

Addressing Jurisdictional Challenges in Prosecuting ISIL Fighters

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ABSTRACT

This paper addresses some of the jurisdictional challenges in prosecuting fighters who joined the ranks of the Islamic State of Iraq and the Levant. It argues primarily in favor of prosecution by the states of which the fighters are nationals. International avenues for prosecution should be examined, as a subsidiary, in case states are reluctant to investigate crimes committed by their nationals. The paper argues in favor of prosecuting suspected ISIL fighters, by a court that respects due process of law with the aim of promoting accountability in a region constantly plagued by conflict.

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INTRODUCTION

Since the birth of the Islamic State of Iraq and the Levant (ISIL) in 2014, experts have exhaustively analyzed the origins of the phenomenon.¹ More recently, the loss of the last ISIL stronghold² in 2019 inspired numerous studies and debates.³ Sociologists and anthropologists have attempted to examine the effects of ISIL's defeat on local communities in Syria and Iraq,⁴ leading to protracted political debates in various parliaments.⁵

As part of a transnational movement, jihadist fighters⁶ are nationals of Iraq and Syria, but also France, Germany, Jordan, the Netherlands, the United Kingdom, and the United States; citizens of an estimated 81 countries joined the movement in Syria.⁷ The departures of fighters from their home country to fight elsewhere is far from a new or unusual phenomenon; for decades, fighters have traversed borders to come to the

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1. See generally, Loulouwa al-Rachid & Mathieu Rey, *Les racines de l'État islamique*. (2016).

2. Bethan McKernan, *ISIS defeated, US-backed Syrian Democratic Forces announce*, THE GUARDIAN (March 23, 2019), <https://www.theguardian.com/world/2019/mar/23/isis-defeated-us-backed-syrian-democratic-forces-announce>

3. Daniel Byman D. (2015). *The Homecomings: What Happens When Arab Foreign Fighters in Iraq and Syria Return?* 38, STUDIES IN CONFLICT & TERRORISM no. 8 at 581-602.

4. For more on this see, *The Kurdistan Region of Iraq: Assessing the Economic and Social Impact of the Syrian Conflict and ISIS*, HUMANITARIAN RESPONSE (2015), https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/assessments/world_bank_report_kri.pdf

5. *Empêcher le retour des djihadistes*, GROUPE DE L'UNION DÉMOCRATIQUE DU CENTRE, <https://www.parliament.ch/fr/ratsbetrieb/suche-curia-vista/geschaefft?AffairId=20181069>

6. Even though this article mentions "the fighters," they are all suspected fighters until proven otherwise.

7. Richard Barrett, *Beyond the Caliphate: Foreign Fighters and the Threat of Returnees* (Oct. 2017), <https://thesoufancenter.org/wp-content/uploads/2017/11/Beyond-the-Caliphate-Foreign-Fighters-and-the-Threat-of-Returnees-TSC-Report-October-2017-v3.pdf>

help of their ‘brothers’⁸ as some sheikhs have called for *jihad*⁹ and resistance against *toughat* (tyrants).¹⁰ From Afghanistan,¹¹ to Bosnia,¹² to Iraq,¹³ fighters have historically journeyed to conflict areas¹⁴ to participate in ‘sacred wars’. However, the influx of fighters to Iraq and Syria to join ISIL had been unprecedented, and though estimates on exact numbers vary,¹⁵ more European foreign fighters have gone to Syria¹⁶ than to all armed conflicts between 1990 and 2010, combined.¹⁷

With the crumbling of the “caliphate,” several social, political, and

8. Sami Aboudi, *Leading Sunni Muslim cleric calls for “jihad” in Syria*, REUTERS (June 1, 2013), <https://www.reuters.com/article/us-syria-crisis-qaradawi/leading-sunni-muslim-cleric-calls-for-jihad-in-syria-idUSBRE9500CQ20130601>.

9. See Sebastian Gorka, *Understanding History’s Seven Stages of Jihad*, 2 CTC Sentinel, no. 10, 2009, at 15-17, <https://web.archive.org/web/20160408163516/https://www.ctc.usma.edu/v2/wp-content/uploads/2010/08/Vol2Iss10-Art6.pdf>.

10. See A.E. Stahl, *Offensive Jihad’ in Sayyid Qutb’s Ideology*, INTERNATIONAL INSTITUTE FOR COUNTER-TERRORISM (March 24, 2011).

11. Anne Stenersen, *Al Qaeda’s Foot Soldiers: A Study of the Biographies of Foreign Fighters Killed in Afghanistan and Pakistan Between 2002 and 2006*, 34 STUDIES IN CONFLICT & TERRORISM no. 3 171-198 (2011).

