INTERNATIONAL LEGAL ADVICE
ON THE POTENTIAL PROSECUTION OF ADULT FEMALES IN AL HOL
BY COURTS ESTABLISHED BY THE AUTONOMOUS ADMINISTRATION OF NORTH EAST SYRIA

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SECTION I: Introduction and Overview

Scope and Limits of Advice

1. The primary purpose of this advice is to shed light on requirements – under the applicable international legal framework of International Humanitarian Law (IHL) and International Human Rights Law (IHRL) – to secure a fair trial before an independent, impartial and competent tribunal respecting defence rights in the context of non-state actor investigations and prosecutions by the Kurdish-led Autonomous Administration of North and East of Syria (The Autonomous Administration, Authorities or AANES) in North East Syria (NES).

2. Specifically, I was asked to address the following issues:

   a) the requirements of an independent and impartial tribunal;

   b) human rights issues related to operationalising fair trial rights;

   c) the potential use of guilty pleas and abbreviated proceedings (APs);

   d) charging considerations.

3. This advice builds on and deepens research provided to the European Institute of Peace (EIP) on 21 May 2020 entitled 'International Legal Advice on the Potential Prosecution of Female Al Hol Detainees by Courts established by the Autonomous Administration for North East Syria' (hereafter Advice 1). Pages 21-35 dealt with 'essential guarantees of fair trial', pages 35-58 with scope of criminality are of particular relevance to these questions. Several other issues addressed there of potential relevance, such as legal implications for third states (pages 58-61) are not dealt with here. An effort was made not to repeat the core legal issues dealt with in Advice 1 and this document should be read alongside that one, which remains relevant.

4. This second advice seeks to address the questions posed above, while focusing on aspects that have emerged in discussions as particularly relevant or challenging in practice (hence the focus on standards at the investigative stage for example, which is the most pressing currently). Whether relevant international fair trial standards flagged here and in earlier advice *can* be met in the challenging situation of NES is a complex question of fact, an assessment or evaluation of which went beyond this exercise, and which would certainly require greater access to facts on the ground. The factual information available to me was limited, though we did have the benefit of interviews conducted by EIP and others on their behalf, often with the Authorities themselves, which provided useful insights particularly into AANES' plans and perspective.

5. Information was particularly limited as regards available evidence. It was therefore difficult to tailor this advice to the context as much as had been hoped, though it was never the purpose of this advice to evaluate the evidence (see below on the need for this as a key priority). Understanding the nature and source of evidence is related to many of the issues raised in this report, such as charging and evidentiary considerations. As this Advice seeks to go beyond an abstract legal analysis of the requirement of fair trial, it takes into account facts and challenges

as understood at the point when this report became due, so far as we could ascertain them from public source information and interviews, while recognising in places that this enquiry is ongoing and the appreciation of facts may evolve.

6. After an executive summary of conclusions and recommendations, this section recalls the factual context in the camp, based mostly on publicly available information, and touches on cross-cutting preliminary issues relevant to the rest of the advice – regarding available evidence, the protection deficit and applicable legal standards. Section II, focusing on the requirements of independence, impartiality and competence, recognises AANES' sensitivity to the need to meet these requirements and its progress in establishing a credible court system, as well as areas to be developed. Section III focuses on safeguards essential for an effective investigation capable of giving rise to a fair trial, some of which seem not to be fully addressed at this time; these include safeguards during questioning, access to counsel, issues related to intelligence information and ensuring freedom from coercion. Section IV explores the potential for abbreviated proceedings in light of burgeoning international practice, and the challenges arising from key requirements of consciousness and voluntariness upon which such proceedings depend. Section V touches on charging considerations addressed in some detail in Advice 1. While advice on charging would need to follow greater evidence, it reiterates various charging options under applicable law, and legal and policy considerations militating against an unduly narrow approach to prosecuting only based on crimes of association or expression such as membership of terrorist organisations.

Executive Summary of Conclusions and Recommendations

7. The factual context is deeply troubling, exacerbated since Advice 1 by further deterioration in the security and humanitarian situation of the adult women and children in the Al Hol camp. This raises urgent, priority, human rights concerns not directly addressed in this advice. They provide, however, part of the inescapable background to the discussion on whether it is possible to ensure a rule of law-compliant approach to criminal justice, as the AANES has expressed its commitment to doing, and if so how. In practice, ensuring a fair trial, with guarantees such as safe and confidential access to counsel among others, or ensuring the voluntariness of confessions, testimony or guilty pleas, depend on addressing the current coercive context in which potential suspects, witnesses and victims find themselves. Consistent with its rule of law goal, accountability cannot justify delays in addressing urgent humanitarian needs, including, where appropriate, through repatriation, nor could any process that takes advantage of the vulnerabilities of the women to elicit confessions or cooperation, be considered fair or reliable. A***ddressing the coercive environment and providing security and support are pre-requisites to ensure that justice can be operationalised in a fair rule of law compliant way.***

8. The situation presents an impossible conundrum for – and burden on – the Authorities, and the need for external support to ensure that rights are protected is recognised. This has prompted them to call for an active international role in, and support for, investigation, prosecution and sentencing.

9. The impunity gap remains stark, and gendered. As yet there have been no prosecutions of women in NES, and as far as could be ascertained, little concerted, thorough effective investigations or development of suspect portfolios for the women. ***As a crucial first step, a comprehensive evidence evaluation is needed.*** This requires an open evaluation, with expert support, of useable evidence within the control of the AANES, and access to other sources of potential evidence from the many state and non-state actors engaged in the collection or preservation of evidence in recent years. In light of it, an urgent plan needs to be drawn up for an effective investigation, supported and resourced so as to be able to meet the legal benchmarks highlighted in this report. The investigation needs to be open, non-discriminatory, and thorough, including gathering incriminating and exonerating information.

10. AANES appears to have adopted a judicial structure and organisation, and imposed basic requirements of judges, that broadly reflect the principles of independence and impartiality that are essential pre-requisites to a lawful and legitimate process. This includes separate panels of investigating, trial and appeal (cassation) judges, a quota of women judges on each bench, and a requirement of legally qualified judges independent of the armed group. ***The commitment to independence should be elaborated in the law of the tribunal and safeguarded in practice***. Among the areas that may require clarifying include an appropriate role for the judicial council in its supervisory function, the relationship between judges and intelligence agents, and the requirements of recusal of judges in particular cases in this challenging context of ISIS crimes.

11. The exercise of their judicial role involves ***safeguarding the overall fairness of proceedings***. On the one hand, fair trial rights must be exercised flexibly to be realizable in challenging contexts, while on the other, a fair trial involves more than ticking a series of due process boxes. Judges must ensure that in all the circumstances trial was fair and just, and seen to be fair and just.

12. The ***capacity-building*** needs are unsurprisingly significant, given the nature of the crimes. This relates not only to judges but to other arms of the justice apparatus, in particular to ensure capacity to investigate and analyse evidence and frame charges effectively, appropriately and free of bias and discrimination. Investigators prosecutors/investigating judges should also be independent in the understanding set out in Section III.

13. Urgent attention is required to ***bolster defence counsel and ensure effective legal representation***. The right to counsel is recognized in principle, and a voluntary cadre of defence lawyers is available, while some women have international counsel. However, for the fundamental right to counsel, at the core of a fair trial, to be meaningful, counsels need to have at least basic qualifications or experience, and resourcing of defence lawyers is essential for them to discharge their crucial function competently and professionally.

14. ***Core safeguards must be introduced in the questioning of potential suspects***, which do not appear to be present at this time. ***Notification – including of the right against self-incrimination – access to counsel during questioning and recording*** are among them. The courts should not rely on evidence taken in violation of these requirements. Measures can however be taken to bolster the reliability and credibility of evidence and its admissibility at

trial. Confessions evidence should not be relied upon as the sole basis of conviction. The court must exercise due diligence to satisfy itself that any confession or testimony was freely given, and not gathered through TCIDT. If there is a risk of evidence having been obtained through TICDT, or at least that it was adopted in the context of a coercive environment which rendered it unreliable, it should not be relied upon.

15. At the heart of fair trial is the requirement that the accused be given ***access to evidence that forms the basis of the case against her***. This forms part of the broader right to defend oneself, and to have adequate time and resources to this end. Access to sensitive information can be subject to reasonable restrictions on form or content where these are strictly required for example on security grounds. Evidence obtained from military or intelligence sources is not inherently problematic, provided there is meaningful access to the evidence and chain of custody is sufficiently clear, so that basic fair trial standards are met and reliability can be contested by the defence and verified by the court.

16. Abbreviated proceedings, including through guilty pleas, are growing practice internationally. In NES they could present important advantages, facilitating some of justice's goals, while ameliorating the challenges outlined elsewhere in this advice. But for a guilty plea to be valid, certain criteria that emerge from international standards and practice must be met. Notably the ***defendant must accept the plea bargain in full awareness of the facts of the case and legal consequences and in a genuinely voluntary manner***. The security context alone makes it difficult to imagine how this could be achieved at this time without first removing the risks that would impede decision making and providing essential physical, psychological and legal support to individuals, but this is a question of fact that needs to be addressed. An agreement between an individual and the authorities should, ideally, be supported by some verification by the court of the individuals culpability and the appropriateness of the charges and plea. Moreover, the system must have the political and financial ability to credibly threaten prosecutions, and to present the accused with a genuine option of a trial with full evidence and fair trial rights. Abbreviated Proceedings should not be seen as a substitute for, but as working within and reducing the burden on, a functioning investigation and trial system.

17. Legal and policy considerations support ***charging established clearly defined crimes under domestic law and international law, rather than terror related crimes***. As recent terrorism prosecutions elsewhere, including in Iraq, indicate, focusing exclusively on membership or association crimes carries multiple dangers, including jeopardising legality, individual culpability, the presumption of innocence and proportionality of sentencing.

Background Facts and Developments

Updated Facts on the evolving crisis at the Al Hol camp

18. Background facts in relation to the Al Hol (or al-Hawl) camp – the AANES-run camp which is one of two in NES where women and children associated with Da'esh fighters are imprisoned – are set out in Advice 1.[1] More information has come to light since, much of it

[1] Advice 1, at 4-6.

deeply troubling as to the humanitarian crisis unfolding in the camps, which pose undoubted challenges for criminal justice.

19. According to the UN Office for the Coordination of Humanitarian Affairs (OCHA), Al Hol currently hosts 64,619 people, of which 53% are children under the age of twelve, 48% of its population is Iraqi, 37% Syrian, and 15% third country nationals.[2] Reports suggest conditions are dire and deteriorating, in terms of overpopulation, inadequate sanitation, drinking water, food, education and medical care, and rates of child mortality.[3] Covid-19 has exacerbated conditions and impeded access, and though reported cases remain limited,[4] this is thought to be due to lack of testing, and few measures are in place to stop the spread of the virus within the densely populated camp.

20. Violence and organised violent extremism appear to have intensified.[5] Some women reportedly continue to engage in ISIS-related violations[6] while others are victims of such practices on an on-going basis,[7] underscoring the diversity of detainees' profiles. Reports refer to 'an ISIS resurgence,'[8] to Hizbah having re-grouped within the camp and enforcing ISIS rules,[9] even maintaining a 'kill list,'[10] and operating a parallel justice system with brutal punishments.[11] An AANES representative appears to have recognized publicly the concern regarding loss of control of the camp, attributing a recent spike in violence to increased ISIS activity, noting that 'at night, the camp is virtually under their control, and much of the violence occurs then'.[12]

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[2] OCHA, Snapshot North East Syria: Al Hol Camp, 11 October 2020, ('OCHA Al Hol Snapshot'), at 1, <https://reliefweb.int/report/syrian-arab-republic/syrian-arab-republic-north-east-syria-al-hol-camp-11-october-2020>.

[3] Human Rights Watch, '"Bring Me Back to Canada": Plight of Canadians Held in Northeast Syria for Alleged ISIS Links', 29 June 2020, <https://www.hrw.org/report/2020/06/29/bring-me-back-canada/plight-canadians-held-northeast-syria-alleged-isis-links>.

[4] OCHA, Al Hol Snapshot, at 2. Until 11 October 2020, OCHA reported four cases of covid-19 in the camp with one fatality and Covid rates are high in the regions nearby.

[5] Médecins Sans Frontières (MSF), 'Women treated for gunshot wounds amidst violence and unrest in Al-Hol camp', 30 September 2019, <https://www.msf.org/women-treated-gunshot-wounds-amidst-violence-and-unrest-al-hol-camp-syria>.

[6] Reports also indicate that of those supportive, most of the so-called 'radicalised' women are 'in it for the money', as openly supporting ISIS and performing radicalism in social media gets them donations from ISIS supporters outside the camp (*see* V. Mironova, 'Life Inside Syria's al-Hol Camp', Middle East Institute, 9 July 2020, <https://www.mei.edu/publications/life-inside-syrias-al-hol-camp>.

[7] Through a series of interviews with women from the Russian-speaking states and European states, Dr. V. Mironova noted that between 70%-80% of camp residents felt they were 'used by ISIS leadership' and do not believe in the group anymore, while 20-30% still support ISIS. See *ibid.*

[8] C. Vianna de Azevedo, 'ISIS resurgence in Al Hawl camp and human smuggling enterprises in Syria: Crime and terror convergence?', *Perspectives on Terrorism* 14 (2020), 43-63, at 45; France 24, 'European jihadists' children "at risk of radicalisation"', 28 March 2021, <https://www.france24.com/en/live-news/20210328-european-jihadists-children-at-risk-of-radicalisation>. Heidei de Pauw, Children Focus on concern regarding loss of control of the camp to ISIS.

[9] F. Gardner, 'IS prisoner issue a ticking timebomb for the West', BBC News, 24 July 2020, <https://www.bbc.com/news/world-middle-east-53428928>.

[10] Human Rights Watch, *supra* note 3, at 23-24. See also OCHA Al Hol Snapshot *supra* note 2 on, inter alia, honour killings.

[11] Rights and Security International, 'Europe's Guantánamo: The indefinite detention of European women and children in North East Syria', 17 February 2021, at 19, <https://www.rightsandsecurity.org/assets/downloads/Europes-guantanamo-THE_REPORT.pdf>. It is reported that the murder of a 14 year-old girl was carried out as a sentence for failing to cover her face properly. See also Commission of Inquiry (COI) also reported that two women were stabbed to death in September 2019 following a decision of this makeshift court: UNHRC, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, 28 January 2020, UN Doc. A/HRC/43/57, at para 62 <https://undocs.org/A/HRC/43/57>.

[12] S. Kajjo, 'UNICEF Alarmed by Spike in Children's Deaths in Syria's al-Hol Camp', VOA News, 25 March 2021, <https://www.voanews.com/extremism-watch/unicef-alarmed-spike-childrens-deaths-syrias-al-hol-camp>.

21. There are multiple reports of a deteriorating security more broadly. OCHA reported significantly worsening insecurity since August 2020,[13] including sexual violence and exploitation[14] by other detainees and by camp guards.[15] Indeed, the UN International Children's Emergency Fund (UNICEF) reported in March 2021 that 40 adults and two children have been killed in Al Hol since the beginning of 2021, 16 of them in March alone.[16] A recent statement from the UN Under-Secretary General for Humanitarian Affairs and Emergency Relief Coordinator, Mark Lowcock confirmed the deterioration in the security situation, resulting in a 3 pm daily curfew. The statement quotes an Al Hol physician stating that young girls are being married off inside the camp, with women and girls facing even more dangers than their male counterparts.[17]

22. Repatriation of third country nationals has remained patchy and intensely controversial, despite major efforts by, among others, a group of UN Special Rapporteurs,[18] the European Parliament,[19] and civil society organisations.[20] Famous cases emerging from Al Hol, notably that of UK-born citizen Shamima Begum, drew attention and legal action challenging the UK's decision to strip her of her nationality.[21] International litigation against states for their failure to act is on-going, raising interesting questions as to third states obligations. In November 2020, the UN Committee on the Rights of the Child (UNCRC) found a case admissible which was brought against France for its refusal to repatriate national children, while another is currently pending before the European Court of Human Rights (ECtHR).[22] The former was noteworthy in finding that the children were within the 'jurisdiction' of the state of nationality, despite being under the control of the non-state actor in NES, and that (going further than Advice 1) France's human rights obligations applied directly to its decision in respect of repatriation.

