

Esmat Alabsi (Southern Region of Syria)

Nobody can be detained without an arrest warrant. This document includes the name of the judge that ordered it and the expected length of the detention. The arrest has to be carried out 48 hours after the warrant is filed. Trials in absentia are possible.

Detainees have the right to a lawyer. The determination of who is a lawyer is the responsibility of the Free Lawyers Association. Free services are offered to accused individuals who need legal assistance and lists of lawyers are kept in the prisons. There is currently a law being drafted affirming that no accused individuals shall appear before a court without a lawyer.

Judges can grant amnesties to detainees when they 'show good character while being detained'.

Trials are public, unless witness protection is needed or another serious reason means it should not be held publicly. Any citizen carrying a form of ID can attend them. Appeals before the Supreme Court are possible.

There are a lack of investigative tools, including those needed to carry out forensic tests (finger prints, DNA analysis), funds and training for staff working in judicial processes. Investigations are primarily carried out by the Criminal Investigation Office.

The Islamic State group's members are tried under a special law.

Kara Abass Billo (SPLM-N)

Courts and procedures are open for the public. There might be closed sessions on the request of the parties.

Sentences can be appealed before a higher court, which will follow up on the case.

Box 3: Case study. Judicial structure according to the Unified Arab Law, applicable in territories controlled by the Free Syrian Army (Syria)

Available at http://theirwords.org/media/transfer/doc/judicial_structure_according_to_the_unified_arab_law-e0ba4194e379447c7bc388f6eb8822bd.pdf

Judicial Structure According to the Unified Arab Law

Chapter I
General Provisions
Article #1: The judicial system is independent. No entity or individual shall have power or authority over the judges save the law.
Article #2: All litigants shall be equal before the judiciary regardless of their characteristics and conditions.
Article #3: The resolutions shall be rendered in the form prescribed by the law.
Article #4: The courts shall be committed to publicize the hearings unless the law dictates otherwise. The pleadings shall be oral unless the law requires otherwise.
Article #5: Legal fees and warrantees shall be nominal and consistent with the principle of free judiciary.

Chapter II Courts Ranks, Configurations, and Competences
Article #6: Courts shall be composed as follows:
1. The Supreme Judicial Council in accordance with the bylaw of the judiciary
2. The Supreme Court, which consists of the
   Court of Cassation – Civil Department – Criminal/Penal Department – Personal Status Department
3. Courts of Appeal and Offenses
4. Courts of First Instance
5. Magistrate's Courts
6. Personal Status Court
7. Criminal Court
8. Investigation and Referral Court
9. Public Prosecution
10. Enforcement Department
[...]

A sliding scale of obligations?

The variety of experiences raised by the representatives from the field showed that further research on this topic is needed, mostly in terms of how the same legal provisions apply to ANSAs with different levels of organization and goals. While some ANSAs apply their own rules for administering justice, others have continued following those that were already in place when they took control of a territory.

One conclusion that can be drawn from the discussion is that the better organized a group is, the more international rules could become applicable. This 'sliding scale of obligations' is seen, for instance, with respect to the participants' internal rules and the procedures they carry out. Furthermore, the presence of lawyers, which is a key element in fair trial guarantees, is only present in those ANSAs that have a higher level of organization. More precisely, in the case of the rules related to the administration of justice in NIACs, this sliding scale appears behind the more restricted scope of application of AP II in relation to CA3.

Consequently, it is possible to conclude the following: first, when an ANSA does not have the capacity to respect the abovementioned safeguards, it shall not carry out judicial processes and alternative mechanisms should be sought; second, when the structure of the group varies and it is not stable, it will only carry out judicial processes as long as it has the capacity to do so; third, when the group has the capacity to carry out judicial processes in accordance with those fair trial guarantees recognized by international law, then everything feasible shall be done to respect them in full. Finally, ANSAs are encouraged to look for external support in their attempt to respect humanitarian norms related to the administration of justice.[43]

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[43] *In addition to the example provided with respect to the United States assisting an ANSA's detention activities in Syria, in the abovementioned trials carried out by the* Mouvement de Libération du Congo in the Democratic Republic of the Congo, *the UN peace support operation MONUC would have provided airplanes for defense attorneys from Kinshasa to travel in, but the Congolese government prevented them from boarding. 'MLC completes Ituri rights violations trials, subject to appeal', Integrated Regional Information Networks (IRIN), 27 February 2003, available at https://www.irinnews.org/news/2003/02/27/mlc-completes-ituri-rights-violations-trials-subject-appeal.*

The Manchester International Law Centre's Initiative

The final session of the 2017 *Garance* Talks was an opportunity to address different initiatives aimed at improving ANSAs' capacity on the administration of justice. In particular, a representative from the Manchester International Law Centre explained that, together with the Syrian Legal Development Program and Lawyers for Justice in Libya, as well as with many international experts of IHL, they have launched an exploratory study meant to lead to the preparation of guidelines for judicial processes in NIACs. After two preparatory meetings in Manchester (2015) and in Louvain-la-Neuve (2016), a drafting committee has been set up and is currently preparing a set of guidelines. Their first draft will be shared and discussed with relevant actors in the field before being finalized and distributed. While international legal instruments constitute a useful reference in the drafting, the purpose of the project is not to unearth any existing law but, rather, to identify the most sensible and practical standards of justice applicable in those processes. For more information, see https://www.law.manchester.ac.uk/milc/research/projects/justice-in-niacs/.