12. *Summary of the Judgement for Enver Hadžihasanović and Amir Kubura*. ICTY (July 28, 2011).

13. David Zucchino, THUNDER RUN 189 (Grove Press 2004). See also Eric Wright, GENERATION KILL, 249 (Berkley Publishing Group 2004).

14. David Malet, FOREIGN FIGHTERS: TRANSNATIONAL IDENTITY IN CIVIL CONFLICT (Oxford University Press 2013); and Thomas Hegghammer, *The Rise of Muslim Foreign Fighters: Islam and the Globalization of Jihad*, 35 INTERNATIONAL SECURITY no. 3 at 53–91 (2010).

15. See, e.g., *Foreign Fighters Under International Law*, THE GENEVA ACADEMY (2014), https://www.geneva-academy.ch/joomlatools-files/docman/files/Publications/Academy%20Briefings/Foreign%20Fighters_2015_WEB.pdf; see also, Aaron Zelin, *Foreign Jihadists in Syria: Tracking Recruitment Networks* (Dec. 19, 2013), <http://www.washingtoninstitute.org/policy-analysis/view/foreign-jihadists-in-syria-tracking-recruitment-networks>. And when Resolution 2178 was debated at the Security Council, the UN Secretary-General estimated the number of foreign fighters at 13,000. See Press Release, Security Council, *Security Council Unanimously Adopts Resolution Condemning Violent Extremism, Underscoring Need to Prevent Travel, Support for Foreign Terrorist Fighters* (Sept. 24, 2014), www.un.org/News/Press/docs/2014/sc11580.doc.htm.

16. Joseph A. Carter, et. al, *Measuring Importance and Influence in Syrian Foreign Fighters Networks*, INTERNATIONAL CENTRE FOR THE STUDY OF RADICALISATION 19 (March 2014), <http://www.washingtoninstitute.org/policy-analysis/view/foreign-jihadists-in-syria-tracking-recruitment-networks>.

17. Adam Taylor, *Could Syria’s Islamist Fighters Hit Europe?*, THE WASHINGTON POST, (July 24, 2014), https://www.washingtonpost.com/news/worldviews/wp/2014/07/24/could-syrias-islamist-fighters-hit-europe/?utm_term=.ed22e143ddb8.

legal conundrums have emerged. The issue of ‘the return of ISIL families’ re-entered the public consciousness after an interview with, then-British citizen,¹⁸ Shamima Begum.¹⁹ The question of whether ISIL families should be allowed to return to their countries of origin has proven divisive. Equally as divisive are questions surrounding what to do with ISIL fighters who surrendered as the “caliphate” was expelled from the last areas it controlled. Currently, Kurdish forces hold thousands of suspected ISIL fighters in captivity.²⁰ The feeble security situation in North East Syria following the Turkish operation on Kurdish controlled territory further outlines the urgency of finding a solution to address the issue. The Syrian Kurdish “Autonomous Administration” has expressed its inability to hold fighters indefinitely. Furthermore, the “Administration” called for assistance and for extradition of foreigners to their respective countries,²¹ all the while knowing that those fighters are highly valuable to western states. As such, foreign fighters, in particular those who are citizens of European states could be used by the detaining authorities as a bargaining chip to achieve political objectives. For example, the Kurdish administration might attempt to gain some level of political recognition as an independent, or semi-independent entity, in exchange for detaining and eventually conducting legal proceedings against the fighters. The majority of states, however, remain reluctant at the prospect of prosecuting fighters domestically, suggesting that concerns for national security ought to prevail.

Historically, laws aiming to prosecute crimes against humanity, genocide, and war crimes were established to “end impunity” as humanity was recovering from the traumas of World War II.²² Since then, *some*

18. Dr. Rumuana van Ark, *British Citizenship Revoked, Bangladeshi Citizenship Uncertain – What Next for Shamima Begum?* (March 11, 2019), <https://icct.nl/publication/british-citizenship-revoked-bangladeshi-citizenship-uncertain-what-next-for-shamima-begum/>.