Prosecution developments and delays

23. In February 2020, the AANES announced it would commence trials of foreign nationals, but the Covid-19 pandemic disrupted those plans. However, the Commission of Inquiry (COI) on Syria reported in its most recent submission to the Human Rights Council that AANES has

[13] OCHA, Al Hol Snapshot, *supra* note 2, at 4.
[14] Rights and Security International, *supra* note 14, at 20, 23. On sexual assault between detainees and sexually exploitation in exchange for basic supplies by camp authorities.
[15] Human Rights Watch, *supra* note 3, on threats of sexual violence by the guards, and Rights International, *ibid*.
[16] UNICEF, 'Two children killed in Al-Hol Camp in Syria', 24 March 2021, <https://www.unicef.org/press-releases/two-children-killed-al-hol-camp-syria>.
[17] Statement by Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator, Mark Lowcock, on Syria New York, 26 March 2021, <https://reliefweb.int/report/syrian-arab-republic/statement-under-secretary-general-humanitarian-affairs-and-emergency-0>.
[18] OHCHR, 'Syria: UN experts urge 57 States to repatriate women and children from squalid camps', 8 February 2021, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26730&LangID=E>.
[19] European Parliament, 'The Syrian conflict – 10 years after the uprising, European Parliament resolution of 11 March 2021 on the Syrian conflict – 10 years after the uprising (2021/2576(RSP))', P9_TA-PROV(2021)0088, 11 March 2021 <https://www.europarl.europa.eu/doceo/document/TA-9-2021-0088_EN.pdf>.
[20] See e.g. Human Rights Watch, 'Thousands of Foreigners Unlawfully Held in North East Syria, Countries should bring Citizens Home; Ensure Due Process for ISIS Suspects', 23 March 2021 <https://www.hrw.org/news/2021/03/23/thousands-foreigners-unlawfully-held-ne-syria>; Avocats sans Frontières France, 'Rapatriement d'urgence: des enfants et des femmes français en danger en Syrie', 6 April 2021 <https://www.avocatssansfrontieres-france.org/media/data/actualites/documents/document1-323.pdf>.
[21] See e.g. BBC, 'Who is Shamima Begum and how do you lose your UK citizenship?', 2 March 2021 <https://www.bbc.com/news/explainers-53428191>.
[22] ECtHR, 'Grand Chamber to examine two applications concerning requests to repatriate two French women held in a camp in Syria with their children', Press Release, 22 March 2021.

convicted 1,881 Syrians for association with ISIS (as of 12 June 2020).[23] AANES submitted that 8,650 detainees have been brought to trial and 1,600 await judicial process. Prosecutions have exclusively concerned male detainees in other camps. No women appear to have been held to account despite the committed view by the Authorities that some of them have been involved in serious crimes associated with ISIS, before and since joining the camps.

24. In June 2020, AANES reportedly began registering the foreigners in Al Hol's annex. A US representative of the coalition is cited as stating that 'Some of these women are still active ISIS members who need to be identified and removed from the civilian setting'.[24] The coalition collected 2,900 biometric tests and 8,000 DNA samples, which will reportedly be added to a database for use by international law enforcement and intelligence officials.[25] Concerns were raised by a group of Special Rapporteurs as to the implications of this 'data-grab'.[26]

25. While all the prosecutions to date have concerned males, the Authorities remain committed to conducting a criminal process for the women, and have expressed their openness to and need for support in that process. While their prosecutions of men to date have compared favourably to Iraqi counterparts, they have also raised concerns, and questions remain as to capacity and human rights compatibility of the trials.[27] The Authorities' commitment and openness to embarking on a fresh process, with international support, that meets their stated goal of tribunals that 'follow the rules of international law and rights of the defense'[28] provides the backdrop to this report.

Preliminary issues

Urgent Need for Evidence Evaluation

26. This exercise was not intended as an evidence review, but it was hoped to ascertain categories of available evidence. The nature and source of evidence are inherently linked to appropriateness and proportionality of resort to criminal law at all, appropriate charging, and more specifically to the human rights issues that arise from evidence gathering, admissibility or accused's access to evidence. It has been a challenge to access consistent information, despite collaboration of the Authorities through answers to questions posed by EIP, though discussions in that respect are ongoing at time of writing. This advice may need to be updated, based on new facts as they emerge.

27. At present, the roles of women in the Al Hol camp, and the extent of information on this and of the investigative effort so far, remains unclear. So far as we know, there are not yet

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[23] UNHRC, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, 14 August 2020, UN Doc. A/HRC/45/31, at paras. 77-78 <https://undocs.org/en/A/HRC/RES/45/31>.
[24] L. Loveluck, '"The most dangerous camp in the world": Inside the Syrian camp for women and children', The Independent, 5 July 2020 citing US Army Col Myles Caggins, spokesman for the US-led coalition in Syria <https://www.independent.co.uk/news/long_reads/women/syrian-women-children-isis-camp-a9594186.html>.
[25] L. Loveluck, 'In Syrian camp for women and children who left ISIS caliphate, a struggle even to register names', The Washington Post, 28 June 2020, <https://www.washingtonpost.com/world/middle_east/syria-al-hol-annex-isis-caliphate-women-children/2020/06/28/80ddabb4-b71b-11ea-9a1d-d3db1cbe07ce_story.html>.
[26] OHCHR, 'Syria: UN experts urge 57 States to repatriate women and children from squalid camps', 8 February 2021, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26730&LangID=E>.
[27] Human Rights Watch *supra* note 3 expresses concerns as to capacity for example.
[28] Interview – as expressed by members of the authorities to interviewers for this project.

investigative files in relation to women detainees, though it is indicated by AANES sources that there is information indicating culpability. Whether there has been little investigation or that information has not been shared, the nature of the evidence is a key question upon which others considered by this inquiry depends.

28. Needless to say, the legitimacy of the exercise as a whole, as in any criminal process, depends to a very large extent on the facts and the evidence. Facts and evidence must drive the process. Assessments of available evidence to date, and of the feasibility of further effective evidence-gathering for fair trial, emerge as key priorities.

29. A vast amount of evidence-gathering and preservation on Syria and ISIS crimes appears to have been done by various states, including some engaged militarily in the fight against ISIS, international organisations and civil society groups. An assessment of potentially accessible evidence in the hands of the Authorities, but also multiple states engaged international mechanisms and civil society, should be carried out as a matter of urgency.

30. The AANES has called on states to cooperate with them on the justice dimension, as they did on the military intervention against ISIS.[29] The extent of states willingness to do so, to strengthen fair and effective investigations, trials and appeals, including to make available evidence seized during military operations or providing the cooperation to bolster capacity and to enable an environment in which justice is plausible, may need to be clarified. Support could also be secured from civil society and diaspora organisations such as the Syria Justice and Accountability Centre (SJAC) and Yazda have also been working on documentation and preservation of evidence.[30] Of obvious relevance is the International, Impartial and Independent Mechanism (IIIM), which preserves and analyses evidence of violations of IHL and IHRL, preparing files for prosecutions.[31] Several developments and resources in recent months may provide further guidance and potentially sources of evidence. These include prosecutions that have proceeded elsewhere,[32] and for example Counter-Terrorism Executive Directorate

[29] Interview statement by AANES authorities.

[30] Syria Justice and Accountability Centre, 'About SJAC', <https://syriaaccountability.org/about/>; Yazda, 'About Yazda', <https://www.yazda.org/about-us>.

[31] UN General Assembly, 'International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011', 11 January 2017, UN Doc. A/RES/71/248, at para 4 <https://undocs.org/A/RES/71/248>.

[32] See e.g the case of Jennifer W, accused of murdering a 5-year-old Yazidi girl, who she and her husband had bought as a slave. The court is set to give its judgment this summer (*see* e.g. M. Eddy, 'German Woman Goes on Trial in Death of 5-Year-Old Girl Held as ISIS Slave', The New York Times, 9 April 2019 <https://www.nytimes.com/2019/04/09/world/europe/germany-isis-trial.html>; 'Alleged Isis member on trial in Germany for genocide and murder', The Guardian, 24 April 2020 <https://www.theguardian.com/world/2020/apr/24/iraqi-goes-on-trial-in-germany-charged-with-genocide-and>). Other cases include: Nurten J (*see* Trial International, 'Nurten J', <https://trialinternational.org/latest-post/nurten-j/> and N. Kaufmann, 'Düsseldorf: Prozess gegen IS-Rückkehrerin aus Leverkusen – die Anklage lässt erschaudern', <https://www.derwesten.de/region/duesseldorf-prozess-verhandlung-nurten-j-oberlandesgericht-is-rueckkehrerin-anklage-richter-staatsanwaltschaft-syrien-id231653783.html>); Omaima A (*see* NDR, 'IS-Prozess: Dreieinhalb Jahre Haft für Cuspert-Witwe', <https://www.ndr.de/nachrichten/hamburg/IS-Prozess-Dreieinhalb-Jahre-Haft-fuer-Cuspert-Witwe,isprozess142.html>); and Carla-Josephine S (*see* Trial International, 'Carla-Josephine S', <https://trialinternational.org/latest-post/carla-josephine-s/>).

(CTED) analytical briefs on the prosecution of women associated with ISIS[33] and their repatriation.[34]

31. The evidence assessment and, if feasible, investigative plan should be drawn up at the earliest opportunity, if this has not already been done. It would include an assessment of the willingness of states to support evidence-gathering, which may require political support. Of course there is a need to be mindful, 18 months on, of limitations in accessing evidence. However international experience points to the potential for investigation and prosecution to be conduct successfully many years after the crime, with the necessary commitment and cooperation.

32. The first recommendation would therefore be to embark on an urgent evaluation of evidence, and develop a plan for an effective investigation, that is supported and resourced so as to be able to meet the legal benchmarks highlighted in this report.

Legal standards?

The focus is on the identification of basic *international* standards that constitute the core of a fair trial relevant to any system of investigation and trial. Applicable law was addressed in Advice 1. As noted there, core fair trial rules are applicable at all times under IHRL, including in ongoing armed conflict, and on the issues covered here, IHL treaties provide for substantially the same guarantees as core human rights provisions of e.g. the International Covenant on Civil and Political Rights (ICCPR) ratified by Syria.[35] IHRL can provide more detail on some issues than IHL. However, neither branch of international law is specific and prescriptive on many of the issue arising in practice. IHRL does not, as a general rule, set down rules of evidence for example, which are matters for domestic systems but it clarifies principles and some redline outer limits of acceptable approaches, which need applied to all the facts. In other words, fair trial standards provide a framework, rather than a formula.

33. In some places regard has also been had to comparative international practice, such as International Criminal Law (ICL) standards, or regional standards e.g. ECtHR jurisprudence. It is recognised that for legal as well as practical reasons one cannot treat International Criminal Court's procedures or ECtHR standards as applicable law in the particular context of NES.[36] Comparative practice can however inform our understanding of applicable law.

34. IHL and IHRL provide 'minimum' standards that states should meet, and in principle go beyond wherever possible. There is no reason why in its Statute, Rules or operation the AANES should not aim to do so, where feasible. While it would be unreasonable to require a non-state actor to meet more stringent protections than states are obliged to, so far as they can

[33] UN Security Council, Counter-Terrorism Committee Executive Directorate (CTED), 'Analytical Brief: The prosecution of ISIL-associated women', 22 July 2020, <https://www.un.org/sc/ctc/wp-content/uploads/2020/07/CTED_Analytical_Brief_The_Prosecution_of_ISIL-associated_Women.pdf>.

[34] CTED, 'Analytical Brief: the repatriation of ISIL-associated women', October 2019, <https://www.un.org/sc/ctc/wp-content/uploads/2020/07/CTED_Analytical_Brief_The_Prosecution_of_ISIL-associated_Women.pdf>.

[35] J. Pictet, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC Commentary on AP II) (1987), at para. 4597.

[36] ICC is also bound by internationally recognised human rights, and the statute reflects this: Rome Statute, Art 21(3): 'The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights […]'.

meet these minimum standards and go beyond them, they would enhance the legitimacy of the processes and perhaps the prospects of cooperation and effectiveness.

35. This advice does not focus on domestic Syrian law governing evidence and procedure. Unlike in relation to applicable criminal law – which in accordance with the principle of legality must be established in law before commission of the crime – issues of jurisdiction, evidence and procedure are not subject to rules on non-retroactivity and can be established thereafter. It is also not, in principle and as a matter of international law, essential that national standards were followed in e.g. the collection of evidence by the armed group during conflict, provided international minimum standards are met. It would however be important, as noted below, to ensure that applicable rules of evidence and procedure that meet those minimum standards are identified and clear during the investigation and well before trial starts.

Non-state actor responsibility:

Advice 1 concludes that there is no prohibition in IHL on the exercise of judicial functions by a non-state armed group such as AANES, provided it meets basic rule of law standards. Where they assume the responsibility for administering justice, it suggests they assume the core obligations to do within the framework for human rights law on an equal basis as states.

36. Since Advice 1, the UN has for the first time issued a statement on the 'human rights responsibilities of armed non-state actors.'[37] These principles underscore the approach in this and the former Advice, wherein human rights should be protected 'irrespective of the status or character of the perpetrator(s)', victims can obtain redress 'regardless of the actor at the origin of their grievance', and organised armed groups are responsible so far as they exercise *de facto* control over a territory and population.[38] The UN statement notes:

> '*practice acknowledges that,* ***at a minimum****, armed non-State actors exercising either government-like functions or de facto control over territory and population must respect and protect the human rights of individuals and groups. Some special procedures and investigative mechanisms of the Human Rights Council have argued that armed groups have human rights obligations, for instance derived from their capacities, and they have detailed the conditions under which these obligations may apply and their extent….*'

37. Moreover, many of the core norms at stake here may be seen as peremptory norms that have been considered binding on non-state actors (NSAs).[39]

38. The law must always be interpreted in context and in a way that can be given effect; inevitably this involves an appreciation of the limitations of context and control incumbent upon the Autonomous Authority operating in a hostile environment in NES.

[37] UN Human Rights Office of the High Commissioner, 'Joint Statement by independent United Nations human rights experts on human rights responsibilities of armed non-State actors', 25 February 2021 <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26797&LangID=E#_ftn1>.

[38] *Ibid.*

[39] See e.g. Advice 1 referring et al to the approach of UN Syria Commission of Inquiry and reports of Special Rapporteur on Terrorism and Human Rights.

SECTION II: Independence, Impartiality and Competence of AANES Tribunals

39. As Advice 1 makes clear, independence impartiality and competence are basic prerequisites to any legitimate criminal tribunal and process. The right to trial by an independent and impartial tribunal established by law is an absolute right applicable at all times without exception (including armed conflict) under IHRL. Under IHL, Common Article 3 to the Geneva Convention refers to *'judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples,'* which is increasingly accepted to mean a court that is independent and impartial, even if the court is established by a non-state armed group.[40] Common Article 3 *has been interpreted by reference to the subsequent provisions of* Article 6(2) of Additional Protocol II which replaced the term 'regularly constituted court' with a functional definition referring simply to a tribunal 'offering the essential guarantees of independence and impartiality'. As IHRL provides more detail, at times these standards are referred to flesh out requirements or as guidance on how independence impartiality and competence might be safeguarded.

40. Pages 25 to 27 of Advice 1 set out the essential requirements of the framework of Independence, Impartiality and Competence, which are not repeated here. This section elaborates in a little more detail some key requirements in light of the (limited) information as to developments in the organisation and practice of the tribunals.

Recognising and Implementing Judicial Independence

41. The challenges to the establishment and operation of an independent impartial and competent tribunal in the context of an armed conflict are well recognised. Though there are many examples of tribunals operating in conflict globally, including increasingly examples of non-state actor justice processes, very often they are closely linked to a party to a conflict and suffer from independence, impartiality and legitimacy deficits. The work of these tribunals could prove informative for the AANES process, although this has not been developed here as examples of good practice appear to be elusive.

42. In this context, it is promising that the Autonomous Authority has made progress in laying the foundations of a framework for an independent impartial tribunals. The information as to emerging practice are noted in relation to each of the requirements below.

Statute and Rules: The Tribunal and its Applicable Law, Procedure and Human Rights pre-requisites should be legally regulated

43. Advice 1 noted that considerations of legality, reflected in IHRL and IHL (see e.g. ICRC Customary Study) require that a tribunal must be 'previously established by law'.[41] Before a tribunal trying any of the women detainees is functioning its operation should therefore be enshrined in law. It may be covered by the existing law governing the established tribunals, if

[40] R. Provost, *International Human Rights and Humanitarian Law* (CUP, 2002), at 427.
[41] Rule 100 refers to competence and previously established in law requirements as relevant to interpreting 'regularly constituted tribunal' under Common Article 3 to the Geneva Conventions and Additional Protocol I.

adequate (this should be accessed and reviewed), or a fresh start may militate in favour of a new statute and regulatory framework.

44. The law would need to be established before the tribunal operates (but unlike substantive criminal law not before the underlying conduct and intent occurred). While some controversies remain as to the extent of non-state actors' legislative – as opposed to enforcement – capacity,[42] there would appear to be no impediment to the *de facto* authorities passing a law of this type (see Advice 1). Doing so is inherent and implicit in the exercise of any sort of enforcement function; if a tribunal is to be 'established' by law in Organised Armed Group-controlled territory it follows logically that the group must be able to make such regulation. The ICRC 2016 Commentary supports this approach.[43]

45. The regulatory framework for the tribunal should clarify applicable law, procedure and other administrative requirements. It should enshrine the basic rule of law and human rights guarantees in international law, as reflected in the various sections of this memo and Advice 1.

Ensuring Structural, Institutional and Individual Independence

46. The ICRC study on customary law, among many other sources, notes that a tribunal must be 'structurally and institutionally independent of the executive'.[44] UN endorsed standards, which describe judicial independence as 'a prerequisite to the rule of law and a fundamental guarantee of a fair trial,' note its institutional and individual dimensions.[45]

47. According to interviewees, a formal ***separation of powers*** exists between the judicial structure and the executive authority in NES:

> *'[Judges] report to the NES justice council who is one of the 3 powers in the self-administration (executive, legislative and judiciary). All the judges are in the power of the justice council.'*

48. It is also promising that the existing tribunals in NES reporting have as '*one of the requirements to join the judicial system [] that the **individual should not be affiliated** to any armed faction, thus respecting the criterion of independence*.'[46] There is little available on the functioning of this in practice, though reports of courts having 'expelled individuals who were affiliated with some of the factions of the Free Syrian Army,' and of withdrawal of financial support by those groups as a result, require further clarification.[47]

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[42] Advice 1, at 25, referring to the ICC Prosecutor's position, Swedish court decision and academics all suggesting the Court must apply law before the conflict; cf. Commentary to the Additional Protocols of 1987 recognizes the possible '*co-existence of two sorts of national legislation, namely, that of the State and that of the insurgents*', at para 4605.

