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**Position Paper of the United Nations Special Rapporteur
on the promotion and protection of human rights and
fundamental freedoms while countering terrorism**

**The prosecution of individuals with alleged links to
designated non-State armed groups for crimes committed
in the Northeast of Syria as a key aspect of the rights of
victims of terrorism**

September 2023

The rights of victims of terrorism have been a core aspect of the work of the Special Rapporteur on the protection and promotion of human rights and fundamental freedoms while countering terrorism (hereafter the Special Rapporteur) since the Mandate's establishment. In line with the fourth Pillar of the UN Global Counter-Terrorism Strategy, which states that "the promotion and protection of human rights for all and the rule of law is essential to all components of the Strategy, recognizing that effective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing, and stressing the need to promote and protect the rights of victims of terrorism", the Special Rapporteur's Mandate has been deeply committed to a human-rights-based approach to victims of terrorism.

This position paper¹ builds on the work relating to victims, with a specific focus on the work of the Mandate on the issue of repatriations from Northeast Syria,² particularly in light of the Special Rapporteur's technical visit to Northeast of the Syrian Arab Republic focussed on the question of detention practices in the region.³ The paper focuses first on the role of prosecutions in upholding the rights of victims of terrorism for crimes committed in Northeast Syria (I). It then examines the situation of mass arbitrary detention in Northeast Syria (II) and core crimes committed by individuals associated to designated non-State armed groups also designated as terrorist (III). Part IV examines the question of prosecution for core international crimes both in territorial States where the crimes were committed and in other countries. Part V looks at questions surrounding evidence for these crimes and part VI looks at the practice of prosecutions for these crimes. The paper concludes with a set of findings and recommendations (VII).

I. Introduction: The role of prosecutions in upholding the rights of victims of terrorism for crimes committed in the Northeast of Syria

A human rights-based approach to victims of terrorism

At its essence, a human rights-based approach to victims of terrorism means that victims of terrorism are deserving not only of compassion and empathy, but of the **recognition and fulfilment of their rights**. Like all victims, victims of terrorism have interrelated and interdependent rights, including **the rights to truth, to justice, to an effective remedy, to reparation, and to information**. The implementation of the right to truth entails, first, the obligation for States to promptly, effectively, thoroughly and independently investigate the crime and make the results public.⁴ The right to justice requires that the crimes be prosecuted, where possible, and that those responsible are punished with sentences commensurate with the

¹ This position paper sets out the view of the Special Rapporteur on the Protection and Promotion of human rights and fundamental freedoms while countering terrorism, Fionnuala Ní Aoláin. Work on this position paper was led by Dr. Anne Charbord, Senior Legal Advisor to the Special Rapporteur. Facilitation and programme management for the work of the Special Rapporteur are led by the Office of the UN High Commissioner for Human Rights and, on this position paper, by Ms. Yasmine Ashraf, Human Rights Officer. Broader support to the Special Rapporteur is provided by the Human Rights Centre at the University of Minnesota Law School.

² To access all the work on repatriations done by the Mandate, see the Mandate's [Repatriation website: https://www.ohchr.org/en/special-procedures/sr-terrorism/return-and-repatriation-foreign-fighters-and-their-families](https://www.ohchr.org/en/special-procedures/sr-terrorism/return-and-repatriation-foreign-fighters-and-their-families)

³ United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Technical Visit to the Northeast of the Syrian Arab Republic, 15-20 July 2023, End of Mission Statement.

⁴ Minnesota Protocol on the Investigation of Potentially Unlawful Deaths, OHCHR (2016).

gravity of their crimes in accordance with international law, to exclude any possibility of impunity and prevent re-occurrence. In this context, the Special Rapporteur stresses that judicial proceedings, including trials, function as a means to accord recognition to victims as rights holders from the pre-trial stage onwards and provide an opportunity for legal systems to establish their credibility.⁵ Victims of terrorism should have equal, non-discriminatory access to justice, including the right to participation, which often requires understanding and addressing barriers that can prevent certain victim and survivor communities from engaging with the accountability process, including through the protection of victims' rights to privacy and safety. The right of victims to adequate, effective, and prompt reparations for the violations and abuses that they have experienced includes compensation, restitution, rehabilitation, satisfaction, guarantees of non-repetition, and memorialisation measures.

The Special Rapporteur affirms that these rights for victims of terrorism are both grounded in human rights law⁶ and well-articulated in international law,⁷ not only for direct and indirect victims of acts of terrorism but also for potential victims of terrorism,⁸ who are the principal beneficiaries of the State's positive obligations to take preventive measures aimed at reducing the risk of future acts of terrorism (guarantees of non-recurrence). Specifically, she highlights that States' legal obligations to take reasonable and effective measures to secure the safety, security, and the right to life of persons, including from acts terrorism, are undergirded by States' obligations under article 6 of the International Covenant on Civil and Political Rights (ICCPR), and have been recalled in multiple judicial decisions⁹ and in General Assembly resolution 72/246.¹⁰ The newly adopted UN Model Legislative Provisions for Victims of

⁵ Special rapporteur on the on the promotion of truth, justice, reparation and guarantees of non-recurrence A/HRC/48/60 para. 18.

⁶ She notes in this respect the UN High Commissioner for Human Rights has stressed that the rights of victims of terrorism to an effective remedy and full compensation is grounded in international human rights law. UN High Commissioner for Human Rights, A/HCR/45/27 (2020) paras. 42 and 43.

⁷ The Special Rapporteur emphasizes the relevance of the body of law applicable to victims of gross violations of international human rights and serious violations of humanitarian law in this context, particularly where acts of terrorism amount to crimes under international law, which also stress the duty of States to investigate and prosecute and punish, where possible and appropriate, and the duty of States to cooperate with one another and assist international judicial organs competent in the investigation and prosecution of these violations. See Principle 4 and 5 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. Their victim-oriented perspective has extended the scope of these principles to include equal and effective access to justice, "irrespective of who may ultimately be the bearer of responsibility for the violation. Principle 3(c) of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly resolution 60/147, 16 December 2005.

⁸ The Special Rapporteur's predecessor emphasized the duty to investigate and bring to justice the perpetrators of acts of terrorism in a manner consistent with international standards on the protection of human rights and the duty to afford adequate reparation to direct and indirect victims of terrorism. See, Special Rapporteur on the protection and promotion of human rights while countering terrorism, Framework principles for securing the human rights of victims of terrorism, A/HRC/20/14.

⁹ See ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (9 July 2004); ECtHR, *Osman v. UK* (28 October 1998); ECtHR, *Opuz v. Turkey* (9 June 2009); and *Tagayeva and Others v. Russia* (13 April 2017).

<http://hudoc.echr.coe.int/eng?i=001-172660>.

¹⁰ General Assembly Resolution on the "Effects of terrorism on the enjoyment of human rights" (A/72/246) adopted 18 January 2018

Terrorism affirm the right to reparation,¹¹ to satisfaction and to truth, which includes a duty to investigate, prosecute and punish those responsible for terrorism.¹²

Relevance of prosecutions for the rights of victims of terrorism to truth and to guarantees of non-recurrence

The Special Rapporteur approaches the question of prosecution of individuals with alleged links to designated non-State armed groups for crimes committed in the Northeast of Syria and Iraq through the prism of upholding the rights of victims of terrorism. She underscores that the prosecution of individuals who have committed grave crimes under international law contributes,¹³ through the combatting of impunity, to the right of victims (and their families) to guarantees of non-recurrence. She fully concurs with the Special Rapporteur on extrajudicial, summary and arbitrary executions that, within the obligations of States in relation to the implementation of the right to life to investigate, identify, bring to justice and punish the perpetrators, to grant compensation, and to take effective measures to avoid future recurrence of such violations, the first two components constitute the most effective deterrent for the prevention of future violations.¹⁴ This is because if perpetrators have certainty that they will not be held responsible, or responsible but on lower charges, violations are likely to continue. Impunity provides fertile ground for further violence and constitutes an ongoing violation of victims' rights by omission. As a result, the Special Rapporteur stresses the centrality of justice and accountability not just for violations of the past, but also for prevention in the future. Justice, including criminal justice, at the national and international levels, contributes to the core preventative function of guarantees of non-recurrence through deterrence.¹⁵ She agrees with her predecessor, Ben Emmerson, that regional courts have made the point that the prosecution or extradition of individuals alleged to be responsible for unlawful killings serves as a measure of prevention.¹⁶ In this way, the State's duty to investigate and prosecute terrorist suspects is directly linked to its obligation to end impunity and prevent future acts of terrorism.¹⁷

The Special Rapporteur highlights the central role of prosecutions in the realisation of victims' right to truth. The Inter-American Court has underscored the broader implications of this right, noting that "preventive measures, measures against recidivism and measures of non-repetition begin with the revelation and recognition of the atrocities of the past. Society must

¹¹ Victims of terrorism have the right to "full, adequate, effective and prompt reparation for all harm suffered from terrorism, including where it is not available from a person or entity responsible for such terrorism. Reparation includes restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition", Model Legislative Provisions to Support and Protect the Rights and Needs of Victims of Terrorism (Modern Legislative Provisions) Article 10.

¹² Model Legislative Provisions, Article 16.

¹³ Numerous international instruments establish the obligation of States to investigate, prosecute and punish persons responsible for gross violations of human rights or serious violations of international humanitarian law, with appropriate penalties, including the Convention on the Prevention and Punishment of the Crime of Genocide (articles I, IV and V), the four Geneva Conventions of 12 August 1949 (Articles 49, 50, 129 and 146), the International Convention for the Protection of All Persons from Enforced Disappearance (art. 6) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 4).

¹⁴ E/CN.4/1994/7, para. 688

¹⁵ Special rapporteur on the on the promotion of truth, justice, reparation and guarantees of non-recurrence A/HRC/30/42, para. 24.

¹⁶ See for example ECHR, *Kaya v. Turkey*, no. 22535/93, para. 85.

¹⁷ Special Rapporteur on the protection and promotion of human rights while countering terrorism, Framework principles for securing the human rights of victims of terrorism, A/HRC/20/14, para. 34.

know the truth so as to be capable of preventing them in the future”.¹⁸ She recalls that the right to justice, through judicial processes, plays a prominent part in the implementation of the right to the truth. Indeed, judicial processes ensure (1) that facts are known (through investigations, the evaluation of evidence); (2) that rights can be claimed before an impartial and independent tribunal (existence of an effective remedy); and (3) that perpetrators are punished with equal severity to the crime committed, and fair compensation provided to victims. In sum, “from the point of view of the right to justice, truth is both a requisite for determining responsibilities and the first step in the process of reparation”.¹⁹ This is also the position of the Model Legislative Provisions to Support and Protect the Rights and Needs of Victims of Terrorism, which include as part of the right to satisfaction and to truth of victims of terrorism an obligation to investigate, prosecute, and punish those responsible for terrorism.²⁰

The Special Rapporteur affirms that the process and outcomes of truth and justice, including fighting against impunity, are critical to preventing and deterring future violence and the commission of crimes such as those committed by non-State armed groups also designated as terrorist.

II. Mass arbitrary detention and insufficient repatriations from the Northeast of Syria

In the context of her work on the situation in the Northeast of Syria, the Special Rapporteur has been particularly attentive to the situation of continued mass arbitrary detention in the region.²¹ She affirms that the question of prosecution cannot be detached from this broader context (see Background).

- *Figures on Repatriation*

Since 2019, approximately **36 countries** have accepted the return of about **8,200 of their citizens (5,200 Iraqis and 2,700 Third Country Nationals)**.²² Since the summer of 2022, under increased pressure resulting from judicial and quasi-judicial decisions, as well as a visible increase of security incidents – including attacks and killings – the pace of repatriations has significantly stepped up and accounts for almost half of all repatriations since 2019. In contrast to previous national positions pertaining to lack of access to the camps, lack of consular presence and the risks posed by these operations, these repatriations (and their increase), show the capacity of the de facto authorities to support and enable them, as well as the now demonstrated practical feasibility of such movements.

