INTERNATIONAL LEGAL ADVICE

ON THE POTENTIAL PROSECUTION OF FEMALE AL HOL DETAINEES

BY COURTS ESTABLISHED BY THE AUTONOMOUS ADMINISTRATION FOR NORTH EAST SYRIA

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A. Introduction

I have been asked to advise on various international legal questions concerning the prospective prosecutions by the Kurdish-led Autonomous Administration of North and East of Syria (AANES) of Al Hol camp's detainees on offences related to support for Islamic State (ISIS). The questions relate to the following issues:

1. The characterisation of the conflict with Daesh in North East Syria, and applicable law;
2. Relevant international law in relation to whether and in what circumstances non-state actor armed groups can set up and run judicial proceedings;
3. Relevant fair trial standards applicable to such proceedings, including to what extent IHRL and IHL guarantees apply, and what the standards require;
4. The scope of criminality: international standards and principles governing applicable criminal law and punishable crimes related to support for ISIS in Syria.
5. The legal implications for third states of processes and judgments of the NSAG court;

These issues are addressed in sections B-F of this memorandum of advice.

Context

While it was not the purpose of this exercise to research or address in detail the underlying facts concerning Al Hol detention, the legal research and advice took into account a brief review of publicly available facts concerning the camp, its inhabitants and the would-be prosecuting authorities.

The Al Hol (or al-Hawl) camp is operated by the Autonomous Administration for northeast Syria (AANES or autonomous administration).[1] The camp is located in the north-east of the Syrian Arab Republic. The PYD established its political and security presence, and asserted itself as the authority in charge of state institutions in the region in July 2012.[2] Since January 2014, the Kurdish interim administration has had its own ministries, laws, courts and a police force/security service. The PYD announced the Kurdish Constitution on 21 July 2013, which does not appear to assert statehood but to recognise Syria as an independent country, of which the autonomous region is an integral part. The SDF was established in October 2015 and is composed mostly by Kurdish, Arab and Assyrian/Syriac militias. In December 2016 the constitution of the AANES named the SDF as its official defence force.

The Syrian Democratic Forces (SDF), led by the YPG,[3] were described in July 2019 as controlling about a quarter of all Syrian territory.[4] The conflict situation is active and territorial control remains in flux,[5] but the area in and around the camp remains firmly under control of the Autonomous Administration.

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[1] Human Rights Watch, 'Syria: Dire Conditions for ISIS Suspects' Families', 23 July 2019 <https://www.hrw.org/news/2019/07/23/syria-dire-conditions-isis-suspects-families>.

[2] International Crisis Group, 'Syria's Kurds: A Struggle Within a Struggle', 22 January 2013 <https://www.crisisgroup.org/middle-east-north-africa/eastern-mediterranean/syria/syria-s-kurds-struggle-within-struggle>.

[3] Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, A/HRC/42/51, 15 August 2019, para 82, 85 suggest that the SDF have established the camp and are now running it.

[4] Department for Country of Origin Information Reports, 'Country of Origin Information Report Syria – The Security Situation', The Ministry of Foreign Affairs of the Netherlands, July 2019, p. 57.

[5] Turkish attacks in October 2019 had an impact on this prior assessment, but I am advised that the relevant authorities remain in control of relevant areas.

The YPG and SDF have been engaged in conflict with, among others, 'Islamist opposition armed groups' including ISIS for years, as one part of a much more complex armed conflict landscape in Syria.[6] Defeating the Islamic State was reported to be SDF's overriding priority, and the SDF in fact declared that it had done so in March 2019, though reports suggest ISIS' continued influence and activity.[7]

Like many other camps, Al Hol appears to serve as something between a camp for displaced people and a detention centre.[8] I understand there are approximately 74,000 detainees, 32,000 of whom are Syrian, 32,000 Iraqi and 12,000 foreigners from around 54 countries held in an international annex. Within this annex, approximately 3,500 adult women, detained with their own or orphaned children many of whom are under six.

The camp has been described as 'a purgatory-like existence for more than 70,000 currently residing there, the vast majority of whom are women and children'[9] and as 'an incubator for IS resurgence.'[10] Reports suggest violence, so-called 'radicalisation,' are rife and living conditions unsustainable, with food and water shortage, inadequate sanitation and healthcare, and no educational facilities for children.[11] Concerns about already very high rates of child mortality intensify in light of COVID 19 in what has been described as 'a breeding ground for infectious diseases.'[12]

I do not have access to relevant evidence as to the identities, roles and conduct of the women in the Al Hol detention centre. However, while public sources describe them as 'wives and children of Daesh fighters',[13] it is understood that a significant proportion have been involved, in various ways, in ISIS related offences. The women come from as many as fifty-four different states. They include a significant number of Europeans, North Africans, Chinese, Russians and Central Asians. Their governments of origin have taken different views on their fate, with some proactively seeking to facilitate their return with others indicating that no return is likely. It is understood that an accountability process which distinguishes between detainees, clarifying guilt and punishing where appropriate, may affect the dynamics surrounding return – potentially encouraging at least some states to accept returnees or influencing the willingness of the detaining power to release them. There may then be a connection between criminal process and

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[6] See Section B, question 1, and eg. T Gill, 'Classifying the Conflict in Syria' International Law Studies Series (2016) US Naval War College 92, 353-80 (360).

[7] The spokesperson of the SDF tweeted that a 'military' victory over Deash had been achieved, see Amnesty International, 'ISIL defeated in final Syria victory: SDF', 23 March 2019 <https://www.aljazeera.com/news/2019/03/isil-defeated-syria-sdf-announces-final-victory-190323061233685.html)>.

[8] TRT World, 'Syria's notorious Al Hol Camp is "on the brink" of a humanitarian disaster', (*IRT World,* 1 October 2019) <https://www.trtworld.com/middle-east/syria-s-notorious-al-hol-camp-is-on-the-brink-of-a-humanitarian-disaster-30266>.

[9] International Rescue Committee (IRC), 'Data analyzed by the IRC reveals staggering health and humanitarian needs of children in Al Hol camp, Northeast Syria - urging repatriation of foreign children', (16 September 2019), <https://www.rescue.org/press-release/data-analyzed-irc-reveals-staggering-health-and-humanitarian-needs-children-al-hol#>.

[10] B McKernan, 'Inside al-Hawl camp, the incubator for Islamic State's resurgence', (*The Guardian,* 31 August 2019), <https://www.theguardian.com/world/2019/aug/31/inside-al-hawl-camp-the-incubator-for-islamic-states-resurgence>.

[11] *Ibid.*

[12] S Hendrix and L Loveluck, 'As epidemic menaces refugee camps, the Middle East's most vulnerable face a deepening nightmare', (*The Washington Post*, 20 March 2020), <https://www.washingtonpost.com/world/middle_east/coronavirus-refugees-migrants-middle-east/2020/03/19/5fe0ddfe-692e-11ea-b199-3a9799c54512_story.html>.

[13] B McKernan, 'Inside al-Hawl camp, the incubator for Islamic State's resurgence', see above.

ameliorating the current detention situation. For other states the possibility of criminal proceedings in north east Syria may have little or no bearing on their attitude to possible returns.

The nature of ISIS crimes, and impunity for them, has been a matter of international notoriety in recent years. Efforts to secure accountability for ISIS crimes, through international prosecution, or prosecution by national courts on various bases, have – with some notable, but limited, exceptions[14]– not borne fruit. It is in this context that question of prosecution of some of the women in the Al Hol camp, by the detaining authority, has arisen. The AANES have expressed their commitment to ensure a justice process for IS crimes, and to do so in a manner that garners international legitimacy and support.

This research focuses on legal questions related to the legitimacy of such prosecutions. It does not address the political questions or – at least directly - the practical questions as to the real capacity of the *de facto* authorities, the sufficiency of evidence or the undoubted challenges of investigation and evidence gathering in this context, though they are questions of fact closely related to the rule of law and human rights issues addressed here. It also does not consider directly the broader human rights issues in relation to the lawfulness of detention now, the obligations in respect of repatriation, or the rights or obligations of states to prosecute individually or collectively. It is however in the context of a problematic detention situation, reluctance around repatriation and accountability, that the prospect of the AANES prosecution of the women emerges, and with it the legal questions addressed in this memo.

Executive Summary of Key Conclusions:

- *Nature of the Conflict and Applicable Law*: At all relevant times there was an armed conflict in NE Syria to which YPG/SDF (or associated entities), and ISIS, were parties. The dominant view appears to be that this was a non-international armed conflict (NIAC) – albeit a 'NIAC with an extra-territorial element.' Common Article 3 (CA3) and customary international humanitarian law (IHL) apply. Although Additional Protocol II (APII) does not apply as treaty law, as Syria is not a state party, it may inform the interpretation of CA3 on certain issues (Section C), or reflect customary law applicable to all conflicts. Treaty and customary IHL applicable in NIAC apply alongside binding international human rights law (IHRL). Co-applicable norms of IHL and IHRL can be read harmoniously, each informing the interpretation of the other, where they are substantively similar and do not conflict. This is so in relation to the fair trial issues addressed in this brief, which as the ICRC noted, are 'almost identical'.

- *Whether non-state armed groups can run judicial proceedings*: Despite on-going controversies, there is no inherent impediment in contemporary international law to the exercise of judicial power by a non-state actor such as AANES. Consistent with its nature, IHL does not authorize the establishment of these tribunals as such, but nor does it prohibit them. IHL provisions recognise the reality of organised armed groups (OAGs) in the administration of justice in armed conflict situations. What the law stipulates in response is the requirement that such tribunals be established in law and afford essential guarantees, including independence, impartiality and the right to a fair trial. This is borne out by reading IHL provisions in context and in light of their object and purpose. It is supported by a significant and growing body of practice including the

[14] See eg Cumulative Charging of Foreign Terrorist Fighters, Report by Eurojust and the Genocide Network, May 2020. Eg. K. Roithmaier, 'Germany and its Returning Foreign Terrorist Fighters: New Loss of Citizenship Law and the Broader German Repatriation Landscape' ICCT (2019) < https://icct.nl/publication/germany-and-its-returning-foreign-terrorist-fighters-new-loss-of-citizenship-law-and-the-broader-german-repatriation-landscape/>.

ICRC, the ICC and a detailed recent national judicial decision directly on point, which indicate that at this point 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.

- *Fundamental Justice Guarantees*: The legitimacy of any court established by AANES would depend on it meeting the essential fair trial and rule of law guarantees inherent in criminal justice. The tribunal must be established by law, which in this case must include regulation by de facto authorities. Fair trial standards are set out consistently and in some detail across IHL and IHRL. They must, as always, be interpreted in context and in a way that makes them capable of being given meaningful effect. *Among the fair trial rights to be* respected at all times are the presumption of innocence, which precludes any shifting of the burden of proof. The tribunal itself must be staffed by competent, independent and impartial judges, free from direct or indirect external control or influence, including from the armed group. Attention is due to ensuring that these requirements are met, and seen to be met, in the challenging context of active armed conflict. Including external expertise, and independent funding of judges, would make an important contribution to safeguarding judicial independence.

- Core rights associated with a meaningful opportunity to know charges and present a defence, applicable in any criminal process, include access to evidence and the right to challenge it in person or through competent counsel, and the right to appeal. While trial within a reasonable time has to take account of the realities of armed conflict and particular contextual realities in NE Syria, prosecutions should proceed promptly to mitigate the risk of falling foul of trial within reasonable time.

- Fair trial standards do not preclude abbreviated procedures, such as guilty plea proceedings, provided suitable safeguards against compulsion are in place.

- Cases need to be considered by prosecuting authorities and judges individually. This includes considering whether the interests of justice in some cases militate against prosecution, for example where the detainees have been victims of trafficking. In exceptional circumstances the authorities may be precluded from prosecuting, where the individuals have been subject to egregious rights violations during detention. The framing of charges, investigation and prosecution must not be discriminatory and must take into account the complexity of the roles of women and girls in ISIS.

- *Crimes Subject to Prosecution*: There are several possible bases for prosecution in applicable national and international criminal law in this scenario. The women could, in principle, be prosecuted under Syrian law, international law, or perhaps – but more controversially – the laws passed by the Autonomous Authority, provided it met the 'quality of law' standard. The tribunal could also combine sources of law, as reflected in the national and international crimes enshrined in the statute of the Lebanon tribunal, applied in accordance with the rights of the accused.

- The crimes must be defined and implemented in line with certain core rule of law standards. For each, the crimes would need to have been established in clear national or international law at the time of the commission of the alleged offence. The principle of legality also requires clarity, specificity and foreseeability, and restrictive interpretation of criminal law. Other core principles include that responsibility must be individual, based on the conduct and intent of the accused. Resort to criminal law, and punishment, must be proportionate. Offences must not constitute an arbitrary or disproportionate

interference with right such as freedom of expression or association or be discriminatory.

- Prosecuting 'terrorism' offences as such raises challenges on several dimensions. Terrorism is not generally considered to constitute a crime under international law. Terrorism offences are enshrined in pre-existing Syrian law, but they offend basic notions of legality, given their breadth, vagueness and susceptibility to abuse - as borne out by their widespread application to silence dissent under President Assad's regime. The Autonomous Administration has passed it's own terrorism law in 2014, which is less broad in scope and less problematic in substance than the official Syrian law, though it contains some provisions that would require restrictive application and/or clarification in the Statute of the Court. It may provide the only prospect for prosecution of terrorism related offences as such.

- However, opinion is divided on whether de facto authorities can pass their own laws (as opposed to prosecuting to enforce existing law) and whether their 2014 terrorism law can therefore provide a legitimate basis for criminal prosecution. In the particular circumstances where this law is narrower than the problematic pre-conflict law, and interpreted restrictively, in line with international standards and in a manner favourable to the rights of the accused, it may be argued to meet the requirements of legality. Its approach to 'terrorism' could therefore be interpreted in accordance with acceptable contours of a definition of terrorism, as set down by the Security Council or UN Special Rapporteur on Terrorism and Human Rights.

- Various forms of support for terrorism can also be prosecuted on other, less controversial, bases under national and international criminal law. As practice shows, these may be prosecuted cumulatively alongside, or as compelling alternatives to, 'terrorism' related offences as such. These include the common crimes, and broad modes of liability, enshrined in Syrian law. Syrian law does not however include serious international crimes and may not, if used alone, capture the fullness of criminality entailed in ISIS crimes. To this end, the AANES could prosecute core crimes under international criminal law. Publicly available facts, and prosecutions to date in states of return, suggest a range of war crimes that women detainees may be responsible for and where, depending of course on available evidence, prosecution may prove feasible. These include prosecuting pillaging, sexual violence, outrages on personal dignity or the infliction of terror on civilians as a separate war crime, all of which are established as crimes in international law applicable in NIAC. Crimes against humanity such as persecution, or indeed genocide, should not be ruled out, particularly when considered alongside the array of developed modes of liability under international criminal law which enable the prosecution of a full range of forms of participation in, contributions to and support for international crimes.

- Combining sources of law may ensure a range of charging options, including international core crimes, which may serve to reflect the nature of the crimes, as well as the interests of victims and the potential truth-telling and restorative role of the process.

- *Implication for Third States*: International cooperation in criminal matters is not an area where international law is generally prescriptive, and this is particularly so in the relatively novel area of non-state prosecution. While it is unlikely that states could be considered bound to cooperate, they are not precluded from doing so. Provided that there is no real risk of a 'flagrant denial of justice', involving serious violations of core fair trial provisions, states may choose to cooperate, for example through evidence

gathering, capacity building or implementation of sentences following conviction. This need not be done through formal mutual legal assistance arrangements. While states broader obligations, such as to address impunity for ISIS crimes (under Security Council resolutions) or protect nationals in humanitarian crisis abroad (as noted recently by two UN Special Rapporteurs) are not directly applicable to the AANES prosecution, they may inform decisions to cooperate with the process to ensure effective trials that respect fair trial standards.

- In the event that states receive returnees who have been subject to the AANES process, they would not be obliged to implement sentences or to recognize its judgments, but they may choose to do so. Nor would states of return be legally precluded from prosecuting individuals subject to trials in Syria, as the rules of *non bis in idem* under IHRL have been deemed applicable only to prevent double prosecution within the same state.

B. QUESTION 1: <u>Characterisation of the Conflict and Applicable Law</u>

Introduction:

The Syrian conflict epitomises the complexity of modern day armed conflict. Beginning as an uprising, it escalated and evolved into a complex mosaic of overlapping armed conflicts, involving literally hundreds of diverse armed groups, the Syrian state, and several states intervening in support of various parties at several different stages.[15] As such it has given rise to some controversy with regards to the nature of the conflict, or more correctly *conflicts* that have arisen, the parties to them, and the applicable law.[16] However, much of this is extraneous to the present analysis, or not decisive in terms of applicable law and standards.

For our purposes, the relevant questions are whether the proposed prosecutions relate to conduct carried out as part of an armed conflict, and if so whether that particular conflict is international (IAC) or non-international (NIAC) in nature, and whether IHL and IHRL are applicable to the underlying criminality (including war crimes) and the trial processes. Within the landscape of Syrian conflicts, our enquiry can be limited to the nature of armed conflict in North East Syria involving YPG and associated forces and ISIS.[17]

As set out below, available facts suggest that there has been at all relevant times an armed conflict between a party consisting of the YPG/Syrian defence forces on the one hand and IS on the other. While the situation is in flux, as the intensity of hostilities and the capacity of IS or YPG evolve, IHL continues to be applicable to the trial process.

International Standards on Classifying the Conflict with Da'esh in North East Syria

Significant international authority, including the ICC, ICTY, ICTR, ICRC, now makes clear that that an armed conflict exists when there is a) resort to armed force between States (international armed conflict (IAC)) or b) armed violence of a certain intensity between governmental authorities and organised armed groups or between such groups (non-

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[15] See B Dill and H Duffy, *Law Applicable to Armed Conflict* (CUP 2020), 15-105. Note, a significant number of States have supported the Syrian or Iraqi governments, while the United States has directed its own attacked ISIS, and supported and coordinated with the Kurdish groups to assist them retake control of key towns from ISIS. Turkey is in turn in a separate conflict with these Kurdish militias. See below on 'internalising, or not, the conflict.

[16] *Ibid.,* It has been suggested that there are multiple conflicts – between Syria and various OAGs; between US coalition and IS (and some say Syria, given lack of consent); and between Turkey and Kurdish groups in the North.

[17] The SDF/YPG and IS have each been engaged in conflicts against the Syrian state, involving at time external states (see internationalisation question below).

international armed conflict (NIAC)).[18] While any use of force between States or occupation of another State's territory can in principle trigger a IAC,[19] a NIAC requires that this two-fold criteria of "protracted armed violence between governmental authorities and organised armed groups or between such groups within a State" be met.

The first question in the two-fold test relates to the nature and extent of hostilities between the parties, which must clearly go beyond the 'sporadic' acts of violence referred to in the Geneva Conventions (GC).[20] International courts and tribunals have developed slightly different approaches to this minimal threshold of confrontation. For example the ICTY's early approach in *Tadić*, [21] reflected in the ICC Statute and some jurisprudence,[22] emphasises the 'protracted' nature of the violence,[23] while the weight of jurisprudence focuses on the *intensity* of violence - judged against factors such as the number of confrontations, type of weaponry used and the extent of injuries and destruction - rather than its duration.[24] In the present context the difference is unlikely to matter, as there seems little doubt that the conflict in NE Syria meets either approach. Heavy confrontations between the YPG (and associated militias) and ISIS,[25] involving shelling, bombings, aerial strikes and sieges, has resulted in thousands of deaths and widespread displacement over a period of seven years.[26]

The second IHL requirement for a NIAC is that it must be possible to identify the parties; non-State groups must have a certain degree of internal organisation to constitute a party to a conflict. 'Non-exhaustive criteria' to establish whether this organisational requirement is fulfilled are set out in, for example, the *Haradinaj* or *Lubanga* judgments.[27] These include factors such as: control of territory; command structure and disciplinary rules and systems; operational headquarters; the ability to procure arms and to plan and carry out controlled military operations; the nature of the group's operations; their ability to coordinate and negotiate settlement of the conflict, and capability (not willingness) to observe and ensure respect for the rules of IHL.

The YPG/SDF, and ISIS, appear to meet this criterion, though the situation continues to evolve. Reports suggest the SDF and YPG controlled about a quarter of all Syrian territory by early 2019, and substantial control over the area of NE Syria, including cities and airports, since 2012.[28] Since Turkish incursions in autumn 2019, it continues to exercise control over a slightly

[18] *Tadić* Case, Trial Chamber Judgment, ICTY, 7 May 1997, para 561.
[19] See the *Tadić* Case, Interlocutory Appeal Decision, ICTY, 2 October 1995, para. 70; Common Article (CA) 2, Geneva Conventions (GC) I-IV, 1949; *Situation in the Democratic Republic of the Congo, in the case of the Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, International Criminal Court (ICC), 14 March 2012.
[20] Article 1(2) of the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) (APII). ICRC, Common Article 3 Commentary (I) for the Geneva Convention on the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Commentary of 2016, para 386.
[21] *Tadić* Case, Trial Chamber Judgment, para 562, see above.
[22] Article 8 of the Rome Statute refers to 'protracted armed conflict between government and armed groups or between such groups' for war crimes, thought this may be a threshold for ICC purposes, not for NIACs as such.
[23] *Tadić* Case, Trial Chamber Judgment, para 562, see above.
[24] *Haradinaj* Case, Judgment, ICTY, 3 April 2008, paras 49, 60.
[25] Human Rights Watch, 'Syria: Dire Conditions for ISIS Suspects' Families', (23 July 2019) <https://www.hrw.org/news/2019/07/23/syria-dire-conditions-isis-suspects-families>; P Tank, 'Preserving Kurdish Autonomy', (2019) Carnegie Endowment for International Peace, <https://carnegieendowment.org/sada/78232>.
[26] T Gill, 'Classifying the Conflict in Syria' International Law Studies Series (2016) 92 US Naval War College 353-380, 360.
[27] *Limaj* Case, Judgment, ICTY, 30 November 2005, paras 94–129; ICTY, *Haradinaj* Case, Judgment, ICTY, 3 April 2008.
[28] Dutch Country of Origin Report - Syria 2019, page 57, see above.

reduced area.[29] The total number of combatants within the ranks of the SDF was estimated at 50,000 in 2018.[30] There is a structured military and civilian operation and within the area under its control there appears to be an organised system of governance, even with its own constitution and laws. In turn the level of organisation of Islamic State in the North East at its peak clearly met the criteria to constitute an 'organised armed group' under IHL, in terms of the degree of regulations issued, physical control of areas, institutional command and control, strict discipline, and apparent ability to regenerate after sustaining serious losses. This needs appraised on an ongoing basis given the reduced capacity of the organisation following its partial 'defeat' in March 2019.[31]

End of the particular conflict? Questions could conceivably arise as to whether this particular conflict has ended in light of reports of the fall of the ISIS 'caliphate' and the changing shape of the non-state actors once the SDF itself declared that ISIS was defeated in March 2019.[32] It is a question of fact, to be assessed against available information on an ongoing basis, whether one of the opposing parties to the conflict has disappeared or no longer meets the level of organisation required by IHL, or there is a 'the general close of military operations'.[33] The situation continues to evolve, and politics can obscure reliable information. However, US authorities suggest that despite the "defeat" in Syria and death of its leader, the group's command structure, operations, and finances have not yet been disrupted,[34] and other recent reports point to the group's resilience and reemergence, albeit more fragmented than before.[35] Furthermore, the ICRC warns against making hasty conclusions on the end of NIACs, as they are prone to re-emerge.[36] It would thus be premature to conclude that there has been anything like a definitive cessation of hostilities or settlement of the conflict.