19. Transcript of IS bride Shamima Begum: ‘It was nice at first, like in the videos’, (Feb. 20, 2019). <https://news.sky.com/story/is-bride-shamima-begum-full-transcript-i-did-have-a-good-time-there-11640278>

20. *Syrian Defence Forces ‘Cannot’ Detain IS Fighters Without Foreign Help*, FORCES NETWORK (Feb. 22, 2019), www.forces.net/news/syrian-defence-forces-cannot-detain-fighters-without-foreign-help. See also, *Les djihadistes étrangers, aidez-nous à les juger en Syrie!*, 24heures, (28, May 2019, 2019). https://www.tdg.ch/monde/djihadistes-etranagers-aidez-nous-juger-syrie/story/28443464?fbclid=IwAR2HEsc-sppOIH8uTmJK_Yo7nO6h6PpgTPkYgqGMLUsIPVuZDEpepSFu6Y

21. Michael Peel *Europe battles problem of returning ISIS fighters*, FINANCIAL TIMES (Feb. 19, 2019), <https://www.ft.com/content/acf5a70e-3384-11e9-bd3a-8b2a211d90d5>.

22. *The Geneva Conventions and their Additional Protocols* (April 17, 2019), <https://www.icrc.org/en/war-and-law/treaties-customary-law/geneva-conventions>.

perpetrators of the worst crimes appeared in front of courts and were prosecuted – with respect to due process and the rule of law.²³ This paper examines the jurisdictional confusion arising from the extraterritorial element of crimes ISIL fighters allegedly committed. The transnational nature of the crimes raises several legal concerns, in terms of competent jurisdiction. Allegedly, jihadist fighters who joined the ranks of ISIL plotted to commit crimes in Europe (terrorism),²⁴ but also allegedly committed war crimes,²⁵ crimes against humanity,²⁶ and genocide.²⁷ The atrocity of these crimes and their brazen documentation by the propaganda wing of the “caliphate”²⁸ and the rhetoric surrounding their perpetration both at home and abroad seem to have eclipsed the existence of laws conceived *ab initio* to sanction “the worst crimes”.²⁹

The scope of this research is restricted to cases of ISIL fighters currently in custody of the “Autonomous Administration” in Syria. It does not examine the cases of fighters³⁰ that joined other armed groups, such as

23. Tessa McKeown, *The Nuremberg Trial: Procedural Due Process at the International Military Tribunal*, 45 VICTORIA UNIV. L. REV., 109-132. (2014).

24. *Mehrjährige Haftstrafen im IS-Prozess*, NDR (Archived from original on March 12, 2018), retrieved September 9, 2018, https://www.ndr.de/nachrichten/niedersachsen/braunschweig_harz_goettingen/Drei-Jahre-Haft-fuer-Islamisten-aus-Northeim.prozess4252.html

25. *Nimrud: Outcry as IS bulldozers attack ancient Iraq site*, BBC NEWS (March 6, 2015), <https://www.bbc.com/news/world-middle-east-31760656>.

26. Zahra Radwan and Soe Blumenfeld, Op-Ed, *Surging Violence Against Women in Iraq*, IPS NEWS (n.d.), retrieved June 07, 2019, <http://www.ipsnews.net/2014/06/op-ed-surging-violence-against-women-in-iraq/>; see also Terrence McCoy, *ISIS, beheadings and the success of horrifying violence*, WASHINGTON POST, (June 13, 2014), https://www.washingtonpost.com/news/morning-mix/wp/2014/06/13/isis-beheadings-and-the-success-of-horrifying-violence/?utm_term=.113cd751d313.

27. See UN Commission of Inquiry on Syria: ISIS is committing genocide against the Yazidis, UNHRC (2016), <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=20113&LangID=E>

28. Charlie Winter, *Apocalypse, later: A longitudinal study of the Islamic State brand*. 35 CRITICAL STUDIES IN MEDIA COMMUNICATION, no. 1 at 103-121 (2018).

29. Kofi Annan, *Advocating for an International Criminal Court*, 21 FORDHAM INT'L L.J. 363, 364 (1997).

30. This paper will adopt the definition of ‘foreign terrorist fighters’ set forth by the United Nations Security Council Resolution, 2178 (2014) (S.C. Res. 2178 6 (a):

“nationals who travel or attempt to travel to a State other than their States of residence or nationality, and other individuals who travel or attempt to travel from their territories to a State other than their States of residence or nationality, for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts, or the providing or receiving of terrorist training”.

the People's Protection Units (commonly known as the YPG),³¹ the ranks of the Free Syrian Army (FSA), or the ranks of Jabhat al-Nusra.³² Practical reasons justify the adoption of a restrained scope of research, as this paper aims to present functional recommendations in the urgent matter of the thousands of prisoners currently in Syrian Kurdish force's captivity in Eastern Syria.