At the same time, it remains clear that **most returns - 77% - have been of women and children**, and that **almost two-thirds of all repatriations have been to Iraq**. According to public figures, **only 56 third country national men have been repatriated to just under 10 countries**. It has also come to the Special Rapporteur’s attention that some transfers of men may be taking place under the framework of **assurances**. She notes her concern about any

¹⁸ *Bámaca Velásquez v Guatemala (Reparations)*, I/ACtHR, Judgment of 22 February 2002, Series C No. 91, para 77; *Case of Caracazo v Venezuela (Reparation)*, I/ACtHR, Judgment of 29 August 2002, Series C No. 95, paras 115, 118; *Juan Humberto Sánchez v Honduras*, I/ACtHR, Judgment of 7 June 2003, Series C No. 99, para 185.

¹⁹ Special Rapporteur on the independence of judges and lawyers, E/CN.4/2006/52, para 17.

²⁰ Model Legislative Provisions, Article 16.

²¹ To access all the work on repatriations done by the Mandate, see the Mandate’s [Repatriation website: https://www.ohchr.org/en/special-procedures/sr-terrorism/return-and-repatriation-foreign-fighters-and-their-families](https://www.ohchr.org/en/special-procedures/sr-terrorism/return-and-repatriation-foreign-fighters-and-their-families).

²² Devorah Margolin, “The Future of Repatriation from North East Syria”, The Washington Institute, June 2023.

process of secret detention or transfer, as well as the issuance of non-reliable assurances in violation of international law specifically as regards non-refoulement as persons returned from these detention facilities may be at significant risk of torture, cruel, inhuman and degrading treatment by national authorities. This concern is particularly heightened if individuals are returned to States who have been found by United Nations Treaty Bodies, or United Nations Special Procedure mechanisms to be engaged in regular practices of torture. The Special Rapporteur finds it essential that assurances are written, specific, and provide for clear long-lasting procedures for effective monitoring and accountability in the case of non-compliance under international human rights norms.

- ***Position on Repatriation***

The position of the Special Rapporteur remains that **the voluntary and human rights compliant repatriation of individuals from Northeast Syria is the only international law-compliant response to the complex and precarious human rights, humanitarian and security situation** faced by those detained in inhumane conditions in squalid camps, overcrowded prisons or other detention centres in Northeast Syria. Following her technical visit to various detention sites in Northeast Syria²³, and based on her findings of mass arbitrary detention specifically for children, incommunicado detention, disappearances, structural and systematic discrimination for detained persons on the basis of age and nationality, torture, cruel, inhuman and degrading treatment as well as the deprivation of the fundamental capacity to live a dignified life including access to water, food, healthcare and education, undermining the right to life, the Special Rapporteur confirms that this return is a legal and moral imperative. Given the geopolitical fluidity of the region currently controlled by various non-State armed groups, **repatriations are also key to the long-term security interests of states. Any repatriation must comply with international law, including with the absolute prohibition of torture, ill treatment, and refoulement.**

Jurisdiction

In response to national arguments pertaining to a lack of jurisdiction in Northeast Syria, the Special Rapporteur*, together with other Special Procedures mandate holders, has argued for a “functional” or “control of rights” approach to jurisdiction rooted in a **duty to act with due diligence and take positive steps and effective measures to protect their vulnerable citizens located abroad where they are at risk of serious human rights violations or abuses and face treatment in flagrant violation of international human rights law.** It seems clear that in the circumstances of Northeast Syria the acts or omissions of States can positively impact on human rights, particularly for rights that are essential to the preservation of values enshrined in the international human rights law. This includes flagrant denial of justice, the imposition of the death penalty, torture or cruel, inhuman or degrading treatment, sexual violence, or arbitrary deprivation of liberty in grave violation of human rights standards and most basic standards of humanity. This is also the position that has been taken by the Committee on the Rights of the Child and the Committee Against Torture (CAT/C/75/D/922/2019; CRC/C/89/D/77/2019, CRC/C/89/D/79/2019, CRC/C/89/D/109/2019).

* Amicus Brief to the ECHR case of H.F. and M.F. v. France

https://www.ohchr.org/sites/default/files/Documents/Issues/Terrorism/SR/FinalAmicus_Brief_SRCT_SRSsummex.pdf

²³ UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Technical Visit to the Northeast of the Syrian Arab Republic, 15-20 July 2023, End of Mission Statement.

- *Accountability*

The Special Rapporteur underscores that **an effective repatriation process includes holding individuals accountable for the serious and systematic crimes committed in Syria and Iraq. It is, in fact, the only way to close the gaping impunity that exists for the serious violations of international law that have occurred on the territories of Iraq and the Syrian Arab Republic.** There is an urgent need for justice, truth and reparation for all of the victims of the serious violations of human rights and humanitarian law that have occurred in the region. There is no substitute for respecting fair trial rights and ensuring meaningful accountability. The lessons painfully learnt in other regions should not be jettisoned in Iraq and Syria for the sake of expediency. The Special Rapporteur stresses that these issues are not abstract, as weak and compromised accountability undermines the rights of victims and contributes to further instability, as the recent history in the region has taught us. **States that can deliver justice in accordance with international human rights law therefore have an abiding responsibility to prosecute individuals who have committed or aided in the commission of crimes that shock our collective conscience, including genocide, crimes against humanity, war crimes, and torture, and to hold them accountable for these acts.**

III. Core crimes committed by individuals associated to designated non-State armed groups also designated as terrorist

The Special Rapporteur recalls that **under international law, genocide, crimes against humanity, war crimes, torture and enforced disappearances are defined as ‘core’ international crimes. This differentiates them from other categories of treaty crimes, including terrorism, which is still an object of controversy due to a lack of agreed definition. Criminal accountability for core international crimes is considered of fundamental importance regarding respect for the rule of law, deterrence of future violations, and the provision of redress and justice for victims.**

The Independent International Commission of Inquiry (“CoI”) on the Syrian Arab Republic and a number of national and international NGOs have extensively investigated and documented a number of very serious and deliberate violations of international law committed in the Syrian Arab Republic since 2011. They have found that government and pro-government forces, as well as non-state armed groups including ISIL, Hay’at Tahrir al-Sham (HTS) (formerly known as Al-Nusra and Jabhat Fatah al-Sham) and the Syrian National Army (SNA) had allegedly committed crimes against humanity, war crimes and gross human rights violations. The CoI also concluded, in 2016, that ISIL had committed the crime of genocide against the Yezidi people, and in particular against Yezidi women.²⁴ In May 2021, while presenting the findings of the United Nations Investigative Team to promote accountability for crimes committed by Da’esh/ISIL (UNITAD)’s sixth Report, former head Karim Khan announced that UNITAD had established “clear and convincing evidence that genocide was committed by ISIL against the Yazidi as a religious group”. Evidence collected by UNITAD also confirmed ISIL was responsible for acts of extermination, murder, rape, torture, enslavement, persecution and other war crimes and crimes against humanity perpetrated against the Yazidis, war crimes and incitement to genocide in connection with mass executions at Tikrit Air Academy, and evidence of the repeated deployment of chemical weapons by the

²⁴ “‘They came to destroy’: ISIS Crimes Against the Yazidis”: Conference Room Paper A/HRC/32/CRP.2

designated group were identified.²⁵ Findings of core crimes committed by members of ISIL have since been confirmed by national court decisions. For example, on 30 November 2021, the Higher Regional Court of Frankfurt am Main in Germany found Taha A. J. guilty of genocide, crimes against humanity resulting in death, a war crime, aiding and abetting a war crime and bodily harm resulting in death and sentenced him to life imprisonment. This decision was confirmed by the German Federal Court of Justice on 18 January 2023.²⁶

The Special Rapporteur notes that there is general acceptance that most individuals currently detained in the Northeast of Syria are held based on their alleged links with ISIL due to the circumstances of their capture. While recalling that (apart from some Syrian and Iraqi nationals held in prison facilities who have been tried, albeit through processes that may not be human rights compliant) none of the individuals in detention have undergone a criminal law process and being cognisant of the fluidity and shifts of individual association with non-State armed groups throughout the conflict in Syria, she notes that ISIL was a well-organised armed force, with an identified command structure, in control of large and populated territories in both the Syrian Arab Republic and Iraq.²⁷ Its command structure was multi-faceted and intentionally constructed. Through its “law enforcement infrastructure”, comprising the Hisbah (religious police, including an all-female division, the Al Khansa’a brigade), the Emni (intelligence forces), a police force, and courts, ISIL subjugated populations across areas under its control and intimidated, coerced and harmed those who challenged its ideology.²⁸

Serious alleged crimes committed include summary executions,²⁹ abductions on a mass scale,³⁰ enforced disappearances,³¹ various forms of deprivation of liberty including secret detention,³² forcible displacement,³³ massacres,³⁴ systematic torture and ill-treatment,³⁵ sexual and gender-based violence including killings, widespread and systematic enslavement, selling of women, rape (including of girls as young as six³⁶), sexual slavery and forced transfer.³⁷ The abuse and violence of ISIL against children has been widely reported.³⁸ ISIL has used terror-instilling methods to rule, such as public beheadings, shootings, stonings,³⁹ amputations and lashings,⁴⁰ as well as displaying mutilated bodies.⁴¹ ISIL’s attacks on churches and historic

²⁵ Special Adviser Khan Briefs Security Council on UNITAD Investigations.” United Nations Investigative Team to Promote Accountability for Crimes Committed by Da’esh/ISIL, 10 May 2022.

²⁶ Ewalina U. Ochab, “German Federal Court of Justice Confirms the First-Ever Conviction of a Daesh Member for Genocide”, Forbes, 26 January 2023.

²⁷ In this regard conflict appears to meet the threshold for a non-international armed conflict established in Article 1(1) Additional Protocol II.

²⁸ CoI, A/HRC/46/55

²⁹ A/HRC/28/18, paras. 19, 28.

³⁰ A/HRC/28/18, paras. 16-20.

³¹ A/HRC/28/69, paras. 21-30, 68-79; Rule of Terror, para. 32 et s.

³² A/HRC/46/55

³³ CoI Rule of Terror, para. 29.

³⁴ See A/HRC/28/69, Annex II, paras. 21-30.

³⁵ A/HRC/28/18, para.49, A/HRC/28/69, Annex 2, para. 67-91; A/HRC/46/55

³⁶ A/HRC/28/18, para. 40.

³⁷ A/HRC/28/18, paras. 35-43.

³⁸ “‘They have erased the dreams of my children’: children’s rights in the Syrian Arab Republic”: Conference Room Paper - A/HRC/43/CRP.6.

³⁹ CoI, Rule of Terror, para. 32.

⁴⁰ CoI, Rule of Terror, para. 36; CoI, A/HRC/27/60, paras. 30-38 and 65-74; CoI A/HRC/25/65, paras 25-33 and 57-63.

⁴¹ CoI, Rule of Terror, para. 33 and 35.

monuments were committed to deliberately inflict terror.⁴² ISIL systematically targeted and held journalists, activists, fleeing civilians and others perceived to hold dissenting views.⁴³ These arise in contexts where they may amount to war crimes, crimes against humanity and/or genocide.

Since the announcement of the establishment of ISIL and its evolution up until August 2021, the Syrian Network for Human Rights has documented that at least 8,648 individuals, including 319 children and 225 women, were forcibly disappeared by ISIL.⁴⁴ The Special Rapporteur stresses the discriminatory nature of ISIL's ideology and treatment of diverse communities and individuals, which has been especially identified by international accountability mechanisms such as the IIIM when comprehensively considering intersectional characteristics such as gender, age, religion, political affiliation.

The Special Rapporteur takes the clear position that **given the very serious core and other international crimes that have occurred in Syria and Iraq, including under the control of ISIL, the overarching imperative must be to provide justice and truth to the victims of these atrocious acts, including the victims of genocide, crimes against humanity and war crimes, enforced disappearances, perpetration of arbitrary killings, torture, serious deprivation of liberty, sexual and gender-based crimes, including slavery rape, sexual assault, and hostage-taking, that have shocked the conscience of humanity. Credible, fair judicial proceedings, including trials, are imperative also to ensure justice for the accused to undergird the legitimacy and credibility of such proceedings.**

IV. Prosecutions

While recognising that there are multiple and varying national approaches to prosecution and that some countries have made the prosecutorial decision of non-prosecution to concentrate state action on reintegration for returnees, the Special Rapporteur recalls that the Security Council has, *inter alia* through resolution 2170 (2014), designated ISIL as a terrorist group and subjected it to its terrorism sanctions regime. Members of ISIL can be prosecuted for terrorist offences under national legislation either in the countries where the terrorist offences were committed or upon return to their countries of origin should the national legislation permit. At the same time, it is well established that ISIL had reached the threshold under international humanitarian law to be considered as an organised non-State armed group party to the non-international armed conflicts in Syria and Iraq.⁴⁵ Therefore, individual members of ISIL⁴⁶ can also be prosecuted for war crimes, crimes against humanity, torture, and genocide.