Moreover, even if this particular conflict had come to an end, IHL would continue to apply for relevant purposes related to the termination of the conflict. Persons deprived of their liberty for reasons related to a NIAC continue to enjoy the protections of IHL until the end of such deprivation or restriction of their liberty.[37] For example the ICRC notes that IHL rules should continue to apply to trials for crimes during conflict even after the end of conflict: *"persons protected under CA3, even after the end of a non-international armed conflict, continue to benefit from the article's protection as long as, in consequence of the armed conflict, they are in a situation for which CA3 provides protection. Thus, for example, persons who have been detained in connection with the conflict should, after the end of the conflict, continue to be*

[29] The Crisis Group, Steadying the New Status Quo in Syria's North East, 27 November 2019 <https://www.crisisgroup.org/middle-east-north-africa/eastern-mediterranean/syria/b72-steadying-new-status-quo-syrias-north-east>.

[30] Dutch Country of Origin Report - Syria 2019, page 69, see above.

[31] HRC, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, A/HRC/27/60, 13 August 2014, para 16; UNSC, Eighth report of the Secretary-General on the threat posed by ISIL (Da'esh) to international peace and security and the range of United Nations efforts in support of Member States in countering the threat, S/2019/103, 1 February 2019, para 98.

[32] HRC, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic (2014), para 13.

[33] D Lewis, G Blum & N Modirzadeh, *Indefinite War: Unsettled International Law on the End of Armed Conflict* (Harvard Law Sch. Program on Int'l Law & Armed Conflict, 2017), page 100.

[34] The Wilson Center, 'U.S. Report: ISIS Resilient in Iraq, Syria', 10 February 2020 <https://www.wilsoncenter.org/article/us-report-isis-resilient-iraq-syria)>.

[35] Al Jazeera, 'With Abu Bakr al-Baghdadi gone, what next for ISIL?', 29 October 2019 (available at: https://www.aljazeera.com/news/2019/10/abu-bakr-al-baghdadi-isil-191028140353503.html); Foreign Affairs, 'New Caliphate, Same Old Problems', 01 January 2020 <https://www.foreignaffairs.com/articles/west-africa/2020-01-01/new-caliph-same-old-problems>.

[36] ICRC, Report on international humanitarian law and the challenges of contemporary armed conflicts, 32IC/15/11, October 2015, page 9.

[37] Article 5(3) APII.

treated humanely, including not being subjected to torture or cruel treatment or being denied a fair trial."[38] The ICRC Commentary also notes that while, in principle, measures restricting people's liberty taken for reasons related to the conflict should cease at the end of active hostilities, this does not apply to criminal convictions.[39]

Internationalising the conflict by foreign intervention? There have been multiple interventions by foreign states in the conflict in Syria creating a complex landscape and giving rise to significant controversies as to the 'internationalisation' or not of the conflicts.[40] However in the present situation, concerning the conflict between SDF/YPG and ISIS, the situation appears to remain a NIAC, albeit with an 'international dimension'.[41] First for the US or Coalition forces to themselves become party to this particular conflict they would have to have enjoyed 'overall control'[42] over SDF or YPG forces, according to quite a high threshold, which does not appear to be asserted or supported on the evidence. Second, even if it was, and the US became a party to the conflict between YPG/IS, it would most likely remain a NIAC so far as there remain non-state actors on at least one side of that conflict.[43] Moreover, and in any event, the controversy does not appear to have significant implications for applicable standards on the justice issues in question here. The fair trial standards (section D) or the scope of war crimes (section E) are areas where standards are broadly comparable for IAC and NIAC.

Note on Applicable Law

The relevant law governing the conduct of parties to a conflict, including the *de facto* authorities, is enshrined in applicable treaty and customary law. Syria ratified the Geneva Conventions in 1953[44], and CA3 is applicable as treaty law.[45] APII does not apply as treaty law in this case as Syria has not ratified. However, customary IHL – as reflected in some respects in both Additional protocols, and as reflected in ICRC Commentaries, clearly applies to all parties to the conflict.[46]

IHL applies alongside international human rights law (IHRL). While at one time the applicability of IHRL in conflict situations in general was contentious, its applicability is now confirmed by the vast weight of international authority and opinion, including the ICJ, ICRC, domestic and international courts and bodies.[47] As such, the focus of discussion is now predominantly on *how* it co-applies alongside IHL, which must be determined in relation to particular rules as they apply in particular contexts. Today IHL and IHRL are closely interconnected; customary IHL has been developed in light of human rights standards on

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[38] ICRC, CA3 Commentary, para 501.
[39] ICRC, Commentary on the Additional Protocols, para. 4493.
[40] For opposing views see Gill Classification, on the one hand, and Geneva Academy RULAC on the other, stating that: "Due to the use of force by the US-led coalition against the Islamic State group in Syria without the consent of the Syrian government, there is an international armed conflict in Syria. In addition, Turkey is using force against both the Islamic State group and Kurdish militia in Syria without the consent of the Syrian government. Israel is also involved in an International Armed Conflict. Israel is using air power against allegedly Iranian targets in Syria without the consent of the Syrian government."
[41] ICRC 2014 Opinion on detention in NIAC CEHCK REF PL; the opinion suggests eg. that IHL permits non-state armed groups to detain during NIAC of an international dimension.
[42] *Tadić* Case, Appeal Chamber Judgment, ICTY, 15 July 1999, para. 70; *Lubanga* Case, para 541, see above.
[43] See above *Lubanga* Case, para 541; *Tadić* Case, paras 84, 90, 131, 137 – 145.
[44] ICRC, Treaties State Parties and Commentary – Syrian Arab Republic < https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=SY>.
[45] CA3; GC I-IV.
[46] On relevant fair trial norms in APII and API as applicable in all conflicts, see ICRC Customary Law Study Rule 100, section 3 of this memo.
[47] Section II on e.g., the position of States, ICJ, ICRC, and Section III on the voluminous body of practice of IHRL courts and tribunals.

relevant points, while IHRL in armed conflict is increasingly interpreted in light of IHL, though there remain important issues of divergence between them.

Co-applicable norms of IHL and IHRL can and should be read harmoniously where they are substantively similar in content and purpose. Where they conflict, the more specific norm may take priority, or be applied as *lex specialis*.[48] While on some issues this can give rise to complex issues of interplay, for the purposes of this memo (notably section E on fair trial) it matters less as the relevant rules are not ones of substantive divergence but ones where IHL and IHRL standards can and should be read together.

Questions do arise as to whether OAGs are bound by IHRL at all. Traditionally the answer would have been that IHRL was only applicable to states, whereas IHL applied to all parties to a conflict. This notable divergence,[49] led to assertions that 'lop-sided results' challenged the notion of belligerent equality.[50] However, in the past decade a considerable body of international *practice* - from the UNHRC, Commissions of Inquiry, UN Special Rapporteurs and others - has emerged suggesting that non-State armed groups may also be bound by IHRL in certain contexts and circumstances within conflict situations. This arises notably, but not exclusively, where they control an area of a States' territory, such that there would otherwise be a 'vacuum of protection',[51] or where OAGs with the 'capacity' to afford human rights protections have assumed functions normally associated with the State.[52] In the present context, it is noteworthy that the UN Syrian Commission, among others, found anti-government armed groups could be 'assessed against customary international law principles.'[53] The UN Commission of Enquiry on Libya described it as '*increasingly accepted that where non-State groups exercise de facto control over territory they must respect fundamental human rights of persons in that territory.*'[54] The Special Rapporteur on Terrorism reached similar conclusions in relation to ISIS.[55] This builds on older jurisprudence of the UN Committee against Torture suggestion that when non-State armed groups exercised functions normally associated with a State, they '*may be equated to State officials for the purposes of certain human rights obligations'*.[56]

Whether this is yet applicable international law is debatable. But international and national practice[57] is undoubtedly evolving to recognise the reality of the exercise of non-state actor power (be it corporate or OAGs in conflicts) and to assess it against IHRL standards. The extent

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[48] These different approaches reflect divergent practice in the ICJ case law of the ICJ and other courts and bodies, explored in Duffy 2019. The difference is not explored as unlikely to be significant here.

[49] S Sivakumaran, 'Re-envisaging the International Law of Internal Armed Conflict', *European Journal of International Law* 22 (2011) 219-264, page 240-242.

[50] On 'lop-sided obligations' see Jelena Pejic, 'Conflict Classification and the Law Applicable to Detention and the Use of Force', in Wilmshurst (ed.), *Classification of Conflicts* 2012, page 115.

[51] Al-Skeini and Others v. the United Kingdom, ECtHR, Grand Chamber Judgment, 07 July 2011, para 141, 142.

[52] S. Sivakumaran EJIL 22 (2011), 219–264 p. 267

[53] See others in Andrew Clapham, 'Introduction', in Andrew Clapham (ed.), Human Rights and Non-State Actors (Cheltenham: Elgar, 2013), xxii, NSAs in Syria and beyond have been called on by the Human Rights Council and others to respect IHL and HR in relation to detention; J Horowitz, 'The Challenge of Foreign Assistance for Anti-ISIS Detention Operations', Just Security, 23 July 2018 <https://www.justsecurity. org/59644/challenge-foreign-assistance-anti-isis-detention-operations/>.

[54] UN Commission of Enquiry report to the HRC on Libya, UN Doc. A/HRC/17/44, 1 June 2011, para. 72.

[55] Emmerson, 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism', UN Doc. A/HRC/29/51, 16 June 2015.

[56] CAT; *Sadiq Shek Elmi* v. *Australia*, Comm.No. 120/1998, UN Doc. CAT/C/22/D/120/1998 (1999), para. 6.5

[57] Peace accords and truth commissions provide further recognition of 'gross violations of human rights and IHL by all warring factions,' implying that IHRL applied to all sides in the first place; one e.g. among others is 'Witness to Truth', Report of the Sierra Leone Truth and Reconciliation Commission (2004), Volume 1, Chapter 2, para. 23.

of territorial control, and exercise of state- like functions would suggest the AANES should be held to such standards. A pragmatic approach that interprets the law flexibly, in context and as a living instrument, is considered necessary for it to remain relevant and responsive to changing realities surrounding non-state actor exercise of what were traditionally state functions, including in this context in relation to detention and prosecution.

In any event, whether strictly bound or not by IHRL, the Autonomous Administration is bound by IHL. Increasingly, IHL (especially in NIAC) is interpreted in light of IHRL, and vice versa. The starting point for the analysis of applicable law is therefore CA3, along with customary IHL, where relevant interpreted in light of in light of the more developed body of (substantively similar) IHRL.[58]

C. QUESTION 2: <u>Does international law permit non-state actors such as the AANES to establish tribunals and hold trials in areas under their control?</u>

Introduction:

I have been asked to consider whether as a matter of international law, non-state actors/ armed groups can set up and run judicial proceedings. Does international law permit non-state actors such as the AANES to establish tribunals and hold criminal trials in areas under their control at all, and if so, on what basis and in what circumstances?

Criminal justice is a quintessential exercise of sovereignty, and a function normally exclusively within the remit of the state. It is not surprising then that the issue remains sensitive, and many states are reluctant to recognise the power of OAGs to assume such functions. However, on the basis of the law, principles and significant body of authoritative international practice set out more fully below, I would conclude that there is no inherent legal impediment to organised armed groups such as AANES - parties to armed conflict, in control of territory and detainees in the context of the armed conflict –holding trials. Instead the key legal issues relate to the nature of those courts and trials, specifically what standards of justice they meet (discussed at Section D below) and whether they respect rule of law principles in the identification of crimes and application of penalties they prosecute and punish (at Section E).

This question raises some fundamental issues regarding how international law, and IHL specifically, address the role of organised non-state armed groups (OAGs) generally, which are worthy of brief preliminary mention. While NSA responsibility under international law has been a long been in dispute, the debate around IHL has been somewhat different from other areas, as IHL clearly *does* impose obligations on organised non-state armed groups (OAGs). (As noted in section X, other areas such as IHRL are struggling to catch up). However, while OAGs clearly have *obligations* under IHL, the law provides limited explicit guidance as to their rights or powers. This reflects the ‘paradox’ that IHL ‘seems to demand what it fails to authorise’.[59]

Put differently, it might be said that IHL applicable in a NIAC has sought to embody a ‘balance’ - on the one hand recognising and regulating the realities of OAGs’ exercise of power, without going further than necessary in ‘legitimising,’ empowering or permitting the incursion into state

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[58] IHRL has international mechanisms of enforcement which have contributed to a (generally) more detailed body of law than IHL. Duffy, Law Applicable in Armed Conflict p. 54 et seq.

[59] M Bergsmo and S Tianying (eds), *Military Self-Interest in Accountability for Core International Crimes* (2nd edn, Torkel Opsahl Academic EPublisher, 2018), 426.

sovereignty that such exercise was seen (by negotiating states) to represent. The result is a lack of clear and explicit answers to questions concerning the powers of OAGs, including whether and when OAGs can legitimately set up tribunals, or indeed whether they can legally detain during a NIAC at all, in the treaties themselves.[60]

Where the ordinary wording of provisions is not clear, consistent or conclusive, several approaches to the interpretation of international law are relevant. First, applicable law needs to be read in light of the body of law as a whole, including subsequent provisions, such as, as noted below, how the language of APII can inform our reading of CA3. Second, it is necessary to consider the logic, purpose and effectiveness of the law. Several such considerations are significant here. For example, the power to conduct trials may *logically* be seen as implicit in provisions that purport on their face to regulate the *fairness* of such trials.[61] They may also be implied by *other* provisions and principles of IHL, such as the equality of belligerents, or the doctrine of superior responsibility applicable to all parties in both IACs and NIACs which implies that OAGs *can* establish tribunals to punish the misconduct of subordinates. Likewise, the requirement that OAGs in control of territory provide a basic level of 'law and order' (including due process) for the civilian population, as required by CA3 and positive obligations in IHRL, also drive in that direction.

Third, regard may also be had to the purpose the law. It has been suggested for example that denying rather than engaging with the 'reality of insurgent justice'[62] is likely to incentivise 'summary justice' or even extra-judicial execution, undermining the humanitarian purpose of IHL.[63] In an area where practice is evolving rapidly, as regards non-state actor power in general and resort to criminal justice by non-state armed groups in recent decades specifically,[64] it may also be necessary for an evolutive or 'living instrument' approach to the law to enable the law to remain relevant and effective in the real world. The many examples from practice explored below reveal ways in which the law is being interpreted and applied to this end.

Section A considers the core provisions of IHL. While it is clear that they do not explicitly empower the establishment of such tribunals, it provides at least 'an opening' to interpret the law as not precluding OAGs from holding trials, provided basic fair trial standards are met. Section B sets out the growing and diverse range of authorities in support of the view that establishment of such tribunals is not itself prohibited in international law, including the ICRC, the ICC, emerging domestic judicial opinion and civil society positions. While uncertainty and controversy about the exercise of judicial and/or legislative functions by a NSA undoubtedly lingers, contemporary practice appears to convincingly recognise the potential legitimacy of NSA justice in certain circumstances.

A. Provisions of International Humanitarian law (IHL)

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[60] A number of cases have questioned this power (eg Serdar Mohammed in UK courts) but been criticized, including for the consequences for lethal resort to force.

[61] D Murray, 'Non-State Armed Groups in NIAC: Does IHL Provide Legal Authority for the Establishment of Courts?' (2014) EJILTalk <https://www.ejiltalk.org/non-state-armed-groups-in-niac-does-ihl-provide-legal-authority-for-the-establishment-of-courts/:noting>. Eg "*By regulating the operation of armed group courts, States implicitly (but necessarily) established the authority to convene such courts.*"

[62] M Bergsmo and S Tianying, *Military Self-Interest in Accountability for Core International Crimes,* 423.

[63] D Murray, Non-State Armed Groups in NIAC ; See below, ICRC 2016 Commentary, para. 689 notes that *'the establishment of NSAs' courts... may constitute an alternative to summary justice and a way for armed groups to maintain "law and order" and to ensure respect for humanitarian law'*

[64] Geneva Call, 'Administration of Justice by Armed Non-State Actors' (2018) < https://genevacall.org/wp-content/uploads/dlm_uploads/2018/09/GaranceTalks_Issue02_Report_2018_web.pdf>.

As noted in relation to question 1, CA3 is applicable treaty law in the NIAC in North East Syria. While API and APII are not, they have been held to provide sources of interpretation of CA3 and in important part to reflect customary law applicable to all armed conflicts including the relevant conflict(s) in Syria.[65] Applicable IHL does not specifically authorise OAGs (or for that matter states), to set up tribunals. As one writer put it, "no general legitimacy is thus granted to such a practice under international law."[66] The question whether it is *prohibited*, however, requires brief regard first to several differently worded IHL provisions.

The starting point is the applicable provision of GC CA3, which prohibits "*the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples.*"

There is no accepted definition of what constitutes a 'regularly constituted court.' Rule 100 of the customary law study,[67] in wording that may be considered problematic for the prosecuting authorities, suggests that *"a court is regularly constituted if it has been established and organised in accordance with the laws and procedures already in force in a country".* At first glance then this would appear to refer to the normal law making and law enforcing apparatus of the state and may suggest that non-state actor tribunals would not qualify. On the other hand, as the ICRC Commentary suggests, this language may simply reflect the principle of legality – that as noted below, a tribunal must be established by law before it operates, without necessarily precluding the possibility that the NSAG itself creates the law.[68] Notably the remainder of ICRC Customary Law Rule 100 focuses on due process standards, comparing (and arguably equating), a 'regularly constituted court' with 'competent' tribunal and a 'tribunal established in law' in human rights law. Moreover, in terms of the sources of practice referred to by the ICRC study, none of them address the question who or what may establish tribunals, or by which authority or law; instead, the many military manuals cited in the practice section (ICRC Study Vol II) refer to tribunals offering 'essential guarantees.'

If we look to other IHL sources as aids to interpretation, they support the view that what is critical is not the formalities of how the courts are set up and by whom, but that they be based in law, competent and respect basic standards of justice. Article 66 GCIV, which is the closest in language to CA3, refers to "properly constituted" courts, and the ICRC Commentary to GC IV treats this term as identical to "*regularly constituted*" courts in CA3.[69] These "properly constituted courts" need not be pre-existing courts in the occupied state, but courts set up by the occupier[70] which meet certain standards governing the administration of justice and are "non-political".[71]

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[65] A Clapham, P Gaeta and T Haeck (eds), *The Oxford Handbook of International Law in Armed Conflict* (OUP 2014).

[66] M Bergsmo and S Tianying *Military Self-Interest in Accountability for Core International Crimes*, 427.

[67] ICRC Customary International Law Study, Rule 100, Volume I, page. 355.

[68] *2016 Commentary,* para. 692.

[69] Customary IHL, Practice Relating to Rule 100. Fair Trial Guarantees Section B. Trial by an independent, impartial and regularly constituted court.

[70] Article 66 GC IV provides that: In case of breach of the penal provisions promulgated by it by virtue of the second paragraph of Article 64, the Occupying Power may hand over the accused to its properly constituted, non-political military courts, on condition that the said courts sit in the occupied country. Courts of appeal shall preferably sit in the occupied country.

[71] GCIV; Commentary of GCIV, Article 66, para 2. For detailed provisions see Article 71 et seq.

Likewise, other IHL treaty provisions emphasis "essential guarantees" of fair trial, rather than how or by whom the court was established.[72] APII is of particular significance in interpreting CA3 given its applicability to conflicts where OAGs have control of territory, and insurgent tribunals are most likely to arise. Article 6(2) of APII notably omitted the term "regularly constituted court" found in CA3(d), in favour of a functional definition referring simply to a tribunal "offering the essential guarantees of independence and impartiality". The ICRC commentary to the APs suggests that the reason for this was that as least some of the drafters recognised that the term "regularly constituted" might seem to preclude the application of Article 6(2) to tribunals created by OAGs; for that reason they adopted the different terminology borrowed from elsewhere in the Geneva Conventions emphasising the guarantees afforded by the tribunal.[73]

As such, at a minimum, it has been suggested that APII provides *"... an opening in the law as it stands now to develop a legal space in which the practice of insurgent groups in setting up courts can be regulated so that it accords to a degree with the requirements of justice under international law."*[74] Subsequent practice and interpretations of IHL suggest that this 'opening' in IHL texts has been seized, rejecting the idea that non-state actor tribunals are inherently impermissible, but rather dependent on their ability and willingness to meet fair trial standards.

B. <u>Other International Standards and Practice</u>

- **Updated ICRC Commentary (2016)**

A significant authority is the updated 2016 ICRC Commentary on the Geneva Conventions, whose purpose is of course specifically to provide guidance on the current interpretation of IHL. The 2016 Commentary suggests no prohibition on NSA held trials, even if there are a number of questions as to legitimacy and capacity that may arise in particular situations. It noted that:

> '*[n]o trial should be held, whether by State authorities <u>or by non-State armed groups</u>, if [the minimum] guarantees cannot be provided. <u>Whether an armed group can hold trials providing these guarantees is a question of fact</u> and needs to be determined on a case-by-case basis'*[75]
>
> *... '[a]lthough the establishment of NSAs' courts <u>may</u> raise issues of legitimacy, trial by such means may constitute an alternative to summary justice and <u>a way for armed groups to maintain "law and order" and to ensure respect for humanitarian law</u>' (emphasis added).*[76]

The Commentary notes that if CA3 referred exclusively to State courts, 'the application of the rule in CA3 to each Party to the conflict' would *'be without effect*'. It makes quite explicit that in the ICRC's view:

> *"Therefore, to give effect to this provision, it may be argued that courts are regularly constituted as long as they are constituted in accordance with the 'laws' of the armed*

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[72] Article 84 (2) of GC III provides that "in no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognised".

[73] ICRC, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, 1398.

[74] R Provost, International Human Rights and Humanitarian Law (Cambridge University Press, 2002), p 426.

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

[76] *Ibid.,* para. 689.

group. Alternatively, armed groups could continue to operate existing courts applying existing legislation".[77]

This is supported by references in the earlier ICRC Commentary to the Additional Protocols of 1987 recognizing the possible '*co-existence of two sorts of national legislation, namely, that of the State and that of the insurgents'*[78].

Thus, although the earlier ICRC Customary law study suggested that courts had to be "*established and organised in accordance with the laws and procedures already in force in a country*,"[79] which appeared for many to preclude the courts of armed groups passing their own 'laws'[80] the ICRC's position appears to have evolved in the intervening years.

- **ICC Elements of Crimes**

The ICC Elements of the Crimes annex to the Rome Statute, in elaborating on the war crime derived from the relevant provision of CA3, states that " *the court that rendered judgment was not "regularly constituted", that is, it did not afford the essential guarantees of independence and impartiality, or the court that rendered judgment did not afford all other judicial guarantees generally recognised as indispensable under international law*."[81] It thus explicitly confirms that a regularly constituted court should be interpreted as commensurate with the requirements of independence and due process set out in section D, not as relating to when or by whom the court was established.