This paper will therefore seek to identify the competent jurisdiction to prosecute the above-mentioned crimes in order to rectify the legal challenges posed by the question of jurisdiction, which is often clouded by the cacophonous public opinions surrounding the controversy of 'returning jihadists.' The paper seeks to establish a genealogy of obstacles in instituting legal proceedings against ISIL fighters. The examination of the status quo, considering the precarious security situation in North East Syria, aims to urge states to imminently work towards prosecuting suspected ISIL fighters. In principle, national courts could prosecute alleged crimes committed by ISIL fighters (*Section 1*). Nonetheless, the nature of the crimes opens up the possibility of a jurisdiction of international tribunals (*Section 2*).

I. EXAMINING NATIONAL COURTS' JURISDICTION

The legal framework instituted by United Nations Security Council Resolution 2178 (2018) encourages states to expand their national legal frameworks to prosecute "foreign terrorist fighters." Furthermore, the recent increase in terrorist attacks on European and American soil encouraged many Parliaments to adopt legislation aiming to prosecute "foreign terrorist fighters". Given the transnational nature of crimes committed by ISIL, it is often difficult to determine the competent jurisdiction.

31. Michael Safi, *Foreign fighter case dropped against man accused of trying to fight with Kurdish rebel*, THE GUARDIAN, (Feb. 9, 2016), <https://www.theguardian.com/australia-news/2016/feb/09/foreign-fightercase-dropped-against-man-accused-of-trying-to-fight-with-kurdish-rebels>; see also, Landelijk Parket, *OM seponeert strafzaak tegen verdachte van moord IS-strijders*. OPENBAAR MINISTERIE (June 21, 2016), <https://www.om.nl/actueel/nieuwsberichten/@94906/seponeert-strafzaak>

32. "Based on analysis of the social media activity of 190 Western foreign fighters, the International Centre for the Study of Radicalization concluded that almost 55% belonged to Islamic State, and just under 14% to al-Nusra." *Foreign Fighters Under International Law*, The Geneva Academy (2014) [https://www.geneva-academy.ch/joomlatools-files/docman-files/Publications/Academy%20Briefings/Foreign%20Fighters 2015 WEB.pdf](https://www.geneva-academy.ch/joomlatools-files/docman-files/Publications/Academy%20Briefings/Foreign%20Fighters%202015%20WEB.pdf) (citing) Joseph A. Carter, et. al, *Measuring Importance and Influence in Syrian Foreign Fighters Networks*, INTERNATIONAL CENTRE FOR THE STUDY OF RADICALISATION 19 (March 2014),

A. Concurrent Jurisdictions

1. Territorial Jurisdiction

Following the amplification of terrorist attacks globally, legislation aiming to prosecute ISIL fighters consistently gathered unanimous support in various legislative bodies. Some argued that legislation had to adapt to a “new kind of war,”^{33 34} and upheld that the shifting nature of terrorism could not “be forced into the mold of existing international law”.³⁵

Yet, the international legal framework has been constantly adapting. A notable example is Security Council Resolution 2178, “memorandum for a more effective response to the Foreign Terrorist Fighter Phenomenon”.³⁶ Courts have also adopted novel approaches to prosecute terrorism related crimes. On 18 May 2012, the Special Court for Sierra Leone convicted as Charles Taylor for aiding, abetting and planning the commission of, among other things, acts of terrorism.³⁷ Likewise, the Special Tribunal for Lebanon issued landmark decisions defining “terrorism” and “mode of participation”.³⁸ Still, the international legal framework was never designed with the aim of supplanting national

33. Dr. Christophe Paulussen, *Testing the Adequacy of the International Legal Framework in Countering Terrorism: The War Paradigm*, ICCT Research Paper 1 (Aug. 2012).

34. See, e.g., Nico Schrijver and Larissa van den Herik, *Counter-terrorism strategies, human rights and international law: meeting the challenges, Final Report Poelgeest Seminar*, 54 NETHERLANDS INT’L L. REV. REVIEW no. 3, 571-587 (2007); Elco Kessels and Anno M. Bunnik, *Ten Years after 9/11: Evaluating a Decade of Intensified Counter-Terrorism*, Report International Launch Conference ICCT – The Hague 7 (Feb. 2010), <http://www.icct.nl/download/file/ICCT-Launch-Conference-Report.pdf> <http://www.grotiuscentre.org/resources/1/Leiden%20Policy%20Recommendations%201%20April%202010.pdf>

35. William Lietzau, *Combating Terrorism: Law Enforcement or War?*, TERRORISM AND INTERNATIONAL LAW: CHALLENGES AND RESPONSES. Contributions presented at the “Meeting of independent experts on Terrorism and International Law: Challenges and Responses. Complementary Nature of Human Rights Law, International Humanitarian Law and Refugee Law,” organized by the International Institute of Humanitarian Law, Sanremo, 30 May – 1 June 2002 and the “Seminar on International Humanitarian Law and Terrorism,” organized by the International Institute of Humanitarian Law in co-operation with the George C. Marshall Center, Sanremo, 24 26 September 2002, <http://www.iihl.org/iihl/Album/terrorism-law.pdf> at 80.