[43] *Ibid,* at para 692. See also *Al Hassan* case, Submission for the confirmation of charges, ICC Pre-Trial Chamber I, ICC-01/12-01/18-394-Red, 9 July 2019, at paras 254-255 <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/12-01/18-394-Red>.

[44] ICRC study on Customary International Law, Rule 100 <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule100>.

[45] UNODC endorsed Bangalore Principles on Judicial Conduct, ECOSOC 2006/23 Strengthening Basic Principles Of Judicial Conduct (2008), at 75 <https://www.unodc.org/res/ji/import/international_standards/bangalore_principles/bangaloreprinciples.pdf>.

[46] Geneva Call, Administration of Justice by Armed Non-state Actors, Report from the 2017 Garance Talks, August 2018 <https://genevacall.org/wp-content/uploads/dlm_uploads/2018/09/GaranceTalks_Issue02_Report_2018_web.pdf>.

[47] See Advice 1, at 26; *ibid*.

49. Independence should be enshrined in law in sufficient detail. There is a law governing the judicial function called the 'Justice Council charter', or the judiciary authority law, which I have seen a translation of. The law has positive elements, including a more impressive emphasis on gender equality than one would see in most systems, but it should more explicitly incorporate the principle of judicial independence and elaborate on its implications.

50. To ensure judges are also seen by an 'independent observer' to be independent, the following specific safeguards of independence need to be addressed in the rules and safeguarded in practice.

- Appointment procedure

51. Appointment, removal and disciplinary procedures can all have an important bearing on, and frequently threaten, judicial independence. As the Human Rights Committee has recommended, the appointment of judges should be based on merit (see competence and integrity) and by an *independent* body.[48] Tribunals whose members were chosen by the executive have been found to violate the independence of the courts, regardless of the qualifications of the individuals chosen.[49]

52. According to interviews, the NES Judges are appointed by the justice council and not by the Authorities, which is promising, though the legislative council has an approval role as in many systems. The relationship between the Council and the Executive is less clear and the potential for influence through that close relationship should be guarded against.[50] Interviewees noted that:

> '*If a judge is needed, the general council of the NES which acts as a legislative council for the administration of NES announces a vacancy for a specific position. People apply, there is a process for interviews and the general council selects a candidate… after their selection they need to go through a training period and they need to get the approval from the local legislative council in the relevant canton.*'

53. Clarification may be needed as to whether appointments are *ad hoc* or to a standing cadre of judges. The latter may provide stronger safeguards against interference as well as serving efficiency and enhancing judicial experience. Ad hoc judges are not inherently problematic, where needed in addition, as international practice before *ad hoc* tribunals shows, as long as provided for in the rules and their appointment and operation safeguards their independence.

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[48] See e.g. HRC, 'Concluding Observations: USA', UN Doc. A/50/40 (CCPR/C/79/Add.50), 7 April 1995, at para 36 <https://undocs.org/A/50/40>.

[49] *International Pen, Constitutional Rights Project, Interrights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisation v Nigeria*, Judgment, African Commission on Human and People's Rights, 137/94, 139/94, 154/96 and 161/97, 31 October 1998, at paras 86 and 94-95 <https://www.refworld.org/cases,ACHPR,3ae6b6123.html>. See also *Media Rights Agenda v Nigeria*, Judgment, African Commission on Human and People's Rights, 224/98, 6 November 2000, at para 66 <http://hrlibrary.umn.edu/africa/comcases/224-98.html>; and *Law Office of Ghazi Suleiman v Sudan*, Judgment, 222/98 and 229/99, African Commission on Human and People's Rights, 29 May 2003, at paras 63-66 <https://africanlii.org/afu/judgment/african-commission-human-and-peoples-rights/2003/47>.

[50] Eg. Art. 2 of the Law on the Judicial Council suggest that the Judicial Council is approved by the Legislative Council, with a role for the body of judges as a whole.

- Salaries and Security

54. Judges receive salaries in NES but they are low. Their security is naturally dependent on others in a volatile situation. As noted in Advice 1, addressing safety and salaries are linked to safeguarding independence.[51]

- Removal, Discipline & Immunity

55. It is important to enshrine safeguards to ensure judges cannot be arbitrarily removed by the executive or judicial council, except in appropriate cases such as corruption, and according to specified criteria and procedures. Judges must be protected from removal, disciplinary proceedings or sanctions for the exercise of their judicial function, their decisions or interpretations of the law. The fundamental nature of this protection is clear, as reflected in the UN Special Rapporteur on the independence of judges and lawyers' 2020 report on the punishment of judges.[52] While the Council must ensure that judges know and apply the law (see competence), and set up the right to appeal and review of judicial decisions, they cannot punish judges for their interpretations of the law.[53]

56. Given the importance of perceptions around independence it is encouraging to be assured that the Justice Council law appears to include immunity for judges for prosecution for their judicial decisions. It should clarify how they will be investigated if they commit crimes not covered by the immunity, and the process in such cases.

Functional independence from Executive and Judicial oversight in judicial decision making

57. Judges must be independent from the executive, as noted above, but also from undue influence from within the judiciary, and from the public.[54]

58. While in practice, issues most often arise where political authorities intervene,[55] independence in the exercise of judicial functions notably extends to freedom from interference within the judiciary. For example, the UN endorsed *Bangalore Principles* note: '*1.4. In performing judicial duties, a judge shall be independent of judicial colleagues in respect of decisions that the judge is obliged to make independently.*'

59. In reaching their decisions, the authorities insist there is complete independence and no intervention from the authorities: '*The judges apply the law and the justice council supervises*

[51] ILAC, 'Rule of Law Assessment Report: Syria 2017', at 42-43 <http://www.ilacnet.org/wp-content/uploads/2017/04/Syria2017.pdf>.
[52] UN General Assembly, Independence of judges and lawyers, Report of the Special Rapporteur on the independence of judges and lawyers, Diego García-Sayán, UN Doc. A/75/172, 17 July 2020, published 15 Oct 2020, at para 95 <https://www.undocs.org/A/75/172>; UNHRC, Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/14/26, 9 April 2010, at para 68 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/126/22/PDF/G1012622.pdf?OpenElement>.
[53] See e.g. a Venezuelan judge whose arrest for authorising release was arbitrary detention: UNWGAD, 'Opinion 20/2010, Communication addressed to the Government of the Bolivarian Republic of Venezuela concerning Maria Lourdes Afiuni Mora' in UN Doc. A/HRC/16/47/Add.1, 17 March 2010 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/102/76/PDF/G1110276.pdf?OpenElement>.
[54] UNODC endorsed Bangalore Principles on Judicial Conduct, ECOSOC 2006/23 Strengthening Basic Principles Of Judicial Conduct (2008), at 75.
[55] e.g. where a decision of a military court in Mexico could be 'revised' by federal authorities and lacked independence *Radilla-Pacheco v Mexico*, Judgment, Inter-American Court of Human Rights, Serie C 209, 23 November 2009, at para 281 <https://www.corteidh.or.cr/corteidh/docs/casos/articulos/seriec_209_ing.pdf>.

their application of the law.' The Judicial Authority law also refers to the mandate of the Judicial Council as, among others, 'supervising' judges 'identifying the errors and violations committed by associated members or committees, and refer them to legal authorities…'[56]

60. Without reading too much into language used, international standards require that there is no interference in - or 'supervision' of - judges application of the law beyond the normal process of appeal or review of decisions. There is no indication of interference by AANES, or undue interference of the judicial council. But it may be worth clarifying in the rules and statutory framework, as well as through training and operation, that in their decision-making function judges must not operate within the power of the executive, the public *or* the justice council and have personal independence.

- Judicial power

61. While in practice, it will often fall to others to implement decisions, judges must have the power to reach decision and to make essential orders to secure appropriate remedies, independent of approval by political authorities. Among many examples, the UN Committee against Torture raised concerns where there was scope for an Attorney General to overrule a Supreme Court order to release people on bail.[57] Remedies, and in particular release, undoubtedly raise complex issues in this context, but care is due to ensure judicial authority cannot be undermined by political decisions, and that judicial decisions can be given effect.

Transparency and 'Faceless' judges

62. Transparency is often associated with fair trial rights and the effectiveness of investigation (Section III below), but it is also a safeguard linked to judicial independence. Human rights bodies such as the UN Human Rights Committee have criticised the use of 'faceless judges' to judge person accused of terrorism as undermining independence and impartiality. In security sensitive contexts this may be a temptation, but '[i]n a system of trial by "faceless judges", neither the independence nor the impartiality of the judges is guaranteed, since the tribunal, being established *ad hoc*, may comprise serving members of the armed forces'.[58] I have no information in respect of the public nature of judges and the process in NES but guarantees of a reasonable degree of transparency, despite the security situation, would be important. The basic right to a public trial and reasoned, public judgment (noted below), are also linked to the safeguard of transparency in judicial proceedings.

Independence, Investigation and Trial

[56] Article 3 Judicial Authority Law.
[57] Seven people had been detained for allegedly attempting a coup in Burundi: UNCAT, 'Concluding Observations: Burundi', UN Doc. CAT/C/BDI/CO/1, 15 February 2007, at para 12 <https://undocs.org/en/CAT/C/BDI/CO/1>.
[58] UNHRC, *Polay Campos v Peru*, Views, 577/1994, UN Doc. CCPR/C/61/D/ 577/1994, 9 January 1998, at para 8.8 <https://undocs.org/en/CCPR/C/61/D/577/1994>. See also *Incal v Turkey*, Judgment, European Court of Human Rights, 22678/93, 9 June 1998 <http://hudoc.echr.coe.int/eng?i=001-58197>; *Grieves v The United Kingdom*, Judgment, European Court of Human Rights, 57067/00, 16 December 2003 <http://hudoc.echr.coe.int/eng?i=001-61550>; *Sadak et al. v Turkey*, Judgment, European Court of Human Rights, 29900/96, 29901/96, 29902/96 and 29903/96, 17 July 2001 <http://hudoc.echr.coe.int/eng?i=001-59594>; *Öcalan v Turkey,* Judgment, European Court of Human Rights, 46221/99, 12 March 2003 <http://hudoc.echr.coe.int/eng?i=001-69022>.

63. The independence of the court needs respect at every stage of the proceedings. This includes a clear separation between the investigating authorities and the decision-makers. The rules should be more explicit that if judges were involved during investigation they cannot be involved at trial. The right to appeal in turn must be before an independent, impartial and competent higher tribunal. [59]

64. This requires the existence of sufficient panels of judges. Interviewees indicated there are multiple panels, reflecting these different roles and the need to separate them. Attention may be needed to whether it is possible to bolster the ranks of the judges to facilitate this if more trials proceed.

Ensuring Impartiality and Recusal, Addressing Bias

65. A tribunal must be both subjectively and objectively impartial, as referred to in Advice 1.[60] Certain aspects of ***objective impartiality*** are particularly important in armed conflict situations. This includes ensuring the military or armed group is not involved in the adjudication process in any way. Obvious examples include state security courts, such as those in Turkey, which violated the objective impartiality requirement partly due to the presence of a military judge,[61] but involvement and undue influence could be less direct and visible.

66. I have seen nothing to indicate that those engaged in the conflict would have a presence on the bench or *de facto* in the process, but care is due to ensure this is the case, and is seen to be so.

67. ***Subjective impartiality*** may also be challenging in the context of the particular crimes at issue and of the ongoing conflict situation. Clarifying the normative framework and expectations of judges in this respect would be important. In principle, judges should have no personal interest in the outcome of a case, and decide without prejudice towards the culture, education, social background or any other personal conditions of the parties.

68. While time for extensive legal education may not be realistic in the present context, basic vetting, training and awareness raising of bias and support to ensure that political, religious, moral or other personal views do not influence decisions would be important. This would include the role that bias plays in evidence gathering, analysis of evidence treatment of victims and witnesses etc. Avoiding statements in relation to the responsibility for the crimes strengthens the perception of impartiality and preserve the presumption of innocence.

69. Where an adjudicator feels they cannot escape personal bias, they must voluntarily withdraw from adjudicating the case; if they do not, this will be a valid ground for disqualification.[62]

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[59] These do not appear to be reflected in the requirements of judges in the Judicial Authority law at this time.
[60] See Advice 1, at 26.
[61] *Öcalan v Turkey,* Judgment, European Court of Human Rights, 46221/99, 12 March 2003 <http://hudoc.echr.coe.int/eng?i=001-69022>.
[62] *Ibid.*

70. The grounds and process of recusal should be clarified in the judicial rules. Account must always be taken of the realities of judges as human beings in a conflict situation, inevitably with opinions that will be relevant to adjudicating notorious crimes. The Bangalore Principles reflect reasonable expectations and the need for flexibility:

> '2.5. A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where: (a) The judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings; (b) The judge previously served as a lawyer or was a material witness in the matter in controversy; or (c) The judge, or a member of the judge's family, has an economic interest in the outcome of the matter in controversy;
> *provided that disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice.*'

Competence

71. As the Basic Principles on the Independence of the Judiciary merely states that '[p]ersons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law.'[63] There is no specific rule governing the level of education or experience required for a competent judge or bench to be composed. The basic requirement – albeit often not followed in systems around the world – is that judges be legally qualified.

72. These basic requirements appear to be met in this situation, on the basis of information provided during interviews which indicated that:

> '*All judges should have a BA in law*' and '*All the judges have at least a BA in law and 2 or 3 have master or doctorate in law. One of the judges was previously a judge in the Syrian court system.*'
> Selection is '*through a competitive exam with a written and oral exam and those who pass are appointed by the Justice council.*'

73. Interviewers suggest that as a result of their level of education, judges clearly *'commanded the respect of prosecutors and security and intelligence sectors.'*

74. It is noted however that the requirements for membership of for example the appeals chamber do not appear to involve legal qualifications.[64]

[63] UN Office of the High Commissioner for Human Rights, Basic Principles on the Independence of the Judiciary, 6 September 1985, Principle 10 <https://www.ohchr.org/en/professionalinterest/pages/independencejudiciary.aspx#:~:text=The%20judiciary%20shall%20decide%20matters,quarter%20or%20for%20any%20reason>.

[64] Article 2, Court of Cassation of the Judicial Authority law.

75. An effort to ensure continuing legal education and mentoring for judges, prosecutors and other personnel and to address any discrimination or corruption within the administration of justice must be made. Again the dictates of the reality on the ground and need for prompt trials would suggest lengthy processes of training on international crimes and fair trial are implausible. But some training backed up with support on an ongoing basis, to bolster the competence of judges that may not have experience of some issues, such as international crimes, gendered dimensions of justice processes, would be important to ensure competence for the task at hand and the credibility of the process.

Composition and Representation

76. It is good practice for criminal trials to be adjudicated by a panel of judges, despite the fact that in some systems a sole judge can determine guilt or innocence as well as sentence, depending on the nature of the crimes.

77. It is encouraging in this context that cases would be heard, and appealed, by panels of 3 judges. As noted above, the investigative trial and appeal stages must have different judges, which is reflected in the scheme anticipated now, as presented in discussions.

78. The importance of gender balance and its interlinkage with the core requirements of independence, impartiality and competence, and basic fair trial rights, has been made clear across international practice in recent years. This is reflected in a 2020 report of the UN Human Rights Council (UNHRC) for example, making clear that appropriate representation is linked to the effective protection of women's rights and freedom from discrimination.[65]

79. The approach in NES is encouraging in this respect too. I understand there is a quota of at least one woman per bench. The information I have been given is that in the court that would prosecute the women in NES:

> '*Courts are made of 3 judges mixed between men and women (at least one women per court). There is a female judge in the court of cassation and in the court of first instance. In the public prosecution, there are two female judges in the Qamishlo court and the same for the Kobani court where there are female court in sitting courts and prosecution. The female judges look into all cases for men and women.*'

80. While balanced gender representation may not be a core requirement, it is undoubtedly an important and positive feature of the proposed trials, and linked to ensuring justice in the context of complex crimes committed by and against women.

[65] UNHRC, 'Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers', UN Doc. A/HRC/44/L.7, 14 July 2020 <https://undocs.org/A/HRC/44/L.7>: emphasizing also that an independent and impartial judiciary, objective and impartial prosecution services and an independent legal profession, which foster a balanced representation of men and women and the establishment of gender-sensitive procedures, are essential for the effective protection of women's rights, including protection from violence and revictimization through court systems, to ensuring that the administration of justice is free from gender-based discrimination and stereotypes.

Safeguard of international engagement

81. In conclusion, there seems commendable ***recognition*** of the importance of independence and impartiality and progress in this respect. These should be secured in the ***regulatory framework***, to the extent this is not the case now, and where necessary fleshed out.

82. Ensuring adequate ***human and financial resources*** for the judicial system to function effectively and independently are key priorities.

83. Ensuring sufficient ***numbers and panels of judges*** would be important to avoid any overlap in judicial roles on any one case, and the potential for recusal when necessary.

84. The relevant authority are fully aware of the need for ***international support*** to fully comply with all elements of the tests set out above, to ensure adequate resources and bolster legitimacy and capacity. As one interview notes, the '*NES sees the prosecution of the Islamic State as a joint responsibility between NES and the international community or at least with the members of the global Coalition against Daesh based on the relationship of military partnership with respect to terrorism. This is based on the security council decision 2107 by virtue of which the member states of the coalition have been mandated to combat the Islamic State and to ensure they are subjected to the justice system. So as partners on the ground from a military perspective, the AANES look for a partnership in sharing the burden of prosecution.*'

85. Providing ***support and training*** to judges is recognized as essential in this context; this should include training in ***countering preconceptions and biases*** to safeguard impartiality and perception of impartiality, and the presumption of innocence, fair trial and equality rights more broadly.