- **ICC practice: *Prosecutor v. Hassan***

In the *Hassan* case, the ICC Office of the Prosecutor (OTP) charged the accused with the war crime of sentencing or execution without due process under Article 8(2)(c)(iv) of the ICC Statute, which gives effect to CA3.[82] It is noteworthy that neither the OTP nor the pre-trial chamber took the view that the establishment of a tribunal by non-state armed groups in Timbuktu was 'inherently illegal', focusing instead on the characteristics of the tribunal and lack of due process guarantees. The PTC found that:

> *"IHL does not prohibit non-State actors from establishing courts and tribunals"*

Citing authoritatively to the 2016 ICRC Commentary the Court noted that:

> *"if ['a regularly constituted court'] would refer exclusively to State courts constituted according to domestic law, non-State armed groups would not be able to comply with this requirement. The application of this rule in common Article 3 to 'each Party to the conflict' would then be without effect. Therefore, to give effect to this provision, it may be argued that courts are regularly constituted as long as they are constituted in accordance with the 'laws' of the armed group." This view appears to be shared by Bothe et al, who argue that "[t]here is no basis for the concept that the rebels are*

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[77] *Ibid.,* para. 692. See also ICC Hassan decision, below.

[78] Y Sandoz, C Swinarski and B Zimmerman, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, 1987, para. 4605

[79] ICRC, Rule 100.

[80] S Sivakumaran, 'Courts of Armed Opposition Groups: Fair Trials or Summary Justice' (2009) 7 JICJ, page 499. A judge of the United States Supreme Court in the Hamdan case interpreted the term as requiring that '*the court be appointed or established in accordance with the appointing country's domestic law'. Hamdan v. Rumsfeld, 548 US, per Alito J, at 2-3*

[81] Article 8 (2) (c) (iv) - War crime of sentencing or execution without due process, ICC Element of Crimes annex 1998.

[82] *Situation in the Republic of Mali in the case of The Prosecutor v al Hassan ag Abdoul ag Mohamed ag Mahmoud,* Pre-trial Chamber, Case No. ICC-01/12-01/18, 4 July 2019.

prevented from changing the legal order existing in the territory where they exercise factual power." Indeed, the establishment of such courts might be required to satisfy a commander's obligations to prevent or punish violations of the laws of war. Some commentators also argue that the fact that such courts have been established by non-State actors might attract a lower standard of due process; that is, that due process expectations are, to some extent, tailored to due process capacities [83.] (emphasis added)

The court concluded by referring to *"the existence of authoritative views that 'rebel' courts are not ipso facto illegal under IHL,"* with the result that it found Mr. al Hassan could not have known that Ansar Dine's establishment of its own court structure would itself constitute a war crime under the ICC Statute.[84]

- **International Human Rights Practice**

The focus of most IHL provisions and commentary on compliance with essential guarantees of fairness, rather than whether the *de facto* authorities have the right to set up the tribunal in the first place, is consistent with the pragmatic approach in IHRL. With regards to the establishment of courts specifically, as section C outlines, IHRL focuses on whether the court is established by law, independent and impartial, and in practice meets fair trial standards, rather than a formalistic approach based on the legitimacy, or not, of the authority that set it up. This is supported for example in *Ilaşcu v. Moldova*, where the European Court of Human Rights noted that "[*i]n certain circumstances, a court belonging to the judicial system of an entity not recognised under international law may be regarded as a tribunal 'established by law' provided that it forms part of a judicial system operating on a 'constitutional and legal basis' reflecting a judicial tradition compatible with the Convention, in order to enable individuals to enjoy the Convention guarantees*."[85]

While international human rights mechanisms remain state-centric, they also increasingly engage with non-state actors on respect for IHRL, including notably supporting and calling for them to exercise justice functions linked to ensuring compliance with IHL and IHRL. For example the Special Rapporteur on the situation of human rights in the Sudan called on the Sudan People's Liberation Army and South Sudan Independence Army to 'investigat[e] the cases brought to their attention and hold … the perpetrators responsible.'[86] Engagement with the 'penal codes' of non-state actors is not new, as reports of the UN Observer Mission in El Salvador (ONUSAL) show, where ONUSAL recognized the reality that non-state entities are legislating and prosecuting in territories under their control, and shifted to ensuring they do so in a rule of law compliant way.[87]

- **State Reactions and Domestic Courts**

While there is not an abundance of practice to draw on, brief research suggests there may also be support for the power to conduct trials in statements of governments, and in domestic case law. For example, the French government stated that French fighters who had joined ISIS and been detained by the People's Protection Units (YPG/YPJ) in Syria could be tried at courts

[83] *Hassan*, *ibid.*, para 254.
[84] *Ibid.,* para 255.
[85] *Ilaşcu v. Moldova*, Judgment (Grand Chamber), 48787/99, 8 July 2004, para. 460. See also *Cyprus v. Turkey*, Judgment (Grand Chamber), 25781/94, 10 May 2001, paras. 231, 236-237, 358.
[86] See eg. Report of the Special Rapporteur on the situation of human rights in Sudan, Gaspar Biro, UN Doc. E/CN.4/1996/62, 20 February 1996, at 87.
[87] Letter from Commander Nidia Diaz, Director, FMLN Secretariat for the Promotion and Protection of Human Rights, 19 October 1988 (hereinafter FMLN Memo), partially reproduced in Americas Watch, Violation of Fair Trial Guarantees by the FMLN's Ad Hoc Courts, Americas Watch, New York and Washington, 1990.

established by this group through its civilian administration.[88] There are also reports of agreements having been entered into between states and the non-state groups.[89] Statements by others governments resisting the return of 'foreign fighters' to the effect that they should remain in Syria and be prosecuted there, may arguably be seen - absent credible alternatives within Syria - to represent implicit support for some kind of NSA process.[90] The issue seems rarely to have been pronounced upon, just as it has rarely arisen in litigation, but practice is likely to continue to evolve.

- **The *Haisam Sakhanh* case, Sweden**

In a context where international authority remains limited, the decision of the Stockholm District Court in the *Haisam Sakhanh* case, confirmed on appeal, is noteworthy. Directly on point, it concerns non-state actor led prosecutions in Syria. Haisam Sakhanh, who was accused of killing seven unidentified detainees from the Syrian state army[91] argued that he was carrying out a sentence pronounced by a legitimate court, after proceedings which met the basic requirements for a fair trial as set out in IHL.[92] The District court held that:

> "*the principle of sovereignty does not prevent a non-state actor from establishing a court. The requirement that a court be regularly constituted should rather be regarded as fundamentally linked with the question of whether the court upholds fundamental legal safeguards, such as being independent and impartial.*"[93]

The Court affirmed that non-state armed groups can have the capacity in certain circumstances to establish courts and impose penal sentences.[94] In line with reasoning set out in this memo, it found that over time there had been "*a change in focus from the question of how a court is established to an assessment of whether a court respects fundamental guarantees of due process*." Elaborating on the consistency of this approach with the wording of CA3, the Court found that while "[t*]he expression "regularly constituted court" could give the impression that only a state can establish a court of this nature…. the scope of application of the article should be as broad as possible…The meaning of this term has been clarified in developments subsequent to the adoption of the Geneva Conventions in 1949, for example in the context of the APs I-II and the Rome Statute*.[95] The ICRC Commentary provides that "*the requirement for the court to be regularly constituted has here been replaced by a requirement of independence and impartiality*".[96]

- **Civil Society**

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[88] 'Une centaine de jihadistes français sont détenus en Syrie, selon Le Drian', France 24, < http://www.france24.com/fr/20180207-jihadistesfrancais-centaine-detenus-syrie-le-drian-irak-familles-rapatriement-justice>; Geneva Call, 'Administration of Justice by Armed Non-State Actors', page 6.

[89] H Jobstl, 'Outsourcing Justice: State Obligations and the Prosecution of Foreign Fighters by Armed Groups in Syria' (2020) <https://armedgroups-internationallaw.org/2020/04/06/outsourcing-justice-state-obligations-and-the-prosecution-of-foreign-fighters-by-armed-groups-in-syria/>, referring to French agreements with the NES regarding the detention and potential trial of French nationals.

[90] 'Syrian council welcomes Belgian support of international trials for foreign ISIS fighters', Kurdistan 24, February 2019, <https://www.kurdistan24.net/en/news/5bb3869f-0c62-4ecb-a3b4-03e9cd2aed50>.

[91] ICRC, Unofficial Translation of the Case, para. 24 <https://casebook.icrc.org/case-study/swedensyria-can-armed-groups-issue-judgments>.

[92] ICRC, Unofficial Translation of the Case, *ibid.*, para. 25.

[93] Stockholm District Court, Case No.: B 3787-16, Judgment of 2017-02-16.

[94] ICRC, Sweden/Syria, Can Armed Groups Issue Judgments?; https://casebook.icrc.org/case-study/swedensyria-can-armed-groups-issue-judgments

[95] See above, ICRC, Unofficial Translation of the Case, para 26

[96] *Ibid.*, para 27.

Finally, it is worth briefly noting that civil society reactions to non-state actor established courts in NE Syria have also generally focused on the question of *how* trials would be pursued, and basic fair trial standards and capacity, not on their right to detain or to try at all. For example, concerns raised by Human Rights Watch focused on realizing the right to defence and appeal in 'a rather rudimentary judicial system'.[97] Amnesty International's approach follows suit.[98] A detailed ILAC report concluded with recommendations to '*assist courts in non-government controlled areas to improve their efficiency and procedures where feasible.*'[99] This echoes other calls for support to strengthen due process standards, and enhance capacity to pursue justice, rather than close down the prospect of non-state actor trials at all.

Conclusion:

The exercise of criminal justice by non-state armed groups is a rapidly developing area of practice.[100] A weighty body of international practice has developed in response, interpreting and applying IHL as not prohibiting or precluding groups such as AANES from establishing courts that meet appropriate standards of justice. This is the logical consequence of provisions that regulate such processes, and those that require law and order and command responsibility, and is consistent with the humanitarian purpose of IHL. The issue is undoubtedly sensitive, given that criminal law is closely associated with the exercise of inherent and exclusive state functions. It is also challenging - as the regularly constituted court requirement, understood as one that meets standards of independence and impartiality and dispenses justice according to fair trial standards, may be one '*which an insurgent force may have difficulty meeting.*'[101] These questions are ones of fact - whether non-state actors can on a 'material' rather than a 'formal' level deliver justice according to basic international standards set out in the next section.[102]

C: QUESTION 3: <u>Essential Guarantees of Fair Trial</u>

Introduction:

Essential fair trial guarantees provide the international litmus test for any criminal procedure, in armed conflict and time of peace. While formulations vary somewhat, core guarantees of fair trial, to enable individuals to meaningfully defend themselves before an independent and impartial tribunal, are reflected fairly consistently across both IHL and IHRL, for IAC and NIAC, under treaty and customary law. As such, it is possible to identify basic guarantees contained in both legal regimes that are essential for any criminal justice process. These would also be the standards on which international cooperation and recognition, discussed under Section F, are likely to depend.[103]

As noted under Section C, as a matter of law, and perhaps as a general proposition of fact, there is no reason to assume that non-state actors *cannot* establish a court of law and provide a process that meets fair trial standards. Whether, in practice, the authorities are capable of meeting the

[97] Geneva Call, 'Administration of Justice by Armed Non-State Actors', page 6.
[98] Amnesty International, 'Syria: Arbitrary detentions and blatantly unfair trials mar PYD fight against terrorism' (2015) <https://www.amnesty.org/en/latest/news/2015/09/syria-abuses-mar-pyd-fight-against-terrorism/>.
[99] Eg. M Ekman (ed.), *ILAC Rule of Law Assessment Report: Syria 2017*, pages 104, 117 and 125.
[100] Geneva Call, 'Administration of Justice by Armed Non-State Actors', page 10, citing eg. detailed court structures in inter alia Sudan and Somalia. See also S. Sivakumaran, 'Courts of Armed Opposition Groups: Fair Trials or Summary'.
[101] Third Report of ONUSAL, UN Doc. A/46/ 876-S/23580, 19 February 1992, para. 111.
[102] On the difference between discussion at the formal and material level, see S Sivakumaran, 'Courts of Armed Opposition Groups: Fair Trials or Summary', page 498.
[103] As discussed more fully in section 4, a trial which is summary in nature and conducted with a disregard for the basic rights of the defence would amount to 'a flagrant denial of justice', and states should refrain from providing cooperation in any form with that process.

fair trial standards set out in this section, and with what support, are separate questions of fact that would need to be engaged with. The degree of difficulty in meeting due process standards would likely be affected by factors such as prosecutions policy including the number of people prosecuted, as with a selective approach , the resource based challenges in meeting due process standards may diminish. At this stage there is no public precision about how many people the AANES is likely to seek to prosecute although it is understood, informally, that only a relatively small number of detainees are likely to be the subject of a prosecution of effort. Some of the key challenges are likely to relate to resources and to obtaining and presenting adequate evidence, which would apply to almost any kind of investigation of this nature in this context. The extent of cooperation and support from the many entities that have been engaged in documenting atrocities in Syria will strongly influence the non-state actors capacity.

If the AANES assumes the responsibility of conducting trials, implicitly asserting the capacity to do so, they need to meet the core international standards set out below. As ever, the law needs to be interpreted and applied contextually and purposively, mindful of limitations and undoubted challenges to investigating and prosecuting violations in an on-going armed conflict situation.

- **Identifying Applicable Law on Fair trial**

As discussed in Section 1, AANES is bound by Common Article 3 (CA3) and customary IHL. As an entity with territorial control, and demonstrated capacity, it can also arguably be considered bound by IHRL. In any event, as an authority assuming prosecutorial powers, it would be expected to meet the core human rights standards associated with the exercise of such powers under both bodies of law, considered in turn.

Under IHL, several slightly differently formulated provisions, across the Geneva Conventions (GC) and both Additional Protocols (AP I and II), reflect the importance of a "fair and regular trial,"[104] providing 'essential' or 'indispensable' 'judicial guarantees,' including an "impartial and regularly constituted court respecting the generally recognised principles of regular judicial procedure…."[105] Fair trial is therefore protected in treaty provisions applicable in all types of IAC and NIAC.

- CA3 protects 'judicial guarantees which are recognised as indispensable by civilised peoples.'

- Article 6 of Additional Protocol II contains a list of 'essential guarantees of independence and impartiality' in NIAC, including affording 'before and during his trial all necessary rights and means of defence.' Even where APII is not applicable as treaty law, it has been described as the starting point to understand the judicial guarantees under CA3.[106]

- Article 75(4) of Additional Protocol I provides a more detailed list of due process guarantees; it 'was drafted based on the corresponding provisions of the International

[104] GC IV Article 5; GC III Articles 102–108; CA3.
[105] AP I, Article 75(4)). CA3: "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples" or a "court offering the essential guarantees of independence and impartiality (AP II, Article 6)
[106] S Sivakumaran, 'Courts of Armed Opposition Groups: Fair Trials or Summary Justice?', pages 489–513.

Covenant on Civil and Political Rights … and may be taken to reflect customary international law applicable in all types of conflict ….'

- Authoritative support for this view is found in Rule 100 of the ICRC customary law study, which provides that core fair trial standards are customary law in both types of conflict, drawing on IHL and IHRL provisions.[107] We can therefore draw from the relatively detailed provisions of IHL on this issue.

IHRL treaties, such as Article 14(3) of the ICCPR, ratified by Syria, enshrine fair trial rights, establishing minimum guarantees "required in the determination of any criminal charge."[108] Although in principle the right to a fair trial is derogable,[109] this has limited effect in practice. The 'core' element of fair trial has been deemed by human rights courts and bodies as applicable at all times,[110] and derogation cannot be inconsistent with any other international obligations, including the fair trial provisions of IHL. Derogation from the applicable IHRL treaty provisions would therefore have little or no impact on the basic fair trial standards set out in this section.[111]

The approach of IHRL is to provide 'minimum guarantees', or parameters, for determining whether in the particular circumstances the totality of the process was fair. It does not purport to provide detailed or rigid prescriptions on how a trial should be conducted, its procedure, nor how evidence should be gathered and presented.[112] As human rights courts and bodies consistently make clear, the appropriate assessment is generally whether the totality of the proceedings amount, in the circumstances, to a fair trial, rather than looking in isolation at the presence of particular safeguards.[113] At the same time, as set out below, certain benchmarks are considered inherent in any fair process.

To understand the law of armed conflict, then, we need to look at applicable norms from both IHL and IHRL and apply them in context. In this situation, this is not as complex as it sounds. Unlike some other issues, where theoretically challenging and contentious issues as to the interplay of IHRL and IHL, identifying '*lex specialis'* norms, or otherwise calculating how much weight to give to each, these questions are less crucial in this situation. The same could be said of the distinction between IAC and NIAC. This is because the core fair trial standards are substantively very similar for IACs and NIACs, and under IHL and IHRL.[114] Where there

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[107] J Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law: Volume I: Rules* (ICRC 2006).
[108] Article 40(2) Convention on the Rights of the Child, Article 8(1) of the American Convention on Human Rights provides that "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent … tribunal, previously established by law." Article 8(2) lists the minimum guarantees to which everyone is entitled "with full equality". Article 6 of the European Convention on Human Rights (ECHR) requires an "independent and impartial tribunal established by law." Article 6(2) and 6(3) ECHR set out "minimum rights" of "everyone charged with a criminal offence." Article 7(1)(d) of the African Charter on Human and Peoples' Rights requires an "impartial court or tribunal", and Article 7(1)(a)-(c) establish minimum procedural guarantees in a somewhat more parsimonious manner than other human rights treaties.
[109] Rights that can be suspended in time of national emergency, so far as necessary and proportionate to the emergency; see Article 4 ICCPR.
[110] HRC, General Comment No. 29, CCPR/C/21/Rev.1/Add.11, paras. 13 and 15; *Judicial Guarantees in States of Emergency*, Inter-American Court of Human Rights Advisory Opinion (OC-9/87).
[111] ICCPR Article 4.
[112] H Duffy, *The 'War on Terror'and the Framework of International Law* (CUP 2009).
[113] *McCallum* v. *United Kingdom*, Appl. No. 9511/81, Judgment of 30 August 1990, *Series A*, No. 183.
[114] While they mostly converge, there are nuances that emerge, for example, the jurisprudence that military commissions cannot prosecute civilians has been associated with IHRL, but not grounded similarly in IHL; see N Bhuta, 'Joint Series on International Law and Armed Conflict: Fair Trial Guarantees in Armed Conflict' EJIL:Talk! (2016) < https://www.ejiltalk.org/joint-series-on-international-law-and-armed-conflict-fair-trial-guarantees-in-armed-conflict/>.

are slight differences, applicable law can be read together and consistently, each informing the interpretation of the other. On some aspects IHRL may provide a more detailed approach than IHL, as the law has been interpreted and applied in many different factual contexts, or elaborated in detail on specific issues through general comments, as a result of the enforcement mechanisms that exist for IHRL, unlike IHL.[115] However, on the issue of fair trial, the explicit guarantees have been described as "sufficiently clear and elaborate under both international humanitarian and human rights law."[116]

What is more challenging perhaps is how to apply the core requirements of either IHL and IHRL in particular contexts, in a way that ensures their effectiveness.[117] Standards found lacking in the holistic analysis of one case cannot just be transplanted as a checklist into another, without adjusting to contextual realities of massive prosecutions during on-going armed conflict situations. This cannot mean that provisions are reduced so as to deprive fair trial of meaning in challenging contexts, but it does mean, as one scholar put it, that the rule of NIAC "*need to be interpreted in a manner which respects their substance while also making compliance with them possible. Anything less sacrifices real protection for the sake of paper standards, proving correct that old adage, the best is the enemy of the good […]"*[118]

The core customary fair trial standards that must be given effect in the specific context, are highlighted below. I have taken as a starting point customary IHL law, specifically the standards contained in Rule 100 of the ICRC's customary law study, which reflects core fair trial standards from both bodies of law.[119]

- **Benchmarks - Minimum Fair Trial Standards**

The Tribunal

- **Regularly constituted court or one previously established by law?**

As discussed in Section 2, CA3 provides for trial by a "regularly constituted court affording all the judicial guarantees which are recognised as indispensable by civilised peoples", though the regularly constituted court language was changed in AP II to "a court offering the essential guarantees of independence and impartiality."[120] A wave of international authorities now interpret the CA3 provision as requiring compliance with the benchmarks set out below, such as an independent and impartial process respecting due process standards.[121]

However the reference to regularly constituted court also reflect considerations of legality, reflected in IHRL, and in the Customary Study on IHL, in the requirement of a tribunal

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[115] Egs include the developed body of case law before international and regional complaints procedures and courts, or General Comments.
[116] J.Pejic, 'Conflict Classification and the Law Applicable to Detention and the Use of Force' in E Wilmhurst, ed, *International Law and the Classification of Conflicts* (OUP, 2012).
[117] N Bhuta, "Military manuals and *the ICRC Customary Law Study* recite the *terms* of these guarantees, but give us little guidance about how to give concrete meaning to these terms in an international or non-international armed conflict."
[118] See above, S Sivakumaran, page 503.
[119] J Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law: Volume I: Rules.*
[120] As some experts questioned whether "regularly constituted court" could be established under national law by an insurgent party, the language changed in AP II
[121] For more on regularly constituted court see question 2, and discussion here: https://www.icrc.org/en/doc/assets/files/other/irrc-867-somer.pdf#page=3

'previously established by law'.[122] This relates to law establishing the tribunal, which must be set up before the tribunal operates (as opposed to the criminal law which must be established before the commission of the underlying conduct and intent (Section E)). Sensitivities around non-state *de facto* authorities passing (as opposed to enforcing) laws is addressed in that section, and views differ on whether non-state entities can prosecute on the basis of their own criminal laws.[123] However, at least some law-making function is implicit if any sort of tribunal is to be 'established' by law in OAG controlled territory. This does not appear problematic in the view of the ICRC in its 2016 Commentary which reflects that the tribunal may be 'co*nstituted in accordance with the 'laws' of the armed group"*.[124] These provisions suggest that they must at least provide a regulatory framework for the tribunal, clarifying applicable law, procedure and other administrative requirements for the purposes of legality as well as efficiency.

- **Competent, independent and impartial tribunal**

The essential guarantees of "independence" and "impartiality" are inherent in the exercise of the 'judicial' function, and reflected across IHRL and IHL including, for example, Article 6(2) of APII.[125] As the United Nations Human Rights Committee (UNHRC) explicitly states, "*the notion of a 'tribunal' ... designates a body ... that is established by law, is independent of the executive and legislative branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature"*.[126] In addition, the ICRC Customary law study considers it a rule for IACs and NIACs, as it is reflected across military manuals, and in national legislation. The UNHRC has moreover, held that the right to an independent, impartial and competent tribunal is absolute and not subject to any exception, even in armed conflict or during states of emergency.[127]

The meaning of the terms is made clear in IHRL. Independence means that the 'court must be able to perform its function independently of any other branch of government…'[128] Political independence is essential: the tribunal must be "*structurally and institutionally* independent of the executive, including from political interference." This in turn requires putting certain safeguards in place to protect judges from interference with their decision-making process, such as security of judicial tenure from arbitrary interference. There is no suggestions as I understand it that a military tribunal would be established; if they were, this would raise a host of additional

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[122] Rule 100 refers to competence and previously established in law requirements as relevant to interpreting 'regularly constituted tribunal' under CA3 and API.

[123] ICC Prosecutors position; Swedish court; Klamberg all suggest the Court must apply law before the conflict; cf. 1987 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'* para. 4605

[124] *Ibid.*, para. 692. See also ICC *Hassan* decision.