36. S.C. Res. 2178, (September, 2014).

37. Prosecutor v. Charles Ghankay Taylor (2012), Case No. SCSL-03-01-T at ¶ 6994.

38. *Special Tribunal for Lebanon Issues Landmark Ruling on Definition of Terrorism and Modes of Participation*, 16 AMERICAN SOCIETY OF INTERNATIONAL LAW no. 6 (4 March 2011), <https://www.asil.org/insights/volume/15/issue/6/special-tribunal-lebanon-issues-landmark-ruling-definition-terrorism-and>.

frameworks, rather the international system was conceived as a subsidiary legal structure.³⁹

As the “caliphate” declared parts of Syria and Iraq as its territory and occupied regions such as al-Raqqa and al-Mosul, it allegedly committed crimes in both states.⁴⁰ Iraqi and Syrian courts could therefore primarily exercise jurisdiction over said crimes. Article 6 of the Iraqi Criminal Code states that “the provisions of this Code are enforceable in respect of offences committed in Iraq”.⁴¹ According to the Criminal Code, an offense is considered to have been committed in Iraq if “the consequences of the act are realized or are intended to be realized there.”⁴² As the Iraqi Criminal Code was last amended on March 14 2010, it does not specifically implement resolution 2178. Nonetheless, it contains the basic framework allowing for the prosecution of Iraqis for some of the crimes allegedly committed between 2014 and 2019. Interestingly, Article 21 of the same code excludes terrorist offenses from the category of political crimes, in order to allow indicted terrorists to receive the death penalty.⁴³ Since Article 22 excludes the death penalty for “political crimes,”⁴⁴ ISIL fighters that appear in front of Iraqi courts could face the death penalty.

The Syrian Criminal Code states under Article 15, “the provisions of the Syrian law are applicable to all crimes committed on Syrian territory”.⁴⁵ Likewise, crimes committed by Syrians should be investigated by Syrian authorities, in accordance with legislative decree 148 which dates back to 22 June 1949. Article 304 specifically criminalizes “terrorist activities” and defines them as acts that aim to create a situation of fear using explosives, military equipment, flammable

39. Article 17 of the Rome Statute.

40. See e.g., UN Commission of Inquiry, *Syrian victims reveal ISIS’s calculated use of brutality and indoctrination* (November 2014) (<https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=15295&LangID=E>). See also UN Commission of Inquiry on Syria, *ISIS is committing genocide against the Yazidis* (16 June 2016). (<https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=20113&LangID=E>)

41. Iraq: Penal Code [Iraq], No. 111 of 1969 (July 1969).

42. *Id.* at Art. 6.

43. *Id.* at Art. 21.

44. *Id.* at Art. 22.

45. Translated by the author from Arabic, Syrian Criminal Code Legislative Decree No. 148 - Penal Code (June 22, 1949), https://www.ilo.org/dyn/natlex/natlex4.listResults?p_lang=en&p_country=SYR&p_count=327&p_classification=01.04&p_classcount=6.

objects, and biological or chemical weapons.⁴⁶ Article 305 of the same code provides that in some cases the sentence for those crimes could be the death penalty.⁴⁷ Articles 9⁴⁸ and Article 19⁴⁹ of the Iraqi and Syrian criminal codes respectively state that the provisions of the code apply in cases in which foreigners committed crimes if they aimed to disturb the internal or external security of the state. The so-called “caliphate” claimed territories of both Iraq and Syria as its own and was responsible for numerous attacks on both army and civilian institutions alike.⁵⁰ It can be inferred *prima facie* that the crimes hinder the internal and external security of both states. Therefore, Iraqi and Syrian authorities could, in principle, institute legal proceedings against ISIL fighters regardless of their nationality. However, ISIL fighters allegedly committed crimes against humanity, war crimes and genocide⁵¹, which are not defined in neither the Iraqi nor the Syrian criminal codes. Therefore, fighters who allegedly committed the worst atrocities could be sentenced for committing an “ordinary crime”. Failing to adequately name and sanction crimes would not only set a dangerous precedent but would also yield an imperfect justice for the victims.