86. The AANES seeks ***external judicial input*** and support. It has suggested that an international court be established, but is also open to other forms of external involvement. This could include through one of the judges on a panel being external to Syria and further removed from the conflict. In interview it was stated that:

> '*The AANES looks forward to this partnership happening in NES through the establishment a court with an international aspect under the supervision of the international community and the security council or at least the member states of the coalition and with their approval by providing legitimacy to these prosecutions and courts*. The AANES is looking at achieving this through the *participation of judges with expertise from these states or at least supervision or recognition of these courts by recognising the decisions issued by these courts.*'

SECTION III: <u>Human Rights and Fair Trial</u>

87. The core aspects of fair trial are outlined in the original note, which made clear that core guarantees of fair trial are reflected fairly consistently across both IHL and IHRL, for International Armed Conflict and Non-International Armed Conflict, under treaty and customary law. Despite this, human rights and fair trial concerns arise recurrently in counter-

terrorism prosecutions globally. The recent prosecutions in Iraq exemplify many of these problems, and alert to the need for an alternative approach, which is recognized by the Autonomous Authority.

88. Fair trial rights, applicable in all conflicts, must be protected at all stages of the process: investigation, trial, and appeal. As the ICRC Principles on Investigation note

> *'[t]he right to a fair trial is a fundamental guarantee of international humanitarian law, and is also protected under human rights law…. The fair trial rights of a suspect must be respected in all stages of any criminal proceedings, from the moment an investigation commences until the rendering of a final judgment on appeal.'*

Fairness of 'proceedings as a whole' and the Minimum Core

89. While IHRL does provide a list of specific fair trial rights during investigation and trial, some of which are highlighted below, it is necessary to consider the fairness of proceedings as a whole, in the particular context. This inherent need for a holistic approach is broadly reflected across IHRL, but well expressed in Amnesty International's fair trial manual:

> *'Assessing the fairness of criminal proceedings is complex and multi-faceted. Each and every case is different, and must be examined on its merits and as a whole. ... in an individual case, the analysis of whether a trial has been fair usually requires a review of the proceedings as a whole. A fair trial may not necessarily require that there have been no errors made and no defects in the process. Sometimes a trial is flawed in one aspect alone, and this flaw may or may not taint the fairness of the proceedings as a whole. ... Conversely, …observing each of the fair trial guarantees does not, in all cases and circumstances, ensure that a hearing has been fair. The right to a fair trial is broader than the sum of the individual guarantees. An assessment of the fairness of criminal proceedings depends on the entire conduct of the proceedings, including appeals, where breaches of standards during trial may be corrected.'*[66]

90. At the same time, as the Inter-American Court of Human Rights put it, 'the concept of a fair hearing in criminal proceedings also embraces, at the very least, those *minimum guarantees.*'[67] As regards prosecution by *de facto* authorities in NES specifically, the Stockholm District Court has found that the process must be independent and impartial and able to satisfy the following basic due process requirements: a) the presumption of innocence, b) the right of defence before and after trial, c) the right not to testify against oneself, d) the right to a trial within a reasonable time, e) the right to hear witnesses and to adduce evidence, f) the right to a public trial and a public verdict, and g) the right to appeal.[68]

91. This section highlights standards on specific issues that have arisen in discussions as areas of particular challenge or controversy in practice. Given what we understand to be the rudimentary stage of investigation and evidence gathering, the focus of this section is on rights

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[66] Amnesty International, Fair Trial Manual, 2nd edition (2014), xvi <https://www.amnesty.org/download/Documents/8000/pol300022014en.pdf>.

[67] *Exceptions to the exhaustion of domestic remedies*, Advisory Opinion, Inter-American Court of Human Rights, OC-11/90 Serie C No 209, 10 August 1990, at para 24 <https://www.corteidh.or.cr/docs/opiniones/seriea_11_ing.pdf>.

[68] Stockholm District Court, Case No. B 3787-16, Judgment of 16 February 2017 <https://www.ejiltalk.org/wp-content/uploads/2017/03/Stockholms-TR-B-3787-16-Dom-2017-02-16.pdf>; see also Advice 1, at 20.

during investigation, though rights during trial are also touched on. As facts emerge and the process unfolds, new priority issues may arise and can be addressed.

Investigation and Evidence Gathering

92. Rights during the investigative stage (or indeed pre-investigative stage), are implicated through the way in which evidence is collected, the requisite independence and impartiality of an investigative authority, the rights of suspects to information, to counsel, to interpretation, not to be compelled to testify against oneself or to confess guilt and to a fair trial without unreasonable delay. All of these pre-trial rights are cited in the 2019 ICRC Guidelines on Investigation as rights relevant to and applicable in investigations in conflict situations.[69] Their observance is key to a rule of law compliant criminal process, and may affect reliability and admissibility of evidence and the feasibility of criminal proceedings, and international cooperation, in due course.

Duties to Investigate and International Benchmarks of 'Effectiveness'

93. It is worth recalling at the outset that there are obligations on states to investigate and prosecute serious crimes under international law, including under IHL and – in more detail – under IHRL which provide benchmarks that inform how we understand 'effective' investigation. As noted in the ICRC Guidelines on Investigation, certain investigative obligations are implicit in the proper application of IHL, and explicit in some provisions.[70] IHRL standards (including several specific treaty provisions and more elaborate jurisprudence) enshrine the duty as one applicable also in armed conflict situations.[71] The ICRC Guidelines describe these obligations as 'the *primary* responsibility of states.'[72] However, as noted, in principle if *de facto* authorities assume responsibility of law enforcement they should so far as possible ensure that the investigations meet the basic benchmarks of 'effectiveness'[73] and they should certainly ensure that the fair trial rights, to which they are linked, are respected.

94. International standards indicate that effective investigations are ones that are independent,[74] prompt, thorough, and, so far as possible, transparent.[75] So far as linked to fair

[69] ICRC, Geneva Academy, 'Guidelines on investigating violations of International Humanitarian Law: Law, Policy, and Good Practice', September 2019 (ICRC Guidelines on Investigation), at paras 55 and following <https://www.geneva-academy.ch/joomlatools-files/docman-files/Guidelines%20on%20Investigating%20Violations%20of%20IHL.pdf>.
[70] *Ibid.*
[71] See e.g. Articles 4, 5, 7, 12 Convention Against Torture; Articles 3, 12 Convention for the Protection of all Persons from Enforced Disappearance; UNHRC, 'General Comment 31, The nature of the general legal obligation imposed on States Parties to the Covenant', UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, at para 18 <https://undocs.org/CCPR/C/21/Rev.1/Add.13>. For a recent examples of jurisprudence see *Hanan v Germany*, Judgment, European Court of Human Rights, 4871/16, 16 February 2021 on investigations into alleged unlawful attacks in Afghanistan <http://hudoc.echr.coe.int/eng?i=001-208279>, or *Rodriguez Vera y Otros (Desaparecidos del Palacio de Justicia) v Columbia*, Judgment, Inter-American Court of Human Rights, Serie C No 287, 14 November 2014 <https://www.corteidh.or.cr/docs/casos/articulos/seriec_287_esp.pdf>.
[72] ICRC Guidelines on Investigation, at para 29.
[73] ICRC Guidelines on Investigation, at paras 30-34 on the relevant standard across IHRL and IHL.
[74] Controversies around whether independence requirements under IHRL apply with the same force under IHL (for investigations by the military of its own members of the armed forces) do not arise in the same way in this context of ISIS crimes and are not addressed here.
[75] ICRC Guidelines on Investigation; *Santo Domingo Massacre v Colombia*, Judgment, Inter-American Court of Human Rights, Serie C No 259, 30 November 2012, at paras 154-173 <https://www.corteidh.or.cr/docs/casos/articulos/seriec_259_ing.pdf>;

trial rights, these are discussed below. It also bears acknowledgement that what constitutes an 'effective' investigation must be interpreted mindful of contextual specificities, including some realities of particular conflict situations, so as not to impose impossible burdens.[76] As the ICRC notes: '*There should be no fundamental difference between the general principles of an effective investigation in armed conflict and outside it, as their application will depend on what is feasible in each situation.*'[77]

95. All feasible steps should be taken by states, and the AANES, to collect, analyse, preserve, and store evidence.[78] IHRL does not set out in detail what steps must be taken or how, providing only broad rights-dependent parameters. There are, however, international best practice guidance on specific types of investigation – such as sexual violence, extra-judicial executions or torture, among others, including in conflict situations – that can be drawn on to in elaborating a credible and effective investigation plan within the contextual limitations.[79] Undoubtedly this requires the '*Allocation of resources … in an adequate and reasonable manner within the overall context.*'[80] In this context this will require investment and allocation of external support.

Who Investigates: independence and competence of the Investigating authority?

96. The standards governing 'effective investigation' referred to above suggest that investigating authorities should in principle be 'independent' and impartial in various ways. They must be independent of those subject to investigation, they must not harbour biases that impinge on impartiality, and as noted in Section II they must be strictly independent of judicial triers of fact, and functionally independent of undue influence of political actors in the conduct of an investigation.

97. They should also have adequate capacity to fulfil their function competently, by being supported by lawyers, interpreters and others with 'special expertise related to specific vulnerabilities in armed conflict should be ensured, such as for cases of alleged sexual violence,

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Isayeva v Russia, Judgment, European Court of Human Rights, 57950/00, 24 February 2005, at paras 209-214 <http://hudoc.echr.coe.int/eng?i=001-68381>; *Al-Skeini v UK,* Judgment, European Court of Human Rights, 55721/07, 7 July 2011, at paras 161-167 <http://hudoc.echr.coe.int/eng?i=001-105606>.

[76] ICRC Guidelines on Investigation, at para 33; *Jaloud v the Netherlands*, Judgment (Grand Chamber), European Court of Human Rights, 47708/08, 20 November 2014 <http://hudoc.echr.coe.int/eng?i=001-148367>.

[77] ICRC Guidelines on Investigation, at para 34.

[78] ICRC Guidelines on Investigation, Guideline 8, at paras 135 and following.

[79] See e.g. good practice guidance on, *inter alia*, extra-legal, arbitrary and summary executions (UN OHCHR, 'Revision of the UN Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions' (Minnesota Protocol), 2016 <https://www.ohchr.org/Documents/Publications/MinnesotaProtocol.pdf>); torture (UN OHCHR, 'Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (Istanbul Protocol), UN Doc. HR/P/PT/8/Rev.1, 2004 <https://www.ohchr.org/documents/publications/training8rev1en.pdf>); deaths in custody (ICRC, 'Guidelines for Investigating Deaths in Custody', October 2013 <https://www.icrc.org/en/doc/assets/files/publications/icrc-002-4126.pdf>); sexual violence (UK Foreign and Commonwealth Office, 'International Protocol on the Documentation and Investigation of Sexual Violence in Conflict' 2nd ed, March 2017 <https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2019/06/report/international-protocol-on-the-documentation-and-investigation-of-sexual-violence-in-conflict/International_Protocol_2017_2nd_Edition.pdf>); and enforced disappearances (International Commission of Jurists, 'Enforced Disappearance and Extrajudicial Execution: Investigation and Sanction', 2015 <https://www.icj.org/wp-content/uploads/2015/12/Universal-Enforced-Disappearance-and-Extrajudicial-Execution-PGNo9-Publications-Practitioners-guide-series-2015-ENG.pdf>) are all referred to in ICRC Guidelines.

[80] *Ibid.*

torture, or incidents in which children may have been victims, witnesses, or suspects.'[81] Efforts should be met in future evidence gathering, to have it driven by independent, impartial and trained investigating authorities.

98. Questions have been raised as to the implications of what may have been a dominant role for the non-state armed groups and of intelligence actors in gathering of any evidence to date. There is nothing in principle to suggest that evidence gathered by the military or indeed by intelligence agencies is inherently problematic or cannot be relied upon (and in many systems it is[82]), provided fair trial standards are met. Human rights fair trial issues do however arise in practice from military and intelligence agency involvement in investigations (e.g. chain of custody of evidence seized on the 'battlefield', access to evidence gathered by intelligence agencies and classified or where serious rights violation arise, among others) as noted below.

Investigation: open, thorough and unbiased examination of facts

99. Evidence gathering, much of which still seems to be required, should meet basic principles relevant not only to the quality and thoroughness of the investigation but to its fairness from the perspective of the accused. As a starting point, the investigation must seek, openly and without prejudice, to establish the facts, in order to determine whether and by whom crimes were committed. It must not be a 'fishing expedition' aimed at justifying detention or prosecution of particular detainees, or based on preconceived ideas of the nature of the crimes or roles of individuals or groups.[83]

100. Investigation should include exculpatory evidence,[84] which should be disclosed to the accused. This is particularly important where the defence's own ability to investigate is minimal (see below on Counsel).

101. Evidence of the crimes in question – specific fact base and contextual elements – will take many forms, and will require not only evidence gathering but careful, bias free, analysis. Given the fundamental nature of the right to equality, it is essential that investigation, analysis and evidence (and later charging) are not discriminatory.

102. Recent experience of forms of evidence used in trial abroad, which provides examples of evidence in relation to the roles of particular individuals with ISIL.[85] For example, digital

[81] ICRC Guidelines on Investigation, Guideline 7, at para 131.

[82] Eurojust, 'Eurojust Memorandum on Battlefield Evidence', September 2020, at 8 <https://www.eurojust.europa.eu/sites/default/files/2020-09/2020-09-14-Eurojust-Memorandum-on-Battlefield-Evidence.pdf>.

[83] Statement by Ms. Fionnula Ni Ailain, Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism 'Virtual open briefing of the Counter-Terrorism Committee on "The role of judges, prosecutors and defence counsel in bringing terrorists to justice, including the effective use of battlefield or military-collected evidence"', 12 November 2020 <https://www.ohchr.org/EN/Issues/Terrorism/Pages/Statements.aspx>.

[84] See e.g. Model Code of Criminal Procedure (MCCP), 30 May 2006, Article 34 cited in UNODC, 'Access to Justice, The Prosecution Service', 2006 at 7 <https://www.unodc.org/documents/justice-and-prison-reform/cjat_eng/3_Prosecution_Service.pdf>. Article 34 requires that the office of the prosecutor investigate both incriminating and exonerating circumstances equally; ICC Statute and many domestic systems.

[85] Eurojust, 'Eurojust Memorandum on Battlefield Evidence', September 2020, at 15 <https://www.eurojust.europa.eu/sites/default/files/2020-09/2020-09-14-Eurojust-Memorandum-on-Battlefield-Evidence.pdf>, features several examples of materials that were used in the courts of respondent States: 'mobile phone data, credit cards, a national administrative document for job seekers, a payroll roster, a list of patients in a hospital, a notebook, a

evidence will be important, particularly given the alleged roles of many women with the Da'esh structure, as online recruiters for example. Care is due in the analysis of such information given the 'potential for bias to impact upon the collection and analysis of such information.'[86] The authorities recognise the need for capacity building and experts on relevant investigative and analytical skills that have been developed in other contexts in accountability of international crimes.

Evidence Gathering Documentation and Chain of Custody

103. The collection of 'battlefield evidence,' its potential and challenges, has been the subject of a soft law explosion. There is now an abundance of 'standards,' from NATO, UN, Eurojust and the United States,[87] and others that being developed.[88] These may provide guidance to interpret international standards in some situations and useful indicators of good and bad practice. Caution is due as they cannot replace or set aside human rights legal standards, as noted with concern by the UN Special Rapporteur on Terrorism and Human Rights.[89]

104. As a starting point, as the ICRC Guidelines on Investigation reflect, all 'investigative steps should be documented.'[90] This proves the diligence of the investigating authorities, steps taken and 'the thoroughness of an investigation should queries and challenges later arise.'[91] It is obviously also essential to allow defence challenge and judicial oversight of the reliability and authenticity of evidence. Particularly where information is collected from conflict or high-risk areas, particular attention is due to documentation, forensic standards and chain of custody.[92]

105. With regard to ***chain of custody***, national laws provide detailed frameworks for the treatment and use of evidence already obtained. Although originally a common law concept, civil law systems often contain detailed rules on seals, documentation transfer and preservation, for example, and in some systems, if not followed, may invalidate the investigative act, render

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wedding invitation, a contract of marriage, a will'. Several States reported that their courts accepted ISIS registrations forms as evidence of membership to the group.

[86] Y. McDermott, A. Koenig, D. Murray, 'Open Source Information's Blind Spot: Human and Machine Bias in International Criminal Investigations', *Journal of International Criminal Justice* (2021), at 21.

[87] US Departments of State, Justice and Defense, 'Non-binding guiding principles on use of battlefield evidence in civilian criminal proceedings' <https://theiij.org/wp-content/uploads/Non-Binding-Guiding-Principles-on-Use-of-Battlefield-Evidence-EN.pdf>. Eurojust refers to US standards as follows: 'US authorities have gained a lot of experience in collecting battlefield information and making it available to international partners. To assist states in their efforts to address some of the challenges in requesting and using battlefield information, the US authorities have issued Nonbinding guiding principles on use of battlefield evidence in civilian criminal proceedings…' in Eurojust, 'Eurojust Memorandum on Battlefield Evidence', September 2020, at 5 <https://www.eurojust.europa.eu/sites/default/files/2020-09/2020-09-14-Eurojust-Memorandum-on-Battlefield-Evidence.pdf>.

[88] Ongoing examples include e.g. Council of Europe Working Group on the Gathering of Evidence from Conflict Zones for the Purpose of Criminal Prosecutions, as part of its counterterrorism strategy (2018–2022), is drawing up guidance on how to gather battlefield evidence and present it in court during criminal proceedings in accordance with the principle of the rule of law and human rights.