[125] Article 6(2) of APII states: "No sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except *pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality. In particular: (a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence; (b) no one shall be convicted of an offence except on the basis of individual penal responsibility; (c) no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under the law, at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby; (d) anyone charged with an offence is presumed innocent until proved guilty according to law; (e) anyone charged with an offence shall have the right to be tried in his presence; (f) no one shall be compelled to testify against himself or to confess guilt."*

[126] UNHRC, General Comment No. 32 CCPR/C/GC/32, para. 18.

[127] *Ibid.*, para. 19 which refers to Communication No. 263/1987, *Gonzalez del Rio v. Peru*, para. 5.2.

[128] ICRC, Rule 100, p 356.

issues in respect of functional independence, fair trial, and the appropriateness of trying civilian suspects,[129] as human rights bodies have frequently noted.[130]

Impartiality in turn means that “the court must not harbour preconceptions about the matter before them, nor act in a way that promotes the interests of one side.”[131] There are two aspects of this, first, judges of the tribunal must be subjectively impartial. That is to say that they must act without any personal bias towards either party in the case and should not harbour preconceptions about the action before them and should remain uninfluenced by the media and public perceptions. Secondly, the tribunal must also be objectively impartial, so as to ‘exclude any legitimate doubt’ about impartiality from the perspective of an impartial observer.[132] Put simply, as the Swedish courts recently noted “although independence and impartiality are two separate legal principles, they are mutually dependent in that they aim to ensure that the accused receives a fair trial where the judgement is not a foregone conclusion.[133]”

While a closer study would be needed of how tribunals have been working to date, and the possibilities for this future tribunal, existing reports suggest that this is an area that will need attention. One pitfall to avoid will be the undue interference - direct and indirect - with the judicial function of the armed groups engaged in conflict. It is positive that in at least some of the non-state actor tribunals in Syria to date “*one of the requirements to join the judicial system is that the individual should not be affiliated to any armed faction, thus respecting the criterion of independence*.” [134] However, reports also expressed concern about courts having “expelled individuals who were affiliated with some of the factions of the Free Syrian Army.” This is turn caused withdrawal of financial support by those groups. Functional independence is also linked to the ability of judges to render judgments without fear of financial repercussions, for their courts or for them personally.[135] Ensuring that judges are remunerated (in a context where reports suggest judges are volunteers), and that it is reasonably secure remuneration, would be important safeguard of independence and impartiality.

A closer analysis would be needed of which internal and external safeguards, are feasible in the context and likely to be effective. This may include involving legal professionals and investigators from beyond the conflict, foreign judges, and a measure of transparency around processes, consistent with the challenging realities of on-going armed conflict.

Finally, the notion of 'competence' is also referred to in certain relevant provisions.[136] Legal competence is of course inherent in any defensible judicial process, alongside broader

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[129] See eg., the HRC’s concluding observations: Slovakia, UN Doc. CCPR/C/79/Add.79 (1997), para. 20, recommending that law be changed to ‘prohibit the trial of civilians by military tribunals in any circumstances’; in addition, the Special Rapporteur on the independence of judges and lawyers explicitly states that “their jurisdiction should be restricted to offences of a military nature committed by military personnel”, Report of the Special Rapporteur on the independence of judges and lawyers, A/68/285 (7 August 2013), para. 15.

[130] See *Polay Campos* v. *Peru* (Comm. No. 577/1994), Views of 9 January 1998, UN Doc. CCPR/C/61/D/577/1994, where the Committee criticised the use of ‘faceless judges’ to judge persons accused of terrorism, in part on the basis that ‘[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. [S]uch a system also fails to safeguard the presumption of innocence’.

[131] ICRC, Rule 100.

[132] *Ibid.*

[133] ICRC, unofficial translation of the case, available at https://casebook.icrc.org/case-study/swedensyria-can-armed-groups-issue-judgmentspara 33

[134] Geneva Call, Administration of Justice by Armed Non-state Actors, Report from the 2017 Garance Talks.

[135] *Ibid.*

[136] UDHR Article 8; ICCPR Article 2(3)(b) and (c).

professional competence of the investigatory, judicial, prosecutorial and defense teams. The close relationship in practice to respect for a fair trial has led to many international initiatives to bolster the capacity of judges and others.[137] There is no guide as to what level of education or experience would suffice for a judge to be considered 'competent' and context will dictate possibilities; a basic degree of legal education and relevant experience of decision making body as a whole would however be important. It may be that one legally qualified member alongside civilian members, or a more legally experienced appeal bench for example, would help compensate for lower judges, but a basic level of legal education across the board would be imperative. Consideration will be due as to what sort of capacity building and support for judges and lawyers can bolster and give effect to these requirements.

The composition of judicial panels may also influence capacity, by reflecting diverse experience and perspective, as well as helping limit discriminatory assumptions and approaches. Positive reports suggest that there have been women judges on existing courts, which should be developed wherever possible.

Presumption of Innocence

The accused has the absolute right to be presumed innocent until proven guilty.[138] The standard of proof should be clear, and suitably high (such as 'beyond reasonable doubt' or 'intimate conviction of trier of fact' in distinct systems).[139] As a result of the presumption of innocence, reversing burdens of proof – where in the face of certain evidence the onus shifts to the accused to show s/he was not guilty of a particular crime - are unacceptable, despite arising recurrently in the counter-terrorism context. Care should also be due to avoid public statements by the authorities – judges or other officials involved - relating to particular suspects that may jeopardise this.[140]

Right to be informed of particulars of the offence

At the heart of fair trial rights is the right to know the *charges and evidence* against you, and to have a meaningful opportunity to defend yourself against them. Article 6 APII states that (a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him …" Article 14(3) of the ICCPR embodies in the right to be informed in detail of the nature and cause of the charge, this includes the type of offence and the elements upon which the accusation has been founded. The obligation to inform the accused of the nature and cause of the accusation is also provided for in the Third and Fourth Geneva Conventions, as well as in API and II.[141]

The core rule requiring information as to charges and an opportunity to defend yourself make the use of, for example, secret evidence and anonymous witnesses (where witness identity is withheld from the accused), is highly controversial.[142] Reasonable steps can, however, be taken

[137] Report of the Special Rapporteur on the independence of judges and lawyers (2013).
[138] ICCPR, Article 14(2); AP I, Article 75(4)(d); AP II, Article 6(2)(d).
[139] ICRC, Rule 100 reflects both possibilities.
[140]*Allenet de Ribemont* v. *France*, Appl. No. 15175/89, Judgment of 7 August 1996, ECtHR, *Series A*, No. 308; also see, A Ashworth, 'Four threats to the presumption of innocence' (2006) 10 *The International Journal of Evidence & Proof* 4, pages 241-278.
[141] GC III, Article 96, fourth paragraph and Article 105, fourth paragraph; GC VI, Article 71, second paragraph and Article 123, second paragraph; AP I, Article 75(4)(a); AP II, Article 6(2)(a).
[142]S*ee* Part B. For standards in the context of the ICC Statute and Rules, *see* Article 68(5) of the Statute and Rule 81(4) suggesting that complete anonymity has been ruled out from ICC proceedings, while other measures to

to protect information where the implications for personal safety or security is at stake, though efforts may be needed to mitigate any potential unfairness. The core of the right to meaningful notice of the case and the evidence against you cannot be set aside. Once again, the court will be guided by the overall fairness of the trial, including the ability of a defendant to fully understand the charges and present a defence.

Rights & Means of Defence/'Minimum' Due Process Guarantees

Article 6 APII provides that the procedure "shall afford the accused before and during his trial all necessary rights and means of defence." This core right to defend oneself, in a meaningful way, is reflected in more detail in both Article 14(3) and Article 75 API and Rule 100 of the ICRC Customary Law Study.

- **The right to challenge and present evidence**

Article 14(3) and Art 75 API refer more specifically to the right to "examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him", which would seem to be a natural elaboration of the right to defence. In practice, the resources available for this may limit the ability to secure witnesses, but there are minimum levels of facilities that must be accorded to all defendants for their defence to be effective. Defendants must be provided with all the materials that the prosecution is to use in court, as well as any other material that may be exculpatory.

It follows from the provision of information and the right of defence that this must be in a language the accused understands. Meaningful preparation of the defence and access to justice naturally requires an interpreter, where needed. Notably, these IHRL standards are reflected in the ICRC Customary Law Study, and thus accepted under both IHL and IHRL. [143]

- **Timeliness**

Timeliness has various dimensions within the right to a fair trial, some of which are compromised in the current situation. The suspect has the right to be charged, and tried, within a reasonable time,[144] though "the actual length of time is not specified in any instrument and must be judged on a case-by-case basis taking into account factors such as the complexity of the case, the behaviour of the accused and *the diligence of the authorities*."[145] As yet the length of detention of most detainees, understood to be around a year, would not compare unfavourably to pre-trial detention in other national or international systems. However the

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protect the safety and well-being of witnesses can and should be taken, and do not raise doubts as to incompatibility with the rights of the accused. *See* F Guariglia, 'The Rules of Procedure and Evidence for the International Criminal Court: A New Development in International Adjudication of Individual Criminal Responsibility', in A Cassese, P. Gaeta and J. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (OUP, 2002), pp. 1111 ff., at pp. 1125–6. For a different view *see* C. Kreß, 'Witnesses in Proceedings Before the International Criminal Court', in H. Fischer, C. Kreß and S.R. Lüder (eds.), *International and National Prosecution of Crimes under International Law* (Berlin, 2001), pp. 375 ff.

[143] ICRC, Rule 100.

[144] *Ibid.,* The proceedings subject to this requirement are those from the time of the charge to the final trial on the merits, including appeal.

[145] ICRC Rule 100.

authorities should do everything within their power, in what must be recognized as a challenging context, to charge and prosecute promptly.

Reasonable *time and facilities for the preparation of a defence*, is inherent aspect of the right. Clearly this must be sufficiently before the commencement of trial – and the explicit terms of APII are violated when, as in some large-scale terrorism trials, the evidence is presented only in the trial itself - though how far in advance will depend on the nature of the case. The UNHRC has noted that ‘the determination of what constitutes “adequate time and facilities” requires an assessment of the individual circumstances of each case.’

- **Defence in Person or through Counsel**

The rights to defend yourself in person *or* through a representative is an inherent part of a fair trial in a criminal case. Confidential *consultation* with counsel is a core aspect of the right, the denial of which has been common, but much criticised, in the security context. Where the ‘interests of justice’ so require, a representative should be provided free by the relevant authorities.[146] Necessarily, the range of counsel ‘of choice’ that may available, and the qualifications of representatives, may be limited in this context more than in others, but the key question is whether a meaningful opportunity is afforded to present a defence and have a competent representative.

The Geneva Conventions do not indicate how soon a person has the right to a lawyer except to specify that a lawyer must be had, not only during the trial, but before it as well.[147] The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment does, however, specify that communication with counsel may not be denied for more than “a matter of days”.[148] In addition, the need for early access to a lawyer before the trial, as well as at all important stages of the trial, has been continuously stated in the case-law of the UNHRC and regional human rights bodies.[149]

- **Public Trial in the Presence of the Accused**

IHL treaties, and IHRL provide that accused persons have the right to be tried in their presence, albeit subject to certain exceptional circumstances, such as serious disruption by the accused. [150] Likewise, the right to be tried in ‘public’ is important, reflected in IHL and IHRL; as far back at the Nuremburg trials, where a violation of fair trial was found ‘because proceedings were held in secret and no public record was kept’.[151] The requirement ‘that the trial be held in public and judgment pronounced publicly, unless this would prejudice the interests of justice’, is also in the ICCPR. However, publicity is not an absolute requirement and is an aspect of the right that may be limited in exceptional circumstances[152] where there is pressing need to do so,

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[146] *Ibid.*

[147] GC III, Article 105, third paragraph (counsel must have at least two weeks to prepare before the opening of the trial); GC IV, Article 72, first paragraph (counsel must enjoy the necessary facilities for preparing the defence).

[148] Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 15.

[149] See, e.g., UNHRC, Sala de Tourón v. Uruguay, Pietraroia v. Uruguay, Wight v. Madagascar, Lafuente Peñarrieta and Others v. Bolivia.

[150] ICRC, Rule 100; AP I, Article 75(4)(e); AP II, Article 6(2)(e).

[151] *Ibid.;* In the war crimes trial of *Altstötter (The Justice Trial) case* in 1947.

[152] That trials in public should be restricted only in ‘exceptional circumstances’ is specified in HRC, General Comment No. 13 (1984), para. 6; Article 14 ICCPR anticipates that exclusion of the press or public may be permissible ‘for reason of morals, public order or national security in a democratic society, or when the interest of

for example, due to witness and victim protection,[153] or the 'interests of justice'.[154] However, it should be borne in mind that as 'the publicity of hearings is an important safeguard in the interest of the individual and of society at large',[155] the need to hold criminal trials completely *in camera* would be difficult to justify. Article 75(4) (i) specifically provides for "the right to have the judgment pronounced publicly."

- **Freedom from Torture, Coercion or Compulsion**

Both IHRL and IHL provisions reflect that the accused cannot be subject to any *coercion or compulsion* to testify against her/himself or to confess guilt.[156] Difficult questions arise in practice where, if for example, confessing guilt was the only way to escape the current situation in which their basic rights are violated. Measures should of course be taken to end those violations, which go beyond the scope of this paper, but it should also be borne in mind that in practice the context may influence the extent to a confession could really be said to be 'freely given'. this can be taken into account on a case by case basis. Confessions, or other evidence obtained through torture or ill-treatment should not be relied upon in the criminal process, other than against the person allegedly responsible for the torture or ill-treatment.[157]

- **Exclusion of Evidence in Extreme cases**

In general, IHRL does not spell out rules of evidence, which are generally left to domestic systems. However, the *admission of evidence* where there is a real risk that it was obtained through torture 'is manifestly contrary, not just to the provisions of [fair trial], but to the most basic international standards of a fair trial', and therefore, 'would make the whole trial not only immoral and illegal, but also entirely unreliable in its outcome.'[158] As noted above, secret evidence will often interfere with a fair trial.

- **Appeal**

The right to *lodge an appeal* is specifically provided for in these fair trial human rights provisions. Under IHRL there is a right to an appeal on facts and evidence, law, and sentencing.[159] This is one area where applicable IHL does not on its face make comparable

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the private lives of parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice'.

[153] Article 14(1) specifies certain exceptional circumstances where the press and public may be excluded. On permissible restrictions under the ECHR, *see P.G. and J.H.* v. *United Kingdom*, Appl. No. 44787/98, Judgment of 25 September 2001, ECtHR, *Reports 2001-IX*, para. 29; *Lamanna* v. *Austria*, Appl. No. 28923/95, Judgment of 10 July 2001; *B. and P.* v. *United Kingdom*, Appl. Nos. 36337/97 and 35974/97, Judgment of 24 April 2001; *Fejde* v. *Sweden*, Appl. No. 12631/87, Judgment of 29 October 1991, ECtHR, *Series A*, No. 212 and, at the Human Rights Committee, *Kavanagh* v. *Ireland* (Comm. No. 819/98), Views of 4 April 2001, UN Doc. CCPR/C/71/D/819/1998.

[154] ICRC, Rule 100.

[155] UNHRC, General Comment No. 13, para. 6.

[156] The right against self incrimination in human rights and ICL. The prohibition on compelling accused persons to testify against themselves or to confess guilt is set forth in the Third Geneva Convention, as well as in Additional Protocols I and II.

[157] CAT, Article 15.

[158] *Abu Zubaydah v. Poland,* para 555-561; *Nashiri v Poland* para. 564; See also, *Othman (Abu Qatada) v. the United Kingdom,* paras. 264-267; *Söylemez v. Turkey,* para. 122.

[159] ICCPR, Article 14(5): "everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law"; UNHRC, General Comment No. 32, paras. 45-51.

provision, beyond requiring that the individual be informed of available remedies.[160] However, although the right to appeal under applicable IHL is less clear and explicit, the ICRC Customary Law Study states that: " the influence of human rights law on this issue is such that it can be argued that the right of appeal proper – and not only the right to be informed whether appeal is available – has become a basic component of fair trial rights in the context of armed conflict."

- ***Ne Bis in Idem***

The right not to be charged or punished more than once for the same act or on the same charge (*ne bis in idem*) is enshrined in the Third and Fourth Geneva Conventions, AP I, and the ICRC Customary Law Study; which explicitly state that the principle applies during conflict. It is also enshrined in the ICCPR,[161] and other international instruments. However, in current law and in practice, the rule is limited in scope. IHRL authorities suggest the principle does not prohibit the reopening of a trial in exceptional circumstances, such as evidence of new facts or a fundamental defect in the previous proceedings which could affect the outcome of the case.[162] The UNHRC has stated that most States make a clear distinction between a resumption of a trial justified by exceptional circumstances and a re-trial prohibited pursuant to the principle of *ne bis in idem* and has held that the principle of *ne bis in idem* does not exclude prosecutions for the same offence in different States (see section 4 in this memo on the impact in third states). Likewise, Article 75(4)(h) of APII states that 'no one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced *under the same law and judicial procedure*.'

Non-Discrimination Including Gender-Dimensions of Criminal Justice

It is a core requirement that investigation and prosecution are non-discriminatory. Extradition and MLA arrangements commonly reflect this, above most other fair trial or other human rights concerns, as a sine qua non of a legitimate process. To an extent this is linked to the framing of charges, and reliance on evidence, which cannot be based solely on religious or political beliefs or practices, or discriminatory gendered assumptions. Other international sources provide detailed guidance on safeguards, which may involve e.g. gendered composition of staff, training and support.[163] While acknowledging the need to control expectations of trials established by an unrecognized de facto authority operating in a conflict zone, ensuring gender sensitivity in the approach to framing, investigation and prosecution of crimes, including sexual and gender based violence at hand of ISIS, will be an important marker for international cooperation in the trial of women detainees.

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[160] Specific references appear in GC III Article 106 (a right to appeal in the same manner as members of the armed forces of the detaining power) and GC IV Article 73 (the right to appeal provided for by the law applied by the court) but the Addition Protocols make no specific reference; see ICRC, Rule 100.
[161] ICCPR, Article 14(7).
[162] ICRC, Rule 100.
[163] 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>; Eurojust, The prosecution at national level of sexual and gender-based violence (SGBV) committed by the Islamic State in Iraq and the Levant (ISIL), 2017 < http://www.eurojust.europa.eu/doclibrary/genocide-network/KnowledgeSharing/The%20prosecution%20at%20national%20level%20of%20sexual%20and%20gender-based%20violence%20committed%20ISIL%20(July%202017)/2017-07_Prosecution-at-national-level-of-sexual-and-gender-based-violence_EN.pdf>.

Abbreviated Proceedings and Guilty Pleas?

For various reasons, including the urgency of the situation in the camp and limited resources, the authorities may be interested to explore the use of abbreviated proceedings such as guilty pleas used before the ICC to good effect in its terror-related *al Mahdi* (abbreviated) trial. Such confessions can be incentivised by lesser penalties, for example, encouraging peacebuilding, truth telling, and potentially victim-oriented and preventive goals. IHL explicitly reflects the duty not to compel anyone to confess guilt,[164] which should be made explicit and caution is due to respect this principle in practice.

Abbreviated criminal procedure has been used in various contexts, particularly in the aftermath of mass atrocities. For example, in Rwanda abbreviated criminal proceedings were used in order to try the backlog of cases, in Colombia it was used in the context of the law Justice and Peace in relation to demobilised paramilitaries, and is currently being applied in the context of (mainly) demobilised FARC members; it was used in different forms in South Africa under the Sub Committee for Amnesty, and in Timor Leste through the Community Reconciliation Procedures related to pro-autonomy (Indonesia-linked) militias.[165] Such processes carry risks, to rights of victims and accused. However, there is experience to draw on of national processes, and broadly supportive international responses, which suggests that it is possible to have expedited and abbreviated procedures, with the consent of the accused, while respecting core principles of fair trial.

Victim Participation and Engagement

It would be over-reaching to claim that there is an obligation to allow victim participation in criminal proceedings as part of the indispensable core of IHRL or IHL, but there is growing recognition of such a right, and a long-established right to reparation (recognition, satisfaction and guarantees of non-repetition).[166] The criminal trial can be one way of meeting these goals, truth-telling, and contributing to understanding of causes, contributors and ‘conditions conducive’ to violent extremism and support for ISIS. So far as possible, an approach that recognises the restorative function of the process would reflect growing examples of good practice on the national and international levels.[167] Reports of the NES courts that have already operated across NE Syria as having pursued a ‘creative restorative justice’ approach suggest a mindfulness of the importance of to ensure that victims interests are appropriately taken into account, whether in the criminal process or through truth-telling processes and effective measures of material support for harm arising from the conflict.[168]

Sentencing and Proportionate Penalties

Neither IHL nor IHRL specify which penalties are appropriate. The requirement of proportionate penalties is however clear in IHL and IHRL principles and explicit in several

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[164] Eg. AP I, Article 75(4)(f).
[165] M Bergsmo and S Tianying, Military Self-Interest in Accountability for Core International Crimes.
[166] Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of Human Rights Law and Serious Violations of International Humanitarian Law, GA Res. 2005/35 (16 December 2005).
[167] Rome Statute Article 75; ECCC Internal Rules, 23 bis, 80bis(4), 90-91, 9, 100; EAC Statute, Articles 14 and 27-28; KSC Law, Article 22. On the role of non-state prosecutions in Sri Lanka, see K Stokke, "Building the Tamil Eelam State: emerging state institutions and forms of governance in LTTE-controlled areas in Sri Lanka" (2006) 27 *Third World Quarterly* 6, 1021–1040
[168] RULAC Report.

treaties and instruments.[169] As noted in Section E (Legality) the penalties imposed should not be more severe that those in place at the time of the commission of the offence. Both IHL and IHRL address and limit the circumstances in which the death penalty might be resorted to,[170] but this may not be crucial as to the credit of the NES processes to date, they appear to have operated within a 'legal system [that] notably features a ban on the death penalty.'[171]

Sentencing should be individual, taking into account the culpability of the individual and her or his particular role, and mitigating circumstances. For example Rule 61 of the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) stipulates that 'when sentencing women offenders, courts shall have the power to consider mitigating factors such as lack of criminal history and relative non-severity and nature of the criminal conduct, in the light of women's caretaking responsibilities and typical backgrounds. Where complete defences are not available, mitigating circumstances enable the Court to take into account the context in which the offence was committed, including the presence of coercive circumstances…'[172]

Reports suggest some recognition of the desire to look beyond punitive custodial approaches to sentencing. These marry with international priorities and deserve development.[173] As noted in part 4 it is open to states to cooperate to ensure effective, human rights compliant penalties that also pursue longer term security goals.

Implications of Violations to Date: 'Abuse of Process' and Authority to Prosecute?

So far as particular women may have been subject to egregious violations of their rights prior to trial, questions may be raised as to the legitimacy of them being prosecuted at all, in line with the doctrine of abuse of process. Although, it is essentially a common law doctrine, it has found reflection in international proceedings before the ICTY, ICTR and ICC, as well as some domestic terrorism cases.