On May 25, 2019, an Iraqi court sentenced three French citizens to death. Syrian Kurdish forces fighting against ISIL in Eastern Syria captured French nationals and delivered them to the Iraqi Government.⁵² Instead of repatriating French citizens to judge them in France, the French Government did not oppose trial of its nationals in Iraqi courts all the while knowing that French citizens risked the death penalty. Minister of Foreign Affairs Jean-Yves le Drian declared that the trials were fair and respected due process,⁵³ even though he also declared that France opposed the death

46. *Id.* at Art. 304.

47. *Id.* at Art. 305.

48. Iraqi Criminal Code, *supra* n. 41, at Art. 9.

49. Syrian Criminal Code, *supra* n. 45, at Art. 19.

50. *ISIS rebels declare ‘Islamic state’ in Iraq and Syria*, BBC NEWS (June 30, 2014), <https://www.bbc.com/news/av/world-middle-east-28091637/isis-rebels-declare-islamic-state-in-iraq-and-syria>.

51. Office of the Prosecutor, ICC, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the alleged crimes committed by ISIS, 8 April 2015.

52. *Iraq sentences three French citizens to death for joining ISIS*, THE GUARDIAN (May 26, 2019), <https://www.theguardian.com/world/2019/may/26/iraq-sentences-three-french-citizens-to-death-for-joining-isis>.

53. *Les procès des djihadistes français condamnés à mort en Irak sont « équitables »*, *estime Le Drian*, L’OBS (May 29, 2019), <https://www.nouvelobs.com/monde/20190529.OBS13670/les-proces-des-djihadistes-francais-condamnes-a-mort-en-irak-sont-equitables-estime-le-drian.html>.

penalty “in all places and at all times”.⁵⁴

The mere transfer of prisoners from a state to another where there are serious risks of human rights violations is a violation of international law. The jurisprudence of the European Court of Human Rights (ECHR), national courts, and the United Nations Committee Against Torture are consistent with one another. They unequivocally prohibit removal from the territory of a state if there is a clear risk that the recipient state would violate their fundamental human rights. Article 3 of the UN Convention Against Torture states: “no State Party shall expel, return (‘refouler’) or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture.”⁵⁵ While states attempted to argue that the non-refoulement obligation should be balanced with the increased risk terrorism poses, the ECHR rejected the reasoning in *Saadi v. Italy*, on 28 February 2008.⁵⁶

Evidently, the Syrian Kurdish Administration is not a party to the European Convention on Human Rights. Nonetheless, French citizens that were transferred to Iraq by Syrian Kurdish forces should in principle be able to benefit from the protection granted by the Convention, especially if French authorities did little to prevent the transfer of suspects from Syria to Iraq. In a similar case, British forces handed over an Iraqi detainee to Iraqi authorities. In response, the ECHR in *al-Saadoon and Mufdhi v. United Kingdom*⁵⁷ stated that the non-refoulement obligation also applies to in-state transfers of individuals detained abroad during an international military operation. Transfer from the Syrian Kurdish-controlled areas in Eastern Syria to Iraq should thus also be prohibited.

The Committee Against Torture also insisted that state parties should apply Articles 2 and 3 to transfers of a detainee within a state party’s custody to the custody of any other state.⁵⁸ The Committee Against Torture also recommended that the State party should “make public the result of all investigations into alleged conduct by its forces in Iraq and

54. *France opposes death penalty for French ISIS fighters in Iraq*, THE GUARDIAN (May 27, 2019), <https://www.theguardian.com/world/2019/may/27/france-opposes-iraq-death-penalty-against-three-french-isis-members>.

55. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984

56. Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, UN doc. A/62/263, §§50–1 (2007).

57. *Al-Saadoon and Mufdhi v. UK* (2010) (ECHR).

58. Committee against Torture, Conclusions and Recommendations: UK, UN doc. CAT/C/CR/33/3, §§4(b) and 5(e) (Dec. 10, 2004). *See also*, Conclusions and Recommendations: USA, UN doc. CAT/C/USA/CO/2, §15 (July 26, 2004).

Afghanistan, particularly those that reveal possible actions in breach of the Convention, and provide for independent review of the conclusions where appropriate”.⁵⁹ In principle, this obligation should also be upheld in the case of fighters captured in Syria, their transfer from the custody of a non-state armed group to the custody of a state should in principle respect Article 3 of the Convention, and thus fighters should not be tried in Iraq.