⁴² CoI, Rule of Terror, para. 31. See also 1954 Hague Convention for the protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention.

⁴³ A/HRC/46/55

⁴⁴ SNHR, "The Tenth Annual Report on Enforced Disappearance in Syria on the International Day of the Victims of Enforced Disappearances; Long Years of Constant Grief and Loss", August 2021, "https://snhr.org/wpcontent/pdf/english/The_Tenth_Annual_Report_on_Enforced_Disappearance_in_Syria_on_the_International_Day_of_the_Victims_of_Enforced_Disappearances_Long_Years_of_Constant_Grief_and_Loss_en.pdf

⁴⁵ <https://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-syria#collapse3accord>; A/68/389, para. 66; A/HRC/28/18, para. 13; A/HRC/28/69, para. 1; S/2014/756, para. 58.

⁴⁶ The developments in this section refer to ISIL, but they can also apply to other non-State armed groups also designated as terrorist.

The Special Rapporteur recalls the **fundamental duty of every State to exercise its jurisdiction over those responsible for core international crimes**,⁴⁷ as “the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation”.⁴⁸ Expanding on this, regional Courts have affirmed that **an inadequate legal characterisation and a penalty disproportionate to the offence can be factors giving rise to impunity**.⁴⁹

Such prosecutions are possible:

- **In the jurisdictions where the offences and crimes have occurred**, according to the territoriality principle (Iraq and Syria).
- **In other jurisdictions**, if a State is able to assert its jurisdiction:
 - Based on the active personality principle (where the presumed offender is a national of the prosecuting State),
 - Based on the passive personality principle (where the victim is a national of the prosecuting State)
 - Based on universal jurisdiction, regardless of the place where the crimes were committed, by whom or against whom.

To ensure that the fight against impunity has no borders, in the Special Rapporteur’s view **universal jurisdiction must be established over war crimes that constitute grave breaches,⁵⁰ torture⁵¹ as well as for all other war crimes, crimes against humanity and genocide committed in Northeast Syria**. This would allow third countries to domestically prosecute a greater number of individuals even absent an active or passive personality principle. The Special Rapporteur highlights that prosecution for other crimes, such as rape and human trafficking, can also be used to circumvent certain jurisdictional obstacles to prosecution for core international crimes, such as limitations on *ratione temporis* competence.

Regarding prosecutions, the Special Rapporteur notes several trends:

- Whether they are prosecuted in Iraq, Syria, or in countries of origin, **almost all the individuals who have been prosecuted for involvement with ISIL have been charged**

⁴⁷ Rome Statute, Preamble. Note also that the Inter-American Court of Human Rights has established that the prohibition of crimes against humanity is a norm of *jus cogens* and that the punishment of such crimes is mandatory under general international law. See *Almonacid-Arellano et al. v. Chile*, Judgment of 26 September 2006, para. 99.

⁴⁸ *Ibid.*

⁴⁹ *García Ibarra et al. v. Ecuador*, Judgment of 21 November 2015, para. 167.

⁵⁰ The treaty basis for the assertion of universal jurisdiction was first introduced by the four Geneva Conventions of 1949 for the protection of war victims in relation to those violations of the Conventions defined as grave breaches. The relevant articles of each Geneva Convention (Arts 49, 50, 129 and 146, respectively) have generally been interpreted as providing for mandatory universal jurisdiction. Additional Protocol I of 1977 to the Geneva Conventions of 1949 extends the principle of universal jurisdiction to grave breaches relating to the conduct of hostilities. It also qualifies all grave breaches as war crimes (Art. 85). Universal jurisdiction in customary international law may be regarded as extending to all violations of the laws and customs of war which constitute war crimes. This would include certain serious violations of applicable law, in particular Article 3 common to the Geneva Conventions and Additional Protocol II of 1977, committed in non- international armed conflict. In contrast with treaty law, there do not appear to be any grounds for concluding that customary international law requires States to exercise jurisdiction. See ICRC, *Universal Jurisdiction over War Crimes*, Advisory Service on International Humanitarian Law, 03/2014.

⁵¹ Article 5 Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (1984).

under counter-terrorism legislation. The most common charges proffered against individuals are that of **membership in a proscribed terrorist organisation, travel to a conflict zone, and/or various forms of provision of support to a terrorist organisation.** These generic offences leave wide discretion to those in charge of applying the laws, require **very little evidence** to prove the commission of the offence in court, some are constructed as **strict liability offences.** Importantly, for reasons detailed further in this paper, **none of these prosecutions offer the victims of core international law crimes the possibility of truth, accountability for specific acts of violence, or information related to the death of a loved one.** The sentencing tariffs for inchoate offences in particular vary. In some countries there are appropriated tailored and individually assessed sentencing regimes, in others there are mandatory minimums which increasingly involve long periods of imprisonment which in some contexts appears disproportionate to the particularity of the charge of membership or travel to a conflict zone.

- There are obvious **gender disparities** that comes with the reality that most women have not been able to self-return (due in part to care burdens, limited opportunity for leaving the territory and the security risks of traveling alone) but many men have made their way back to their home countries individually, often before 2019. In contradistinction, most returns since 2019 have been of women.
- There have been **few prosecutions for serious violations of international law committed by persons who were members or commanders of designated terrorist groups** in Syria and Iraq, leaving a yawning impunity gap, and thousands of victims with no remedy for the harms they have experienced.

(1) Judicial Processes in the Northeast of Syria and Iraq

Some trials, undertaken by the Kurdish de facto authorities, of individuals associated with designated terrorist groups have taken place in the region. However, these trials have concerned mostly Syrian and a few Iraqi nationals,⁵² and only included broad terrorism offences. Noting the broader structural limits on legal capacity and authority in the territory there has been no adjudication of international crimes. The Special Rapporteur takes note that the unwillingness of states to repatriate third country nationals has led some States to entertain the possibility of trials in the region for these individuals, either through the creation of a special mechanism or through local courts, putting forward, often de-contextually, arguments regarding the benefits of proximate justice to protect the rights of victims.⁵³

The Special Rapporteur agrees that in an ideal world, justice would be delivered close to where the offenses and crimes were committed. This would allow for victims' views and concerns to be taken into account at all stages of the proceedings,⁵⁴ allow their attendance and testimony to contribute to the truth and provide them a forum in which they can speak to what has happened to them and see the evidence of what happened to them publicly revealed. However, in practice and for the reasons outlined below, there is no effective possibility of proximate and fair justice in the current situations in Northeast Syria, and **so the failure to**

⁵² According to the Rojava information Centre, the People's Defence Courts of the de facto authorities have tried approximately 8000 Syrians. There has been no precision on the specific crimes of which these persons have been convicted, the guarantees of fair trial provided, nor the avenues for appeal.

⁵³ Helen Duffy, "International Legal advice on the Potential Prosecution of Female Al Hol Detainees by Courts Established by the Autonomous Administration for North-East Syria", May 2020.

⁵⁴ UN Basic. Principles on Justice for Victims of Crime, Principle 6(b); ACmHPR, Fair Trial Principles, N(f)(2).

repatriate and, as appropriate, apply relevant criminal justice procedures,⁵⁵ has limited the necessary application of the criminal law, left an evident accountability gap and has undermined the human rights of victims.⁵⁶ The lack of sustained State action for the scale of the crimes committed abrogates the responsibility of the States whose nationals have committed these violations.

- *Ad Hoc or Hybrid Mechanism*

The Special Rapporteur notes that the possibility of some form of **international or regional ad hoc or hybrid court in the region** was previously advanced by some (mostly European) States.⁵⁷ She stresses that, in theory, the possibility of establishing an *ad hoc* mechanism that would address a broader range of agreed crimes including core crimes may be welcome. Precedents for such mechanisms can be found in the Kosovo Specialist Chambers, or the hybrid courts in Sierra Leone or Cambodia. Their potential use is illustrated by the calls for cooperative action by several States, including some in the region and the Kurdish detaining authority. It could be supported by international evidentiary mechanisms, such as the IIM and UNITAD.

The Special Rapporteur stresses nonetheless that, at present, **political, legal, and practical obstacles** exist for the establishment of such a mechanism. It is, in her view, **politically** untenable for States to press for a special terrorism court to only address crimes committed by limited parties to the conflict given the scale of the alleged violations in the region and the lack of accountability offered in the territorial States. Advancing the possibility of such selective justice, which would serve primarily the interests of non-territorial States, would, undoubtedly and justifiably, raise serious criticism from many victims and survivors. She also acknowledges the lack of political agreement within the Security Council and the complexity of consent to such a mechanism by affected territorial States to engage as well as a willingness allow such a tribunal to exist on its territory.

There are also **legal** impediments to the establishment of such mechanisms, given the absence of international agreement on the definition of terrorism and of a legal corpus that could be used as precedent or guiding jurisprudence by such a judicial body. She also notes the sheer **practical** difficulties engaged by holding trials in the region. Given the geopolitical shifts of effective power, the close proximity to ongoing activities by non-State armed groups, including some designated as terrorist, and, critically, the lack of capacity to protect victims and witnesses, all make holding trials in the region extremely dangerous for witnesses and survivors. She expresses concern that such a mechanism would be unable to deliver the promised outcome to victims and survivors. In light of these concerns, **she views the possibility of such a court being established as currently extremely limited.**

- *Local Courts*

⁵⁵ OHCHR, Guidelines on the role of Prosecutors (<https://www.ohchr.org/en/instruments-mechanisms/instruments/guidelines-role-prosecutors>) 8th UN Congress on the Prevention of Crime and the Treatment of Offenders

⁵⁶ A/HRC/20/14.

⁵⁷<https://www.aljazeera.com/news/2019/3/25/sdf-calls-for-international-tribunal-for-isis-detainees>; Anthony Dworkin, A tribunal for ISIS fighters? ECFR, 31 May 2019, https://ecfr.eu/article/commentary_a_tribunal_for_isis_fighters/.

Another option identified by some Member States has been for States of origin to “**outsource**” trials to the judiciaries of Iraq and of de facto authorities in Northeast Syria. Regarding Iraq, the Special Rapporteur acknowledges the considerable efforts being made by the Iraqi government to advance accountability in highly challenging circumstances. She highlights the significant on-going process of repatriation and reintegration of Iraqi nationals amidst a complex and fragile humanitarian and security situation which is already placing a disproportionate burden on the country. She stresses the sheer under-investment in, and unwillingness to support, the national legal system as a whole by the international community, compounded by prevailing insecurity for the judicial branch in charge of such complex trials. This has led both UNAMI and OHCHR to raise serious concerns regarding ongoing violations of fair trial standards:

- An overreliance on confessions with frequent allegations of torture or ill-treatment inadequately addressed by courts;
- An overly broad and vague definition of terrorism and related offences – focused on ‘association’ with or ‘membership’ of a terrorist organisation, without sufficiently distinguishing between those who participated in violence and those who joined ISIL for survival and/or through coercion;
- Harsh penalties that fail to distinguish degrees of underlying culpability;
- Mandatory death penalty for a wide range of acts that do not meet the ‘most serious crimes’ threshold following unfair trials.⁵⁸

The Special Rapporteur recalls that Iraq has not incorporated core international crimes in its legal system, and holds that the focus on terrorism offences alone does not allow victims, their families, and the general public to accept that the perpetrators are fully being held to account, fails to expose the full range of crimes committed and contribute to the right to truth, and fails to provide alleged perpetrators with fair trials.

Looking at additional challenges to the Iraqi criminal justice system, the Special Rapporteur notes the reported alleged systematic violations of human rights in detention, as documented by the OHCHR and UNAMI,⁵⁹ which include acts of torture and ill-treatment, overcrowding and deteriorated material conditions of detention, lack of access to fundamental safeguards, practices of incommunicado detention and solitary confinement against detainees, amongst whom a large section have been convicted of terrorism offenses. These shortcomings affect the reliability of the existing accountability mechanisms and their compliance with international human rights standards.