First, international and national authorities make clear that this is a doctrine that should be applied exceptionally, for the most serious violations. In the *Nikolić* case, the ICTY found that 'in a situation where an accused is *very seriously mistreated, maybe even subjected to inhuman, cruel or degrading treatment, or torture*, before being handed over to the Tribunal, this may constitute a legal impediment to the exercise of jurisdiction over such an accused.'[174] The

[169] See the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment, New York, 10 December 1984, UN Doc. A/39/51 (1984). Other examples include: Convention Concerning Forced or Compulsory Labour, adopted on 28 June 1930 (ILO No. 29), 39 UNTS 55; Convention on the Prevention and Punishment of the Crime of Genocide, New York, 9 December 1948, 78 UNTS 277; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Geneva, 7 September 1956, 226 UNTS 3; International Convention on the Suppression and Punishment of the Crime of Apartheid, New York, 30 December 1973, Convention against Forced Disappearance. As for non-binding instruments that reflect acceptance of this duty, see Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, ESC Res. 1989/65, Annex, 1989, UN ESCOR supp. (No. 1) at 52, UN Doc. E/1989/89 (1989).

[170] B Saul and Dapo, *The Oxford Guide to International Humanitarian Law* (OUP 2020).

[171] M Krause, Northeastern Syria: Complex Criminal Law in a Complicated Battlespace, (*Just Security*, 28 October 2019), < https://www.justsecurity.org/66725/northeastern-syria-complex-criminal-law-in-a-complicated-battlespace/>.

[172] See above UNODC Report, Handbook on Gender Dimensions of criminal justice.

[173] Report so some de facto authority prosecutions point eg to deal with "re-education' programmes to deal with radicalization".

[174] *Nikolić* Case, Trial Chamber Decision on Exercise of Jurisdiction, ICTY, 9 October 2002, para. 114.

Appeals Chamber in the same case held that '[a]lthough the assessment of the seriousness of the human rights violations depends on the circumstances of each case and cannot be made in abstract, certain human rights violations are of such a serious nature that they require that the exercise of jurisdiction be declined.'[175] As the ICTR Appeals Chamber in the *Barayagwiza* case noted, it is limited to excessive delays, or serious 'pre-trial impropriety or misconduct'.[176] As the ICC Appeals Chamber in the *Lubanga* case noted it only arises "[w]here fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial.'[177]

The issue has arisen in terrorism trials in some national systems, recognising that '*where, by reason of gross executive misconduct manipulating the process of the court, the defendant has been deprived of the protection of the rule of law and it would as a result be unfair to put him on trial at all'*.[178] The rationale is often cited however as 'protect[ing] the integrity of the processes of justice.'[179]

It may be relevant that in the present situation, although the camp presents serious issues with regard to detention rights, there do not appear to be allegations of violations at the hand of AANES itself. There is support in terrorism cases before English courts for the view that abuse of process does not arise where the prosecuting authority is not responsible for, or complicit in, the pre-trial violations, such as where individuals were allegedly tortured by foreign states before being transferred to the UK and stays of proceedings have been denied.[180] This logic has not been applied on the international level, where tribunals have taken a more human-rights centered approach finding it "irrelevant which entity or entities were responsible for the alleged violations of the Appellant's rights'.[181]

When a trial becomes "impossible", or "oppressive" as the Australian courts put it in the *Benbrika* case,[182] is an evaluation of fact for tribunals themselves.[183] In practice, this doctrine will only very rarely result in a stay of proceedings, in the most serious cases. This reflects the fact that "the remedy of setting aside jurisdiction will [...] usually be disproportionate', and '[t]he correct balance must [] be maintained between the fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law.'[184]

How this translates into the present context, where the authorities have expressed their commitment to solving intractable detention and impunity problem, is unclear. The doctrine does, however, underscores the importance of the authorities responsible for prosecutions ensuring that they do not contribute to excessive periods of pre-trial detention or inhumane

[175] *Nikolić* Case*,* Appeal Chamber Decision on Interlocutory Appeal, ICTY, 5 June 2003, para. 30.
[176] *Barayagwiza* Case, Appeal Chamber Decision, ICTY, 3 November 1999, para. 74 -77.
[177] *Ibid.*
[178] *Rangzieb Ahmed and Habib Ahmed v. The Queen* [2011] EWCA Crim 184, para. 24.
[179] *Ibid.*
[180] *Rangzieb Ahmed and Habib Ahmed v. The Queen*, para. 4. *R v. Khyam* [2008] EWCA Crim 1612, para. 36, 75-80
[181] *Ibid.*, para. 73.
[182] *R v Benbrika & Ors (Ruling No 20)* [2008] VSC 80 (20 March 2008), and *R. v. Benbrika and Others* (Ruling No. 1) [2011] VSC 76 (11 March 2011). The courts found that they could not proceed with the trial (on charges of membership in a terrorist organisation) unless the 'most austere conditions of detention' were improved, as otherwise the trial would be rendered unfair.
[183] *Ibid.,* para. 28.
[184] *Ibid.*

camp conditions for example, and take all measures within their control to address conditions of detention pending trial.[185]

As Section E notes, complex questions as to victim-perpetrators in the IS context may also require prosecutors to refrain from prosecuting, such as where the accused were also victims of trafficking. It is understood that prosecutions are limited to adult women, but important issues may also arise in relation to the rights of the child, which are not addressed here but deserve seperate consideration.[186] Every effort should be made to recognise and respond to the particular facts, and factors such as the youth or vulnerability of particular detainees are relevant to whether and how to prosecute as well as sentencing.

D. QUESTION 4: Scope of Criminality; Applicable Criminal Law and Punishable Crimes

Introduction:

This section addresses the substantive legal basis for criminal prosecution of the female detainees in the Al Hol camp for their roles in, and support for, ISIS activities. I agreed to address 'international legal issues arising in relation to prosecuting women detainees in the Al Hol camp on Daesh-related "terrorism" charges, focusing on the possibilities and pitfalls in relation to "terrorism" related offenses and so far as possible alternative chargeable offenses'.[187] The question of *which crimes* may be prosecuted, including terrorism-related crimes, and on *what legal basis*, raise fundamental issues of relevance to the legality and legitimacy of any process.

The memo explores the challenges that arise with prosecuting "terrorism" as such in NE Syria under applicable national and international laws, how these concerns might be ameliorated, and alternative legal bases for charging conduct under national or international law.

It is not possible to meaningfully advise on appropriate framing of charges, or which charges could be sustained in particular cases, absent a much clearer understanding of available evidence as to the individual contributions of would-be accused. But it is possible to identify relevant *applicable criminal law* and within it, relevant *crimes* and *modes of liability* that may provide a basis for prosecution, if consistent with international legal principles. It does so premised on broad publicly available information on the nature of IS crimes in the area under the authorities control, and the range of roles that women have played in them. While assumptions as to the role of women in general have proved erroneous and should always be avoided, it is written mindful that a number of reports (including a recent a UN study on gender & criminal justice responses to terrorism) suggest that the majority of women may have played "support roles" – having been engaged in recruitment, promotion and other forms of support, as opposed to generally at the forefront of terrorist attacks or active combat roles. As noted below, these diverse roles may qualify as a range of potential crimes, understood alongside various modes of liability, under national and international law.

There seem to be several possibilities in play in terms of applicable law, and the potential avenues for accountability and challenges that each raise will be assessed below. These include:

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[185] *R v Benbrika & Ors, ibid.,* para. 92.

[186] See however OSCE Guidelines on Foreign Terrorist Fighters above.

[187] TOR: 'To write a short report over a period of approximately three days which: - Considers the international legal issues arising in relation to the possibility of Kurdish de facto authorities in AANES prosecuting women currently in the Al Hol camp on Daesh-related "terrorism" charges. - Focuses on the possibilities and pitfalls in relation to the scope of "terrorism" related offenses - Addresses, if time allows, broader legal issues such as alternative chargeable offenses.'

domestic Syrian law which was in force at the outset of the conflict, including a) terrorism law (Section B, para. i.) or b) broader penal code (Section B, para. ii); c) the 'terrorism law' passed by the de facto authorities in 2014 (on the basis of which many prosecutions appear to have been conducted by the Syrian Defense Force (SDF) elsewhere in North East Syria) (Section B, para. iii), and d) crimes under international law (Section B, para. iv).

To constitute a rule of law approach to criminal justice the applicable law chosen to form the basis of prosecution would need to meet certain basic standards. These are derived from core international human rights law (IHRL) and recognised principles of criminal law.[188] Considered in turn in Section A below, these are: the principle of *legality* (including non-retroactivity and certainty), *individual responsibility* and *lawful restrictions on human rights* (such as freedom of expression or association). Two other aspects relevant to legitimacy will also be touched on, namely gender framing and discrimination and international guidance governing key elements of the definition of terrorism.

A. Rule of Law Principles Governing and Limiting the Nature and Scope of the Crimes

i. Legality: *Nullum Crimen Sine Lege*, Non-retroactivity and Specificity

The requirement of legality in criminal law (captured in the rules of *nullum crimen sine lege* or *nulla poena sine lege*), is enshrined across human rights instruments, including Article 15 of the International Covenant on Civil and Political Rights (ICCPR), which has been ratified by Syria, and is customary law. It is a core rule of law principle applicable at all times,[189] as reflected in the fact that treaties explicitly proscribe derogation from this right,[190] and its inclusion as a separate rule in the ICRC Customary IHL study.[191]

There are several elements to the principle of legality that would need to be met by the criminal law for it to be applied by the AANES. For our purposes these can be broadly reduced to non-retroactivity and legal certainty.

a. *Non-retroactivity*:

- First, non-retroactivity (*lex previae*) requires that no-one shall be held guilty of a criminal offence that did not constitute a crime at the time it was committed. At a minimum, any 'new' law, such as the 2014 legislation that appears to have been adopted by the Autonomous Administration or indeed the Syrian 2012 Terrorism Law, could not provide the basis to prosecute or punish crimes committed before they entered into force.
- As Article 15 of the ICCPR explicitly recognises, the crimes may also be established in *international law* at the relevant time; thus, it would suffice that the crime base was established by treaty or custom, even if not also reflected in prior domestic law.

[188] Eg. The General Assembly has urged all United Nations Member States "to ensure that their laws criminalising acts of terrorism are accessible, formulated with precision, non-discriminatory, non-retroactive and in accordance with international law, including human rights law". See A/RES/64/168, OP 6(k).
[189] Article 15(1) ICCPR provides: "No one shall be held guilty of any criminal offence on account of any act or omission, which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than one that was applicable at the time when the criminal offense was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby." See also Article 11(2) UDHR; Article 7(1) ECHR; Article 9 of the American Convention on Human Rights (ACHR); see also Articles 22 (*Nullum crimen sine lege*) and 23 (*Nulla poena sine lege*) of the Rome Statute of the International Criminal Court (ICC).
[190] Article 4 ICCPR, Article 15 ECHR and Article 27 ACHR all expressly proscribe derogation from this right.
[191] Rule 101 of the Principle of Legality, ICRC Customary Law Study.

- As reflected in IHRL and international criminal law (ICL), it is the crime that must be pre-established, not jurisdiction over it.[192]

Of course, non-retroactivity cannot preclude the *interpretation* of existing law. Provided, as noted below, the requirements of strict interpretation and application of criminal law, and reasonable foreseeability, are met, the law can be clarified, fleshed out and (where unduly broad or ambiguous) restricted in particular contexts, without falling foul of the non-retroactivity rule.

Nor does the rule preclude the 'reclassification' of the crimes established in pre-existing law. The International Criminal Tribunal for the former Yugoslavia (ICTY) reasoned that the principle of legality would not be offended as long as "the conduct, rather than […] the specific description of the offence in substantive criminal law"[193] was pre-established. It found the question to be "whether the act of the accused was a crime as *generally understood* at the time of the offence charged".[194] While caution is due here, there is scope to clarify (and certainly restrict) the exact nature of conduct that will be prosecuted, provided it was criminalised at the relevant time.

b. *Legal certainty:*

A crucial related dimension of legality is the requirement that criminal law must be clear, precise and foreseeable (*lex certa)*, allowing those covered by it to understand the law's limits and modify their behaviour accordingly.[195] In the context of 'anti-terrorism laws' globally, the use of nebulous, broad-reaching or ill-defined terms that are susceptible to abuse has been the source of widespread criticism and in some cases the nullification of criminal norms on the basis that they lacked the basic quality of law.[196] As noted below, particular concerns arise regarding the Syrian antiterror laws in this respect, and to a lesser extent the Autonomous Administration's terror laws.

All the essential elements of offences, comprising individual conduct and intent (see below Section A ii. on individual responsibility), need to be clear and foreseeable. For offences involving support for terrorism that may be relevant to detainees, a recent UNODC Report reflects that "*both the support conduct (facilitating, preparing, financing, providing material support) and the conduct supported (the violent act) must be defined in a way that complies with the principle of legality. In the context of criminalizing conduct in support of terrorism, a law that prohibits, for example, providing support or encouraging terrorism must provide sufficient detail to enable a person to understand what forms of support or means of encouragement fall within the scope of such an offence*." [197]

c. *Strict interpretation, in favour of the accused*:

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[192] For example, the ICTY decided already in its first case (*Prosecutor v Tadic*) that the so-called *jus de non evocando* principle - that an accused has the right to be tried by a particular court - was not universal, or applicable to the ICTY. This is reflected also in ICL and findings of international tribunals.

[193] *Prosecutor v. Hadžihasanović and Others*, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ICTY-01-47-AR72, 16 July 2003.

[194] *Ibid.*

[195] A. Ashworth and L. Zedner, *Preventive Justice*, (Oxford: Oxford University Press, 2014), pp. 113-114, (hereafter, A. Ashworth and L. Zedner, *Preventive Justice*).

[196] While courts set aside law sparingly, there are multiple examples in the context of terrorism, from Uganda to Indonesia, where courts have found infringements with the principle of legality to nullify the effect of the law.

[197] 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>.

Finally, the law must be interpreted and applied "in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment."[198] Two important offshoots of this principle are that criminal law must be strictly applied and restrictively interpreted (*lex stricta*), and that any ambiguity should be resolved in favour of the accused. Thus, the statute of the tribunal should clearly identify and clarify applicable law(s) and indicate that they will be interpreted and applied restrictively, in favour of the accused.

ii) Individual Responsibility: Criminal Conduct and Intent

It is an essential principle of criminal law that responsibility must be individual.[199] One explicit manifestation of this is IHL's prohibition on 'collective' punishments.[200]

In considering the permissible scope of criminal law in the context of massive criminality, as in the ISIS context, a basic but sometimes challenging principle is that the individuals must be held responsible for their own individual conduct and intent.[201] Conduct with intent (*actus reus* and *mens rea*, or the material and mental elements) provide the objective and subjective conditions for liability. They ensure moral culpability and legal responsibility,[202] and that there is 'sufficient normative involvement of an individual in the wrongful act, or at the very least, in the deliberate creation of risk of such a wrongful act taking place to justify criminal intervention.'[203] Remoteness is a constraining principle of criminal law.[204]

Usually an accused will have to have *caused or contributed to a 'harm'*[205] but exceptionally, through inchoate crimes, it is also possible that s/he is punished for conduct, committed with criminal intent, that did not cause harm but posed a *significant danger of the harm* occurring.[206] These have been expanded commonly, and sometimes controversially, in domestic laws around the globe in the terrorism context in recent years, to include 'preventive' approaches that prosecute preparatory acts, planning or conspiracy with a view to contributing to a terrorist offence, training, membership, and various forms of support or association.

These 'terrorism' crimes must not, however, overstep the limits of the law. For example, the law cannot punish thoughts or ideas no matter how dangerous they are perceived to be, but can only intervene when they are converted into concrete acts.[207] It should not prosecute abstract

[198] See: *S.W. v. United Kingdom* and *C.R.* v. *United Kingdom*, ECtHR, Judgments of 22 November 1995, cited in *Streletz, Kessler and Krenz v. Germany*, Judgment of 22 March 2001, para. 50.
[199] ICTY, *Prosecutor v. Tadic*, (Case No. IT-94-1-A), Judgment (Appeals Chamber), 15 July 1999, para. 186: "nobody may be held criminally responsible for acts in which he has not personally engaged or in some way participated".
[200] On the prohibition on collective punishments in international humanitarian law, see Article 33 of the 1949 Geneva Convention (IV) on Civilians; Article 75 of Additional Protocol I, Article 6(2) Additional Protocol II.
[201] See eg. European Parliament, EU Approach to Criminal Law.
[202] For how this is reflected in international criminal law principles, see eg., A. Eser, "Individual Criminal Responsibility", in A. Cassese, P. Gaeta and J. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002), vol. 1, p. 797.
[203] OSCE Report 2017 citing A. Ashworth and L. Zedner, *Preventive Justice*, p. 112.
[204] A. Ashworth and L. Zedner, *Preventive Justice*, p. 109.
[205] Harm to a protected value justifying resort to criminal law is referred to as the "harm principle' in criminal law.
[206] Examples would include direct and public incitement to genocide in international criminal law, where the conduct (the expression) in question creates a significant danger that this serious crime will be committed, and the accused intends this to happen, which can be punished even if the crime does not ultimately occur.
[207] This basic principle is embodied in eg the Roman law principle *cogitationis poenam nemo patitur* ("nobody endures punishment for thought.", Justinian's *Digest* (48.19.18)). In a recent example, a provision in French counter-terrorism legislation was declared unconstitutional by the French Constitutional Council in 2017 as a "crime of thought": the provision sought to criminalize consultation of terrorist websites "when accompanied by the desire to adhere to an ideology expressed by these services" but otherwise fell short of requiring terrorist intent. See B. Boutin, "Excesses of Counter-Terrorism and Constitutional Review in France: The Example of the

danger that an individual's conduct is seen to present, but concrete and sufficiently proximate risk posed by their conduct, with intent, albeit sometimes without having to show impact. For terrorism crimes, the intent requirements mean that the accused must not only have intended to act but to cause or contribute to terrorism. As noted below (under modes of liability), within these boundaries there are various ways in which the law enables punishment of collective contributions to harm.

iii) Legality and International Parameters of a Definition of Terrorism

National definitions of 'terrorism' and associated offences[208] in recent decades have not infrequently been problematic and subject to criticism or review for their incompatibility with the standards above. As a result, non-binding international guidance has been elaborated, which set out core elements, or perhaps acceptable parameters, of a definition of terrorism. It should be emphasised that there is no one agreed definition of terrorism in international law (see Section C iv) below), and in any event states are free to define offences in their own criminal law, as long as they meet legality requirements. However, if domestic criminal law is developed, or in this case interpreted and clarified (Section C below), in line with international guidance regarding key elements of the definition of terrorism, it may help to ensure compliance with the principles set out above and enhance international legitimacy.

The UN Security Council[209] and the UN Special Rapporteur on terrorism and human rights have both set down broadly similar guidance as to the parameters of acceptable definitions. In UNSC Resolution 1566 (2004) on Threats to International Peace and Security caused by Terrorist acts, the Security Council provides guidance to UN member states on defining terrorism in the implementation of Security Council Resolutions. It suggests that terrorism covers:

> "***criminal acts**, including against civilians, committed with the **intent to cause death or serious bodily injury, or taking of hostages** with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act*". Those acts should constitute "*offences within the scope of and as defined in the international conventions and protocols relating to terrorism"*.[210]

The UN Special Rapporteur on terrorism and human rights reports would also provide assistance in the identification of the key elements of terrorism:

> *"While the existing international legal framework does not provide for a comprehensive definition of the concept of terrorism, the Special Rapporteur has expressed the view that the cumulative characterization of a terrorist crime, as elaborated by the Security Council in its resolution 1566 (2004), represents an effort to confine counter-terrorism measures to offences of a genuinely terrorist nature. In his view, any offence defined in domestic law as a terrorist crime should meet the following three conditions: (a) committed against **members of the general population**, or segments of it, with the intention of causing death or serious bodily injury, or the taking of hostages; (b) committed for the **purpose** of provoking a state of terror, intimidating a population, or compelling a Government or international organization to do or abstain from doing any*

Criminalisation of the Consultation of Websites", Verfassungsblog, 10 May 2018, <https://verfassungsblog.de/where-visiting-a-website-is-now-a-crime-excesses-of-counter-terrorism-and-constitutional-review-in-france/>.

[208] More problematic terms such as extremism are not addressed here as, unlike 'terrorism' and membership they are not apparently reflected in any of the relevant criminal laws (below).

[209] UN SC Resolution 1566 (2004) on Threats to International Peace and Security caused by Terrorist acts, S/Res/1566(2004), 8 October 2004, para §.3.

[210] H. Duffy, *War on Terror* (CUP 2015), p. 9-72.

act; and (c) ***corresponding to all elements of a serious crime as defined by the law****. Any law proscribing terrorism must adhere to the principle of legality enshrined in article 15 of the International Covenant on Civil and Political Rights (the Covenant), be applicable to counter-terrorism alone and comply with the principle of non-discrimination."*[211]

iv) Lawful & Proportionate Interference with Rights: Expression, Association, and Protest

There are many ways in which criminal offences, including terrorism offences (eg. incitement, recruitment of others, membership, conspiracy or *association des malfaiteurs* etc.) restrict human rights, such as freedom for expression, association or protest. In certain circumstances this restriction may be lawful, and appropriate, or even required, under IHRL.[212] However any restrictions on these rights must be clearly set out in law, necessary and proportionate, and have attendant safeguards. Criminal law is by its nature onerous, and thus, needs to clearly prescribe the exceptional circumstances in which speech or association might amount to crimes. In the particular case, the use of criminal law, as well as the specific penalty, must be a proportionate response to the acts in question.

Prosecuting crimes of expression:[213] IHRL makes clear that speech can be prosecuted, notably where it amounts to *incitement to discrimination or violence*.[214] But jurisprudence reflects the need to clearly distinguish between such incitement to violence,[215] and even "hostile", "negative" or "acerbic" comments and criticism.[216] Expressions of general sympathy and support for a cause or a leader of a "terrorist organization" would be unlikely to justify criminal prosecution, as reflected in previous case law.[217] The European Court has noted for example that "a message of intransigence as to the objectives of a proscribed organisation cannot be confused with incitement to violence or hatred".[218]

More problematic are crimes of justification, encouragement or *apology* for terrorism, that may not contribute to future criminal acts, but purport to justify prior acts or simply consist of expressions of opinion. The UN Secretary-General, in his 2008 Report on Human Rights and Terrorism draws a bright line between direct incitement to violence on the one hand, and glorification or *apology* of past acts on the other, stating unequivocally that while 'the first may be legally prohibited, the second *may not*'. [219] The UN Human Rights Committee has explicitly criticised legislation in the UK that criminalised 'encouragement'[220] and 'glorification,' and

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[211]UN Human Rights Council, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin : addendum : mission to Spain*, 16 December 2008, para 6.

[212] Positive obligations to investigate and prosecute serious crimes, acts of violence or hate crimes is reflected in IHRL.

[213] For more details see, H. Duffy and K. Pitcher, 'Indirectly Inciting Terrorism? Crimes of Expression and the Limits of the Law' in B Goold and L. Lazarus *Security and Human Rights* (Hart Studies in Security and Justice 2019); OSCE Guidelines for Addressing the Threats and Challenges of on Foreign Terrorist Fighters (2018), < https://www.osce.org/odihr/393503?download=true>.

[214] See: Article 20 ICCPR; and Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

[215] *Belek and Velioglu v. Turkey*, ECtHR, Judgment of 6 October 2015, paras. 24-27.

[216] *Falakaoglu v. Turkey*, ECtHR, Judgment of 26 April 2005 (French), para. 35.