[89] UN General Assembly, 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism', UN Doc. A/74/335, 29 August 2019 <https://undocs.org/pdf?symbol=en/A/74/335>.

[90] ICRC Guidelines on Investigation, Guideline 8, at para 141.

[91] *Ibid*. This documentation 'should include what actions have been taken, what actions were attempted, and what actions were not able to be taken and why. Documentation serves, *inter alia*, to demonstrate the thoroughness of an investigation should queries and challenges later arise.'

[92] *Ibid*, at paras 130, 135.

the evidence inadmissible or create a presumption of non-reliability under domestic law.[93] Whichever approach the system adopts, the purpose of these rules is to ensure evidence cannot be tampered with, corrupted or altered. International law does not have rigid or specific requirements on chain of custody, but it does require a framework that provides assurance that evidence is reliable and contestable, as part of broader obligations to ensure a fair and just trial. Recent soft law standards on the role of military in gathering battlefield evidence support the basic idea that, in all situations, securing chain of custody will be important to enable a criminal tribunal to satisfy itself that elements of proof were those seized at the relevant location.

106. The ***record of investigative steps*** should show in detail and chronologically *how the evidence was seized and handled: at a minimum, the military should record what was seized, when, and by whom; who handled the information; and when it was transferred to law enforcement or judicial authorities. Any breaks in the chain of custody should be documented and explained.*[94]

Questioning potential Suspects, Cautions and Safeguards

107. The information available suggests that interviews, informal discussions and registration processes may have been conducted with the women held at Al Hol. It was suggested that this may have given rise to certain information, which may amount to evidence of wrong doing by that person or others, though the extent of this is unknown. Certain core rights come into play if persons are questioned in relation to criminal offences absent basic safeguards, which would need to be addressed and, where possible, remedied to avoid rights violations and potentially to enable the evidence to be inadmissible.

108. *Notification*: First, there are certain 'notification' rights required under international law that apply to any person detained or questioned in relation to a criminal offence. Some arise upon 'detention' on whatever grounds – namely the requirement that 'anyone arrested or detained is informed of their rights and is provided with an explanation of how they may avail themselves of such rights'[95] – and should trigger a host of other detention related rights (not addressed here).[96] The right to be promptly notified in detail of any *charges* is also explicitly recognised across international standards.

109. However, in addition, notification must be given before any questioning of potential suspects in relation to a criminal process.[97] Advance notification of their rights in a language they understand, including of the right not to incriminate themselves, is a basic pre-requisite to

[93] F. Guariglia, *Concepto Fin y Alcance de las prohibiciones de valoración probatoria en el procedimiento penal* (Puerto, 2005), at 30.
[94] CTED, 'Guidelines to facilitate the use and admissibility as evidence in national criminal courts of information collected, handled, preserved and shared by the military to prosecute terrorist offences ("Military Evidence Guidelines")', 2020, at 27 <https://www.un.org/sc/ctc/wp-content/uploads/2020/01/Battlefield_Evidence_Final.pdf>. *Ibid*, at 27.
[95] Amnesty International, Fair Trial Manual, 2nd edition (2014) <https://www.amnesty.org/download/Documents/8000/pol300022014en.pdf> at 39.
[96] E.g. as consular assistance for foreign nationals, access to counsel and medical attention, right to challenge the lawfulness of detention and to communicate with counsel, family and others - that are not being effectively guaranteed at the moment. These detention rights are outside the scope of this advice.
[97] UNODC, 'United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice System', June 2013 (UN Principles on Legal Aid), Principle 8 at 10 and Guideline 3 at para 43(a) <https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidlines_on_access_to_legal_aid.pdf>; Article 55(2) of the ICC Statute; Rule 42 of the ICTR Rules of Procedure and Evidence; Rule 42 of the ICTY Rules of Procedure and Evidence.

safeguarding rights, the validity of the interview process and its subsequent use in criminal proceedings. The relevant legal framework I have seen notes the suspect's right to be notified of charges and to speak, but not the right to be notified of the rights against self-incrimination and the right to remain silent.[98]

110. *Right to counsel during questioning:* Second, international standards also make clear the potential suspect's right to have a lawyer during questioning.[99] This includes the right to consult in confidence with counsel beforehand.[100]

111. The right to a lawyer during questioning is reflected across international practice. In many systems, and at the ICC, suspects have to at least have the *option* of a lawyer; whereas in others, the requirement is simply to provide the lawyer – the idea being that such rights cannot be waived and counsel is a requirement for the validity of the interview itself. If the person is considered to have waived the right to legal representation, including during questioning, this must be established in an unequivocal manner and accompanied by adequate safeguards.[101] The UN Principles on Legal Aid reflect the possibility of waiver, providing that 'unless there are compelling circumstances, states should prohibit police from interviewing suspects in the absence of their lawyer unless they have voluntarily and knowingly waived the right to counsel.'[102] In the present situation of vulnerability and uncertainty, given the coercive environment of the camps and situations of detainee-interviewees, the right to counsel during questioning is likely to be considered fundamental safeguard against abuse. The UN Assistance Mission to Iraq (UNAMI) report of ISIS prosecutions in Iraq noted 'of serious concern, UNAMI received consistent reports that no lawyer was allowed to be present during interrogation by police or other security forces.'[103]

112. The implications of the failure to provide a caution or have a lawyer present is debatable and may depend on all the circumstances. But, for example, the UN Special Rapporteur on torture has stated that no statement or confession made by a person deprived of its liberty, except one made in the ***presence of a lawyer or judge***, should have probative value in court (except as evidence against a person accused of Torture or Cruel, Inhuman or Degrading Treatment (TCIDT)). The link between this right and protection against torture means the right is applicable at all times.[104]

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[98] AANES Decree on "Investigation and Prosecution Committee", Article 10.

[99] UNHRC, 'Concluding Observations: Ireland', UN Doc. CCPR/C/IRL/CO/3, 30 July 2008, at para 14 <https://undocs.org/CCPR/C/IRL/CO/3>; UNHRC, 'Concluding Observations: Republic of Korea', UN Doc. CCPR/C/KOR/CO/3, 28 November 2006, at para 14 <https://undocs.org/en/CCPR/C/KOR/CO/3>; UNHRC, 'Concluding Observations: the Netherlands', UN Doc. CCPR/C/NLD/CO/4, 25 August 2009, at para 11 <https://undocs.org/CCPR/C/NLD/CO/4>; See also UNCAT, 'Concluding Observations: Turkey', UN Doc. CAT/C/TUR/CO/3, 20 January 2011, at para 11 <https://undocs.org/CAT/C/TUR/CO/3>.

[100] UN Principles on Legal Aid, Principle 8 at para 29.

[101] Amnesty International, Fair Trial Manual, 2nd edition (2014) <https://www.amnesty.org/download/Documents/8000/pol300022014en.pdf>; Principle 8 and Guideline 3 at para 43(a).

[102] Amnesty International, Fair Trial Manual, 2nd edition (2014) at 81 <https://www.amnesty.org/download/Documents/8000/pol300022014en.pdf>.

[103] United Nations Assistance Mission for Iraq (UNAMI), Human Rights in the Administration of Justice in Iraq: Trials under the anti-terrorism laws and implications for justice, accountability and social cohesion in the aftermath of ISIL, January 2020 (2020 UNAMI Report), at 13 <https://reliefweb.int/sites/reliefweb.int/files/resources/Iraq_-_ISIL_trials_under_the_anti-terrorism_laws_and_the_implications_for_justice_28012020.pdf>.

[104] UN Special Rapporteur on torture, Report, UN Doc. E/CN.4/2003/68, 17 December 2002, at para 26(e) <https://undocs.org/E/CN.4/2003/68.

113. *Record of questioning*: Reliable recording of questioning, in some way or another, is important and widely recognised, including in AANES regulation.[105] Electronic recording is recommended good practice, and increasingly seen as required, though if other safeguards are in place this may not be treated as a strict rule.[106] However the UN Special Rapporteur on Torture has stated that evidence from interrogations which are not recorded should be excluded from court proceedings,[107] as it is an important safeguard against abuse. Interviews noted that records have been kept of detainee interviews though the nature and quality of them needs clarified.

Absence of Coercion and Right against self-incrimination

114. The right not to incriminate oneself, and the right to be cautioned in this respect, are recognised across criminal law systems and in international standards.[108] They are reflected in the right to remain silent in many systems, though differently protected, and this right is not considered absolute right in all systems.[109] However, it is inherently linked to the prohibition on compelling anyone to confess guilt, which *is* absolute. As UN Body of Principles, Principle 21 states (in terms resonate here)

> *'1. It shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person.'*

115. Ensuring the absence of coercion needs careful attention in light of the conditions in the Al Hol camp. The right involves more than an absence of TCIDT or direct coercion. As the UN Human Rights Committee has stated it requires '*the absence of any direct or indirect physical or psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt*' (emphasis added).[110] The investigation would need to ensure a safe context in which voluntariness is safeguarded. This would seem extremely difficult at the moment, absent effective protection schemes, but this is a question of fact that could evolve.

116. ***Confessions***: Any criminal law system must make meaningful provision for confession evidence, as for guilty pleas and its importance in the face of mass criminality and depleted resources is undeniable (see Section IV below). Practice shows confessions are problematic and

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[105] See e.g. Rule 111 of the ICC Rules of Procedure and Evidence: 1. A record shall be made of formal statements made by any person who is questioned in connection with an investigation or with proceedings.

[106] Association for the Prevention of Torture, African Commission on Human and People's Rights, Regional Office of the UN High Commissioner for Human Rights, 'Robben Island Guidelines for the Prohibition and Prevention of Torture in Africa', April 2008, at 47, 81 <https://www.achpr.org/public/Document/file/Any/rig_practical_use_book.pdf>; UNHRC has expressed such concerns in relation to Israel.

[107] UN Special Rapporteur on torture, Report, UN Doc. E/CN.4/2003/68, 17 December 2002, at para 26(e) <https://undocs.org/E/CN.4/2003/68>.

[108] Article 14(3)(g) of the ICCPR; Article 40(2)(b)(iv) of the Convention on the Rights of the Child; Article 18(3)(g) of the Migrant Workers Convention, Article 8(2)(g) of the American Convention on human rights; Article 16(6) of the Arab Charter on human rights; Principle 21(1) of the Body of Principles for the Protection of All Person under Any Form of Detention or Imprisonment; Section N(6)(d) of the Principles on Fair Trial and Legal Assistance in Africa; Principle V of the Principles on Persons Deprived of Liberty in the Americas; Articles 55(1)(a)-(b) and 67(1)(g) of the ICC Statute; Article 20(4)(g) of the ICTR Statute; Article 21(4)(g) of the ICTY Statute.

[109] Section N(6)(d)(ii) of the Principles on Fair Trial in Africa; Article 55(2)(b) of the ICC Statute; Rule 42(A)(iii) of the Rwanda Rules; Rule 42(A)(iii) of the Yugoslavia Rules. For the ECtHR the right is not absolute and inferences may be drawn in certain circumstances.

[110] UNHRC, 'General Comment 32, Right to equality before courts and tribunals and to a fair trial', UN Doc. CCPR/C/GC/32, 23 August 2007, (HRC General Comment 32) at paras 41, 60 <https://undocs.org/en/CCPR/C/GC/32>.

susceptible to abuse, however, even in less inherently coercive circumstances. Criminal justice systems that rely too heavily on confession evidence have been criticised for creating 'incentives' for coercion.[111] The UN Special Rapporteur on Torture suggests that confessions by detainees should only be admissible if recorded, made in the presence of a competent and independent lawyer and confirmed before a judge. International indicate that confessions should not be the sole basis for a conviction.[112]

Inadmissibility of evidence that may have been obtained through TCIDT

117. If there is any indication of statements obtained as result of torture, other ill-treatment or other forms of compulsion, the exclusionary rule in international law (and most domestic systems) applies, irrespective of safeguards that may be in place. The rule that information obtained by TCIDT, coercion, is not admissible as evidence and should not be relied on in any proceedings is absolute.[113] This would cover situation where the evidence obtained through TCIDT was gathered by others. Steps should be taken by prosecutors and judges to exercise reasonable due diligence to ensure they are not relying on evidence obtained in such a way.[114]

118. Where allegations are made that information may have been obtained by such means, it is the judge's responsibility to ensure that there is an investigation into the allegations, sufficient to safeguard the rule. The onus cannot be placed on an applicant to prove TCIDT, or that confessions for example were not freely given.[115] If a tribunal were to rely on evidence of this nature, the trial would be rendered unfair, a grave enough violation to amount to a 'flagrant denial of justice' – a serious violation of fair trial rights and of the protection against TCIDT. Other states would be obliged not to cooperate or to recognise the sentences of the tribunal if they did.[116]

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[111] See e.g. International Commission of Jurists, 'Assessing Damage, Urging Action, Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights', 2009 (ICJ Assessing Damage report), at 149 <https://reliefweb.int/sites/reliefweb.int/files/resources/5C941500ECEDDA6F492576040021DD91-Full_Report.pdf>.

[112] See e.g. UNHRC, *Nallaratnam Singarasa v Sri Lanka*, Communication No. 1033/2001, UN Doc. CCPR/C/81/D/1033/2001, 28 August 2004 <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F81%2FD%2F1033%2F2001&Lang=en>.

[113] Article 15 of the Convention Against Torture provides: 'Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings […]'. The UN Committee Against Torture has clarified this applies also in relation to inhuman and degrading treatment, and that no limitation may be placed on this prohibition in any circumstances see UNCAT, 'General Comment No. 2, Implementation of article 2 by States parties', UN Doc. CAT/C/GC/2, 24 January 2008, at para 6 <https://undocs.org/CAT/C/GC/2>. see also UN General Assembly, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, UN Doc. A/HRC/25/60, 10 April 2014 <https://undocs.org/A/HRC/25/60>.

[114] See e.g. UN Office of the High Commissioner for Human Rights, International Bar Association, 'Manual on Human Rights for Judges, Prosecutors and Lawyers', 2003, at 231 <https://www.ohchr.org/Documents/Publications/training9Titleen.pdf> noting 'it is … also the duty of judges to be particularly alert to any sign of maltreatment or duress of any kind that might have taken place in the course of criminal investigations or in detention and to take the necessary measures whenever faced with a suspicion of maltreatment.'

[115] ICJ Assessing Damage report *supra* note 106, noting examples in the terrorism context where the burden was on the accused to demonstrate confessions were not freely given.

[116] *Othman v UK*, Judgment, European Court of Human Rights, 8139/09, 17 January 2012 <http://hudoc.echr.coe.int/eng?i=001-108629>: confirms it is at the core of fair trial; see also UN General Assembly, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, UN Doc. A/HRC/25/60, 10 April 2014 <https://undocs.org/A/HRC/25/60>.

119. The rule is most explicit in relation to torture,[117] but most legal authorities, including the UN Committee against Torture, extend the prohibition to CIDT,[118] while other authorities such as the ICC or the UN standards for Prosecutors, suggest evidence obtained pursuant to other serious violations should also be excluded where for example antithetical to the fairness or integrity of proceedings.[119] While serious concerns have been raised about protection of the right to privacy and data, which deserve attention,[120] given our emphasis on the minimal core and fair trial, it could not be said that strict rules of exclusion apply to other rights violations such as privacy in the same way. What would be required in face of such violations may be an evaluation of fairness of proceedings as a whole and the reliability of evidence, including considering the need to afforded it less weight.[121]

120. The rules of procedure employed by AANES should clearly preclude admissibility of evidence where there is reasonable basis to believe it may have been obtained through TCIDT.

121. I should emphasise that I am aware of no suggestion that individuals have been or are at risk of being tortured or subjected to ill-treatment by the *de facto* authorities, or that the tribunals would rely on evidence so obtained. Steps should however be taken to ensure that this is the case, given the serious implications for individuals and the credibility of the process. It is also necessary to address the impact of conditions which may themselves amount to TCIDT.

Coercive environments and CIDT?

122. A coercive environment, such as that in the camps, is not one conducive to unhindered information sharing or to voluntary confessions. Reports suggest that the conditions are themselves inhumane, and continued detention therefore an implicit threat of ongoing CIDT.[122] Confessions rendered in the hope of being removed from that environment may well not be

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[117] Article 15 UN Convention Against Torture.

[118] Many international standards reject a distinction between torture and CIDT and the prohibition is treated as applicable to either by e.g. UNCAT; the ECtHR however has found in e.g. *El Haski v Belgium*, Judgment, European Court of Human Rights, 649/08, 25 September 2012, at para 85 <http://hudoc.echr.coe.int/eng?i=001-113445> finding that if CIDT and not torture evidence was admitted, but not relied upon for conviction, there was no violation: 'the admission of such evidence obtained as a result of an act qualified as inhuman treatment in breach of Article 3, but falling short of torture, will only breach Article 6, however, if it has been shown that the breach of Article 3 had a bearing on the outcome of the proceedings against the defendant, that is, had an impact on his or her conviction or sentence'.

[119] Article 69(7)(b) ICC Statute: 'The admission of the evidence [obtained by means of a violation of this Statute or internationally recognized human rights]would be antithetical to and would seriously damage the integrity of the proceedings'. See also e.g. United Nations, 'Guidelines on the Role of Prosecutors adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders', September 1990 (UN Guidelines on Prosecutors), <https://www.ohchr.org/Documents/ProfessionalInterest/prosecutors.pdf> Guideline 16 advising that: '[w]hen prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice'.