2. *Repatriation and Extraterritorial Jurisdiction*

The International Criminal Tribunal for the Former Yugoslavia (ICTY) defined an armed conflict as “a resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state”⁶⁰ In presence of an armed conflict, international humanitarian law (IHL) applies. However, IHL does not apply in the same manner in “international armed conflicts” (IAC) and in “non-international armed conflicts” (NIAC)⁶¹

A NIAC is a situation of “regular and intense armed violence between the armed forces of a state and one or more organized armed non-state groups, or between such groups”.⁶² In a NIAC, international humanitarian law does not grant prisoner of war (POW) status to captured fighters, but merely accords material protection to those “who do not or no longer take part in hostilities”.⁶³ Adopting the fragmentation approach, the conflict against ISIL in Syria and Iraq⁶⁴ is a NIAC.⁶⁵ Therefore, prisoners captured by Kurdish forces in Syria cannot benefit from POW status. Accordingly, Article 118, which provides that “*prisoners of war shall be released and repatriated without delay after the cessation of active hostilities,*”⁶⁶ is

59. *Id.*

60. Prosecutor v. Tadic, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, par.70.

61. Tom Gal, *Legal Classification of the Conflict in Syria*, In H. Moodrick-Even Khen, N. Boms, & S. Ashraph (Eds.), *The Syrian War: Between Justice and Political Reality*, 29 (2019).

62. *Foreign Fighters under International Law*, *supra* n. 15, at 15.

63. The Third Geneva Convention, art. 3, 1949.

64. Human Rights Office of the High Commissioner for Human Rights, United Nations Assistance Mission in Iraq, *Report on the Protection of Civilians in the Non-International Armed Conflict in Iraq: 5 June – 5 July 2014*

65. Terry D. Gill, *Classifying the Conflict in Syria*, 92 INT’L L. STUD. 353 (2016).

66. Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* 255; J. B. Bellinger III and V. M. Padmanabhan, *Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law*, 104 AM. J. INT’L L., Vol. 201ff (2011).

inapplicable to ISIL fighters captured in Syria.

During the Iraq war in 2003, the Bush administration went to extensive lengths⁶⁷ to demonstrate that the conflict between al-Qaeda and its associated forces qualifies as a “global war on terror” and is therefore a NIAC. ⁶⁸ In the fight against ISIL, fighters were mainly comprised of Syrian Kurds to the west of the “caliphate”, and of Iraqi or Kurdish Iraqi forces to the east of the “caliphate”, which were all supported by coalition forces.⁶⁹ Even though coalition forces provided assistance, it is well-established in international humanitarian law that despite a third-party states’ assistance to a country or group, a conflict remains classified as an NIAC.⁷⁰ Therefore, POW status cannot be granted to ISIL fighters in Syria, and as such, fighters cannot be repatriated to their countries of origin based on the provisions of Article 118 of the Third Geneva Convention.⁷¹

However, national law might provide a different legal basis for instituting domestic legal proceedings against fighters. For example, the French Criminal Code, under Article 113-6, provides that French law is applicable to any crime committed by a French citizen outside of France, also known as the active nationality principle.⁷² Establishing extraterritorial jurisdiction for crimes committed by a states’ citizens allows countries to sanction their own nationals when they commit crimes overseas. This legislation also allows for the repatriation of citizens in instances of distrust in the judiciary system of the state in which a crime was committed. Likewise, in Article 18 U.S. Code § 7, the United States defines “special maritime and territorial jurisdiction” as “any place outside the jurisdiction of any nation with respect to an offense by or against a national of the United States”.⁷³ US citizens that joined the ranks of ISIL

67. See, Andrew Tully, U.S.: *Washington Debates Application Of Geneva Conventions*, Radio Free Liberty, (July 11, 2006), <https://www.rferl.org/a/1069767.html>.

68. J. F. Addicott, *Rightly Dividing the Domestic Jihadist from the Enemy Combatant in the “War Against Al-Qaeda” – Why It Matters in Rendition and Targeted Killing*, 45 CASE W. RESERVE J. INT’L L., Vol. 45 259ff (2012–13)

69. U.S. Department of State, *The Global Coalition To Defeat ISIS*, <https://www.state.gov/bureaus-offices/bureaus-and-offices-reporting-directly-to-the-secretary/the-global-coalition-to-defeat-isis/>.

70. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

71. See J. Pejic, *Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence*, IRRRC, no. 858 at 375ff (2005).

72. French Criminal Code, Article 113-6, https://www.legifrance.gouv.fr/affichCodeArticle.do;jsessionid=EE2B712386E29A4C1A81D538721E5164.tplgfr37s_1?idArticle=LEGIARTI000006417191&cidTexte=LEGITEXT000006070719&dateTexte=19940301&categorieLien=id&oldAction=&nbResultRech=.