[217] *General Comment No. 34*, CCPR, para. 46.

[218] *Surek and Ozdemir v. Turkey*, ECtHR, Judgment of 8 July 1999, para. 61; *Erdogdu v. Turkey*, ECtHR, Judgment of 15 June 2000.

[219] UNGA, 'Report of the Secretary General: The protection of human rights and fundamental freedoms while countering terrorism' (28 August 2008) UN Doc A/63/337, para 61 (UN Secretary General's report). para 61.

[220] Concluding Observations Human Rights Committee, United Kingdom (CCPR/C/GBR/CO/6), 21 July 2008.

legislation in Russia punishing 'justification' of terrorism,[221] as unduly 'broad and vague' in scope.

So far as crimes of provocation or propagandising reflected in domestic laws (see B i) -iii) below) do amount to incitement to violence, they may legitimately be prosecuted. It would therefore be important to clarify what forms of expression criminalised in law would be sufficient to meet this criteria.[222] As the UN Special Rapporteur on terrorism and human rights has noted, the conduct (speech) should have caused at least a real danger of a terrorist act being committed, and there should be personal and specific intent to incite a future terror offence (albeit this may be inferred from the circumstances).[223]

Crimes of Association: Difficult questions arise regarding the criminalisation of membership of, or support for, terrorist organisations.[224] In principle, people should not be prosecuted solely on the basis of who they are associated with, but rather, their own contribution or support for criminal acts with criminal intent. Membership of criminal organisations has, however, long been prosecuted in domestic systems, and indeed at Nuremberg, and is arguably not inherently problematic, provided what is criminalised and punished - proportionately - is conduct committed with intent to engage in or contribute to acts of violence. By contrast, offences based solely on, for example, marrying ISIS members or supporting family members, are more difficult to justify as proportionate interference with freedom of association, or the right to family life. Likewise, crimes such as 'collaboration' with terrorist organisations has been criticised for vagueness and danger of 'broadening out to cover acts that do not relate to any kind of violent activity.'[225]If reliance is placed on domestic law criminalising support to terrorism, it must be clear which elements of such conduct make it a terrorist crime.[226]

In short, the authorities must ensure that prosecutions proceed with a prior legal basis, for crimes with defined mental and material elements, and that interferences with expression or association are proportionate. Prosecution should not be based exclusively on expression of opinion or association with others, but on intentional or reckless contribution to harm or real

[221] Concluding Observations Human Rights Committee, Russian Federation (CCPR/C/RUS/CO/6), 29 October 2009, para. 3

[222] Duffy and Pitcher Crimes of Expression discusses in more detail. The so-called "Rabat Plan of Action" can provide useful guidance on what constitutes incitement for the Statute, even though it is not an internationally binding standard. It identifies six factors: the context, position of the speaker, intent, content and form, extent of the speech act, and the likelihood, including imminence, of harm that may occur as a result of the speech. See: "Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence"; Appendix in UN High Commissioner for Human Rights, *Report to the Human Rights Council* ("Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred"), UN Doc. A/HRC/22/17/Add.4, 11 January 2013.

[223] Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, Ten areas of best practices in countering terrorism (A/HRC/16/51), p. 29. Also see the example of Article 5, COE Convention.

[224] "Safeguards are required to ensure that the limitations to the right to freedom of association are construed narrowly. These include ensuring that the principle of legality is respected in the definition of terrorism, terrorist acts and terrorist groups. Too wide or vague a definition may lead to the criminalization of groups whose aim is to peacefully protect, inter alia, labour, minority or human rights." Office of the United Nations High Commissioner for Human Rights, 'Fact Sheet No. 32, Human Rights, Terrorism and Counter-terrorism', (*OHCHR* 2008), pp. 43-44, <https://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf>.

[225] See for example: A. Schmid, 'Revisiting the Relationship between International Terrorism and Transnational Organised Crime 22 Years Later' ICCT (2018).

[226] Article 576 of the Spanish law on collaboration with terrorist organizations, for example, included a catch-all "in general any other equivalent form of cooperation, assistance or complicity, economic or otherwise".

risk of harm. A range of different contributions may nonetheless be covered by national or international law, as explained in Section D below.

v) Gender Framing & Discrimination

Most of the standards set out in these memos are relevant to prosecution of women or men. Given the focus on the prosecution of women in the present situation, it is pertinent to note the *'increased recognition of the need to examine how gendered experiences and practices should inform and shape the criminal justice response to terrorism.'*[227] This is multi-dimensional, but begins with the nature and scope of crimes prosecuted (as well as available defences, investigation, fair trial, sentencing and mitigation.)

It is crucial to avoid gender stereotypes, including assumptions about the role of women as victims, that have characterised policy and prosecutorial errors in many states in the past few years.[228] Denying women's agency, and assumptions as to their role, or that of men, based on their sex, may also amount to unlawful discrimination. The disproportionate impact of certain crimes on women, such as harbouring or failure to report criminal behaviour, should also be careful to avoid indirect discrimination.[229]

The decision to prosecute, and what to prosecute, should also reflects the complexity of women's roles within ISIS. Among the factors that the 2019 UNODC Report on Gendered Dimensions to Criminal Justice[230] and a 2017 UN report on the journey to extremism in Africa, suggest as relevant is the '*the disproportionately high percentage of women who are coerced into joining terrorist or extremist organsations, including Boko Haram, Al-Shabaab and Islamic State in Iraq and the Levant…*'[231] Case studies and reports in the 2019 Report shows how the distinction between voluntary and coerced involvement in a terrorist group is far from clear. This underscores the importance of ensuring individualised assessment of conduct and intent, culpability and mitigating factors, in deciding whether or not to prosecute and punish (as well as appropriate penalties), and the availability of suitable defences including duress or coercion.[232]

The "principle of non-punishment of victims of trafficking" is reflected in international standards; according to the 2019 Report, victims "should not be punished or sanctioned for crimes committed as a consequence of, or in close connection to, their trafficking, including as a result of compulsion…" Built into the screening system should be serious efforts to ascertain whether women and girls were victims of trafficking or other serious crimes, to ensure they are not prosecuted for conduct directly related to that victimisation.

The gender dimensions at the forefront of the prosecution of the women detainees are part of a broader obligation to ensure that the framing of crimes and prosecutions are not discriminatory on any prohibited ground. Framing of crimes and evidence of culpability must also avoid

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[227] 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>, (hereafter 'UNODC 2019 Report').
[228] OSCE Guidance on Foreign Terrorist Fighters (FTF); UNODC 2019 Report.
[229] UNODC 2019 Report. Examples of to recruitment, promotion, harbouring and failure to report are provided
[230] *Ibid.*
[231] United Nations Development Programme, 'Journey to Extremism in Africa: Drivers, Incentives, and the Tipping Point for Recruitment' (2017), p. 495, states that respondents indicated that they had voluntarily joined a violent extremist group, with women accounting for 12 per cent of those respondents. 78 respondents indicated that they had been recruited by force by a violent extremist group, with women accounting for 53 per cent of those respondents.
[232] Article 31 ICC Statute.

prosecutions based effectively on grounds of religion or belief, as has been the case in some state practice in recent years.

v) Applicable Criminal Law: Problems and Possibilities (in light of above principles)

On one level, the most obvious legal basis for prosecution of detainees whose crimes were committed in Syria would be pre-existing Syrian law. This would most comfortably avoid issues with the first dimension of legality, non-retroactivity, as the body of law existed prior to the events in question. Some have suggested that during armed conflict prosecutions should be based on law prior to the *conflict*,[233] and while this may not be clear as a matter of law, Syrian law does have the advantage of being an uncontroversial source of binding law in this respect. However, leaving aside (probably significant) political issues that may arise with the use of Syrian law by the local administration, serious issues arise with the *Syrian Terrorism law* (discussed at Section B, i. below), which offends the principle of legality due to the amorphous and ill-defined nature of terrorist offences enshrined in the law. Other crimes and modes of liability in Syrian law also deserve brief consideration (at Section B, ii.). While a Syrian lawyer would need to advise, and information is patchy, this is likely to be possible on the basis of ordinary crimes and modes of liability. Whether these would reflect the gravity and fullness of the crimes, given that international crimes are not incorporated into Syrian criminal law, is unclear.

Limitations with domestic law make it particular important to consider prosecution for crimes under international law. Some of the possible bases for prosecution, and modes of liability, are highlighted at in Section C, para. iii. Finally, an additional possibility, probably most favoured by those planning to prosecute, would be to apply a version of the Unified Arab Code, which has been the basis for prosecutions by *de facto* authorities to date (Section B, iv.). A few observations and areas for further research on each of these, and compatibility with the principles in A above, are noted below.

i. Syrian 'Terrorism law'?

The Counter-Terrorism Law (CTL) No. 19 of 2012 was issued by Bashar al-Assad on 28 June 2012 and came into force on 2 July 2012.[234] The CTL no. 19 of 2012 comprises 15 Articles,[235] and sentences 'may include 10 to 20 years of hard labour, or the death penalty'[236]. Article 9 of the CTL provides that the crimes stated within it 'shall fall under the mandate stated in the Penal Code',[237] such that a full understanding of the law would require analysis of broader Syrian law. However, it is plain from the face of the following aspects of the law that it is excessively broad-reaching and lacking in specificity, and starkly at odds with the international standards highlighted above.

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[233] See eg M. Klamberg, 'Possibility of a Non-State Actor to Establish Courts, Issue Sentence and Avoid Criminal Responsibility for Acts that Otherwise Would Constitute War Crimes' SSRN (February 9, 2017) <https://ssrn.com/abstract=2914188 or http://dx.doi.org/10.2139/ssrn.2914188>; see also the Swedish court decision and position of the ICC Prosecutor below; and cf. as noted in Section 2, the ICRC among others recognising that non-state actors can also pass their own 'law'.

[234] Violations Documentation Center in Syria (VDC), 'Special Report on Counter-Terrorism Law No. 19 and the Counter-Terrorism Court in Syria', (*VDC* 2015), p. 10, <http://www.vdc-sy.info/pdf/reports/1430186775-English.pdf>, (hereafter VDC Report).

[235] VDC Report, p. 37-40.

[236] M. Ekman, 'ILAC Rule of Law Assessment Report: Syria 2017' (2017), p. 67, <http://www.ilacnet.org/wp-content/uploads/2017/04/Syria2017.pdf>.

[237] *Ibid.*, p. 39.

Particularly problematic is the definition of terrorism in Article 1, as:

> any action aimed to cause panic among people, disturb public security or harm the State's infrastructure, that is committed by means of arms, munitions, explosives, flammable materials, poisonous or burning products, epidemic or bacteriological agents, regardless of the form of these means, or by means of any tool that serves the same purpose.[238]

Article 8 broadens it out further by clarifying that '*threatening'* such terrorist acts are also a crime. Terrorist acts are not limited to violence, nor are they limited to conduct that is 'criminal', but rather, cover 'any act'. The references to the action being committed by 'any other tool' is open-ended and vague. There is no specificity as to whether or not the acts must be directed against a civilian population but might also include the state.[239]

Various forms of support for such terrorist acts or organisations are covered, broadening the provisions out further. These include '*financing* terrorism' defined broadly as '[a]ny *direct or indirect* raising or supplying of money, arms, munitions, explosives, telecommunication means, *information* or any other object to be used in a terrorist act perpetrated by a terrorist individual or terrorist organisation.'[240] It includes, for example, *directly* or *indirectly* supplying *information*, which appears to go beyond most approaches to financing.

Article 8 compounds the problem by criminalising the *promotion of terrorist acts* by providing that: "whoever *distributes* publications or *stores* information of *any form* with a view to promote terrorist actions shall be punished by temporary hard labor; the same penalty shall apply to those who administer or *use* a website for that purpose.[241] Article 10 provides that if anyone knows of any of the crimes in the act and *fails to report them*, they shall be imprisoned for 1-3 years. A group of three or more persons that aims to perpetrate one or more of the broadly defined 'terrorist acts' is a terrorist organisation under the law, and joining or forcing others to do so receives a penalty of no less than 7 years, which doubles if the organisation seeks to 'change the system of government'.

Criticisms of the Law: The law is, on its face, at odds with *nullum crimen sine lege*. This is reflected in broad international criticism, suggesting that reliance on it to prosecute would undermine the legitimacy of prosecutions on this basis. For example, in 2014, the Spokesperson for the UN High Commissioner for Human Rights criticised the Counter-Terrorism Law (CTL) No. 19 of 2012 as 'broad and ill-defined,'[242] the International Legal Assistance Consortium (ILAC) concluded that 'terrorism' under Article 1 was 'designed to allow the government to silence political opponents'.[243] Others note that the law's breadth and susceptibility to abuse is borne out by its use as a pretext to prosecute dissent by the Assad regime. For example, a 2015 Report by the Violations Documentation Center in Syria (VDC) refers to *"vague words and expressions which may apply to anybody opposing the regime's repression of the people's uprising whether adults or minors, male or female, civil activists or armed rebels, or any other group that might form the slightest threat to the government'.*[244] Another report notes that the CTL is '*regularly applied in legal proceedings that interpret the definition of a terrorist to also include the exercise of constitutionally and internationally recognised rights like freedom of*

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[238] VDC Report, p. 37.
[239] Cf terrorism as a war crime in IHL below; or the UN Special Rapporteurs Elements of Terrorism.
[240] *Ibid.*
[241] VDC Report, p. 39.
[242] R. Colville, 'Press briefing notes on Syria and Thailand', (*OHCHR* 2014), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15085&LangID=E>.
[243] ILAC Report, p. 65.
[244] IMEP Brief: Law No. 19 of 2012: Counter-terrorism Law', p. 12.

assembly and expression' and that '*both qualitative and quantitative data to indicate that the Syrian regime has regularly used the Counter-terrorism Law [...] against nonviolent civilians'*.[245]

It would be fair to note that in the period since this law was adopted, many other states have adopted overly broad and vague terrorism laws, making this law less of an outlier than it was. Nonetheless, it remains the case that relying on excessively broad-reaching terrorism laws like Counter-Terrorism Law No. 19 of 2012 to prosecute would raise serious legitimacy concerns. It is therefore necessary to seek an alternative legal basis in domestic or international law.

ii. Alternative Criminal Law in Syria: the Syrian Penal Code

The possibility of prosecuting support for IS as ordinary crimes under the provisions of the Syrian Penal Code (which have remained unaffected by the adoption of the CTL) deserves consideration given controversies that often beset prosecution of 'terrorism.' As discussed, advice should be sought from a Syrian lawyer as to the scope of Syrian criminal law, but brief research of publicly available information suggests a range of common crimes and modes of liability may – as ever, depending on evidence - provide a solid basis for investigation and prosecution of some of the detainees. Domestic lawyers should be asked to confirm that common crimes such as murder, kidnapping, rape, forced labour form part of the Syrian Penal Code.[246] Prosecuting at least in part on this basis has the benefit of focusing on long established and relatively uncontroversial common crimes.

A brief reeview of Syrian law suggests that a broad range of modes of liability allow for the prosecution of a range of roles that contribute to these crimes, even if they are not themselves the principal perpetrators. Some of these may create tensions with the principles of legality and individual responsibility, and would need applied restrictively to avoid this. For example, especially relevant for ISIS supporters is Article 218, relating to the 'accomplices of those who commit crimes and those who harbour them.'[247] Article 218 captures four very broad categories of accomplice liability: (a) the ***giving of information*** helpful to the perpetration of a crime; (b) the ***strengthening*** of the perpetrator's resolve; (c) the ***aiding or abetting*** of a perpetrator in the ***preparation***, ***facilitation*** or ***commission*** of the crime; and (d) the ***agreement*** with a perpetrator or ***knowledge*** of his or her conduct and the ***provision of food, shelter, refuge or a meeting place***. Problematic aspects that would need further consideration in light of local law would include, for example, the lack of definition as to what constitutes *'helpful'* information, and how 'agreeing' with someone and providing food could be sufficient link in itself to the commission of crimes. The UNDOC Report notes how harbouring provisions in this context can be problematic, and have a disproportionate and discriminatory impact on women.

[245] A range of international and regional-focused NGOs criticised the law's scope. See eg Tahrir Institute for Middle East Policy, 'TIMEP Brief: Law No. 19 of 2012: Counter-terrorism Law', (2019), <https://timep.org/reports-briefings/timep-brief-law-no-19-of-2012-counter-terrorism-law/>.

[246] NB caution is due as some of the crimes may be limiting, as well as very problematic from a human rights perspective: marital rape is reportedly excluded from the Syrian code for example.

[247] Article 218: "*…anyone who **gives information helpful** to the perpetration of a crime, or who **strengthens the resolve** of its perpetrator, or who **aids and abets** such persons in actions to prepare for or facilitate a crime, or in actions to commit a crime, or anyone **who is in agreement with the perpetrator or has knowledge of the conduct of evildoers and provides them with food, shelter, refuge or a place in which to meet***." Supplementary report by the Syrian Arab Republic to the Counter-Terrorism Committee (2001).

However, most of the modes of accomplice liability provide a reasonable basis to prosecute a range of criminal roles. Article 325 also specifies penalties for criminal associations.[248]

The Syrian Penal Code appears to have adequate jurisdictional scope to apply to crimes within Syrian territory by individuals of any nationality (Article 15),[249] to Syrian nationals beyond its territory (Article 20)[250] and to a foreign national resident in Syrian territory who commits, instigates or is involved in a crime or misdemeanour punishable under Syrian law outside Syrian territory, where his return has not been requested or accepted (Article 23).[251]

In short, it may be that ordinary, pre-existing Syrian law provides a possible basis for prosecution. Ordinary criminal law, and ensuring that it meets the international standards, may be an option that could be further explored, separately or in conjunction with international crimes set out below.

iii. The *De Facto* Authorities Own Law

It is understood that local anti-terrorism laws have been passed by *de facto* authorities in several regions of NE Syria. I have a copy of one of those laws found on the internet (confirmation is pending as to whether the content of the law is identical between provinces). However, questions arise both as to the reliance on non-state actor law at all, and then its content.[252]).

a. Legality and 'Law' passed by de facto authorities:

A first group of questions concern the legitimacy of *de facto* authorities passing 'criminal laws' and whether prosecutions based on such laws meet legality requirements. On one view, these echo questions addressed in Section C as to legitimacy of the exercise of other - including judicial – powers and should be treated in the same vein. However, opinion appears more divided on the legislative role of NSAs.

For example, the ICC OTP's position[253] distinguishes between enforcement of the law on the one hand (which *de facto* authorities may do, including by setting up tribunals), and the adoption of new laws, that represents a further encroachment into state sovereignty recognised in IHL.[254] The recent Swedish decision (the *Sakhanh* case), confirmed on appeal, supports the OTP view while suggesting a way forward. As discussed in Section C, it's key finding was that "*the principle of sovereignty does not prevent a non-state actor from establishing a court*," but it also found that "*it is only the state that may introduce criminal law provisions by virtue of their respective constitutional rules*", and that courts established by non-state actors "*cannot apply laws at [their] own discretion*." At the same time, it suggests flexibility, provided the law

[248] '[w]here two or more persons form an association or enter into an agreement for the purpose of committing crimes against people or property they shall be punished by a term of hard labour.'
[249] *Article 15:* 1. Syrian law shall apply to all crimes committed on Syrian soil. 2. A crime shall be considered as being committed on Syrian soil: (a) If one of the elements constituting a crime, or an act inseparable from a crime, or a principal or subsidiary act of collaboration took place on Syrian soil; (b) If the outcome of the crime occurred or was expected to occur on Syrian soil.
[250] Supplementary Report by the Syrian Arab Republic to the Counter-Terrorism Committee (2001), "*Syrian law shall apply to any Syrian person who, when outside Syrian territory, commits, instigates or is involved in a crime or misdemeanour punishable under Syrian law. The same shall apply even if the accused person loses his Syrian nationality or acquires it after the commission of the crime or misdemeanour".*
[251] *Ibid.*
[252] The law I have is the Jazeera province law, and these comments of substance reflect its content
[253] The Court did not specifically address this issue and judicial authority remains limited.
[254] The principle of non-intervention in the internal matters of States is reflected in APII, which states that the Protocol may not be invoked to preclude the government's right to use legitimate means to maintain or re-establish law and order within the State.

applied is not more stringent than the pre-conflict law, and that the nature of those laws (which I discuss below) may be relevant:

> "*in a non-international armed conflict, a non-state actor can establish courts […] provided that […] the court applies the* ***law that was in effect before the start of the conflict, or which at least does not deviate significantly in a more stringent direction from the legislation that applied****"*.[255]

On the other hand, the ICRC among others recognise that a multi-layered legislative framework, including *de facto* authorities 'own laws',[256] do (and perhaps must) arise in certain circumstances. The exercise of *de facto* control and state-like powers must be based on clear accessible law, and the power to adopt legal frameworks (like the judicial role) may be said to be implicit, and to serve rather than undermine the principle of legality. Moreover, if the alternative would be to apply unjust pre-existing laws, the authorities ability to correct this would be consistent with the humanitarian purpose of the law. Consistent with IHL principles, if national terrorism legislation is incompatible with IHL/IHRL then NSAG tribunals may legitimately refrain from enforcing it.[257] An alternative, more restrictive, 'terrorism' law – such as the Autonomous Administration's own law discussed below- may then be required to prosecute those particular terrorism-related crimes.[258]

In an area of some uncertainty in which practice is limited it is difficult to be categorical about what the law provides for. In the author's view there is no clear prohibition in IHL on the passage of such laws, but nor (as ever) is that power conferred. Taking a pragmatic and purposive approach, it is doubtful that NSAs can be precluded from adopting laws that may be necessary as a basis for exercise of other functions, that are in turn essential to give effect to IHL and human rights. If laws were adopted in the interests of justice, to safeguard legality and human rights, this arguably should not be seen as constituting an infringement of State sovereignty. Adopting a pragmatic approach has led to an emphasis on ensuring that the substance of the laws meets legality standards,[259] and to human rights NGOs calling on international actors to 'encourage' *de facto* local authorities to pass laws that enshrine international crimes and meet international standards.[260]

In conclusion, it may be possible for *de facto* authorities to rely on their own law, provided it meets legality standards, considered next. At the same time, if reliance on alternative sources of law is possible by, for example, relying on international crimes in the section that follows, a layer of controversy around sovereignty concerns would be avoided. If this law was interpreted

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[255] The full text of this decision, and the appeal decision, has been translated into English (unofficially) on the website of the Eurojust Genocide Network, see: <http://www.eurojust.europa.eu/doclibrary/genocide-network/GNnationaljurisprudence/Case%20number%20B3787-16%20-%20Stockholm%20City%20Court,%20Sweden%20(February%202017)/2017-02-SE-Stockholm-City-Court_EN.pdf.>.
[256] See section C.
[257] *Commentary to GCIV*, p. 336-337: even in the different context of occupation, the *Commentary to GCIV* recalls that the occupying power can abolish pre-existing tribunals applying inhumane or discriminatory laws
[258] But see below on alternative bases for prosecution eg war crimes
[259] Section C.
[260] One statement from the head of counter-terrorism at HRW noted: "If key international actors believe that such trials can be held locally – a proposition that seems far-fetched given the rampant abuses in Syria and Iraq – they should invest in beefing up local justice systems, ensure fair trial guarantees, eliminate the death penalty and encourage local authorities to amend their laws to allow prosecutions for international crimes." See: N. Houry, 'Bringing ISIS to Justice: Running Out of Time?' HRW (2019), <https://www.hrw.org/news/2019/02/05/bringing-isis-justice-running-out-time.>.

restrictively, ensuring that it was ‘less stringent’ than the Syrian law in place, and if it were interpreted and applied to accord with international legal standards and acceptable contours of the definition of terrorism, it may appease concerns and garner greater international support.

b. The quality of the law:

The version of a law being applied by the *de facto* administration’s tribunals in the North East appears to be the ‘Autonomous Administration in North and East Syria’s Anti-Terrorism Law.’ If this is the law upon which the tribunal would proceed, it has significantly more positive dimensions than the Syrian law. However, it also has some significant shortcomings, raising the question of whether and how they can be remedied.