The de facto Kurdish authority in **Northeast Syria** has [announced](#) that due to the international community’s slow response to the repatriation of thousands of individuals affiliated with the Islamic State (IS), it will begin to hold “fair and transparent trials in accordance with international and local laws related to terrorism.”⁶⁰ While acknowledging the possibility under international humanitarian law for a non-State actor to engage in judicial

⁵⁸ UNAMI/OHCHR, “Human Rights in the Administration of Justice in Iraq: Trials under the anti-terrorism laws and implications for justice, accountability and social cohesion in the aftermath of ISIL”, January 2020.

⁵⁹ UNAMI/OHCHR “Human Rights in the Administration of Justice in Iraq: legal conditions and procedural safeguards to prevent torture and ill-treatment”, August 2021.

⁶⁰ “To achieve justice and honor the victims, the AANES has decided to commence open, fair, and transparent trials of Daesh foreigners held in its detention centres. These trials will adhere to international and local laws on terrorism, ensuring the rights of plaintiffs among the victims and their family members are upheld”. AANES Public Statement, 10 June 2023.

processes,⁶¹ in due respect of principles of impartiality and independence, the Special Rapporteur views the possibility of international law abiding trials to take place in Northeast Syria as highly problematic in light of broader security assessments of the region, the analysis of infrastructure needs⁶² complemented by the findings following her technical visit to the region.⁶³

From a **legal perspective**, the Special Rapporteur recalls that while a body of international practice has developed interpreting and applying IHL as not prohibiting or precluding groups such as the de facto Kurdish detaining authority from establishing courts,⁶⁴ these must meet appropriate standards of justice and due process.⁶⁵ She recalls the obligations of fair trial contained in the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights, as well as the specific obligations from Common Article 3 of the Four Geneva Conventions which require that any acceptable legal proceedings under the law of armed conflict provide at a minimum “judicial guarantees which are recognized as indispensable. More specifically, sentencing or executions without previous judgements pronounced by a regularly constituted court. Additional Protocol II of 1977 stipulates, concerning offences committed in connection with a non-international armed conflict, that no sentence may be passed, and no penalty executed in the absence of a conviction previously pronounced by a court offering the essential guarantees of independence and impartiality. In addition, Article 75 spells out the procedural safeguards that must be respected.

In practice, the Special Rapporteur also unequivocally finds that there is no infrastructure or capacity to support the processing trials for foreign individuals consistent with international law in the northeast Syrian Arab Republic. In this region, where there was no judicial system and no terrorism law before 2014, it is estimated that local bodies identified as courts (the “People’s Defence Courts”) have, since 2014, tried and sentenced around 8,300 mainly Syrians⁶⁶ (and a few Iraqis suspected of belonging to ISIS and affiliated groups as well as factions of the Turkish-backed Syrian National Army). 6,279 cases related to individuals with alleged links to ISIL, and another 1,000 additional cases are slowly progressing.⁶⁷ These trials have been reportedly marred with irregularities, including in relation to the right to defense, to present evidence, to appeal, to be presumed innocent, among other fundamental judicial guarantees of a fair trial.⁶⁸ It is estimated that between the years 2014-2019, the “People’s Defence Courts” in Qamishli, Afrin, and Kobanê had tried 1,500 local ISIL cases, with another 4,000 awaiting some form of international human rights and humanitarian law compliant legal process. If these numbers are accurate, it would take approximately thirteen years to try all

⁶¹ See Helen Duffy, “International Legal Advice on the Potential Prosecution of Female Al Hol Detainees by Courts Established by the Autonomous Administration for North East Syria”, 21 May 2020.

⁶² See Thirty-first report of the Analytical Support and Sanctions Monitoring Team submitted pursuant to resolution 2610 (2021) concerning ISIL (Da’esh), Al-Qaida and associated individuals and entities, S/2023/95, paras 40-54; Care, “12 years on, Challenges caused by the Syrian conflict show no signs of abating”, 15 March 2023; Urban Recovery Framework, “Recovery of Services in Syria, Not If, but How?”, July 2022.

⁶³ UN Special Rapporteur on the protection and promotion of human rights and fundamental freedoms while countering terrorism, Technical Visit to the Northeast of the Syrian Arab Republic, End of Mission Statement. <https://www.ohchr.org/sites/default/files/documents/issues/terrorism/sr/statements/EoM-Visit-to-Syria-20230721.pdf>

⁶⁴ Additional Protocol II, Article 6(2); ICRC Study on Customary International Humanitarian Law (2005), Rule 100.

⁶⁵ ICRC, Detention by Non-State Armed Groups: Obligations Under International Humanitarian Law and Examples of How to Implement Them, ICRC, Geneva, 2023, Rule 12, p.61-63.

⁶⁶ CoI, A/HRC/54/58, para. 92.

⁶⁷ CoI, A/HRC/54/58, para. 92.

⁶⁸ Communication by Special Procedures mandate holders, AL OTH 28/2022, dated 12 May 2022.

currently identified Syrian cases.⁶⁹ With a particular focus on the criminalization of terrorism-related offences and related judicial proceedings against children for such offences, the Special Rapporteur reiterates that there are heightened protections and fundamental procedural guarantees owed to all children (i.e. any individual under the age of 18) under international law, including in counter-terrorism contexts. The Special Rapporteur recalls that the minimum age of criminal responsibility—including as stipulated in article 40 of the CRC—is generally intended to reflect that children below a certain age shall be presumed not to have the capacity to infringe penal law.⁷⁰ Moreover, there should be no exception to lower the minimum age of criminal responsibility for terrorism offences as this would be directly contrary to the guidance of General Comment 24 (CRC) which states that “States should not create exceptions to lower the MACR in cases where, for example, a child is accused of committing a serious offence, including national security and terrorist offences”.⁷¹ She also recalls that the detention of children must always be used as a measure of last resort and for the shortest duration possible as required by Article 37 (b) of the Convention on the Rights of the Child and Article 9 of the International Covenant on Civil and Political Rights. Children detained for their association with individuals themselves presumably detained for association with armed groups also designated as terrorist are first and foremost victims of grave abuses of human rights and humanitarian law. From a distinctly practical perspective, she highlights the ongoing hostilities taking place on the territory of the northeast of the Syrian Arab Republic, including ongoing incursions by another State, the established presence of areas of effective control by the territorial State which includes retaining control over the civil administration and judiciary, the ongoing instability of the military situation, metastatic growth of designated armed groups, and proximity to the detention camps and prisons, which make an augmentation and amelioration of trial proceedings highly unlikely in any foreseeable future.

The Special Rapporteur also notes that the condition of impartiality, for the courts created by the Kurdish de facto authorities, is difficult to achieve in cases of members and affiliates of designated non-State armed groups, such as ISIL, in light of the observed stigmatization,⁷² regardless of the individual responsibility of defendants for crimes committed, and without due consideration for children’s status as victims. These trials further lacked meaningful participation by victims and witnesses, due to the ongoing security risks. **The Special Rapporteur takes the view that given the complexity of the military situation on the ground, and the lack of resources including judicial, technical and legal capacity in the territory concerned, also considering the practical deficiencies in legal processes conducted against Syrian nationals, the fundamental guarantees of fair trial cannot be currently delivered by the detaining authority in Northeast Syria.**

The Special Rapporteur confirms, further, that there is currently no support in State practice for the sub-contraction of trials concerning grave breaches of international law to non-State armed groups. She notes that it is unlikely that third countries will view the de facto authority as a suitable legal or political entity to undertake legally binding proceedings processing their nationals for core international crimes. The Special Rapporteur also notes that no serious or meaningful political or legal conversations concerning the possibility of trials by a non-state actor in the northeast of the Syrian Arab Republic are taking place at the United Nations, or to

⁶⁹ Tanya Mehra and Matthew Wentworth, “New Kid on the Block: prosecution of ISIS fighters by the Autonomous Administration of North and East Syria”, ICCT, 16 March 2021.

⁷⁰ UNODC, Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups, 76 (2017).

⁷¹ CRC, General Comment 24, para 25

⁷² Technical visit to Syria, End of Mission Statement, para.16.

her knowledge in other international multilateral fora. She therefore considers the possibility of any such trials as entirely remote and in the realm of the fanciful.

The Special Rapporteur underscores that **effective criminal prosecutions rely on reasonably-resourced and broadly stable environments which are sufficiently secure and predictable and thus in a position to produce legitimate outcomes and function in line with international law requirements.** When security is undermined or fragile, identifying offenders and acquiring reliable evidence can be very challenging, leading to an over-reliance on witness testimony and confessions, or intelligence sources which themselves may encourage torture and false denunciations. Unfair trials can lead to the resentment in the families and communities of those individuals charged and sentenced, while at the same time reinforcing designated groups' narratives against the authorities and negatively impacting on conflict exit strategies. Similarly, opaque screening processes for prosecution, or prosecution strategies that cast the net of alleged offenders too wide increase the uncertainty for low-level members of non-state armed groups/designated terrorist groups who might be tempted to defect but fear unfair treatment. In addition, the lack of transparency in criminal proceedings may increase the resentment of victims who do not see justice being done for the scalar violations they have suffered, nor allow them to participate in such proceedings.

The Special Rapporteur also reminds States that prosecutions are a key step in the criminal justice system towards truth and justice and should not pave the way for further human rights violations, including serious crimes such as torture and other cruel, inhuman or degrading treatment or punishment. She notes the dire conditions in detention facilities in Northeast Syria, notably the lack of food and medical care, a situation exacerbated by overcrowding, and the lack of safeguards, such as access to the outside world, which at least amounts to cruel, inhuman or degrading treatment and in some cases to torture. In such circumstances, the potential conviction of third country nationals by the "People's Defence Courts" would only lead to further imprisonment in torturous environments, in clear violation of States obligations towards their nationals to take all necessary measures to prevent torture and ill-treatment. In addition, without repatriation, third country nationals' detention is expected to be indefinite with no possibility of release.

(2) Prosecutions in Third Countries (of Origin)

In addition to the 19 Sectoral terrorism conventions that many States have translated in their national legislation, the UN Security Council framework, in particular resolutions 1373 (2001) and 2178 (2014), requires States to not only criminalise acts in their national legal systems as terrorist offences (including financing, travelling, training, recruitment and other forms of facilitation), but also to bring individuals who are suspected of having committed such acts to justice or, in the event that they are unable to do so, to extradite them (*aut dedere aut judicare*). The Special Rapporteur recalls, however, that the lack of a universal definition of terrorism has led many States to adopt overbroad and vague definitions of terrorism in their national legislations which has led to a number of significant concerns, including about the fairness of counter-terrorism trials, as well as broader concerns about the misuse of counter-terrorism legislation against a range of protected groups.⁷³

⁷³ See UN Special Rapporteur on the protection and promotion of human rights while countering terrorism legislative reviews available at: <https://www.ohchr.org/en/special-procedures/sr-terrorism/comments-legislation-and-policy>.

She notes that prosecutions of individuals who have returned from zones of conflict – either via organised repatriations or individually – have been **influenced by the legally nebulous concept of “foreign terrorist fighters” introduced by Security Council resolution 2178**, which defines them as “individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict”. This concept, which has no legal grounding in international humanitarian law,⁷⁴ focuses exclusively on augmentation of Security Council based counter-terrorism frameworks and on the actions of designated groups. Since terrorist acts themselves remain undefined, there are profound consequences for the evaluation of individual criminal responsibility.