[120] The UN Guidelines mention specifically the right to be free from arbitrary interference with privacy and that it is not used in a discriminatory manner they recommend imposing a 'sunset clause' or temporal limit on the storage of information. There should also be specific procedures for information relating to children.

[121] International Commission of Jurists, 'Counter-Terrorism and Human Rights in the Courts, Guidance on judicial application of the EU Counter-terrorism Directive', 2020, at 37 <https://www.icj.org/eu-guidance-on-judicial-application-of-the-eu-counter-terrorism-directive/>.

[122] On direct or indirect threats of torture as torture, see UN General Assembly, 'Question of torture and other cruel, inhuman or degrading treatment or punishment', UN Doc. A/56/156, 3 July 2001, at para 7 <https://undocs.org/A/56/156>. see also *Gäfgen v Germany*, Judgment, European Court of Human Rights, 22978/05, 1 June 2010, at paras 89-91 <http://hudoc.echr.coe.int/eng?i=001-99015>.

reliable, and could not said to be 'freely given' and fully voluntary. Ameliorating that environment, to safeguard safe and reliable evidence gathering and to meet the duty to ensure any evidence was freely given and not the result of TCIDT, seems to be inescapable pre-requisite to avoiding such concerns.

123. ***Implications for pre-existing interviews and evidence gathered?*** It seems unlikely that the obligations of notification, of counsel and of safeguards against abuse were fulfilled in initial interviews, partly as these may have been conducted for different purposes. Any information gathered is unlikely to be useable as evidence, and if it is, its probative value would likely be diminished.[123] In any event, given susceptibility to abuse and credibility questions, the judicial authorities should not rely on evidence obtained from individuals questioned without safeguards.

124. International practice does not seem to rule out using such evidence for the purposes of 'leads'. Moreover, efforts could be taken to genuinely remedy the procedural deficit, without prejudice to the accused. Where, for example, certain guarantees were overlooked, subsequent interviews could be conducted by different interviewers, with enhanced safeguards and transparency, such as cautions, counsel and recording.

Access to Evidence including 'Intelligence information'

125. In practice, where information is derived from and in the hands of intelligence agencies, as in some of the evidence that may exist in the present scenario, it is often withheld from the accused and can infringe key aspects of fair trial during investigation and trial. The problem is heightened by the fact that, as the recent ICRC Guidelines note, '[t]here is a risk of over-classification of information in armed conflict.'[124] The practical implications are borne out by the UN report on ISIS prosecutions in Iraq which identified reliance on anonymous informants and intelligence or security information as one of three core concerns that lead to conclusion that the trials had not met basic fair trial standards.[125]

126. The rights at stake go to the heart of the right to defend yourself. They include the *rights of the accused to be informed* of the case[126] and to confront evidence against her and to present evidence in her own defence.[127] Without knowledge of the source of certain information, the defence is not in a position to counter its lawfulness and admissibility, or its credibility and reliability.[128] Reliability often depends on the source, origin, content corroboration or

[123] While e.g. some risks of e.g. TCIDT must be excluded in all circumstances, others where evidence was gathered, questions as to whether rights were respected at a minimum it would affect the weight that could be afforded to evidence. H. Duffy, *The War on Terror and the Framework of International Law* (2nd ed), (CUP, 2015) at Chapter 7A.
[124] ICRC Guidelines on Investigation, at para 153.
[125] 2020 UNAMI Report, at 6-7.
[126] The obligation of sufficient notice under Article 14(3)(a) of the ICCPR; see also Article 9(2) ICCPR: '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.'
[127] Art 75 of the Additional Protocol I to the Geneva Conventions specifically on confronting witnesses, and broader provisions on essential guarantees (see also Article 6 of the Additional Protocol II to the Geneva Conventions or Article 14 ICCPR).
[128] R. Cryer, D. Robinson and S. Vasiliev, *An Introduction to International Criminal Law and Procedure* (CUP, 2019), at 433.

trustworthiness of the evidence[129] and 'the value of any information as evidence, […] is, in part, dependent on its source'.[130]

127. Evidence cannot then be presented in a way that denies the accused's ability to challenge the evidence, or present evidence to counter it.[131] There is often a degree of flexibility employed in practice, reflected in abundant examples around the globe and in soft law principles (some of which are controversial), in an effort to find ways to allow evidence to be taken into account that cannot be shared for security reasons with the accused. As the Counter-Terrorism Implementation Task Force (CTITF) notes, restrictions on disclosure of information are possible 'subject to conditions that sufficiently guarantee the right of the person to respond to the case'.[132] They depend on the accused knowing the substance of charges and having a real and meaningful opportunity, on all the facts, to present evidence to counter them.[133] Alternative approaches, from redactions to summaries to special advocates have been employed in the name of finding a balance.

128. Secret evidence should never form the basis for criminal liability. Classified information is problematic if it goes to the 'material facts' of the indictment – that is, the facts which 'apprise the accused of nature, cause and content of the charges.'[134] While such information may be used in the investigation stage as a lead (unless torture evidence which should not be used for any purpose), it should not be used directly in supporting a material fact at prosecution stage.[135] The Rabat soft law standards suggest, somewhat differently, that undisclosed intelligence information may be submitted as part of the evidence, as long as it can be corroborated by other bodies of evidence.[136]

129. Whenever possible, the source as well as content of evidence should be disclosed;[137] if any less restrictive measure can achieve the same legitimate aim e.g. of ensuring security concerns are met, those measures must be applied.[138] In situations where non-disclosure occurs, it is up to the court to assess whether or not fairness is secured, and restrictions are necessary

[129] *Ibid*, at 433.
[130] International Bar Association, 'Evidence Matters in ICC Trials', August 2016, at 24 <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=b9b8dc23-6616-41ba-8ef2-3d209398bdbd>.
[131] Eurojust, 'Eurojust Memorandum on Battlefield Evidence', September 2020, at 7 <https://www.eurojust.europa.eu/sites/default/files/2020-09/2020-09-14-Eurojust-Memorandum-on-Battlefield-Evidence.pdf>.
[132] Counter-Terrorism Implementation Task Force (CTITF), Working group on protection human rights while countering terrorism, 'Basic Human Rights Reference Guide, Right to a Fair Trial and Due Process in the Context of Countering Terrorism', October 2014, at 30 <https://www.ohchr.org/en/newyork/documents/fairtrial.pdf>.
[133] See e.g. *Al-Khawaja and Tahery v. the United Kingdom* (Grand Chamber), Judgment, European Court of Human Rights, 26766/05, 22228/06, 15 December 2011, at para 127 <http://hudoc.echr.coe.int/eng?i=001-108072>; *Asani v The Former Yugoslav Republic of Macedonia*, Judgment, European Court of Human Rights, 27962/10, 1 February 2018, at paras 36-37 <http://hudoc.echr.coe.int/eng?i=001-180485>.
[134] V. Tochilovsky, 'Chapter 35. Charging in the ICC and relevant jurisprudence of the Ad Hoc Tribunals' in The Legal Regime of the International Criminal Court, *International Humanitarian Law Series* 19 (2009), 825-841, at 829.
[135] ICJ Assessing Damage report *supra* note 106, at 153.
[136] Global Counterterrorism Forum, 'Recommendations for Using and Protecting Intelligence Information In Rule of Law-Based, Criminal Justice Sector-Led Investigations and Prosecutions' (Rabat Recommendations), at Recommendation 1 <https://www.thegctf.org/Portals/1/Documents/Framework%20Documents/2016%20and%20before/GCTF-Rabat-Good-Practice-6-Recommendations-ENG.pdf?ver=2016-09-01-151629-950>.
[137] Global Counterterrorism Forum, 'Abuja Recommendations on the Collection, Use and Sharing of Evidence for Purposes of Criminal Prosecution of Terrorist Suspects', 2018 ('Abuja Recommendations'), Recommendation 18, at 15 <https://www.thegctf.org/Portals/1/Documents/Framework%20Documents/2018/GCTF-Abuja-Recommendations_ENG.pdf?ver=2018-09-21-122246-523×tamp=1580219129062>.
[138] CTITF, *supra* note 127.

and proportional on a case-by-case basis. There is a growing body of case law to draw from setting out considerations that should be taken into account in that evaluation.

130. **Equality of Arms and the Urgent Need to Strengthen the Right to Counsel*:*** Respect for equality of arms is under strain where for example defence and prosecution have a significantly disproportionate rights and resources to give effect to them. While a common problem, it threatens to take extreme form in this context where defence rights such as access to counsel are jeopardised.

131. Access to counsel, and the ability to consult confidentially with counsel, lies within the non-derogable core of fair trial rights applicable at all times.[139]

132. In this context, though the women are to be afforded counsel in principle, interviews suggest defence counsel are entirely unpaid. This needs remedied if they are to be able to carry out their role professionally and competently. Similar considerations of capacity arise as for other actors in the process. It is unclear to what extent counsel have qualifications, support or resources, and meaningful confidential access to their clients to discharge their function.

133. Informal reports suggest access difficulties, and security concerns, impeding meaningful access to counsel. Women need sufficient protection to be able to consult counsel, provide evidence and to participate in the process generally without fear of reprisals. This forms part of the need to address witness protection and the broader security landscape as a pre-requisite to fair trials.

134. Defence counsel are likely to have more limited access to sensitive information. Since prosecutors generally have higher level and broader clearances than defence lawyers, the intelligence information is available to only one of the parties, infringing upon the equality of arms. Where the prosecution, the judge and the intelligence agents collaborate closely, without at all consulting the defence,[140] such cases raise serious doubt as to the tribunal's objective impartiality and fair trial standards.[141] Therefore, in order to ensure the equality of arms, measures may need to be taken to ensure sufficient defence counsel with the appropriate level of clearance.[142]

135. The principle of equality of arms does not mandate that both parties materially have the same resources, rather the same procedural rights.[143] However a range of factors can so undermine the notion of equality that they challenge the fairness of proceedings.[144]

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[139] This is enshrined in binding treaty law, ample jurisprudence across systems and more recently eg. CTITF *supra* note 127, at paras 68-71.

[140] C. Rosenberg, 'Trial Guide: The Sept. 11 Case at Guantánamo Bay', The New York Times, 30 September 2020, <https://pulitzercenter.org/reporting/trial-guide-sept-11-case-guantanamo-bay>; C. Rosenberg, 'The Growing Culture of Secrecy at Guantánamo Bay', The New York Times, 4 April 2020, <https://pulitzercenter.org/reporting/growing-culture-secrecy-guantanamo-bay>.

[141] HRC General Comment 32, at para 23.

[142] Rabat Recommendations, *supra* note 131, Recommendation 5, at 7.

[143] *Ibid*, at para 13. See also UNHRC, *Dudko v Australia*, Communication No. 1347/2005, UN Doc. CCPR/C/90/D/1347/2005, 23 July 2007, at para 7.4 <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F90%2FD%2F1347%2F2005&Lang=en>.

[144] UN General Assembly, 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism', UN Doc. A/63/223, 6 August 2008, at para 35 <https://undocs.org/A/63/223>.

Charges and Trial within Reasonable Time

136. The right to be notified of charges within a reasonable time is a basic fair trial right (linked to others under the right to liberty). Promptness is a benchmark of effective investigation. While serious criminal investigations are challenging and time consuming, it is also true that evidence can be – and will have been – lost and there are right implications for victims and suspects of 'justice delayed', even in normal circumstances.[145] If justice is unduly delayed, in particular due to lack of due diligence by the authorities, as noted in the Advice 1, questions may ultimately arise as to the right of the authorities to prosecute at all, through e.g. abuse of process doctrine. This is exceptional and unlikely to arise, but is the ultimate consequence of pre-trial violations.[146]

Other issues concerning effective investigation and prosecution

Women, Equality & Juvenile Justice

137. Facts available to date suggest that women have not yet been subject to serious investigation and none have been prosecuted. the importance of holding women perpetrators to account needs to be considered, alongside the importance of investigation of serious crimes in general, and the avoidance of discrimination in the application of criminal law.

138. As noted in Advice 1, and supported by emerging facts, the complexity of victim-perpetrator relationship means that careful attention is needed to protect victimisation. In respect of women who should be prosecuted, considerable standards on the prosecution of women defendants can assist and inform the approach to investigation and prosecution, even in the challenging context at hand.[147]

139. Facts also appear to reveal that among the male detainees, '*Some minors … have been convicted whether for crimes committed in the camps or if they were participating in terrorism cells or combat operations. The age of these minors is between 12 and 15 year old and minors under 12 are not prosecuted.*'[148] Without extending this advice, careful attention is due to universal international standards on the rights of the child.[149] As the UN Special Expert notes, without denying that children do commit serious crimes, those involved with armed groups such as ISIS should be treated as primarily victims.[150] These operate on assumptions that

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[145] ICRC Guidelines on Investigation at para 145: 'It should be recalled that there are no time limitations in respect of bringing the perpetrators of war crimes to justice under international law, which means that a criminal investigation may be opened long after the events at issue. Such an investigation is likely to face particular obstacles as regards the collection of information and evidence which, in turn, can affect the due process rights of suspects, as well as of victims and witnesses.'

[146] Advice 1, at 33-35.

[147] Advice 1, 42-43; UNODC, 'Handbook on Gender Dimensions of criminal justice responses to terrorism', 2019 < https://www.unodc.org/documents/terrorism/Publications/17-08887_HB_Gender_Criminal_Justice_E_ebook.pdf>.

[148] See interviews for this project.

[149] UN Convention on the Rights of the Child; see also OSCE, 'Guidelines for Addressing the Threats and Challenges of "Foreign Terrorist Fighters" Within a Human Rights Framework', 2018, at 68 and following <https://www.osce.org/files/f/documents/4/7/393503_2.pdf>.

[150] UNHRC, 'Annual report of the Special Representative of the Secretary-General for Children and Armed Conflict', UN Doc. A/HRC/31/19, 28 December 2015, at para 65 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/082/23/PDF/G1608223.pdf?OpenElement>.

children are victims, and that where criminal process is appropriate, require distinct approach to prosecution and detention consistent with juvenile justice standards.

140. The importance of countering bias has been reiterated in relation to impartiality (Section II), investigation and analysis (Section III) and in the selective approach to prosecuting male and female perpetrators. Non-discrimination is a core non-derogable principle of human rights and includes non-discrimination on religious grounds. There is a real danger of such discrimination, and intersectional discrimination in the prosecution of women in this context, throughout the investigation, trial and sentencing stages. Relying on religious practice as evidence may well be discriminatory, as will distinctions based on religious practice that purport to justify sentencing or pardons. One interview suggests pardons and release have been conditional on undertakings not to engage in religious training, this may illustrate the ill-founded and discriminatory practice.[151]

Transparency and Participation in Investigation and Public Trial

141. These principles, interlinked with effective investigation, as well as victims' rights, should be considered and reflected so far as possible in criminal justice model in NES. However, as ICRC put it '*It should, however, be acknowledged that the international discussion about the transparency of criminal investigations in armed conflict is evolving*;' the law is not set in stone nor are the practicalities of operationalising this aspect clear. Realities may limit transparency, but should do so only so far as genuinely considered necessary and proportionate. Appropriate public communication, where possible, is important to 'ensure confidence in the system' as an important safeguard against abuse and for the process to fulfil its ultimate potential on multiple levels. Likewise, the ***participation victims and families*** is increasingly recognised as feature of investigations globally, even in conflict situations, and the authority may wish to recognise this in principle and consider the feasibility of some accommodation of victim participation,[152] albeit mindful of the current situation in the camps which perpetrators and victims are housed in close quarters and violence abounds. The right to a public hearing provides an important safeguard for defence rights, as well as the interests of victims and their families and of society at large.[153] This was noted in UNAMI report on Iraqi ISIS prosecutions, which underscored the importance of trying adults in public, so far as possible, even in security challenged circumstances. The Iraq report links this to the need for survivors to 'entitle[ment] to obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law and to learn the

[151] Interview notes: '*There has been a number of acquittals after convicts spent their sentencing time and have been released. They are all Syrians. Lately, a group of 630 persons have been released as they benefited from the* ***pardon law*** *and the condition was that they did not participate in the combat operations and were not members of terrorist cells or leaders and emirs neither were they from those who provided religious and Shari'ah training.*'

[152] ICRC Guidelines on Investigation, at para 156; ICRC Guidelines also recognise that it may simply not be possible for security or other reasons, but suggests consideration of whether 'Technology and digital communication can, however, be relied on to overcome certain challenges associated with distance and security issues to enable the participation of victims or next of kin remotely, for example by video link'.