In crucial distinction with the Republic’s law, the definition of terrorism in Article 1 is limited to “criminal acts” committed with a particular aim; this broadly accords with the approach to international good practice suggested by the UN Special Rapporteur or Security Council Guidance in UNSC Res.1566. The aims are somewhat broadly cast, but not excessively or unusually so, as including “to spread terror, chaos and disruption of public security or damage to public and private property…”.

The law goes on to specify acts that will be considered ‘terrorist’, some of which accord with good practice, for example, specifying a link with violence and articulating proscribed conduct in relative detail.[261] Others are unduly broad reaching and problematic in light of the standards above.

It may also be noted that the object of terrorist attacks is not limited to the civilian population but covers conduct directed against the authorities. Best practice in light of international approaches to core elements of terrorism, and ‘terrorism as war crime’ under international law (discussed below) focus more narrowly on attacks on *civilian population*. Article 3 also fails to distinguish crime of terrorism from attacks on military objectives during conflict.[262] While this disconnect between terrorism and armed conflict is common, the failure to distinguish between legitimate and illegitimate objects has been criticised by the ICRC, and others, as undermining IHL.[263]

c. Safeguarding rights in the way the law is to be interpreted and applied:

[261] UNOFFICIAL TRANSLATION: Article 3: The following acts are considered ‘terrorist’:

- Whoever organizes or heads an organization’s leadership that aims for creating violence or the threat thereof which aims to spread terror among citizens or endanger their lives, liberty, and property regardless of the motives and purposes in implementation of a terrorist project.
- Providing support, financing, counseling, intervention, and contributing, in words or deeds/actions, in any way that can deemed to be terrorist acts, and provoking sedition among the components of society, the Jazeera’s parts or provoking a sectarian civil war by arming citizens or compelling them to arm each other with incitement or funding.
- Assault with firearms using or any other lethal weapon against the departments of the People's Protection Units, volunteer centers, security authorities, national military, or sectors, or extend their extension to their supply chains, communication lines, camps, and bases.
- Assault with firearms on the embassies and diplomatic personnel in Al-Jazeera province.
- Also kidnapping or restricting individuals ’freedoms and detaining them for extortion for a political, sectarian or nationalist purpose that threatens national unity and the peaceful coexistence between the components of the province.

[262] *Ibid.*

[263] OSCE, ‘Guidelines for Addressing the Threats and Challenges of “Foreign Terrorist Fighters” within a Human Rights Framework’ (2018), p. 24.

So far as these laws are to be relied upon, questions arises as to whether, and if so how, they may be made more rule of law compliant, avoiding the areas of relative weakness.

One way would be to clarify how aspects of the law would be interpreted and applied. This may include *not* applying certain aspects of the law, or restrictively interpreting others. For example, rather than prosecuting crimes that undermine SDF's authority or attacks against military in accordance with IHL, prosecutions should be limited to crimes related to ISIS. This would accord with best practice and be likely to garner more support. It would also avoid some criticisms that has been made of SDF prosecutions to date, to the effect that some of them have been used against those that oppose the administration.[264] Given that this is a troubling (and common) feature of terrorism legislation in oppressive states, with Turkey being a leading example among others, it may be important to distance this process from such prosecutions to ensure its legitimacy.[265]

iv. International Crimes

The individuals could also be prosecuted for crimes under international law, provided they were reflected in applicable law at the time of their alleged commission.[266] A vast body of international law is potentially relevant to ISIS crimes in Syria: most straightforward are the 'core' crimes under international law of war crimes, crimes against humanity and genocide.[267] These core crimes are enshrined in treaties such as the Geneva Conventions and the Genocide Convention, which has been acceded to by Syria, and forms part of customary law.

Reliance on international law as the legal basis for the crimes averts the need for them to be based in domestic law, which is significant as the 1953 Syrian Penal Code does not currently contain provisions for international crimes. A new instrument could however be adopted to clarify the nature of crimes to be prosecuted by the tribunal, as long as the crimes were criminalised under international law at the time. These core crimes are distinct from the conduct in treaties that deal with terrorism, hostage taking or drug trafficking, which do not purport to themselves criminalise and provide a basis for prosecution, but rather, to oblige state parties to do so; the basis for such crimes must then be provided in domestic law at the time of the commission of the offences.

Crimes that are (and are not) prosecutable under international law:

i. Terrorism

There is no generally accepted definition of terrorism in international law. Efforts to conclude a Comprehensive Convention on International Terrorism have still not been successful, on account of decades of outstanding dispute regarding certain elements of an international definition of terrorism.[268] There is therefore no universal terrorism treaty that criminalises terrorism as such and that might provide a basis for prosecution of treaty crimes. There are

[264] Amnesty International, 'Syrie. Détentions arbitraires et procès iniques ternissent la lutte du PYD contre le terrorisme' (7 September 2015) <https://www.amnesty.org/fr/latest/news/2015/09/syria-abuses-mar-pyd-fight-against-terrorism/>.

[265] Eg. COE, 'Misuse of anti-terror legislation threatens freedom of expression' (4 December 2018) <https://www.coe.int/en/web/commissioner/blog/-/asset_publisher/xZ32OPEoxOkq/content/misuse-of-anti-terror-legislation-threatens-freedom-of-expression/pop_up?_101_INSTANCE_xZ32OPEoxOkq_viewMode=print&_101_INSTANCE_xZ32OPEoxOkq_languageId=en_GB>.

[266] Article 15 ICCPR.

[267] A recent Eurojust and Genocide Network Report on Cumulative Prosecution of FTFs, May 2020, confirms the relevance of each of these categories.

[268] For more detail, see eg H. Duffy, *War on Terror* (CUP 2015), p. 9-72.

multiple treaties and UN Resolutions that oblige state parties to criminalise domestically a range of different forms of terrorism or support for it, for example, financing, terrorist bombings, hostage-taking, but these generally do not even contain definitions of terrorism,[269] and they all depend on clear national law that meets the criteria explored in Part A.

Some have suggested that 'terrorism' can be prosecuted as such as a crime under customary international law. However, there are literally hundreds of definitions of terrorism scattered across regional and international practice, with different material and mental elements, and far greater diversity on the national level.[270] It is unsurprising then that most commentators, including this one, have taken the view that there is no accepted definition of terrorism internationally, and a fortiori no *crime* of terrorism given the particularly stringent requirements of *nullum crimen sine lege* in criminal law. It is noteworthy that Special Tribunal for Lebanon (STL) in 2011 in its *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*[271] has taken a contrary view that:

> "*On the basis of treaties, UN resolutions and the legislative and judicial practice of States, there is convincing evidence that a customary rule of international law has evolved on terrorism in time of peace, requiring the following elements: (i) the intent (dolus) of the underlying crime and (ii) the special intent (dolus specialis) to spread fear or coerce authority; (iii) the commission of a criminal act, and (iv) that the terrorist act be transnational.*[272]

The STL's approach has been followed in at least one English case,[273] but I am not aware of domestic prosecutions on this basis, and it remains a very controversial decision.[274] There is therefore at best limited authority for prosecuting terrorism as a crime under customary law, and doing so may be considered to attract unnecessary controversy, given available alternatives. For example, while the STL crime focused on 'terrorism in time of peace,' a more compelling and appropriate basis could be found for the prosecution of inflicting terror on the civilian population and other war crimes under well-established international law.

ii. War Crimes (incl. inhumane acts, pillage, terrorising the civilian population…)

It is now clear that serious violations of IHL applicable in non-international armed conflicts may amount to war crimes. At a minimum, this includes violations of Common Article 3 and others, reflected for example in Article 8 of the ICC Statute. These would cover many crimes occurring in areas under IS control, including: violence to life and person including cruel treatment, outrages on personal dignity, attacks against civilians and civilian objects, pillaging, rape and sexual violence, forced conscription, ordering displacement and denying quarter.

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[269] The Terrorism Financing convention does have a definition of sorts, but most refer eg. to 'criminal acts.'

[270] I have explored comparative practice on this in more detail in H. Duffy, *War on Terror* (CUP 2015), p. 9-72, but I can provide detail upon request.

[271] *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, STL-11-01/1, Special Tribunal for Lebanon, 16 February 2011.

[272] *Ibid.*

[273] *Notably, the position of the STL concerning the customary definition of the crime of terrorism has been quoted and approved before UK courts, for example, in R. v Gul, UK Court of Appeal, 22 February 2012* para 32. *"International law has developed so as to create an international crime of terrorism in peacetime, i.e. outside of armed conflicts"*.

[274] Among many others see B. Saul, 'Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism' (2011) 24 *Leiden Journal of International Law* 3, 677-700; H. Duffy, *War on Terror* (CUP 2015), p. 9-72.

Inflicting Terror on Civilians: So far as the individuals are being prosecuted in relation to conduct arising in the context of the NIAC in NE Syria (Section B) they may be prosecuted for inflicting terror on the civilian population. Although there remain some detractors from this view, it would seem to now be well-established that the deliberate infliction of terror on the civilian population in armed conflict is a war crime under treaty or customary law.[275]

International law provides a definition of terrorism for the specific context of armed conflict: '*Acts or threats of violence the primary purpose of which is to spread terror among the civilian population'* are prohibited in international and non-international armed conflict under both Additional Protocols.[276] APII does not apply as treaty law in Syria, but this crime has been held to amount to a crime under customary IHL[277] by the Appeals Chamber of the ICTY in the *Galić* case,[278] supported more recently by the *Milosevic*.[279] This was confirmed by the prosecution of terror as a war crime in a series of cases from the Special Tribunal for Sierra Leone[280] and confirmed by the ICRC Study on customary law.[281]The Appeals Chamber in *Galić* noted that the prohibition of terror against civilian population as enshrined in the two Protocols is part of customary international law "*from at least the time of its inclusion in those treaties*".[282]

The elements of the war crime have also been spelled out by the tribunals. The crime involves acts of violence with the primary (but not exclusive) purpose of spreading terror among the civilian population.[283] Inflicting terror is a 'specific intent' crime, requiring intent or recklessness in relation to the conduct and the terrorisation of civilians.[284] The elements of this crime are, however, limited to the civilian population, and would not cover attacks on the SDF as suggested by the 'terrorism laws' above.

Other relevant war crimes: Recent prosecutions in European states of returnee so-called 'foreign terrorist fighters' illustrate a range of war crimes with which women involved in ISIS may potentially be charged. These often reveal the practice of charging war crimes

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[275] Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, p. 8–11. Note this is not true of terrorism a crime *outside armed conflict* where greater diversity of opinion and practice remains. *The Gul case and the STL interlocutory decision suggest otherwise.*

[276] Article 51 of Additional Protocol I and Article 13 of Additional Protocol II. See also Article 33(1) of the Fourth Geneva Convention, which provides that 'terrorism is prohibited' without defining the phenomenon.

[277] J. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law, Vol. 1*: *Rules*, (ICRC 2005), pp. 8–10. See also the STL Interlocutory Decision, and *Prosecutor* v. *Galic*, Case No. IT-98-29-T, Judgment, 5 December 2003; *Galic* ICTY -98-29A, Appeal Decision, 30 November 2006.

[278] *Prosecutor v Galic,* Trial Judgment, TC, ICTY, 5 December 2003 (*The Trial Chamber did not take position on whether a customary rule of law exists for a crime of terror to be considered as a violation of the laws or customs of war,* para 113, but the AC did: *Prosecutor v Galic*, Appeals Judgment, ICTY, 30 November 2006.

[279] *Prosecutor v. Dragomir Milosevic*, Case No. IT-98-29/1-T, Judgment (Trial Chamber), 12 December 2007, paras. 873 et seq.

[280] *Prosecutor v. Brima, Alex Tamba et al,* Case No. SCSL-04-16-T, Judgment (Trial Chamber), 20 June 2007, para. 666; *Prosecutor v. Fofana, Moinina and Kondewa*, Case No. SCSL-04-14-T, Judgment (Trial Chamber), 2 August 2007, para. 169; *Prosecutor v. Seasy Gallon and Gbao*, Case No. SCSL-04-15-T, Judgment (Trial Chamber), 2 March 2009, para. 112.

[281] The ICTY adjudicated the first case concerning the offence of inflicting terror on the civilian population during armed conflict, which it found amounted to a crime under treaty law. ICTY, *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Judgement and Opinion, 5 December 2003. In 2006, Galić's appeal was denied and the Appeals Chamber extended his original 20-year sentence to life imprisonment. *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Appeal Judgement, 30 November 2006. See also the Sierra Leone tribunal's first judgment including the crime of terrorism, *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, SCSL-04-16-T, Special Court for Sierra Leone, 20 June 2007. See Chapter 4 Duffy for more detail.

[282] *Prosecutor v Galic*, Appeals Judgment, ICTY, 30 November 2006, para 90.

[283] *Galic* Appeals Chamber, para 72.

[284] *Galić* Appeals Decision, paras. 103 and 104.

cumulatively, alongside terrorism charges (albeit with different definitions than those at play here), but in some states where, for example, there was no crime of membership of terrorist organisations, prosecutions have proceeded for war crimes alone.[285] These cases have included the prosecution of a range of levels and forms of responsibility for ISIS crimes. Examples include prosecution of the war crime of *pillage* in respect of homes taken over by ISIS families, [286] of *enlisting child soldiers* for woman who 'hand[ed] over her child to an ISIS training camp,'[287] of *slavery* in respect of persons forced work in ISIS households, or of *outrages upon personal dignity* from posing with and posting photos of deceased victims.[288]

iii. Crimes against humanity

Acts of terrorism can also constitute crimes against humanity (CAH) in certain circumstances, and there can be little doubt that some of IS activities would fall within the definition of such crimes, as multiple international inquiries and authorities have indicated. 'Crimes against humanity' consist of certain acts – such as murder, torture, inhumane acts or persecution – directed against the civilian population as part of a widespread or systematic attack. Prosecuting CAH might most adequately capture the gravity and nature of ISIS crimes. 'Inhumane acts' is a broad term found in various international instruments and domestic laws,[289] covers the infliction of severe bodily harm,[290] as well as mental harm and serious 'cruel treatment'.[291] As the ICTY has noted, the 'terrorisation' of groups may also amount to persecution,[292] which consists of fundamental rights violations on political, national, racial, religious or other grounds.[293] The "crimes of terror and of forcible transfer of the women, children and elderly" have been held to constitute crimes against humanity of inhuman acts and persecution.[294] Thus, the crime of terror can be both constitutive of a crime against humanity and a war crime.[295]

It is also not difficult to see how IS crimes might satisfy the threshold of being 'widespread or systematic' given their scale and the extremely 'organised nature of the acts of violence and the

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[285] Eurojust report on Cumulative Charging of Foreign Terrorist Fighters, May 2020. Sweden and Finland have no such crimes and prosecuted eg outrages on personal dignity.

[286] Higher Regional Court of Dusseldorf, 4 December 2019, reference III-2 StS 2/19 Higher Regional Court of Stuttgart, 5 July 2019, reference 5-2 StE 11/18; also Eurojust Report, p 17

[287] Federal Court of Justice, 17 October 2019, reference AK 56/19

[288] See Finnish and Swedish cases involving posing with and posting photos of deceased persons; District Court of Kanta-Häme, 22 March 2016, reference R 16/214 Scania and Blekinge Court of Appeal, 17 April 2017, reference B 569-16, in the Eurojust 2020 Report.

[289]Inhuman(e) acts or treatment are referred to, for instance, in the four Geneva Conventions of 1949 (Article 50, GC I; Article 51, GC II; Article 130, GC III; Article 147, GC IV); in the 'International Convention on the Suppression and Punishment of the Crime of Apartheid', 30 November 1973, GA Res. 3068 (XXVIII); in the ICCPR (Article 7); in the ECHR (Article 4); in the Convention (No. 29) Concerning Forced Labour, adopted by the ILO on 28 June 1930, in the Slavery Convention of 25 September 1926; and in the ICC Statute, Article 7.

[290]Article 18(k) of the ILC's Draft Code of Crimes mentions severe bodily harm and mutilation.

[291]*Prosecutor* v. *Jelisic*, Case No. IT-95-10, Judgment, 11 December 1998, para. 52. The Tribunal refers to international standards on human rights, to interpret 'other inhumane acts', in order 'to identify a set of basic rights appertaining to human beings, the infringement of which may amount, depending on the accompanying circumstances, to a crime against humanity'. *Prosecutor* v. *Kupreskic et al.*, Case No. IT-95-16, Judgment, 14 January 2000, para. 566. *Prosecutor v. Lukić and Lukić*, Case No. 98-32/1-T, Judgement (Trial Chamber), 20 July 2009, para. 960.

[292] *Prosecutor v. Popovic*, supra note 46, para. 999; *Prosecutor v. Blagojevic and Jokic,* Case No. IT-02-60-T, Judgment (Trial Chamber), 17 January 2005, para. 589.

[293] See ICC Statute, supra note **Error! Bookmark not defined.**, Article 7(1)(h) and 7(2)(g). Discriminatory animus is not required for crimes against humanity generally, but is an element for persecution only. Robinson, supra note **Error! Bookmark not defined.**, p. 235.

[294] *Prosecutor v. Radislav Krstić*, Trial Judgment, No. IT-98-33-T, ICTY, 2 August 2001, para 607.

[295] *Ibid.,* para 653.

improbability of their random occurrence.'[296] While the threshold of CAH is high, it cannot be ruled out that women in the camp could be convicted on this basis for their roles in the broader scheme. It should be noted that the conduct of the particular accused need not be widespread or systematic, and even a single act by a perpetrator may constitute a crime against humanity, provided it forms part of a broader (widespread or systematic) attack or campaign, and is committed with relevant knowledge of that attack.[297]

iv. Genocide

Finally, there are multiple apparently well-founded allegations that IS members committed genocide, for example, against the Yazidi population. Suffice to note here that the Human Rights Council, in various reports, has confirmed the role of the Islamic State in the genocide of the Yazidi community.[298]

Genocide is defined and explicitly criminalised in the 1950 Genocide Convention, ratified by Syria, and there is a strong basis to prosecute genocide under treaty and customary law.[299] Genocide occurs if any of the following acts are committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group:

> (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.[300]

The underlying acts are therefore fairly broad, for example, in the International Criminal Tribunal for Rwanda (ICTR) it was suggested that the infliction of 'terror' was one of the ways in which mental harm could be inflicted, as part of a genocidal campaign.[301] The definitive element of the crime of genocide is however the requirement of the specific intent,[302] regarding the destruction of a group in addition to the primary *mens rea* to commit the underlying acts of

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[296] Nahimana ICTR Appeals Chamber 28.11.2007, para 920 and *al Bashir Arrest Warran*t case, para 81.

[297]*Prosecutor* v. *Mrskic, Radic and Sljivancanin*, Case No. IT-95-13-R61, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 3 April 1996, para. 3; *Prosecutor* v. *Tadic*, Case No. IT-94-1, Judgment (Trial Chamber), 7 May 1997.

[298] Human Rights Council, 'They came to destroy: ISIS crimes against the Yazidis', A/HRC/32/CRP.2 (15 June 2016); Human Rights Watch, 'Iraq: Forced Marriage, Conversion for Yezidis' (11 October 2014); Human Rights Council, Report of the Office of the United Nations High Commissioner for Human Rights on the human rights situation in Iraq in the light of abuses committed by the so-called Islamic State in Iraq and the Levant and associated groups, A/HRC/28/18 (13 March 2015), page 16

[299] Article III, Convention on the Prevention and Punishment of the Crime of Genocide 1951

[300] Article II, Genocide Convention ibid; Article 6, Rome Statute of the International Criminal Court 2002

[301] *Prosecutor v Kayishema and Ruzindana*, Trial Judgment , ICTR-95-1-T, 21 May 1999, para 107; the Prosecutor stated that 'the inflicting of strong fear or terror, intimidation or threat may amount to serious mental harm'.

[302] Prosecutor v. Milomir Stakic (Trial Judgement), IT-97-24-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 31 July 2003, para 520

genocide.[303] This genocidal intent can be determined by circumstantial evidence surrounding the *actus reus* concerning the allegations.[304]

a. Modes of liability

Modern international criminal law, reflected in practice of the ad hoc tribunals and the ICC, recognises many forms of individual criminal liability, not only for perpetrator and co-perpetrators, but also for accessories that influence or assist the principals in the commission of the core crimes above. Despite the gravity of the crimes of genocide, and other core crimes, many roles and different levels of responsibility can therefore be captured by modes of liability that are now set out in some detail in international instruments and jurisprudence. Conspiracy to commit genocide, direct and public incitement to commit genocide, attempts to commit genocide, and complicity in genocide are explicitly recognised in the Genocide Convention itself. The Statutes of the International Criminal Tribunal for the Former Yugoslavia and for Rwanda charged individual criminal liability to participation in planning, instigating, ordering, or otherwise aiding or abetting in the very planning, preparation or execution of the crimes committed. Some modes of liability such as joint criminal enterprise were developed in ICTY jurisprudence. The Rome Statute recognises accessorial liability under Article 25(3), which has been fleshed out in the Court's case law.

While not 'binding' law in this context, the ICC approach could reasonably be taken as enshrining acceptable international standards in respect of criminal law. They could also be taken as aids to interpret, given definition to or limit comparable provisions of domestic law (above). The most relevant aspects are flagged for their relevance to the detainees in the Al Hol camp.

i. Aiding and Abetting

Aiding and abetting is a broad mode of liability covering intentional contribution to a crime, which was at least attempted. Article 25(3)(c) of the ICC Statute states that any person would be liable for the international crimes recognised in the Statute if the person: "*For the purpose of facilitating the commission of such a crime,* ***aids, abets, or otherwise assists*** *in its commission or its attempted commission, including providing means for its commission"*[305] In the *Al Mahdi case*, the Pre-Trial Chamber clarifies that:

> "*[i]n essence, what is required for this form of responsibility is that the* ***person provides assistance to the commission of a crime and that, in engaging in this conduct, he or she intends to facilitate the commission of the crime****. It is* ***not required that the assistance be "substantial****" or anyhow qualified other than by the required specific intent*

[303] Also confirmed by the ICC in The Prosecutor v. Omar Hassan Ahmad Al Bashir, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009; and the ICJ in Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, p. 43, para 187; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015, p. 43, para. 132.

[304] Prosecutor v. Rutaganda (ICTR-96-3-T), Judgment, 6 December 1999, para. 61; Prosecutor v. Akayesu, ICTR-96-4-T, Judgment, 2 September 1998, para. 523. See also Prosecutor v. Jelisic, IT-95-10-T, Judgment, 14 December 1999, para. 101; Prosecutor v. Kayishema & Ruzindana, ICTR-95-1-T, Judgment, May 21 1999, para. 93.