The Special Rapporteur reaffirms that violent acts carried out in the context of an armed conflict can fall under various frameworks and be variably qualified. While accepting that in non-international armed conflicts, the territorial State maintains the ability to apply domestic terrorism laws to designated non-State armed groups, and she maintains and affirms the right of states of origin to prosecute individuals on the basis of such laws as permitted by the assertion of jurisdiction, she recalls the **overarching primacy of the international human rights and humanitarian law frameworks and the particular importance such frameworks provide to ensure that the rights of victims of terrorism are adequately protected. The Special Rapporteur is particularly concerned that in many countries, terrorism offences, particularly offences of membership, are considered as victimless offences. Therefore, victims are not engaged in trial processes – there is no victim representation or testimony involved.** She highlights as critical the distinction made that UNITAD’s “mandate deals with international crimes and not with terrorism. (...) [T]his distinction is key in terms of legal implications, as well as victims’ participation and rights. Membership in an organisation, even a terrorist one (...) does not see a victim. On the contrary, investigating international crimes means investigating the real attacks, the cruel treatment of the victims, and it means looking into the intent of the perpetrators and the impact on the affected communities. That is the kind of justice which the victims seek and deserve.”⁷⁵ Similarly, UNITAD has also noted “the need for survivors of ISIL crimes not simply to be seen as victims of terrorism, murder or rape, but to have their suffering recognized as a crime against their communities, as a crime against the people of Iraq, and for the true scale and nature of ISIL criminality to be exposed through the presentation of incontrovertible evidence in fair trials”.⁷⁶

The Special Rapporteur notes with concern that the **use of terrorism offences comes with a reductionist view of the role of individuals within terrorist groups** which misses the nuances and the opportunities that would allow for meaningful exit and reintegration. As these convictions rarely focus on the roles and extent of involvement of individuals in terrorist groups, **they generally fail to properly assess criminal responsibility.** The gravity and depth of the crimes committed, including sexual violence, slavery, summary and arbitrary executions, enforced disappearances, and torture are not addressed by criminal prosecutions. **By failing to address both specific terrorism-related criminal acts and serious violations of international law beyond acts of terrorism, such criminal convictions fail to assign clear responsibilities that could contribute to general deterrence.** This essentially securitised

⁷⁴ ICRC, “International Humanitarian Law and the Challenges of Contemporary Armed Conflicts”, ICRC report, 2020 pp. 61 and 62.

⁷⁵ “UNITAD’s Role in Promoting Accountability for ISIL International Crimes”, Christian Ritscher, 4 May 2023.

⁷⁶ UNITAD, S/2019/878 (2019), para. 101

approach to criminal justice aims to place individuals viewed as security ‘risks’ in lengthy periods of detention. She highlights the pressures placed on prosecutors and judges to prevent and suppress future acts of terrorism, which can be interpreted as a duty to prevent future recruitment. This approach is consistent with both the failure to repatriate and to take into consideration the time spent in custody in the camps or prisons in the conflict zone as legal detention for the purposes of reducing sentences.

The Special Rapporteur is further concerned that the combination of broad terrorism offences and prosecution strategies that inevitably lead to conviction fail to take into consideration the specificities of the situation of **women both as perpetrators, victims and complex circumstances that transverse both categories**. She observes, at the outset the impact of incarceration of women on their underage children, particularly problematic when women are sentenced for blanket terrorism offences and often where incarceration is imposed without recourse to alternative solutions. She is also particularly concerned that carrying out maternal responsibilities, including giving birth or forming a household, is being used and considered as the sole basis for conviction under the terrorism offences of “membership” and “material support to terrorism”. More generally, she stresses that blanket prosecutorial approaches and broad offences fail to address in a granular way the situation of women, particularly those that arrived in conflict zones when they were underage.⁷⁷ She recalls that women’s association with terrorist groups is complex, and that there is great potential for coercion, co-option, trafficking, enslavement, sexual exploitation, threat and harm for joining or being associated with non-state armed groups including sexual or household services or labour for the organisation. She also recalls that victims of trafficking are victims of serious crimes under international law and affirms with the Special Rapporteur on trafficking in persons, especially women and children and the importance of the UN Palermo Protocol in this context. Shouldering the consequences of alleged association with a designated terrorist group through broad criminal charges absent the commission of specific acts could lead to double victimisation, in contradiction with the principle of non-punishment of victims of trafficking, and in violation of States’ obligations to identify and protect victims of human trafficking.

The Special Rapporteur highlights the prevalence of allegations of sexual and gender-based violence and international crimes, as well as trafficking, committed by terrorist groups, and calls, including by the Security Council, to hold perpetrators accountable.⁷⁸ **The Rome Statute was the first international criminal law statute to recognize the crime against humanity of persecution on grounds of gender, as part of the larger recognition of various forms of sexual and gender-based harms within the Statute, which are recognised as being among the gravest crimes.**⁷⁹ Despite this recognition, and the global outrage caused by the alleged sexual enslavement of Yezidi women and girls, these remain deplorably unaddressed, rarely

⁷⁷ A/76/263

⁷⁸ See S/PRST/2015/25, UN Security Council resolutions 2331 (2016) and 2388 (2017) and Security Council resolution 2242 (2015) highlights that acts of sexual and gender-based violence can be part of the strategic objectives and ideology of certain terrorist groups. the UN High Commissioner for Human Rights, “women, boys and girls have suffered sexual violence and/or have been trafficked or otherwise forced into marriage, sexual slavery and exploitation by UN-listed terrorist groups”, UN OHCHR, “Bachelet urges States to help their nationals stranded in Syrian camps”, 22 June 2020. See also Jane Huckerby, “When terrorists traffic their recruits”, Just Security, 15 March 2021; UN Special Rapporteur on trafficking in persons, especially women and children, A/HRC/47/34, para. 33, 52; UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on the human rights of adolescents/juveniles being detained in North-East Syria, May 2021, p. 11.

⁷⁹ ICC Policy Paper on Sexual and Gender-Based Crimes, 2014, para. 45; UNSC Resolution 2467 (2019), para. 15.

investigated adequately or charged, and justice remains elusive for victims.⁸⁰ The Special Rapporteur is concerned at attempts to develop concepts such as sexual offences with a terrorist intent or to construe sexual and gender-based offences as terrorist offences. The Special Rapporteur stresses that bringing charges for the core crime of gender persecution and sexual crimes would capture a fuller range of criminality than that which is capable of being covered by terrorism charges, and redress impunity gaps. For example, core crime charges can capture both gender and other intersecting discriminatory grounds. Only this qualification would enable prosecutors and courts to address sexual violence and related crimes with gender persecution as an integral part of the tactics used to destabilise populations. Core crime prosecutions would also shed light on structural discrimination and fundamental rights deprivations experienced by vulnerable gender groups such as women, girls, children as well as LGBT and gender diverse persons in these contexts. The recognition of the cumulative and overlapping effect of such acts would promote the rights of victims by accurately describing the significance and extent of their mistreatment. Where possible, naming fundamental rights violations based on discriminatory grounds that may cumulatively amount to a severe deprivation also produces a more accurate and holistic historical record of the abuses that occurred,⁸¹ the impact of the use of sexual violence as a weapon of war on entire families, communities and the social fabric of societies. Furthermore, this, in the Special Rapporteur's view, ultimately acts as a meaningful deterrent to future violations of this nature.

For all these reasons, **the Special Rapporteur takes the view that although it is procedurally easier and more expedient for States to address actors and their acts as terrorist in nature** rather than to address the harder and complicated questions of assessment on what the applicability of common article 3 to the Geneva Conventions and Additional Protocol II might mean or to collect evidence of core crimes, **prosecutorial strategies that focus only on prosecutions for broad terrorism offences fail to deliver true justice either to the victims or to the individuals convicted.** She underscores that **it is only by prosecuting and referring to horrific acts as war crimes, crimes against humanity, and genocide, and identifying and prosecuting individuals for their own direct acts or omissions, or for ordering or facilitating a crime, for having aided and abetted, planned, ordered, incited or failed to exercise superior or command responsibility, that meaningful and adequate justice will be delivered to the many victims and survivors.** Governments in states of origin therefore have a duty to meet their obligations by going beyond trials for returnees on terrorist offenses such as membership in proscribed groups or travel and address core crimes.

V. Questions around evidence

One of the main considerations put forward by States for failing to investigate and prosecute individuals who have returned from the conflict zones of Syria and Iraq for core international crimes relate to the **collection of evidence that will be admissible in court.**

In this context, the Special Rapporteur is particularly concerned that there is a push for increased reliance on forms of evidence that function in violation of the right to a fair trial, notably “battlefield evidence”,⁸² “evidence” collected online as well as on information collected by security agencies. She highlights in particular that the military and intelligence actors operating abroad may not be subject to extraterritorial application of human rights law;

⁸⁰ ICC, Policy on Gender persecution, November 2022.

⁸¹ ICC, Policy on Gender persecution, November 2022.

⁸² https://www.ohchr.org/sites/default/files/Documents/Issues/Terrorism/SR/UNSRCT_Position_Battlefield-evidence-2021.pdf

that military actors have no knowledge or methods regarding how to bring complex criminal cases through criminal justice systems; and that the methods of evidence and information gathering of intelligence actors are regulated by specific rules which often lack in independent oversight and are deficient in human rights adherence.⁸³ Further, the collection of evidence often engages the arrest, detention and interrogation of suspects which, in turn, engages questions related to the right to detain, the length of detention and the review of detention, as well as to the treatment of individuals during detention. When this is combined with the lowering of standards relating to chain of custody, evidence obtained in violation of human rights could eventually be used in trials in violation of the principle of exclusion. Other risks include the reliance on information obtained by other States through information-sharing agreements lacking in oversight and control, the abandonment of specific requirements such as prohibitions on hearsay,⁸⁴ or the use of classified information, all of which violate the principle of equality of arms.⁸⁵

She recalls that the rights to equality before the courts and tribunals and to a fair trial are key elements of human rights protection and serve as a procedural means to safeguard the rule of law. **Fundamental principles of fair trial, such as the presumption of innocence, should not be derogated from, and the guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights.** This includes any trial leading to the imposition of the death penalty, the use of statements or confessions or other evidence obtained in violation of the absolute prohibition of torture and other ill-treatment. Respect for the right to a fair trial is multifaceted and engages a number of rights beyond those that apply directly to trial proceedings. **Because the fair trial guarantees of a suspect must be respected in all stages of any criminal proceedings, and the rights of victims and witnesses must be guaranteed from the beginning of a criminal procedure, a number of other fundamental rights are engaged by the use of evidence that may, for procedural expediency, contain lower guarantees.**

In this context, the Special Rapporteur highlights novel solutions to the lack of access to primary sources of evidence located in the conflict zones by potentially prosecuting States, notably the UN Investigative Team to Promote Accountability for Crimes Committed by Da'esh (UNITAD)⁸⁶ and the UN International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 (IIIM).⁸⁷ Both investigative bodies can play a critical role in supporting the prosecution of persons for the most serious crimes under international law though the provision and analysis of evidence of violations of international law. Located in Geneva, the IIIM is tasked to independently and impartially assist the investigation and prosecution of persons responsible for serious violations of international law by: consolidating, preserving and analysing evidence of violations of international humanitarian and human rights law; and, preparing files to facilitate and expedite fair and independent criminal proceedings in accordance with international law standards.⁸⁸ It receives evidentiary materials from sources including the Commission of Inquiry for the Syrian

⁸³ See A/HRC/37/62; and A/HRC/34/60.

⁸⁴ D Glazier, 'Precedents Lost: The Neglected History of the Military Commission' (2005) 46 *Virginia Journal of International Law* 5, 54–55.

⁸⁵ Article 13, European Convention on Human Rights; and Article 14, International Covenant on Civil and Political Rights. See also UN Human Rights Committee, General Comment 32, paras. 8, 13 and 32.

⁸⁶ UNITED was created through UN Security Council resolution 2379 (2017).

⁸⁷ On 21 December 2016, the UN General Assembly adopted resolution A/71/248 which established the IIIM.