[153] 2020 UNAMI Report, at 13.

truth in regard to these violations'.[154] It also underlines the importance of judgments being reasoned and read in public.[155]

SECTION IV: Guilty Pleas and Abbreviated Proceedings

Introduction

142. I have been asked about the prospect of APs as one option for accountability in a challenging environment. This develops the brief treatment of the subject at Advice 1. APs take various forms across the world – such as plea bargaining, guilty pleas, summary procedures, and cooperating witness procedures – and their use is rapidly increasing. Many involve some form of guilty plea process which 'may encompass the negotiation over reduction of sentence, dropping some or all of the charges or reducing the charges in return for admitting guilt, conceding certain facts, foregoing an appeal or providing cooperation in another criminal case.'[156] APs clearly carry potential advantages and dangers of acute relevance in NES. They offer the prospect of speedier justice in situation of urgency,[157] are less resource intensive processes,[158] limit the amount of evidence required, incentivise information-sharing truth-telling on important historical crimes, including potentially on other higher ranking accused, with the potential to bring larger numbers and levels of perpetrators to justice.[159] APs have been used 'to encourage other suspects and perpetrators of crimes to come forward.'[160] It has been described as 'good policy in criminal matters that some form of consideration be shown towards those who have confessed their guilt'.[161] For the accused they offer an opportunity for reduced sentences within a prompter procedure, which should be advantageous for those with a likelihood of being convicted at trial.[162]

143. They also entail necessary limitations – providing a less full accounting for and record of criminality for example than a normal criminal process – and more critically some real risks for defence rights that would need grappled with in this context. If used as a way to circumvent fair trial rights, the core of which is absolute right in IHRL, to effectively coerce confessions while creating summary proceedings that avoid legal protections, they present a side-stepping of justice and the antithesis of a rule of law response to ISIS violations. For this reason the key

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[154] *Ibid*.
[155] *Ibid*, at14.
[156] OECD, Policy Roundtables, 'Plea Bargaining' (2006)<https://www.oecd.org/daf/competition/cartels/40080239.pdf> citing M. M. Feeley, 'Perspectives on Plea Bargaining', *Law and Society Review* 13 (1979) 199-209, at 199–200.
[157] See the cases of Argentina, Colombia and Bosnia and Herzegovina in M. Bergsmo (ed.), *Abbreviated Criminal Procedures for Core International Crimes* (TOAEP, 2017), Foreword by Judge Meddžina Kreso, at v <https://www.toaep.org/ps-pdf/9-bergsmo>.
[158] M.P. Scharf, 'Trading Justice for Efficiency: Plea Bargaining and International Tribunals', *Journal of International Criminal Justice (JICJ)* 2 (2004) 1070-1081, at 1077.
[159] K. McCleery, 'Guilty Pleas and Plea Bargaining at the Ad Hoc Tribunals', *Journal of International Criminal Justice* 14 (2016) 1099-1120, at 1109; F. Guariglia, 'Article 65. Proceedings on an admission of guilt' in O. Triffterer, K. Ambos, *The Rome Statute of the International Criminal Court, A Commentary* (3rd ed), at 1624.
[160] *Ruggiu* case, Judgment and Sentence, ICTR Trial Chamber I, ICTR-97-32-I, 1 June 2000, at para 55 <https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-97-32/trial-judgements/en/000601.pdf>.
[161] *Ibid*.
[162] R. K. Helm, 'Constrained Waiver of Trial Rights? Incentives to Plead Guilty and the Right to a Fair Trial', *Journal of Law and Society* 46 (2019), 423-447, at 432-433; *Erdemović* case, ICTY, IT-96-22-T <https://www.icty.org/en/case/erdemovic>.

questions to be addressed will be whether they meet the requirements reflected in IHRL and practice set out below.

144. In the past 25 years the adoption and use of abbreviated proceedings has increased drastically (on one estimate, 66 countries across all six major continents used APs by the end of 2015)[163] and have been described as largely replacing trials in some jurisdictions.[164] This section touches on and illustrates this growing practice so far as it informs the discussion of possible processes for NES. It then highlights the (admittedly still relatively slight) jurisprudence and standards that suggest pre-requisites to use APs that should be met if they are to be countenanced as part of the justice response in NES.[165] Analysis of the feasibility of meeting these requirements, in the particular context of the camps in NES, would be essential. As such, this section does not seek to endorse any of these approaches as such, but to note there is the possibility in principle of appropriate expedited procedures and to flag relevant practice principles and possible pitfalls to be addressed if this route is pursued.

Evolving Practice on Guilty Pleas and Abbreviated Proceedings of Potential Relevance

145. ***Plea Bargaining – Common, Civil and international Law systems:*** In a number of principally common law states, plea bargaining is commonly used to obtain guilty pleas and expedite cases. Typically, the prosecutor will offer some form of sentencing concession in exchange for the defendant's guilty plea. Approximately 90% of cases in the US are disposed of by guilty plea.[166] The practice of summary proceedings following guilty pleas is also now used in many civil systems. In some, they are only for relatively minor violations of the Criminal Code, carrying for example penalties of a fine or a prison sentence of up to five years.[167] While rarer in war crimes cases, there are also examples of APs in the context of serious crimes nationally and internationally.[168] The practice is often controversial, in particular as regards safeguarding the voluntariness of any admission of guilt and a degree of due process for the accused.[169]

146. ***Justice and Peace Model Colombia*****:** the Justice and Peace Law (Law No. 975) developed a special framework for the investigation and prosecution of core international crimes perpetrated by demobilised members of illegal armed groups that may be worth

[163] Fair Trials, 'The Disappearing Trial: Towards a rights-based approach to trial waiver systems', (27 April 2017), at 4 <https://www.fairtrials.org/sites/default/files/publication_pdf/Report-The-Disappearing-Trial.pdf>.
[164] *Ibid*.
[165] *Ibid*.
[166] Y. Ma, 'Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany, Italy: A Comparative Perspective', *International Criminal Justice Review* 12 (2002) 22-52, at 25.
[167] M. Bergsmo (ed.), *supra* note 152, Foreword by Judge Meddžina Kreso, at vi stating that 'one should keep in mind that Bosnia and Herzegovina legislation provides for the possibility of summary proceedings, but only in cases of minor violations of the Criminal Code, carrying milder penalties. Within the Special Procedures section, the Criminal Procedure Code of Bosnia and Herzegovina, just like the laws of the entities and of the Brčko District, provides for the possibility of issuing a sentencing warrant if the case involves criminal offences carrying a principal punishment in the form of a fine or a prison sentence of up to five years'.
[168] M. Bergsmo (ed.), *supra* note 152, at vii; Siracusa International Institute for Criminal Justice and Human Rights, 'Closing the implementation gap: Criminal justice responses to illicit trade in South Eastern Europe and associated challenges', (November 2020), at 88 <https://bird.tools/wp-content/uploads/2020/11/SII-Closing-the-Implementation-Gap-full-report-web2.pdf>.
[169] F. Guariglia, *supra* note 154, at 1630 – the most controversial issue of the procedural consequences of an admission of guilt.

considering in NES if this avenue is to be explored.[170] This framework adopted an abbreviated criminal procedure, while including elements that seek to reflect the victim's right to truth, justice and reparations, and the requirements of peace and individual or collective reintegration into civilian life of the members of armed groups.[171] It provided for reduced sentences for ex-paramilitaries, in exchange for full, complete and genuine disclosure of crimes given by way of deposition.[172] In order not to disproportionately compromise the rights of victims under the Constitution, the Constitutional Court ruled that all benefits of the law are forfeited if ex-paramilitaries do not confess the whole truth as part of the *version libre.* Reflecting the rule in some systems that there should be minimum and maximum penalties specified, the law provides that prison terms should be no fewer than five years and no more than eight.[173]

147. ***Gacaca Trials Rwanda*****:** Perhaps the most extreme and well known example in terms of adapted procedures in response to massive criminality beyond the power of regular courts was the Rwandan *Gacaca* system of lay courts, offering reduced sentences and abbreviated criminal procedures in exchange for confessions.[174] Confessions had to give a detailed description of the offence, reveal the co-perpetrators and accomplices, and provide any other information useful to the exercise of the public action. In turn the consequences for those whose confessions were rejected was life imprisonment or the death sentence.[175] The *gacaca* system was famously controversial for some based on fair trial concerns,[176] and lauded by others as presenting a less culturally bound notion of what constitutes a fair trial, rooted in community and transformation.[177] It sounds a strong note of caution for present purposes, given the pressure placed on individuals to reveal facts, including in relation to others, and the stakes of not doing so on the one hand, and the risk of retaliation for truth-telling on the other. While the context is very different, these risks that were acute in Rwanda where the stakes for those involved were so high, present issues to be grappled with in the present situation.[178]

148. ***Courts Martial:*** In the context of military justice during deployments, court martials are often set up to try members of the armed services accused of offenses against military law.[179] In practice, they are often charged with hearing guilty plea cases, where the accused waived their procedural rights and pleaded guilty in exchange for favourable treatment or a limited

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[170] G. Ž. Kustura, 'Abbreviated Criminal Procedures for Serious Human Rights Violations Which May Amount to Core International Crimes' in M. Bergsmo, *supra* note 152, at 146.
[171] *Ibid*, at 147.
[172] M. Wierda, 'How to Deal with Backlog in Trials of International Crimes: Are Abbreviated Criminal Proceedings the Answer?' in M. Bergsmo, *supra* note 152, at 234.
[173] Colombian Constitutional Court, Sentence C-370/2006, 18 May 2006 <https://www.corteconstitucional.gov.co/english/Decision.php?IdPublicacion=9221>. M.P. Saffron, 'The Colombian Peace and Justice Law: An Adequate Abbreviated Procedure for Core International Crimes?' in M. Bergsmo, *supra* note 152, at 178.
[174] In 2005, 80,000 detainees were awaiting trial. See G. Ž. Kustura, *supra* note 165, at 136-8.
[175] *Ibid*.
[176] See, for example, Human Rights Watch, 'Law and Reality: Progress in Judicial Reform in Rwanda', (July 2008), at 70-88 <https://www.hrw.org/reports/2008/rwanda0708/rwanda0708web.pdf>; see also A. Meyerstein, 'Between Law and Culture: Rwanda's *Gacaca* and Postcolonial Legality', *Law and Social Inquiry* 32(2) (2007), 467–508, at 469-470; W. A. Schabas, 'Genocide Trials and Gacaca Courts', *Journal of International Criminal Justice* 3(4) (2005), 879-895, at 881.
[177] T. Longman, 'Justice at the grassroots? Gacaca trials in Rwanda' in N. Roht-Arriaza and J. Mariezcurrena (eds.), *Transitional Justice in the Twenty-First Century. Beyond Truth versus Justice* (CUP, 2006), at 223.
[178] See Interview in Kigali with Antoine Mugesera, President of the survivors' group IBUKA, June 2002; Human Rights Watch, 'Rwanda', World Report 2003, (December 2002) <https://www.hrw.org/legacy/wr2k3/africa9.html>.
[179] See F. D. Rosenblatt, 'Awakening Self-Interest: American Military Justice in Afghanistan and Iraq', in M. Bergsmo and S. Tianying (eds.), *Military Self-Interest in Accountability for Core International Crimes* (TOAEP, 2018), at 295.

sentence.[180] Other cases are sent back for trial; for example, the 25th Infantry Division of the US armed forces deployed in Iraq sent contested and complex cases back to the US where the accused can 'exercise all of his or her due-process rights with minimal intrusion on the unit or danger to civilian and non-deployed DoD personnel'.[181] The guilty plea focus of these court martials may reflect the challenges of justice in a combat zone[182] as well as the desire to ease the government's burden to present evidence and witnesses in this context.[183] It also speaks to the importance of considering these proceedings in the conflict context, as well as the implications where there is no fall back or alternative for individuals who do not consent to avail themselves of the guilty plea route.

149. ***International criminal tribunals*: **Practice of the *ad hoc* tribunals and the ICC endorse the use of guilty pleas, and developed over time to suggest an intermediate approach. At the ICTY, although not anticipated at the outset, practice evolved to accept guilty pleas as independent mitigating factors in sentencing;[184] in *Erdemović* (second sentencing decision), *Todorovic* and *Sikirica* the Posecution agreed to recommend a lower sentence in exchange for a guilty plea.[185] The ICTY then came to codify principles and procedures for plea agreements[186] and by 2016, 20 out of the 84 ICTY convicts were sentenced as a result of a guilty plea. In *Todorović*, the Trial Chamber expressly endorsed reduced sentences for guilty pleas noting reasons of efficiency, but also that the APs relieved victims and witnesses of the need to testify, and contributed to the historical record.[187] Importantly though, it affirmed that the Court was not bound by the agreement between the prosecution and the defence[188] and that 'convictions entered by a trial chamber must accurately reflect *the actual conduct and crime committed* and must not simply reflect the agreement of the parties as to what would be a suitable settlement of the matter'.[189]

150. The ICC negotiations drew on domestic and international practice to find a balance between competing factors, enshrined in the Rome statute and rules, what is essentially a guilty plea process resulting in a mini-trial with attendant safeguards. Article 64(8)(a) of the Rome Statute stipulates that the Trial Chamber must afford the accused, at the commencement of the trial, the opportunity to make an admission of guilt to each of the charges proffered or to plead not guilty. If an admission of guilt is made, then a specific process containing a number of safeguards kicks in (as provided for in article 65 of the Statute). The agreement reached between

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[180] *Ibid*, at 308.
[181] *Ibid*, at 309.
[182] *Ibid*.
[183] *Ibid*, at 309.
[184] The Trial Chambers in *Erdemović* and *Jelisić* held they were not (*Erdemović* case, Sentencing Judgment, ICTY Trial Chamber, IT-96-22-T, 29 November 1996 <https://www.icty.org/x/cases/erdemovic/tjug/en/erd-tsj961129e.pdf>; *Jelisić* case, Judgment, ICTY Trial Chamber I, IT-95-10, 14 December 1999 <https://www.icty.org/x/cases/jelisic/tjug/en/jel-tj991214e.pdf>) but by the second sentencing decision in *Erdemović*, the Trial Chamber cited Erdemović's guilty plea as an independent mitigating factor (*Erdemović* case, Sentencing Judgment, ICTY Trial Chamber II, IT-96-22-Tbis, 5 March 1998 <https://www.icty.org/x/cases/erdemovic/tjug/en/erd-tsj980305e.pdf>).
[185] *Sikirica et al*. case, Sentencing Judgement, ICTY Trial Chamber III, IT-95-8, 13 November 2001 <https://www.icty.org/x/cases/sikirica/tjug/en/sik-tsj011113e.pdf>.
[186] Rules of Procedure and Evidence, ICTY, IT/32/Rev.50, as amended on 8 July 2015, Rule 62ter.
[187] *Todorović* case, Sentencing Judgment, ICTY Trial Chamber III, IT-95-9/1, 31 July 2001, at paras 79-81 <https://www.icty.org/x/cases/todorovic/tjug/en/tod-tj010731e.pdf>.
[188] *Ibid*.
[189] *Nikolić* case, Sentencing Judgment, ICTY Trial Chamber II, IT-94-2, 18 December 2003, at para 65 <https://www.icty.org/x/cases/dragan_nikolic/tjug/en/nik-sj031218e.pdf>.

prosecution and defence may include reduction of sentence as an incentive, and a guarantee that no party to the proceedings will appeal. The Trial Chamber must be satisfied that his or her admissions are supported by the facts and that all the elements of the relevant crimes are proved. If it is not satisfied, the Trial Chamber must instruct that the case revert to the normal trial procedure. In both the practice of the ICTY and ICC, there is an endorsement of APs, but subject to evidence, judicial engagement and efforts to ensure the appropriateness of the charges and safeguard the overall fairness of proceedings.[190] The first article 65 process following a guilty plea in the *al Mahdi* case, while more elaborate than would be necessary in all cases, provides an instructive illustration of the 'mini-trial' approach.[191]

Requirements for Acceptable APs and guilty pleas

151. Certain basic features must exist in order for abbreviated proceedings to be used effectively and within a rule of law or rights compliant way.

152. First, the ***principle of legality*** must be complied with. Abbreviated proceedings must be prescribed by law, and should be addressed in a statute and rules establishing the tribunals. The rules should reflect specifically and clearly when they apply e.g. which categories of crimes fall under such proceedings, their requirements, the implications and need for other safeguards noted below.

153. Second, they should be *administered and* ***overseen by the courts***. This can be done through specially designed panels of judges and/or corresponding prosecutorial units, provided the judicial role is retained in ensuring the overall fairness of proceedings and appropriateness of the plea and APs.[192] The content of the bargain and the fairness of the manner in which it had been reached must have been subjected to sufficient judicial review and the 'bargain' must not have run counter to the rights of the accused or potentially important public interest.[193]

154. Third and relatedly, they should not bypass the need for any establishment of facts; supporting facts should be provided to the tribunal to enable its oversight function. It undoubtedly eases the investigative burden but does not replace it.[194]

155. Fourth and critically, the accused's decision to opt for AP for core international crimes must be ***based on an understanding of the implications*** for the accused, and 'c***onscious and voluntary.***'[195] This test is worthy of emphasis and analysis as to how it might be given effect in NES.

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[190] See M. Kersten, 'Some Thoughts on the al Mahdi Trial and Guilty Plea', *Justice in Conflict*, 24 August 2016 <https://justiceinconflict.org/2016/08/24/some-thoughts-on-the-al-mahdi-trial-and-guilty-plea/>.

[191] *Al Mahdi* case, Version publique expurgée du « Dépôt de l'Accord sur l'aveu de culpabilité de M. Ahmad Al Faqi Al Mahdi », ICC Pre-Trial Chamber I, ICC-01/12-01/15-78-Red2, 19 August 2016 <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/12-01/15-78-Red2>; *Al Mahdi* case, Judgment and Sentence, ICC Trial Chamber VIII, ICC-01/12-01/15-171, 27 September 2016 <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/12-01/15-171>.

[192] G. Ž. Kustura, *supra* note 165, at 149.

[193] *Ibid*. See also *Hermi v Italy*, Judgment (Grand Chamber), European Court of Human Rights, 18114/02, 18 October 2006, at para 73 <http://hudoc.echr.coe.int/eng?i=001-77543>.

[194] F. Guariglia *supra* note 154, at 1630. Note thought that the ICC requires a heightened degree of proof that may not be necessary in these cases.

[195] *Natsvlishvili and Togonidze v Georgia*, Judgment, European Court of Human Rights, 9043/05, 29 April 2014, at para 97 <http://hudoc.echr.coe.int/eng?i=001-142672>.