[305] Article 25(3)(c), Rome Statute of the International Criminal Court, 2002.

to facilitate the commission of the crime (as opposed to a requirement of sharing the intent of the perpetrators)".[306]

Aiding and abetting has been described as 'assisting,'[307] or even encouraging and lending moral support to,[308] but it must relate to the perpetration of specific offences. The ICC defined 'aiding' as ***"imply[ing] the provision of practical or material assistance",***[309] while 'abetting' included "the moral or psychological assistance of the accessory to the principal perpetrator, taking the form of encouragement of or even sympathy for the commission of the particular offence".[310] The jurisprudence differs with respect to the contribution of the assistance to the commission of the crime, however, it must at least help in facilitating or furthering the crime.[311]

The *mens rea* requirement consists of the knowledge (or awareness) that the acts of aid or assistance would acts assist in the commission of a specific crime by the principal.[312] Various support roles, and duties of enforcement of IS policies, could potentially meet the criteria of aiding and abetting.

ii. Common purpose?

Broader still is the residual concept of acting in 'common purpose.' Article 25(3)(d) states that any person would be liable for the international crimes in the Statute if the person:

In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) Be made in the knowledge of the intention of the group to commit the crime.[313]

Article 25(3)(d) has been considered to be a *'residual form of accessory liability, which makes it possible to criminalise those contributions that cannot be characterised as ordering, soliciting, inducing, aiding, abetting or assisting'*.[314] It remains unsettled whether, as one trial chamber asserted, the person must make a "*significant contribution*" to the crimes committed

[306] *Prosecutor v Al Mahdi*, Decision on the Confirmation of Charges, 24 March 2016, ICC-01/12-01/15-84-Red, para 26.
[307] *Prosecutor v. Simić*, Appeals Judgment, 28 November 2006, IT-95-9-A, para 161.
[308] *Prosecutor v Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud,* Decision on the Prosecutor's Application for the Issuance of a Warrant of Arrest for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, Judgment, 22 May 2018, ICC-01/12-01/18, para 185.
[309] *Prosecutor v Bemba et al*., Trial Judgement, 19 October 2016, ICC-01/05-01/13, para 88.
[310] *Prosecutor v Bemba et al.,* Trial Judgement, 19 October 2016, ICC-01/05-01/13, para 89.
[311] *Prosecutor v Blé Goudé*, Decision on the Confirmation of Charges, 12 December 2014, ICC-02/11-02/11-186, para. 167; Prosecutor v Bemba et al., Trial Judgement, 19 October 2016, ICC-01/05-01/1), para 94' cf Peresic ICTY on substantial contribution.
[312] *Prosecutor v. Simić*, Appeals Judgment, 28 November 2006, IT-95-9-A, para 163; Prosecutor v Karera, Appeals Judgment, 2 February 2009, ICTR-01-74-A, para. 321; Prosecutor v Blaškić, Appeals Judgment, 29 July 2004, IT-95-14-A, para.50; Kvočka, Trial Judgment, 2 November 2001, IT-98-30/1, para. 255; Mrkšić at al., Trial Judgment, 27 September 2007, IT-95-13/1 para. 556; Sesay et al., Trial Judgment, 2 March 2009, SCSL-04-15-T, para. 280.
[313] Article 25(3)(d), Rome Statute of the International Criminal Court 2002.
[314] *Prosecutor v Lubanga*, Appeals Judgment, 01 December 2014, ICC-01/04-01/06-3121-Red, para. 337. See also *Prosecutor v Katanga*, Appeals Judgment, 25 September 2009, ICC-01/04-01/07-1497, para. 483.

or attempted,[315] but it cautioned against this being read as a '*substantial*' contribution.[316] What this means must be determined by considering the conduct and the context, but opens the door to prosecution for contributions through a common plan or common criminal purpose, absent evidence of intentional contribution to particular criminal acts.[317].

iii. *Soliciting and Inducing*

It is also possible that 'soliciting' and 'inducing', as understood under in Article 25(3)(b) could be seen to be applicable to the role played by women in spreading the propaganda and ideology and their role in recruitment. This may cover those who '*prompted' others to commit a crimes,*[318] for example, by exerting psychological influence over them.[319] There is some authority for soliciting consisting of either an act or an omission.[320]

The conduct that accrues liability for inducing or soliciting may arise through words or by publications,[321] and could be expressed or implied.[322] Lastly, there is some authority in the ICTY in support of the view that instigation 'need not necessarily have direct effect…'[323] but the ICC has so far taken a narrower view requiring 'causal effect between the crime and the act of soliciting or inducing.[324]

Conclusion:

There are several options in terms of applicable criminal law, nationally or internationally. While Syrian terrorism law plainly falls foul of the principle of legality, other options are presented in the ordinary law of the land, the 2014 'terrorism' law that may be seen to modify and restrict the scope of Syrian law, and international criminal law. Modes of liability in Syrian law, and/or international criminal law, provide for the potential prosecution of a significant range of persons.

Basing prosecution on local or international law, terrorism or international crimes, each has its advantages and disadvantages. The choices made will not only reflect legal considerations

[315] *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-465-Red, Decision on the Confirmation of Charges, 16 December 2011 ("Mbarushimana Confirmation Decision", para. 285; confirmed in *Prosecutor v. Mbarushimana,* ICC-01/04-01/10-465-Red, Judgment On The Appeal Of The Prosecutor Against The Decision Of Pre-Trial Chamber I Of 16 December 2011 Entitled 'Decision On The Confirmation Of Charges' Para 54, 55

[316] *Ibid.* See also dissent of S. Fernandez rejecting any such threshold.

[317] *Prosecutor v. Lubanga*, ICC-01/04-01/06-2842, Judgement, 14 March 2012, para. 996; Prosecutor c. William Samoei Ruto And Joshua Arap Sang, ICC-01/09-01/11.

[318] *Prosecutor v Al Madhi,* Decision on the Confirmation of Charges, 24 March 2016, ICC-01/12-01/15-84-Red, para 25 (See *Prosecutor v Ntaganda*, Decision on the Confirmation of Charges, 14 June 2014, ICC-01/04-02/06-309 para. 153; *Prosecutor v Gbagbo*, Decision on the Confirmation of Charges, 12 June 2014, ICC-02/11-01/11-656-Red, para. 243; *Prosecutor v Bemba et al.,* Decision on the Confirmation of Charges, 15 November 2014, ICC-01/05-01/13-749, para. 34; *Prosecutor v Blé Goudé*, Decision on the Confirmation of Charges, 12 December 2014, ICC-02/11-02/11-186, para. 159; *Prosecutor v Ongwen*, Decision on the Confirmation of Charges, 23 March 2016, ICC-02/04-01/15-422-Red, para. 42. From the ICTY, *Prosecutor v. Kristić,* Judgment, 2 August 2001, IT-98-33-T, para 601

[319] *Prosecutor v Bemba et al*., Trial Chamber Judgement, 19 October 2016, ICC-01/05-01/13, para 73 - 75

[320] *Prosecutor v. Akayesu*, Judgment, 2 September 1998, ICTR-96-4-T, para 180

[321] S. Finnin, *Elements of Accessorial Modes of Liability: Article 25 (3)(B) and (C) of the Rome Statute of the International Criminal Court (International Humanitarian Law)* (Brill - Nijhoff 2012), p. 65,66.

[322] *Prosecutor v. Bemba et al.,* Judgment, 19 October 2016, ICC-01/05-01/13-1989-Red, para. 78

[323] *Prosecutor v Brđanin,* 1 September 2004, IT-99-36-T, para 359

[324] *Prosecutor v Al Hassan* Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, Decision on the Prosecutor's Application for the Issuance of a Warrant of Arrest for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, Judgment, 22 May 2018, ICC-01/12-01/18, para 185. *Prosecutor v Bemba et al.,* Trial Judgement, 19 October 2016, ICC-01/05-01/13, para 81

addressed here, but evidentiary and perhaps policy ones, such as the desire to create distance from unjust practices associated with terrorism prosecutions in the past.[325]

Consideration is also due as to which crimes reflect the nature of the crimes, from a victim - oriented and justice perspective. Crimes against humanity such as sexual violence,[326] or war crimes of inflicting terror on the civilian population, may be among those that capture the egregious nature of the crimes, where these can be established. Some may take the view terrorism offences are epitomised is ISIS activities, and for some forms of contribution terrorism charges will be more readily established. As a recent 2020 Eurojust and Genocide Network Report notes: *"prosecuting terrorism offences combined with acts of core international crimes ensures the full criminal responsibility of perpetrators, results in higher sentences and delivers more justice for victims."*[327]

It is also possible to combine legal sources, to cover the breadth of criminality, while reinforcing protections of the principle of legality, the rights of the accused, and the legitimacy of the process. Ordinary crimes under Syrian law could then be prosecuted alongside international crimes. The 2014 'law' alone is unlikely to suffice, given its own deficits, though to the extent that it is considered important or necessary to prosecute terrorism, it could be bolstered through selective application, and clarification in light of the principles and core elements of terrorism as highlighted above. Controversies around the *de facto* authorities law-making role may be alleviated if the definition of terrorism was interpreted in light of international good practice as set down by, for example, the UN Special Rapporteur, and if it is prosecuted alongside international crimes.

The combination of national and international law as a basis for prosecuting terrorism appears in the work of the Lebanon Tribunal, which incorporates elements of international and Lebanese domestic law, complemented by a provision in its statute that the law that most favours the accused in the particular situation should be applied. Drawing in international crimes would also implicitly recognise calls from human rights advocates to reflect such crimes in Syrian law and practice. This may best serve the interest of justice, enhancing the legitimacy of the process and those conducting it.

A Statute or other such guiding document could clarify and as necessary restrict the crimes and modes of liability to be applied, for the benefit of accused and judges. International practice supports such clarification of applicable law through elaboration of documents on the elements of the crimes after violation but before prosecution (as eg. ICC elements document). Based on the relevant sources of law, which may be multiple, it could identify common characteristics of the prohibited conduct and required mental element as "*one way of avoiding ambiguity in the law."*[328] Caution is due not to offend the principle of non-retroactivity, by effectively criminalising conduct that was not at the time an offence or extending to offences that were not

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[325] According to an AP new report, '[t]he Kurds renamed the terrorism courts, saying that the term was too negative' and '[K]urdish official call their prisons "academies", saying the emphasis is on reeducation. https://apnews.com/d672105754434b738c8e5823233572c9/Syria.

[326] It has been noted that terrorism charges have tended to undermine the crucial role of sexual violence in this context, which may be better captured by a focus on relevant war crimes; Columbia School of Public Health, Sexual Violence in the Syrian Conflict (Aug. 30, 2012)

[327] CUMULATIVE PROSECUTION OF FOREIGN TERRORIST FIGHTERS FOR CORE INTERNATIONAL CRIMES AND TERRORISM-RELATED OFFENCES, Eurojust and Genocide Network Report, May 2020 (Eurojust report).

[328] UNODC Gender Dimension Report 2019, which suggest 'examples' and also notes, 'If prosecuting authorities are applying or interpreting legislation in ways not envisaged by legislators, the principle of legality also demands that such authorities provide clear guidance and "fair notice" of the conduct that is liable to prosecution.'

foreseeable.[329] However, building up the normative framework in a way that *restricts* the breadth of the law in force, to benefit of the accused (as opposed to impermissibly extending it), is unlikely to raise human rights concerns. While there is no way to avoid an individualised assessment case by case, greater additional clarity is also likely to favour the accused and efficiency in the administration of justice.

QUESTION 5: <u>Implications for Third States</u>

Introduction:

This section considers the implications for and in third states of justice process by the AANES. This includes the potential implications of cooperation by those states and the impact of judgments of a NSAG court on potential processes in those states.[330]

Cooperation?

International cooperation in criminal matters is not an area where international law is generally prescriptive, and this is particularly so in the relatively novel area of non-state prosecution. The complex framework of bilateral agreements between states, international agreements to cooperate on particular issues including mutual legal assistance (MLA) frameworks, and UN Security Council resolutions calling for inter-state cooperation on terrorism, do not apply as such in this context.[331] It is therefore unlikely that third states could be considered legally obliged to cooperate with a prosecution by a *de facto* administration.

This is distinct from the question whether there are legal impediments to doing so. It appears to follow from the analysis in preceding sections, that when it comes to supporting or cooperating with those processes, the key question upon which the lawfulness of cooperation will depend is whether the processes meet basic due process and rule of law standards, as required by IHL and IHRL. If they do, states would not be precluded from cooperating with them, for example, through evidence gathering and sharing, receiving prisoners or capacity building. While they are not legally bound to cooperate, or to recognise domestically the legal validity of the processes, it is within their discretion to do so.

- ***Sovereignty and International Wrongs?***

Sovereignty concerns, reflecting the mutual self-interest of states, feature large in the enforcement and non-enforcement of international law, and reluctance on the part of some governments to recognise non-state actor led criminal processes would not be surprising. For the most part such concerns are political rather than legal. One related legal concern that may arise is whether cooperating with NSAG justice processes might amount to an international wrong *vis a vis* the territorial state. In circumstances where those processes, and the state's cooperation, do not themselves preclude the exercise of sovereignty by the state, or contribute to the limitation of its sovereignty, this seems unlikely. Rather, cooperation may be seen to

[329] Unforeseeable interpretations of the law may amount to ex post facto criminalization as noted above.

[330] *Original question clarified on the phone: what are the implications for third states in relation to judgements of NSAG court eg. implementation, serving of sentences, consequences of admissions of fact ... in court proceedings in third states.*

[331] Bilateral treaties make specific arrangements for various forms of cooperation, e.g. extradition, MLA or enforcement of sentences. International treaties provide a framework for cooperation in relation to some of the crimes (e.g. the many terrorism-related treaties on financing or terrorist bombing) while others (e.g. crimes against humanity) have no general treaty governing cooperation as yet, but proposals are afoot. Many would argue for a general obligation to cooperate to investigate and prosecute war crimes. However, whether these oblige cooperation with non-state actor mechanisms may stretch a developing area of law too far.

reflect a reality on the ground in which control of territory has been lost by the state, and justice processes must nonetheless proceed in order to give effect to international law. Cooperation that seeks to help bring a rule of law framework to bear, contributing to ending the current detention situation and ensuring fairer trials for example, can be distinguished from other forms of cooperation with non-state groups that do directly contribute to maintaining that status quo, which raise different and legally more complex questions.

- ***Violations of Human Rights***

The principal limits on permissible cooperation by third states would be those found in human rights obligations. IHRL, reflected to an extent in MLA norms, indicates that states should *not* cooperate with processes that violate fundamental human rights. This includes core fair trial standards, amounting to a 'flagrant denial of justice', which has been found 'synonymous with a trial which is manifestly contrary to [fair trial provisions] or the principles embodied therein'.[332] Nevertheless, this is 'a stringent test of unfairness', meaning that '[a] flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial procedures which might result in a breach of Article 6 if occurring within the Contracting itself.'[333] Instead, the breach must be 'so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by [Article 6]'.[334]

Human rights courts have tended to focus on limits to international cooperation in the context of extradition, finding that transferring someone despite a 'real and foreseeable risk that he could face a flagrant denial of justice' violates the sending states fair trial obligations.[335] The same principles may, arguably, be said to apply to other forms of cooperation such as evidence gathering (although strictly speaking it would be very unlikely that individuals subject to prosecution are within the 'jurisdiction' of the state for the purpose of its human rights obligations).[336]

Human rights based arguments, premised on the impact on individuals' rights, apply with equal force to state or non-state-led processes. Therefore, the ability to cooperate is inherently linked to whether processes violates or respects fair trial rights of the victims and accused.

- ***Relevance of Third States Obligations, Accountability and Rule of Law Principles***

Growing international attention has been dedicated to the obligations of third states (such as states of nationality of foreign fighters, or others) in respect of the humanitarian crisis epitomised in the Al Hol camp.[337] For example, a recent legal analysis by two UN Special Rapporteurs on women and children detained in Syrian camps suggests that: *'states, in their*

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[332] On the notion of 'flagrant denial of justice', see the following ECtHR case-law: *Soering v. the United Kingdom*, para. 113; *Mamatkulov and Askarov v. Turkey* [GC], paras. 90-91; *Al-Saadoon and Mufdhi v. the United Kingdom*, para. 149; *Ahorugeze v. Sweden*, para. 115; *Othman (Abu Qatada) v. the United Kingdom*, para. 258; Abu Zubaydah or *Al Nashiri* v. Poland, paras. 565-569; *Sejdovic v. Italy* [GC], para. 84.

[333] *Abu Zubaydah* or *Al Nashiri v. Poland,* para. 563.

[334] *Ibid*; *Ahorugeze v. Sweden,* para. 115; *Othman (Abu Qatada) v. the United Kingdom,* para. 260.

[335] In eg *Abu Zubaydah v. Poland*, the ECtHR concluded that 'at the time of the applicant's transfer from Poland there was a real risk that his trial before [a US military commission] would amount to a flagrant denial of justice'.

[336] Human rights treaties apply to those within the territory or jurisdiction of the state, which in short arises where the state exercises 'effective control'. This is unlikely to arise in relation to the AANES prosecutions. A broad approach to jurisdiction has been advanced by Special Rapporteurs suggesting that national detainees may fall within the states jurisdiction.

[337] OSCE, Repatriation of 'foreign terrorist fighters' and their families urgently needed to safeguard human rights and security, OSCE human rights head says, 11 February 2020, <https://www.osce.org/odihr/445909>; UN CTED, Analytical Brief: The Repatriation of ISIL-Associated Women, 2019, < https://www.un.org/sc/ctc/wp-content/uploads/2019/09/CTED-Analytical-Brief-Repatriation-of-Women.pdf>.

view, have a positive obligation to take necessary and reasonable steps to intervene in favour of their nationals abroad, should there be reasonable grounds to believe that they face treatment in flagrant violation of international human rights law.'[338] Likewise, for certain serious violations of human rights, and IHL, states have a detailed framework of obligations to investigate, prosecute, provide reparation and in some cases to cooperate with other states to that end. In turn, UNSC Resolutions reiterate the importance of justice for ISIS crimes,[339] pursue goals of international security, rule of law and human rights that go beyond mutual self-interest of particular states.

Asserting that there is a legal obligation to cooperate with the AANES tribunal would likely stretch too far, but states broader obligations and collective responsibility to bring a rule of law framework to bear in a difficult situation, and avoid impunity, should inform the exercise of the discretion whether and how to cooperate with the process. Arguments can certainly be made as to why cooperation that contributes to accountability for IS crimes, fairer trials that are better able to ascertain the truth and protect victims' rights, in a context in which alternatives are notoriously lacking, would be consistent with the spirit of these international standards, even if not obliged by them.With regards to the modalities of cooperation in, for example, evidence gathering, as noted above formal mutual assistance arrangements will not apply, but in practice much cooperation unfolds out with these arrangements. It should however unfold consistently with the relevant frameworks of IHRL and IHL in relation to investigation and prosecution.

- ***Returnees***

A tribunal established by the Autonomous Administration is unlikely to have major legal implications, as a matter of international law, in states of return. First, it is unlikely that states could be considered obliged to recognise the judgments of this novel justice forum, to which there would not appear to be applicable bilateral or multilateral agreements governing the enforcement of judgments. Indeed, '[i]n the absence of treaty commitments, countries are under no obligation to recognise and/or enforce foreign judgments.'[340]

If the judgments result from a process that amounts to a flagrant denial of justice however, states should not recognise and give effect to them as 'the enforcement of foreign judgments can violate international law if the judgment itself is incompatible with international law'.[341] In exceptional circumstances then 'the enforcement of a judgment that does not conform with human rights, either procedurally or substantively, can be a violation of human rights'.[342]

Questions may also arise as to whether states can take into account information gathered in the course of such processes. In deciding how to deal with returnees, justly and effectively, pursuant to states obligations, there is no reason that states cannot have regard to information gathered through these processes, provided it was not obtained in violation of core human rights norms such as freedom from torture or ill-treatment. Submitting the accused to a justice process that respects human rights, is based on voluntary statements provided by suspects and affords an

[338] Statement by UN Special Rapporteurs on the promotion and protection of human rights while countering terrorism and on extrajudicial, summary or arbitrary executions: OHCHR, Extra-territorial jurisdiction of States over children and their guardians in camps, prisons, or
elsewhere in the northern Syrian Arab Republic, 2020 < https://www.ohchr.org/Documents/Issues/Executions/UNSRsPublicJurisdictionAnalysis2020.pdf>.
[339] Eg. UN Doc. S/RES/2354 (2017); S/RES/2367 (2017); S/RES/2368 (2017); S/RES/2370 (2017); S/RES/2379 (2017) ; S/RES/2396 (2017).
[340] R Michaels, 'Recognition and Enforcement of Foreign Judgments', in *Max Planck Encyclopedia of Public International Law* (2009), para. 11.
[341] *Ibid.,* para. 12.
[342] *Ibid.* Also see, *Pellegrini v. Italy,* paras. 40-48.

opportunity to challenge evidence, if achievable, would not be such a situation. More problematic in practice may be a scenario in which individuals continue to languish in undefined and unacceptable detention situations, which as noted in Section C could, if they pass a certain threshold of time and gravity of violation, eventually have an impact on the ability to submit them to criminal prosecution.[343]

Specific questions relate to whether states of return would be able to prosecute, if they wish to do so. In other words, does *ne bis in idem* – the international law rule that generally prevents double prosecution or punishment for the same facts[344] preclude this possibility? As a matter of IHRL the rule of *ne bis in idem* has been held not to apply to prosecutions in foreign states, only to prosecutions within the same jurisdiction. In its General Comment 32 and case-law, the UN Human Rights Committee underlined that the principle 'does not guarantee *ne bis in idem* with respect to the national jurisdictions of two or more States', but that it 'prohibits double jeopardy only with regard to an offence adjudicated in a given State'.[345] Nevertheless, the HRC stressed that '[t]his understanding should not undermine efforts by States to prevent retrial for the same criminal offence through international conventions.'[346]

Should states of return wish to prosecute, they would not be precluded from doing so by the fact of these processes having taken place in Syria. They may of course take into account previous processes and punishment, just as they would take into account periods in pre-trial detention, in assessing the appropriateness in all the circumstances of prosecuting, and the determination of appropriate sentences.

Conclusion:

It goes without saying perhaps that AANES proceedings do not impede the ability of other states to themselves investigate and prosecute, through several bases of jurisdiction under international law, or from establishing an international mechanism to do so. However, in the absence of credible national and international alternatives, states are increasingly being called upon to support and cooperate with non-state actor prosecutions. The importance of international cooperation and support to the prospects of justice have been emphasised in multiple reports on the situation in NE Syria. There are no legal impediments to such cooperation, and these processes are unlikely to significantly limit the ability of states of return, to for example rely on evidence obtained therein or indeed prosecute if the interests of justice so require, provided the basic standards associated with criminal justice processes can be protected.

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[343] See section 3 on abuse of process doctrine and international practice.

[344] ICCPR, Art. 14(7); ECHR Protocol No 7, Art. 4; ACHR, Art. 8(4); ACHPR, Art. 7(2). The principle does not preclude the reopening of a case where newly discovered facts arise or serious defects in the earlier proceedings affected the outcome of the case.

[345] UNHRC, General Comment No. 32, para. 57; Communication No. 204/1986, *A.P. v. Italy*, para. 7.3 ; Communication No. 692/1996, *A.R.J. v. Australia*, para. 6.4

[346] *Ibid.*