⁸⁸ A/RES/71/248; A/71/755

Arab Republic, UN entities, the Organization for the Prohibition of Chemical Weapons-United Nations Joint Investigative Mechanism, States, international or regional organisations, NGOs, foundations and individuals. An important instrument in this regard is the Protocol of Cooperation between the IIM and Syrian civil society organisations participating in the Lausanne Platform. Supplementary to secondary sources of evidence, the IIM itself also collects witness testimony, and documentation and forensic material.⁸⁹ As of 9 August 2023, the IIM had received 286 requests for assistance from 15 competent jurisdictions relating to 216 distinct investigations of core international crimes and that it had been able to provide support in response to 193.⁹⁰ The IIM has currently three strategic lines of enquiry open in its structural investigation (i.e. on detention related crimes, crimes by individuals associated with Islamic State in Iraq and the Levant (ISIL) and unlawful attacks against civilian and civilian objects (including use of chemical weapons and attacks against medical facilities).⁹¹ Its work is built on an expanding central repository of information and evidence and acting as a justice facilitator that supports current and future investigations and prosecutions of core international crimes. The Special Rapporteur highlights in particular the Mechanism’s gender strategy which aims to integrate a gender analysis into all its work to address the adverse impact of the discriminatory gender hierarchy and create additional opportunities for inclusive justice, and its contribution to clarifying the fate and whereabouts of missing persons.⁹²

Similarly, UNITAD was established “to support domestic efforts to hold ISIL (Da’esh) accountable by collecting, preserving and storing evidence in Iraq of acts that may amount to war crimes, crimes against humanity and genocide committed by the terrorist group ISIL in Iraq, to the highest possible standards (...) to ensure the broadest possible use before national courts and complementing investigations being carried out by the Iraqi authorities, or investigations carried out by authorities in third countries at their request”.⁹³ UNITAD has six Investigative Units covering crimes against all communities in Iraq, as well as a dedicated investigative unit focused on ISIL’s finances and economy which allows it to look into the hierarchy and the structure of ISIL as an organization to identify those most responsible for the international crimes that were committed in Iraq. It also has a dedicated Gender Crimes and Children Unit to focus on such crimes.

Importantly, both entities ensure a victim-centered approach, putting the safety and well-being of the victims and survivors first, and ensure that the integral chain of custody is preserved for all evidence collected, so that the evidence is admissible before any competent court where prosecutions of ISIL members for international crimes can take place. The Special Rapporteur applauds the work of both mechanisms and encourages States to use both mechanisms.

VI. Prosecutions in practice

The Special Rapporteur positively notes that the number of investigations being undertaken in various States for crimes committed in Syria has increased in recent years. These include a majority of individuals linked to the Syrian regime, including one that has led to the landmark conviction of Anwar Raslan, former head of the investigation unit at the al-Khatib

⁸⁹ A/71/755

⁹⁰ IIM 9th Bulletin, August 2023, <https://iiim.un.org/wp-content/uploads/2023/08/IIM-Bulletin-9-ENG-9-%D9%86%D8%B4%D8%B1%D8%A9-%D8%A7%D9%84%D8%A2%D9%84%D9%8A%D8%A9.pdf>

⁹¹ Ibid.

⁹² <https://iiim.un.org/documents/iiim-strategies/>

⁹³ UN Security Council resolution 2379 (2017).

branch of the General Intelligence Service in Damascus, on 13 January 2022, by the Higher Regional Court of Koblenz in Germany for crimes against humanity in the form of killing, torture, severe deprivation of liberty, rape and sexual assault in conjunction with 27 cases of murder, 25 cases of dangerous bodily harm, aggravated rape, two cases of sexual assault and deprivation of liberty lasting more than one week in 14 cases. He was sentenced to life imprisonment. Eyed Al-Gharib, an employee of the subdivision working with Anwar Raslan's investigation unit, was also found guilty of aiding and abetting a crime against humanity in 30 cases of torture and aggravated deprivation of liberty and sentenced to four and a half years in prison.

There are currently at least 193 investigations open in multiple states which include charges for core crimes committed in Syria by several parties to the armed conflict in 15 competent jurisdictions.⁹⁴ The Special Rapporteur positively welcomes that a number of the ongoing investigations relate to individuals who have allegedly committed core crimes while they were members of non-State armed groups also designated as terrorist, including ISIL, Jabhat al Nusra and Al Sham, in France, Germany, Hungary, the Netherlands and the United States of America. Several of these cases have resulted in convictions (see summary of some cases below).⁹⁵ The Special Rapporteur commends those States that are undertaking the harder work of investigating, prosecuting and trying individuals for core international crimes, mostly under cumulative prosecution processes in which the charges relate to counter-terrorism offences (particularly membership) and core crimes.⁹⁶ She positively acknowledges the key role of accountability mechanisms in these investigations, notably the IIM. She encourages States to not only continue such investigations and prosecutions for their own nationals but also to consider carrying out these trials for non-nationals given the importance of accountability and the current impossibility of holding such trials in the region where core crimes were committed.

The case of Fatosh Ibrahim

On 29 March 2023, Göteborg District Court convicted Swedish national Fatoush Ibrahim for war crimes for posting photos of severed heads in Raqqa, Syria, with disparaging comments and sentenced to 3-month imprisonment (under appeal).

The case Camilla Olofsson and Abdirahman Shukri Mohamed

On 9 January 2023, the Solna District Court convicted two Swedish nationals who had joined ISIL for their respective roles in taking children to a war zone and the girls' forced marriage and rape. The mother of the two girls, Camilla Olofsson, was sentenced to 6 years and 10 months imprisonment for human trafficking and aiding and abetting rape against

⁹⁴ IIM, Bulletin No. 9, August 2023, <https://iim.un.org/wp-content/uploads/2023/08/IIM-Bulletin-9-ENG-9-%D9%86%D8%B4%D8%B1%D8%A9-%D8%A7%D9%84%D8%A2%D9%84%D9%8A%D8%A9.pdf>.

⁹⁵ The cases in the following boxes are drawn from the TRIAL International Universal Jurisdiction database (<https://trialinternational.org/latest/>) and the IIM Bulletins.

⁹⁶ See IIM 7th Bulletin, 7 March 2022, <https://iim.un.org/wp-content/uploads/2022/03/IIM-Syria-Bulletin-7-ENG-March-2022-1.pdf>. Also see: Preliminary Conclusions and Recommendations of the Special Rapporteur on the Promotion and Protection of human rights and fundamental freedoms while countering terrorism on: Thematic Visit to Germany and North Macedonia on the repatriation, return, reintegration and prosecution of persons returning from conflict zones where designated terrorist groups are active (3-12 July 2023).

children. The man who married one of the girls, Abdirahman Shukri Mohamed, was sentenced to 8 years and 10 months imprisonment for two counts of aggravated rape against a child.

The case of Lina Naina Ishaq

Lina Naina Ishaq, a Swedish national, travelled to Syria in 2013 with four of her children to join her husband and an older son. One of her sons, aged 12, was recruited by the Islamic State (ISIS) and used as a child soldier. He died in combat in 2017. She returned from Syria in 2020. On 4 March 2022, the Stockholm District Court convicted her as an accomplice for serious crimes under international law and war crimes and sentenced to six years imprisonment for her omission as a legal guardian to protect her 12-year-old son from being recruited and used as child soldier by ISIL in Syria, where he died.

The case of Jennifer W. and Taha A.-J.

In 2014, Jennifer W. left Germany for Iraq and joined ISIS. Between June and September 2015, she allegedly conducted the so-called daily “moral patrols” in ISIS-occupied Fallujah and Mosul by inspecting whether women’s behavior and clothing complied with the rules set by ISIS. While conducting such patrols, Jennifer W. reportedly carried various lethal weapons with her. For this, she allegedly received remuneration from ISIS. Jennifer W. shared a household with her spouse, Taha A.-J., who allegedly joined ISIS in 2013. In summer 2015, Taha A.-J. reportedly purchased a woman and her five-year old daughter from a group of Yazidis taken captive by ISIS. Taha A.-J. brought the woman and her daughter to his house. Taha A.-J. and Jennifer W. allegedly kept the Yazidi woman and her daughter captive as slaves and exposed them to inhuman living conditions. Taha A.-J. is suspected of having prohibited the Yazidi woman and her daughter from exercising their religion and forced them to convert to Islam. In order to punish the captives, Taha A.-J. allegedly beat them severely and repeatedly. To punish the five-year old, Taha A.-J. is suspected of chaining her outdoors in scorching heat, which subsequently led to the child’s death. Jennifer W. reportedly witnessed her husband’s acts and did not undertake any steps to prevent the death of the child.

On 25 October 2021, the Higher Regional Court of Munich in Germany found Jennifer W. guilty of membership in a foreign terrorist organization, aiding and abetting attempted murder as well as attempted war crimes and a crime against humanity. She was sentenced to ten years in prison. The Federal Public Prosecutor subsequently appealed the sentence, demanding life imprisonment. On 30 November 2021, the Higher Regional Court of Frankfurt am Main found Taha A. J. guilty of genocide, crimes against humanity resulting in death, a war crime, aiding and abetting a war crime and bodily harm resulting in death. He was sentenced to life imprisonment. In addition, he must pay the joint plaintiff and mother of the deceased child EUR 50’000 as compensation for the non-material damage she suffered. This decision was confirmed by the German Federal Court of Justice on 18 January 2023.*

* Ewalina U. Ochab, “German Federal Court of Justice Confirms the First-Ever Conviction of a Daesh Member for Genocide”, Forbes, 26 January 2023.

The case of Omaila A.

Omaila A. is a German-Tunisian national who travelled in January 2015 with her three underage children, from Turkey to Syria to settle there. By taking care of the household and children she enabled her husband to participate in the hostilities as a fighter. Between spring and summer 2015 Omaila A. held a 13-year-old Yazidi girl, who was entrusted to her by a friend, as a slave.

On 2 October 2020, the Hanseatic Higher Regional Court in Hamburg found the German-Tunisian citizen Omaila A. guilty of membership in a foreign terrorist organization, crime against humanity by enslavement, breach of duty of care or upbringing, unlawful imprisonment and breaches of the Military Weapons Control Act. She was sentenced to three years and six months in prison. On 22 July 2021, the Hanseatic Higher Regional Court in Hamburg found her guilty of aiding and abetting a crime against humanity by enslavement in conjunction with deprivation of liberty. She was sentenced to four years in prison. This sentence encompasses the prison term from the sentence of 2 October 2020.

The case of Sarah O.

Sarah O. traveled to Syria in November 2013 at the age of 15 to join ISIS. She married a German ISIS member in January 2014 according to Islamic rites. Sarah O. supported her husband's activities for the terrorist organization by running the household and taking care of their three daughters. She temporarily accommodated new arrivals for ISIS and also attempted to persuade others to travel to Syria and participate in jihad. Following the ISIS ideology, the defendant Sarah O., together with her husband, held five Yazidi women and two underage Yazidi girls as slaves. Three of the five women participated in the proceedings as joint plaintiffs. Sarah O.'s husband violently forced at least two of the three joint plaintiffs to have sexual intercourse with him. This happened with the consent of the defendant, who considered this action against the defenseless women to be required by the rules of ISIS and encouraged her husband in his actions. An enslaved 14-year-old girl was killed in an attack during a cross-country trip approved by Sarah O. over a road connection near Al-Mayadin that had already been under fire the day before.

On 16 June 2021, the Higher Regional Court of Düsseldorf found Sarah O. guilty of membership in a foreign terrorist organization in conjunction with a crime against humanity by enslavement resulting in the death of the victim, persecution as a crime against humanity, aiding and abetting rape as a crime against humanity and deprivation of liberty for a period of more than one week resulting in death in conjunction with bodily harm. She was sentenced to six years and six months in prison under juvenile law. Her husband's German parents were sentenced to four years and six months and three years respectively in prison for, among other charges, supporting a terrorist organization abroad.

The case of Leonora M.

According to the indictment, Leonora M. left Germany for Syria in March 2015 to join the Islamic State (ISIS) while she was still under eighteen. She married a member of the ISIS security apparatus and lived with him in Raqqa from the fall of 2015 to June 2017. During this time, she temporarily owned a semi-automatic handgun for firing cartridge ammunition and exercised control over a Kalashnikov assault rifle, a weapon subject to the War Weapons Control Act. She supported her husband's activities in ISIS by managing the household and writing a letter of application for him to the ISIS intelligence service, for which he then worked until April 2017. Leonora M. also worked for ISIS herself. Shortly after her arrival, she was assigned to a hospital controlled by ISIS for three months. At the end of 2015, she took on the task of investigating the wives of ISIS fighters for the ISIS intelligence service.

On 18 May 2022, the Higher Regional Court of Naumburg found Leonora M. guilty of membership in a foreign terrorist organization and violations of the War Weapons Control Act. The Court acquitted her of the charge of aiding and abetting crimes against humanity. The acquittal is based on factual grounds as the Court could not establish that the defendant facilitated human trafficking by caring for a Yazidi woman. She was sentenced to two years in prison under juvenile law and the sentence was suspended on probation, setting the probation period at three years. Both the Federal Public Prosecutor and the defendant have appealed the decision. The Court of Appeal will have to determine whether Leonora M. supported her husband in trafficking in human beings. At the end of June 2015, her husband allegedly bought a 33-year-old Yazidi woman as a slave in order to sell her and her two small children for a profit. They were allegedly held captive in the couple's shared apartment in Raqqa. According to the prosecutor, at the behest of her husband, Leonora M. physically took care of the injured Yazidi woman so that she could be resold at a profit. In addition, she allegedly tried to dissuade the victimized Yazidi woman from her religious beliefs and to convince her of ISIS's understanding of Islam. The enslaved Yazidi woman was subsequently sold at a profit.