156. International standards, while still not developed globally, support standards in many national systems that underscore the essential nature of these requirements. They are reflected in e.g. ICC statute and the jurisprudence of the ECtHR. The ECtHR has reflected that the defendant's decision is a waiver, at least of 'his rights to an ordinary examination of his case on the merits and to ordinary appellate review.'[196] The waiver '*must be established in an unequivocal manner, and be given in full knowledge of the facts, that is to say on the basis of informed consent [...] and without constraint [...]*'.[197] A court must be satisfied this was 'undoubtedly' a 'conscious and voluntary' decision.[198] Guilty pleas will be considered voluntary if they have not resulted from duress, false promises, or abuse of process[199] or are 'tainted by constraint'[200] including where the pressure to accept the plea was 'so compelling'[201] that there was no reasonable choice to be made. There must be no pressure external to the central decision to waive the right to a full trial that is independent of the risks and rewards of trial. If the implications in terms of sentencing are such that one is disproportionate, it becomes no longer a reasonable choice for a defendant to exercise their right to a full trial and this would be a violation of fair trial.

157. The real consequences for the applicant of pleading or not pleading must be taken into account in ascertaining whether informed consent was given and the plea freely made.[202] The nature of the incentives offered and the consequences of pleas, in practice and in context, therefore need to be carefully assessed. Unfortunately, literature suggests that in practice incentives are not uncommonly coercive and involve serious constraint, such that there may be little real choice.[203] Domestic courts have also found e.g. that threats of physical violence have invalidated guilty pleas, but so have more subtle forms of compulsion.[204] In the case of *United States v Jackson,* the Supreme Court held that the 'choice' between the exercise of the constitutional right to trial by jury and the risk of the imposition of the death penalty was impermissible.[205] In *Brady v United States,* the Court accepted that 'a plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no

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[196] *Ibid.*
[197] *D.H. and Others v the Czech Republic*, Judgment (Grand Chamber), European Court of Human Rights, 57325/00, 13 November 2007, at para 202 <http://hudoc.echr.coe.int/eng?i=001-72317>.
[198] *Natsvlishvili* case, *supra* note 190, at para 97.
[199] *Ibid*.
[200] *Deweer v Belgium*, Judgment, European Court of Human Rights, 6903/75, 27 February 1980, at para 54 <http://hudoc.echr.coe.int/eng?i=001-57469>.
[201] *Ibid*, at para 51.
[202] *Ibid*, at para 51; Had he not paid the fine, he would have been 'deprived of the income from his trade', would have 'incurred the risk of having to continue to pay his staff and of not being able to resume business with all his former customers once his shop reopened', and would have 'suffered considerable loss as a consequence'.
[203] See L. Bachmaier, 'The European Court of Human Rights on negotiated justice and coercion', *European Journal of Crime, Criminal Law and Criminal Justice* 26 (2018) 236-259; H.M. Caldwell, 'Coercive plea bargaining: The unrecognized scourge of the justice system', *Catholic University Law Review* 61 (2011) 63-96; R.L. Lippke, *The Ethics of Plea Bargaining* (OUP, 2011).
[204] S.M. Davis, 'The Guilty Plea Process: Exploring the Issues of Voluntariness and Accuracy', *Valparaiso University Law Review* 6 (1972) 111-134, at 123.
[205] *United States v Jackson*, 390 U.S. 570 (1968), at 572 <https://www.law.cornell.edu/supremecourt/text/390/570>.

proper relationship to prosecutor's business (e.g. bribes).'[206] Careful enquiry would be needed to ensure such knowledge and voluntariness.

158. The defendant must be able to opt out at any point, and unless absolutely necessary to protect the safety of a witness or a similar interest, the proceedings, including the delivery of the final judgment, should be open to the public.

159. Fifth, the voluntariness of a plea bargain is linked to legal representation of the accused. Defence counsel must be given the right to contact and freely communicate with the accused, access to evidence and awareness of all its consequential penalty's implications.[207] Access and communication promote the equality of arms which in turn allows for a fair trial.

160. In NES the challenges are clear, and the following would be required:

a) securing full *knowledge* of the accused, and sufficient clarity as to alternatives and implications, albeit within a murky and uncertain international political environment;

b) securing full and free *consent*, given the implications for the individual of not pleading guilty. Clearly to be *voluntary* it would have to be an option for an individual to choose to plead guilty or not to do so, and proceeding to a full trial would have to be an option;

c) ensuring that *incentives and consequences are reasonable and just*; an 'incentive' cannot be related to respect for basic human rights, such that the process represents an implicit unlawful threat of rights violations. Securing access to basic services, or freedom from conditions that amount to CIDT which should be given as a matter of right, should not be used as incentives, or this may amount to a serious violation in itself. Freedom from CIDT, safety or security for self or family cannot be an 'incentive' or element of negotiation;

d) securing *the option of a full fair trial*; in practice the 'threat' of trial would need to be credible and these processes would not avoid establishing such processes and are not a system-wide alternative, but they would ease the burden;[208]

e) establishing *basic facts and evidence* regarding the responsibility of individuals; this is likely to be necessary to incentivise such pleas (as in the *al Mahdi* case where clear documentary evidence of his role preceded his plea) and corroboration of a confession or guilty plea would provide a safeguard against coercion or constraint.

161. In conclusion, APs are a growing area of practice, the relevance of which to non-state actor in NES deserve consideration. They could present important advantages, facilitating some of justice's goals, while ameliorating the challenges outlined elsewhere in this advice. But for an agreement to plead guilty to be valid, the defendant must accept the plea bargain in full awareness of the facts of the case and of the legal consequences; and must accept the plea

[206] *Brady v United States*, 397 U.S. 742 (1970) <https://www.law.cornell.edu/supremecourt/text/397/742>.

[207] N. G. Kisekka, 'Plea bargaining as a human rights question', *Cogent Social Sciences* 6 (2020), at 5. See *S v Switzerland*, Judgment, 12629/87 and 13965/88, 28 November 1991, at para 48 <http://hudoc.echr.coe.int/eng?i=001-57709>; *Brennan v UK*, Judgment, 39846/98, 16 October 2001, at para 58 <http://hudoc.echr.coe.int/eng?i=001-59722>; *Öcalan v Turkey*, Judgment, European Court of Human Rights, 46221/99, 12 March 2003, at para 146 <http://hudoc.echr.coe.int/eng?i=001-69022>.

[208] R. K. Helm, *supra* note 157.

bargain in a genuinely voluntary manner.[209] Once again addressing the coercive environment and providing security are pre-requisites to ensure that justice can be operationalised in a fair rule of law compliant way. The need to address the real prospect of fear and retaliation against individuals or their families for testifying against other individuals would need to be addressed. The security context alone makes it difficult to imagine how this process could unfold at this time without first removing the risks that would impede decision making and providing essential physical psychological and legal support to individuals. Moreover, the criminal justice system in which the plea bargaining takes place must have the political and financial ability to credibly threaten prosecutions.[210] APs are unlikely to be a substitute for, but to work within and take the burden off of, a functioning trial system.

SECTION V: Charging Considerations

162. Appropriate charging depends on an assessment of facts and available evidence that is regrettably currently unavailable. Detailed advice on this issue would be best provided in light of the review of available evidence which was identified in the introduction as urgently needed.

163. The core principles are those set out in Advice 1.[211] That advice refers to concerns that remain relevant regarding, among others: legality in relation to the definition of some terrorism offences, the danger of gendered framing of criminal law and discrimination and the essential nature of conduct and intent to establish individual (as opposed to collective) responsibility.

164. That advice also sets out a range of possible crimes that can be investigated and prosecuted, subject again to what the evidence shows (once gathered or shared). ISIS crimes include international crimes of war crimes and crimes against humanity which can be committed through a range of relevant modes of liability, or domestic crimes, including terrorism related offences provided they are defined and applied with sufficient regard for the principles of criminal law noted above. I have seen nothing to indicate at this stage the possibility or the impossibility of fairly charging any of these crimes.

165. It is understood from interviews that evidentiary challenges may be leading the *de facto* authorities to lean towards charging crimes related to terrorism, and specifically membership of/or association with a terrorist group, rather than international crimes as recommended in Advice 1.

166. While not impermissible, and widespread practice shows such prosecutions have occurred in many contexts globally, terrorism prosecutions based solely on *membership* often generate particular tensions with human rights and principles of criminal law. Concerns arise in part from the vague all-encompassing definitions of 'terrorism,' which includes broad acts undermining security and control of the AANES over the area,[212] and the fact that an

[209] *Natsvlishvili* case, *supra* note 190, at para 89.
[210] *Ibid*.
[211] See Advice 1, Section 3: The Scope of Criminality.
[212] Eg. Decree no. 20, Anti-terrorism Act, Article 4 which includes within the definition of 'terrorism': "The following acts, in particular, are considered acts that undermine the security of the Canton, and are considered terrorist acts: Every action that threatens national unity and peaceful coexistence between the components in the

'organisation' simply involves three of more persons involved in such acts.[213] As Advice 1 addressed the possibility of applying a narrower approach to terrorism, consistent with international human rights standards, if prosecutions are to proceed on this basis.[214] standards principles of criminal law requiring individual responsibility and the disproportionate impact on rights of criminalising the mere fact of association with others (rather than the contribution of the individual to acts of terrorism). There are therefore good legal and policy reasons to consider carefully this decision, and to consider prioritizing where possible charging established international crimes, or at least a combination of charges.

167. Basic principles of criminal law and human rights dictate that charges must be based not only on clear pre-established crimes, but on ***individual responsibility, established through material and mental elements***. If terrorism crimes are charged, ***a reasonable proximate relationship*** between the individual and a crime of terrorism should be establish to justify criminal prosecution for such crimes.

a) For example, crimes of ***directing and participating in terrorist groups*** have been adopted and prosecuted in several states, but with the requirement of participation in activities of the group in the 'knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group.'[215] It has been noted that in order to prevent application of such offences in a way that disproportionately interferes with human rights, 'contribution' should be narrowly interpreted as confined to contributions that have an actual effect on, and close proximity to, the commission of a principal criminal offence of terrorism.[216]

b) Crimes ***related to expression***, given their obvious impact on human rights should be limited to *incitement to violence* not expressions of support for the aims, ideology of the group that have been commonplace and problematic in recent years. The contribution or essential nexus between the individual's expression and criminal acts should always be established.[217]

Canton, and the safety of society, and affects public security and stability and weakens the ability of the People's Protection Units and Asayish authority to defend and maintain the security of citizens and their properties and the institutions – whether by armed collision with the Canton forces, or any form that is outside the freedom of opinion and expression guaranteed by law. Every action which involves the initiation of force and violence to overthrow the Democratic Self–Administration, or undermine its structure set in the charter of the Social Contract…."

[213] Decree No. 20 Article 2: Terrorist Organization, "It is each group consisting of three or more individuals working to commit terrorist acts."

[214] Advice 1, Section E, p 57

[215] European Parliament, Directive 2017/541 on combatting terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, 15 March 2017 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017L0541>: Article 4 Offences relating to a terrorist group 'Member States shall take the necessary measures to ensure that the following acts, when committed intentionally, are punishable as a criminal offence: a) directing a terrorist group, b) participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group.'

[216] International Commission of Jurists, 'Counter-Terrorism and Human Rights in the Court. Guidance for Judges, Prosecutors and Lawyers on Application of EU Directive 2017/541 on Combatting Terrorism', November 2020 < https://www.icj.org/wp-content/uploads/2020/11/Guidance-counter-terrorism-ENG-2020-1.pdf>.

[217] *Ibid.*

c) *The implication for* ***family life and supply of basic economic social support*** *of certain charges should also be considered.* Provision of 'impartial' assistance, humanitarian assistance or basic economic and social provisions for individuals such as food or medical supplies, should not be interpreted as falling within the scope of the offence of participation in a terrorist group.[218] The Special Rapporteur on Terrorism and Human Rights has warned of inappropriately penalising family life through broad offences of support for terrorist organisations. She added that: *'conduct criminalized as a terrorist offence must be restricted to activities with a genuine link to the operation of terrorist groups. … construing support to terrorist organizations in an over-broad manner may effectively result in criminalizing family and other personal relationships.'*[219] The Special Rapporteur further stressed that '*support related to ensuring that a person enjoys "minimum essential levels" of economic and social rights, including the rights to food, health and housing, should not be criminalised as support to terrorism.*'[220]

168. Practice to date in a number of states supports these concerns with terrorism prosecutions. The UN Counter-Terrorism Executive Directorate (UNCTED) study concerning the prosecution of women returnees associated with ISIS[221] makes clear that while they have been prosecuted for various offences, membership of a terrorist organisation has been the most common where proving specific acts at the conflict zone has proved challenging.[222] However the study cautions that an overly broad interpretation of membership in some States has led to convictions for simply being a family member of alleged ISIS fighters, and makes clear the need for a rigorous approach.

169. These concerns are seen in heightened form in relation to ISIS prosecutions in Iraq. A 2020 UNAMI report on Iraqi prosecutions of ISIS offences expressed 'serious concern' with terrorism prosecutions in that context, and in particular with 'association or membership offences as a basis for conviction'.[223] It referred to problems of broad definitions which '*enlarge the scope of the proscribed conduct and make them susceptible to subjective and overly discretionary interpretation,*'[224] and which fell foul of the crucial 'principle of fair trial' that *'individuals should only be held criminally liable and punished for acts for which they possess some personal culpability ("principle of individual criminal responsibility").'* By contrast, in membership or association cases, '*judges required mere proof of "membership" of, or "association" with, a terrorist group, rather than any proof that the alleged conduct was in furtherance of a specific underlying crime.*' In practice, the trial was reduced to sentencing, with culpability presumed in hundreds of cases of persons convicted of 'joining a terrorist

[218] European Parliament, Directive 2017/541 on combatting terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, 15 March 2017, at (38) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017L0541>.
[219] UNHRC, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Visit to Belgium, UN Doc. A/HRC/40/52/Add.5, 8 May 2019, at para 18 <https://undocs.org/en/A/HRC/40/52/Add.5>.
[220] *Ibid*.
[221] CTED, 'Analytical Brief: The prosecution of ISIL-associated women', 22 July 2020 <https://www.un.org/sc/ctc/wp-content/uploads/2020/07/CTED_Analytical_Brief_The_Prosecution_of_ISIL-associated_Women.pdf>; See also CTED, 'Analytical Brief: The repatriation of ISIL-associated women', October 2019 <https://www.un.org/sc/ctc/wp-content/uploads/2019/09/CTED-Analytical-Brief-Repatriation-of-Women.pdf>.
[222] CTED, 'Analytical Brief: The repatriation of ISIL-associated women', October 2019, at 3-4.
[223] 2020 UNAMI Report, at 9-10.
[224] 2020 UNAMI Report, at 5.

organization' based on 'providing basic support to ISIL members, such as cooking or selling vegetables and family members of ISIL members, including women and children.'[225]

170. The UNAMI report illustrated another recurrent and serious problem, which is the reversal of the burden of proof in practice in membership or association cases, with insidious implications for the presumption of innocence.[226]

171. Crucially, in both CTED and the UNAMI reports dealing with membership prosecutions in quite distinct contexts, serious concern was expressed that such prosecutions have not adequately taken into account whether association was voluntary or coerced.[227]

172. Finally, as Advice 1 noted in more detail, charging considerations should take into account the importance of the truth and collective learning in the reparation and prevention of atrocities. In this respect, the UNAMI report notes for example that 'the broad and widespread reliance on "membership" of, or "association" with, a terrorist organization fails to meet victims' interests in exposure of the full range of crimes committed.'

173. The UNAMI report provides a series of cautions that must be heeded by the AANES which must ensure it does not fall into the same trap of fair trial deficits:

> '*In light of the seriousness and severity of the crimes committed by ISIL and other terrorist groups, it is imperative to hold perpetrators duly to account. Nonetheless, the broad application of the Federal Anti-Terrorism Law to any form of 'membership' of or 'association' with a terrorist organization, alongside a lower standard of proof and serious disadvantage for defendants to present their cases, also risks amounting in its effect to a form of collective punishment of certain communities…*'

174. Conversely, while recent international practice demonstrates and problematizes recourse to terrorism trials, it also demonstrates the feasibility of proving international crimes in at least some of the more serious cases. Prosecution for war crimes has succeeded as cumulative to terrorism charges. The most common offences charged were outrages upon personal dignity, inhumane treatment, child recruitment, and killing of protected persons.[228] Several past and pending cases could prove informative both as to possible sources of evidence, approach to framing charges and permissible limits.

175. Finally, for either war crimes, crimes against humanity or terrorism charges, concerns also arise as to the discriminatory framing of charges and gendered assumptions that underpin them. These deserve careful attention, expertise and support to counter. For example, in recent practice elsewhere it appears that only women have been charged with pillaging, solely on the basis of living in houses previously captured and allocated to them by ISIS, or with crimes relating to the neglect of their parental duties.[229]

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[225] 2020 UNAMI Report, at 10.
[226] *Ibid*, at 9-10.
[227] CTED, *supra* note 213, at 3-4.
[228] *Ibid*, at 4.
[229] A.L. Kather, A. Schroeter, 'Co-Opting Universal Jurisdiction? A Gendered Critique of the Prosecutorial Strategy of the German Federal Public Prosecutor in Response to the Return of Female ISIL Members: Part I', *Opinio Juris*, 7 March 2019 <http://opiniojuris.org/2019/03/07/co-opting-universal-jurisdiction-a-gendered-critique-of-the-prosecutorial-strategy-of-the-

german-federal-public-prosecutor-in-response-to-the-return-of-female-isil-members-part-i/>. Several pending cases are informative.