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Agenda
The 2017 *Garance* Talks

Administration of justice by Armed Non-State Actors

22 November 2017

9.00-9.15
Opening and Welcome remarks
- Pascal Bongard, Head of the Policy and Legal Unit, Geneva Call

9.15-9.35
Presentation of Actors and Contexts
- Geneva Call

9.35-10.15
Presentation of the Legal Framework Applicable to the Administration of Justice in Non-International Armed Conflicts
- Dr. Daragh Murray, University of Essex

10.15-10.30
Coffee Break

10.30-12.00
The Legal Basis for the Establishment of Courts and Judicial Processes by Armed Non-State Actors and in Armed Non-State Actors' Territories
- Moderator: Ezequiel Heffes, Thematic Legal Adviser, Geneva Call

Questions that were discussed with ANSA representatives during this session:
- *Who can administer justice in the territories you control or operate?*
- *When you deal with cases related to the armed conflict, what laws do you rely on and why?*
- *Do you have written laws, decrees, or an internal code describing how judicial processes should take place? Do you have a specific penal code or criminal laws?*
- *What are the procedures to appoint a judge and what are the requirements or criteria for a judge to be selected?*
- *What type of cases can be addressed by judges/ persons in charge of the administration of justice? Members of your movement, members of enemy forces and civilians for cases linked to the armed conflict?*
  Can you deal with private life problems not linked to the armed conflict (stealing or common homicides, for instance)? If so, what is the legal basis? Do you have a written law?
- *How are cases generally brought before you? Can individuals present complains? Are there any specific procedure?*

12.00-13.00
Light lunch at the venue

13.00-14.30
Deprivation of Liberty by Armed Non-State Actors
- Moderator: Carla Ruta, Thematic Legal Adviser, Geneva Call

Questions that were discussed with ANSA representatives during this session:
- *What types of deprivation of liberty do you face? Are all of them related to the armed conflict?*
- *Have you ordered arrests? If so, who is in charge of carrying them out? Do you have a police force or is it the armed wing of the group?*
- *What kind of places of detention do you have? Do you have different detention facilities for detainees related to the armed conflict and for those arrested for common crimes? If so, what are the differences?*
- *If you don't have a place of detention with suitable conditions to detain an individual, what do you do with the detainee? Have you ever transferred a detainee to either another movement, organization or to the State's forces? If so, who is in charge of the transfer?*
- *Do all detainees receive medical care? Who is in charge of providing it? Do you have doctors working specifically in the detention facilities?*
- *Do detainees have the possibility of being visited either by their families or by impartial humanitarian organizations?*
- *Do you have special considerations for specific categories of persons, such as children?*

14.30-14.45
Coffee Break

14.45-16.15
Procedural Safeguards – Rights and Protection of Detainees
- Moderator: Ezequiel Heffes, Thematic Legal Adviser, Geneva Call

Questions that were discussed with ANSA representatives during this session:
- *Do you have a mechanism to ensure that detainees know the reasons why they have been detained?*
- *Do detainees have access to lawyers? If so, how do you determine that an individual is a "lawyer"? Is there any law regulating this?*
- *Are hearings and trials public? If so, who can attend them?*
- *Can detainees challenge their detentions? Do they have the right to appeal a decision? Can you explain what this process is?*
- *What types of punishments do you have? Have you punished individuals for simply participating in the conflict?*
- *How do you carry out investigations? Do you call witnesses?*

16.15-16.45
Presentation of "Draft Principles for Fair Trial before Judicial Institutions Established by Non-State Armed Groups"
- Ibrahim Olabi, Manchester Center of International Law

16.45-17.00
Closing Remarks and Conclusions
- Elisabeth Decrey Warner, Executive President, Geneva Call

Selected provisions

INTERNATIONAL HUMANITARIAN LAW

Administration of justice under Common Article 3 of the 1949 Geneva Conventions

Article 3
'[…] (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ' hors de combat ' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
[…] (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples […]'

Administration of justice under the 1977 Additional Protocol II

Article 6
'[…] 2. No sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality. In particular:
(a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;
(b) no one shall be convicted of an offence except on the basis of individual penal responsibility;
(c) no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under the law, at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;
(d) anyone charged with an offence is presumed innocent until proved guilty according to law;
(e) anyone charged with an offence shall have the right to be tried in his presence;
(f) no one shall be compelled to testify against himself or to confess guilt.
3. A convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.
4. The death penalty shall not be pronounced on persons who were under the age of eighteen years at the time of the offence and shall not be carried out on pregnant women or mothers of young children […]'

Administration of justice under customary IHL

Rule 99. 'Arbitrary deprivation of liberty is prohibited'.

Rule 100. 'No one may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees'.

Rule 101. 'No one may be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time it was committed; nor may a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed'.

Rule 102. 'No one may be convicted of an offence except on the basis of individual criminal responsibility'.

INTERNATIONAL HUMAN RIGHTS LAW

Administration of justice under the International Covenant on Civil and Political Rights

Article 9
'1. Everyone has the right to liberty and security of 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.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.'

Article 14
'1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
(c) To be tried without undue delay;
(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
(g) Not to be compelled to testify against himself or to confess guilt.
4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.'

Article 15
'1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.
2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.'

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