Case of Nurten J.

Nurten J. is a German national. According to the indictment, she traveled to Syria with her three-year-old daughter in February 2015 to join the Islamic State (ISIS). She married a high-ranking ISIS member and they lived in requisitioned apartments provided by ISIS after the owners had fled or were displaced. The accused regularly invited to the apartment a friend who enslaved a Yazidi woman and forced her to clean the house of the accused on at least 50 occasions.

On 21 April 2021, the Higher Regional Court of Düsseldorf in Germany found Nurten J. guilty of membership in a foreign terrorist organization, war crimes against property, aiding and abetting a crime against humanity by enslavement in conjunction with deprivation of liberty, breaches of the Military Weapons Control Act and breach of the duty of care or upbringing. She was sentenced to four years and three months in prison.

Case of Ahmad al-Y

Ahmad al-Y., a Syrian national, entered the Netherlands as an asylum seeker in October 2019. According to the judgment, Ahmad al-Y. commanded Ahrar al-Sham fighters and took part in an offensive in the city of Hama in April 2015. During this time, he subjected persons who were hors de combat to humiliating and degrading treatment by posing with the corpse of an enemy fighter and kicking the body of another. In addition, he appeared in a video posted on YouTube, “singing to celebrate the deaths of fighters and referring to them as dogs.”

On 21 April 2021, The Hague District Court found Ahmad al-Y. guilty of membership in a terrorist organization and committing a war crime of assault on personal dignity by putting his foot on a corpse, making a kicking movement to another and by celebrating the deaths of the deceased adversaries while referring to them as “dogs”. He was sentenced to six years in prison. The prosecution appealed the decision. On 6 December 2022, The Hague Court of Appeal ruled that the acts depicted on the videos presented in support of the case did not reach the threshold of the war crime of assault on personal dignity, and acquitted al-Y. of all core international crimes charges. It upheld the finding of guilt for membership in a terrorist organization. Al-Y.’s sentence was thus lowered to five years and four months in prison. The prosecution has appealed the decision on the law before the Supreme Court.

Case of Hassan Faroud

Hassan Faroud, a Syrian national, commanded a small unit of ISIS in the province of Homs. He ordered the occupation of the town of Al-Sukhnah and the drawing up a “death list” of those who rejected the goals of ISIS and as a consequence would be executed. The executions included the public beheading of the local imam and at least 25 civilians, including women and children, in Al-Sukhnah. Faroud personally participated in the execution of the imam as well as the murders of three other civilians in the area between 13 May and 15 May 2015. He also shot another person. He left Syria in 2016 and obtained refugee status in Greece in 2017. On 22 March 2019, based on information obtained by European national intelligence services, a Budapest court ordered Faroud’s detention for alleged murders committed in Syria. He was subsequently arrested by the Hungarian Counterterrorism Center at the Nyírbátor immigration detention facility.

On 13 November 2019, Faroud’s trial began in Budapest. In December 2020, he was found guilty of crimes against humanity committed as a part of a criminal organization and sentenced to life imprisonment with the possibility of parole after 30 years. He was acquitted of the terrorism charges. The Prosecution appealed his conviction and sentence to include the offense of terrorism and for more serious punishment, namely life imprisonment without parole. Faroud appealed seeking acquittal. On 11 October 2021, the Court of Appeal confirmed the conviction of Faroud. It also found that Faroud had committed the crimes against humanity as part of a criminal organization. Faroud was sentenced to life in prison, without parole.

VII. Conclusions and Recommendations

As for all victims, the rights of victims of terrorism to truth, to justice and to an effective remedy, and to reparation must be recognised and fulfilled. Prosecutions, as an element of victims' right to justice, play a central role in the realisation of victims' right to truth and to non-recurrence, as an element of reparation. The process and outcomes of truth and justice, including fighting against impunity, are critical to preventing and deterring future violence and the commission of crimes such as those committed by non-State armed groups also designated as terrorist.

The Special Rapporteur takes the clear position that given the serious core international crimes that have occurred in Syria and Iraq, including by non-State armed groups also designated as terrorist, like ISIL, the overarching imperative must be to provide justice and truth to the victims of these atrocious acts, including the victims of genocide, crimes against humanity and war crimes, including enforced disappearances, perpetration of arbitrary killings, torture, serious deprivation of liberty, sexual and gender-based crimes, including slavery rape, sexual assault, and hostage-taking, that have shocked the conscience of humanity.

The prosecution of these heinous crimes and their qualification as war crimes and crimes against humanity exclude the possibility of granting amnesties, pardons, or implementing statutes of limitations on prosecutions, which would deny justice to victims and contravenes States' obligations pursuant to the General Assembly resolution 3074 (XXVIII) (December 1973) requiring states not to "[t]ake any legislative or other measures which may be prejudicial to the international obligations they have assumed in regard to the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity."

Criminal accountability for these crimes is considered of fundamental importance in redeeming respect for the rule of law, deterrence of future violations, and the provision of redress and justice for victims. Credible, fair trials are imperative also to ensure justice for the accused to undergird the legitimacy and credibility of such proceedings. To ensure that the fight against impunity has no borders, states must establish universal jurisdiction for war crimes that constitute grave breaches and torture and should establish it for other war crimes, crimes against humanity and genocide.

The voluntary and human rights compliant repatriation of third country nationals from Northeast Syria remains the only international law-compliant response to the complex and precarious human rights, humanitarian and security situation faced by those detained in Northeast Syria. An effective repatriation process includes holding individuals accountable for the serious and systematic core crimes committed in Syria and Iraq. States must act with due diligence and take positive steps and effective measures to protect vulnerable citizens located abroad where they are at risk of serious human rights violations or abuses and face treatment in flagrant violation of international human rights law. In Northeast Syria, State action can positively impact on the human rights of those detained, particularly on rights that are essential to the preservation of values enshrined in the international human rights law. State action can address flagrant denial of justice, the imposition of the death penalty, torture or cruel, inhuman or degrading treatment, sexual violence, or arbitrary deprivation of liberty in grave violation of human rights standards and most basic standards of humanity.

Given the finding that fair trials and credible prosecutions in accordance with international human rights and humanitarian law that allow for safe victim participation and that address core international crimes cannot take place in Northeast Syria and would require considerable investment, support, and legislative reform to be enabled in Iraq, States that can deliver justice for such crimes in accordance with international human rights law must prosecute individuals who have committed or aided in the commission crimes that shock our collective conscience, including genocide, crimes against humanity, war crimes, and egregious acts of torture, and hold them accountable for these acts.

Criminal charges under counter-terrorism legislation for the generic offences of membership in a proscribed terrorist organisation, travel to a conflict zone, and/or various forms of provision of support to a terrorist organisation do not offer the victims of core international law crimes the possibility of truth, accountability for specific acts of violence, or information related to the death of a loved one. They rarely focus on the roles and extent of involvement of individuals in terrorist groups and thus mostly fail to properly assess criminal responsibility. By failing to address both specific terrorism-related criminal acts and serious violations of international law beyond acts of terrorism, such criminal convictions fail to assign clear responsibilities that could contribute to general deterrence. They also fail to take into consideration the specificities of the situation of women both as perpetrators, victims and in complex situations that transverses both categories.

It is only by prosecuting and referring to horrific acts as war crimes, crimes against humanity, and genocide, and identifying and prosecuting individuals for their own direct acts or omissions, or for ordering or facilitating a crime, for having aided and abetted, planned, ordered, incited or failed to exercise superior or command responsibility, that genuine and meaningful justice will be delivered to the many victims and survivors.

The overarching primacy of the international human rights and humanitarian law frameworks and the particular importance such frameworks provide to ensure that the rights of victims of terrorism are adequately protected should be contradistinguished from terrorism offences which are regrettably considered as victimless crimes in many legal systems.

Fundamental principles of fair trial, such as the presumption of innocence, should not be derogated from, and the guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights. Because the fair trial guarantees of a suspect must be respected in all stages of any criminal proceedings, and the rights of victims and witnesses must be guaranteed from the beginning of a criminal procedure, a number of other fundamental rights are engaged by the use of evidence that may, for procedural expediency, contain lower guarantees.

Novel solutions to the lack of access to primary sources of evidence located in the conflict zones by potentially prosecuting States, notably the UN Investigative Team to Promote Accountability for Crimes Committed by Da'esh (UNITAD) and the UN International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 (IIIM) can and are playing a critical role in the prosecution of persons for the most serious crimes under international law though the provision and analysis of evidence of violations of international law. States should use both mechanisms that ensure a victim-centered approach, putting the safety and well-being of the victims and survivors first, and ensure that the integral chain of custody is preserved for all evidence collected, so that the

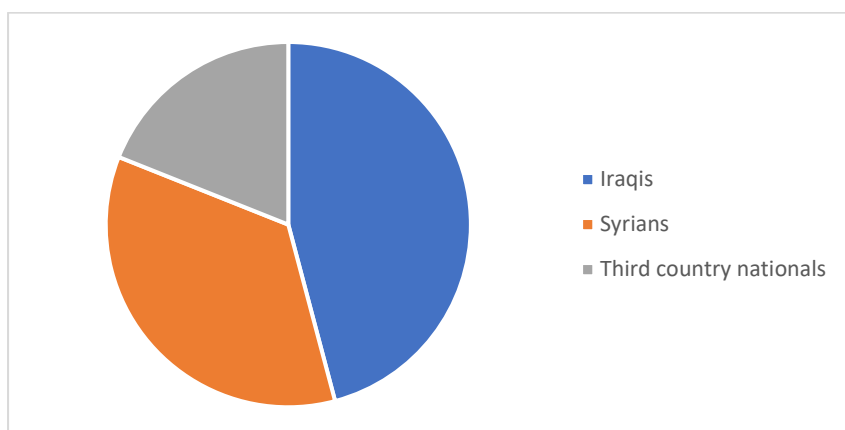
evidence is admissible before any competent court where prosecutions of ISIL members for international crimes can take place.

States must enhance and increase such investigations and prosecutions for their own nationals but given the importance of accountability and the current impossibility of holding such trials in the region where core crimes were committed and are encouraged to consider conducting criminal trials for non-nationals under universal jurisdiction, in full compliance with principles of international law.

Background: Detention Situation⁹⁷

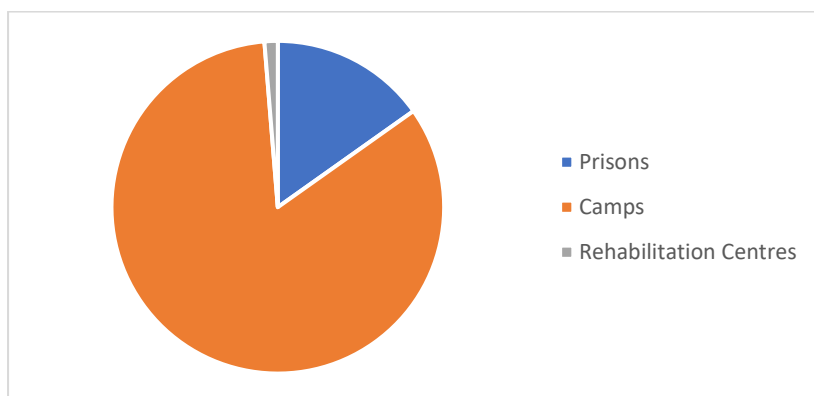
- *Overall Figures*

As of March 2023, there were still approximately **65,000 men, women and children** detained in Northeast Syria. **23,000** of these are Syrians and **42,000** of these individuals are foreign nationals, of which approximately **12,000** are third country nationals (nationals of states other than Iraq and Syria).



- *Prisons: Men and Boys*

There are approximately **10,000 men** detained in some ten or twelve detention centres throughout the territory of Northeast Syria, including up to **1,000 detainees who were apprehended as boys** and who have since crossed the threshold into adulthood. Of these, approximately **5,000 are foreigners** (Iraqi and other third country nationals), of which approximately **2,000 are third country nationals**. Following her visit to Northeast Syria, the Special Rapporteur estimates that over **1,000 boys** are also detained in the region, either in detention centres or in closed rehabilitation centres.



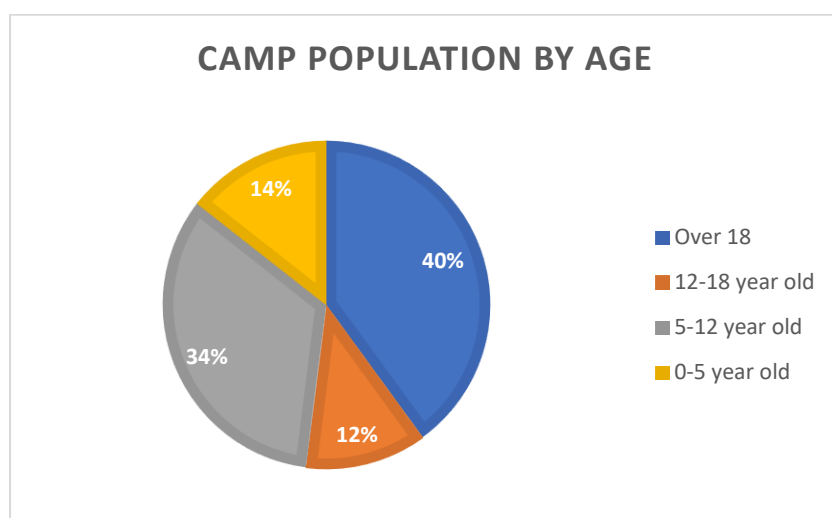
⁹⁷ The Special Rapporteur highlights the general problem of accuracy of official and unofficial figures given the lack of transparency from the detaining authority and acknowledging that in the Mandate's view the detaining authority does not have accurate figures for individuals in the various places of detention, particularly third country nationals, and the continuously evolving repatriation figures. The numbers provided are all approximations.

- **Camps: Mostly Women and Children**

The UN Commission of Inquiry reported in September 2023 that the two largest locked camps for women, girls and boys, al-Hol and al-Roj, hold approximately **51,600** individuals. This includes **35,000** foreign nationals from 66 different countries, of which approximately **10,000** are third country nationals.

In these camps, **over 60 percent of the population are children, of which 80 percent are under the age of 12 and 30 percent are under the age of five.**⁹⁸

The Special Rapporteur notes that there are also approximately 3,000 Syrian and Iraqi men present in Al-Hol camp.



- **Placement**

In addition to those individuals attempting to leave Syria from 2017 onwards and who were captured by the SDF, most of the individuals have been detained by the Syrian Democratic Forces (SDF), the military wing of the Autonomous Administration of Northeast Syria (AANES), since the fall of Baghouz in the Spring of 2019, when what was left of the self-proclaimed Caliphate dispersed. They were all placed in camps and detention centres with some variability of location based on their **gender** and **age**, their perceived or actual **nationality**, and premised on their **alleged association with ISIL**. Most men were presumed as fighters and placed in prisons, while women and young children were placed in the camps as associated family members.

There remains very little knowledge about the identity, nationality and ages of the individuals detained and what they are alleged to have done when living in the territory controlled by ISIL. In particular, there are no reliable numbers concerning the proportion of male children who were previously forced into ISIL training camps and of girls who were used as slaves by members of the group. Although some of these individuals have undergone “security” or “counter-terrorism” assessments, undertaken by intelligence agencies to determine a potential security risk, none of the individuals in camps, prisons or other detention

⁹⁸ [Press Release](#), Children in Northeast Syria must be urgently repatriated: UN experts, 31 March 2023.

centres have undergone a proper legal process consistent with the requirements of international law that would allow to determine their roles and responsibilities or identify the complex layers of identity and the vulnerabilities of the populations, a process which cannot be done absent judicial involvement.

- *Arbitrary Detention*

The European Court of Human Rights has determined that the situation for persons detained in the camps “**verges on a legal vacuum**”.⁹⁹ As there is **no legal basis** for the **blanket**,¹⁰⁰ **indefinite detention** of all these individuals in any place of detention, including on security grounds absent an international law compliant process of review, and as the detentions are **not subject to any judicial authorisation, review, control or oversight** and because they entirely lack in predictability and due process of law, the Special Rapporteur determines that they are **arbitrary**.

- *Conditions of Detention in the Camps*

The conditions of detention in the camps are dire and the security situation is continuously deteriorating. The Special Rapporteur has, together with other Special Procedure mandate holders, determined that the conditions therein amount to torture and inhuman or degrading treatment. The European Court of Human Rights has determined that the camps’ inhabitants “were facing a **real and immediate threat to their lives and physical well-being**, on account of the living conditions and safety concerns in the camps, which are regarded as **incompatible with respect for human dignity**”.¹⁰¹ The United Kingdom’s Special Immigration Appeals Commission has also noted that “conditions in the camp are so bad that they **meet the threshold of inhuman or degrading treatment** for the purposes of Article 3 of the European Convention on Human Rights”.¹⁰² The UN Committee Against Torture has stated that “there exist sufficient conditions to establish that the conditions of detention (...) in the camps, notably with respect to the lack of health care, food, water and sanitation equipment **amount to inhuman and degrading treatment**”.¹⁰³ The Committee on the Rights of the Child has found that children in the camps face “**an imminent risk of death**”.¹⁰⁴

The Special Rapporteur fundamentally opposes the qualification of any of these detention facilities as “IDP” or “refugee” camps. All individuals are subjected to some form of limitation of their freedom of movement and foreigners are all subjected to various forms of deprivation of liberty, including the arbitrary detention of third country nationals.

Similarly, “rehabilitation centres” are locations where adolescent boys are deprived of their liberty, with some held in confinement conditions which meet the threshold for torture, inhuman and degrading treatment under international law. It is her opinion that these centres also constitute places of detention.

⁹⁹ Fionnuala Ní Aoláin and Anne Charbord, European Court Tackles the Thorny Issue of Family Repatriation From Northeast Syria, [Just Security](#), 22 September 2022.

¹⁰⁰ A/HRC/46/55 para. 96.

¹⁰¹ Aoláin and Charbord, [Just Security](#), 22 September 2022.

¹⁰² *Id.*

¹⁰³ CAT/C/75/D/922/2019

¹⁰⁴ CRC/C/89/D/77/2019, CRC/C/89/D/79/2019, CRC/C/89/D/109/2019

- *Conditions of Detention in the Prisons*

In the prisons, the men and the boys detained there are being held **incommunicado**. Prisoners are held in **overcrowded collective cells** of 20 to 25 people, in **inhumane conditions**, with **limited access to food and medical care, open latrines, and poor ventilation**, which means that infectious diseases, such as **tuberculosis** and **scabies**, are rampant. Hundreds of individuals have died in the prisons. A Federal Court in Canada¹⁰⁵ has assessed that the condition of the men in prisons “even more dire” than those (...) in the camps. The court referred to the **lack of access to the prisons**, to the fact the men have **not been seen or heard of since 2019**; and to deplorable conditions of detention, including overcrowding, lack of health care and food and torture allegations”. It is clear that **none of these detention sites or “prisons” meet the minimum United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Standards)**.

The Special Rapporteur is profoundly concerned that no legal process applies to the detention of around 5000 adult men and approximately 700 children detained in Gweiran’s Panorama prison facility. She notes there does not appear to be a standardised file management system in place, as required by the Mandela Principles,¹⁰⁶ which would include the date and hour of each admission as well as any transfer that occurs during detention. She finds that all are held in incommunicado detention and disappearances may be engaged in this facility. The prison is experiencing a highly contagious and widespread tuberculosis outbreak that the authorities do not have the capacity to treat or to isolate sick detainees. Untreated tuberculosis is a life-threatening condition estimated by the World Health Organization to cause fatality in 50% of cases. In a context of indefinite detention without trial the failure to treat may thus constitute a death sentence in its own right.¹⁰⁷

- The Special Rapporteur’s mandate has been able to determine that some male children – including some as young as 9 years old - were placed in the prisons with the men, allegedly based on family relations.
- The Special Rapporteur’s mandate has also documented that many boys are transferred from the camps to male adult detention centres or closed rehabilitation centres upon attaining puberty when they reach the age of 10-12* after being taken away from the care of their mothers, often at gunpoint in the middle of the night. Many mothers have not heard of their sons since they were taken away.

The Special Rapporteur is appalled by the forced arbitrary separation of hundreds of adolescent boys from their families, specifically mothers, absent any legal procedure, in what can only be qualified as summary separation based on an unproven security risk that male children pose upon reaching adolescence (around 10 to 13 years old). It appears that such practices are primarily directed at third country nationals raising profound questions about the knowledge or acquiescence of their governments in these processes. Such separation clearly violates article 9 of the Convention on the Rights of the Child. The Special Rapporteur was informed that children reaching the age of 11 or 12 suffer from extreme stress and anxiety fearing their imminent removal from the camp and separation from their mothers. Mothers she spoke to confirmed that it was often many months before they were told where their boys had been taken, and this was also confirmed by the boys she met who had been taken away. Such a practice constitutes at a minimum, in the Special Rapporteur’s view a disappearance under international law, in direct contravention of articles 9, 19, and 37 of the CRC, articles 7 and 9 of the ICCPR, and articles 1, 2 and 16 of the CAT. Such systematic acts may further engage core international crimes under a universal jurisdiction framework.**

* [Press Release](#), “Syria: UN experts alarmed by reports of boys taken from Camp Roj by de facto authorities”, 16 February 2023.

** UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Technical Visit to the Northeast of the Syrian Arab Republic, 15-20 July 2023, End of Mission Statement.

Access to the prisons and the conditions of detention therein have severely deteriorated since an attack by ISIL on Hasakah’s Al Sina’a prison in January 2022.¹⁰⁸ This prison, the largest in the region, held approximately 700 boys in an Annex who were used as human shields during the attack.¹⁰⁹ Since, the fate of at least 100 boys remains unknown,¹¹⁰ while several others still suffer from untreated wounds and tuberculosis. The Annex to the prison, in which the boys were detained, was destroyed, and most of the boys were allegedly moved to the newly built Panorama prison.¹¹¹ The Special Rapporteur highlights her concern at practices of secret detention in Northeast Syria,¹¹² specifically of children based her direct knowledge of undisclosed places of detention, as well as testimony that indicates that detained adults and children being moved between various places of detention, some of which are formally known and some not.

The Special Rapporteur has determined that a sizeable number of these detentions are carried out at the behest of the countries of nationalities of the prisoners. In particular, States that belong to the Global Coalition Against ISIL are also providing substantial assistance – including the building of the new high-security Panorama prison – and technical advice to the de facto authorities*. Several closed rehabilitation centres have also been refurbished and some are apparently in process of being built.

* See, e.g., AL GBR 1/2022

The Special Rapporteur is concerned that the lack of information regarding places of detention, and the persons held therein, allows for secret detention, increasing the risk of torture, ill-treatment, and extrajudicial killings, as well as hinders the capacity to determine the fate and whereabouts of detainees, who many amongst them are in *de facto* disappearance. This also infringes on the right of families to receive information about their family members and be notified in case of illness or death.¹¹³

¹⁰⁸ [Press Release](#), Syria: UN expert urges States to ‘save their boys’ caught up in ISIL prison attack, 25 January 2022.

¹⁰⁹ [Press Release](#), UN experts appalled by death of young Australian boy in Syrian detention facility, 25 July 2022.

¹¹⁰ [Press Release](#), Syria: UN experts profoundly concerned for missing and injured children after January attack on ISIL prison, 1 April 2022.

¹¹¹ See the letter received from the Government of the United States of America, dated 12 July 2022, in response to the Special Procedures mandate holders’ communication USA 2/2022, sent on 1 February 2022.

¹¹² Joint study on global practices in relation to secret detention in the context of countering terrorism of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin; the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak; the Working Group on Arbitrary Detention represented by its Vice-chair, Shaheen Sardar Ali; and the Working Group on Enforced or Involuntary Disappearances represented by its Chair, Jeremy Sarkin A/HRC/13/42

¹¹³ The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), Rules 69-70.