73. See 18 U.S.C.A. § 7 (2001).

can thus appear in front of Iraqi or Syrian courts as well as American courts. In concern of crimes committed by French and American ISIL fighters abroad, there are two competent jurisdictions: jurisdiction in the location of the crime's commission, and French or American courts. This creates a positive conflict of jurisdiction, a situation in which two or more courts have jurisdiction to prosecute suspects and investigate crimes.⁷⁴ Even though French ISIL fighters and American ISIL fighters have joined the same organizations and allegedly committed the same crimes, they have not received similar treatment. At date of writing, French ISIL fighters remain detained in Syrian Kurdish prisons, while the majority of American fighters were repatriated to the United States.⁷⁵

Certain legal frameworks were primarily drafted to prevent citizens from journeying to conflict areas;⁷⁶ passport suspension measures in Britain,⁷⁷ United States,⁷⁸ and Australia,⁷⁹ are particularly illustrative. (Discussing Sec. 4 Authority to Deny or Revoke Passport and Passport Card). States attempt to prevent their citizens from leaving their countries to fight in wars abroad. Once fighters have managed to evade domestic prosecution and acquire military "experience," states may consider them as threats to national security. As a result, they may become *persona non grata* in their countries of origin, a measure epitomized by drastic actions, including citizenship revocation.⁸⁰

74. For more on positive conflicts of jurisdiction in criminal proceedings see Gerard Coffey, *Resolving Conflicts of Jurisdiction in Criminal Proceedings: Interpreting Ne Bis in Idem in Conjunction with the Principle of Complementarity*, 4 NEW J. EUROPEAN CRIM. L., 1, 59–81 (2013).

75. Ryan Browne and Evan Perez, US transports another alleged American ISIS fighter back from Syria to face trial, *CNN* (1 August 2019), <https://edition.cnn.com/2019/08/01/politics/transport-american-isis-suspect-syria/index.html>

76. *Foreign Fighters under International Law*, *supra* n. 15, at 59.

77. See House of Commons, Home Affairs Committee, Counter-terrorism, Seventeenth Report of Session 2013-14, May 2014, at 35–6. Noting the lack of external scrutiny, the Committee 'recommends that the Home Secretary report quarterly on its use to the House as is currently done with TPIMs [Terrorism and Prevention Investigation Measures] and allow the Independent Reviewer of Terrorism Legislation to review the exercise of the Royal Prerogative as part of his annual review'. At: www.publications.parliament.uk/pa/cm201314/cmselect/cmhaff/231/231.pdf

78. Peter Spiro, *ISIL Foreign Fighters: You Can't Take Their Citizenship. Can You Take Their Passports?*, OPINIO JURIS (September 23, 2014), opiniojuris.org/2014/09/15/isil-foreign-fighters-cant-take-citizenship-can-take-passports.

79. See Tony Abbott, Prime Minister of Australia, *Statement on the occasion of the Security Council summit leading to the adoption of Resolution 2178* (date), www.un.org/News/Press/docs/2014/sc11580.doc.htm.

80. Sangita Jaghai, *Citizenship deprivation: differential treatment or discrimination?*

Extraterritorial jurisdiction of national courts for crimes committed by nationals abroad is far from being a groundbreaking legal theory. Nonetheless, in the case of ISIL fighters, prosecutors conveniently ignore the legal framework. The positive conflict of jurisdiction allows some authorities to evade prosecuting suspects themselves and thus from repatriating their citizens. It is therefore convenient that French fighters face trials in Iraq rather than in France. A plethora of means exist to prosecute returning fighters, yet many fighters remain awaiting trial, in part due to varying limitations such as legal considerations and national security concerns.

B. Political Limitations to Prosecuting ISIL Fighters

1. Due Process and Legitimacy Considerations

Given the convoluted political situation in Syria and Iraq, considerations of lack of due process and questioned legitimacy of the Syrian Government could constitute limitations from the outset. The disputed legitimacy of the Syrian Government complicates the prosecution of fighters in Syrian courts. France recognized the Syrian National Council “as the sole legitimate representative of the Syrian people.”⁸¹ After a meeting between the Syrian Opposition and the United Kingdom Foreign Secretary William Hague, the latter declared that the “Assad Regime [. . .] lost its legitimacy in the eyes of the wider world”.⁸² Likewise, Hillary Clinton at the time US Secretary of State declared the “Syrian National Council [a] leading and legitimate representative of Syrians seeking a peaceful democratic transition”.⁸³ Absent recognition, it is unlikely that states would allow their nationals to appear in front of courts of the Syrian Government.

Non-governmental organizations and various United Nations bodies made numerous allegations of violations of human rights norms and due

15 FEBRUARY 2018 | EUROPEAN NETWORK ON STATELESSNESS (Feb. 15, 2018), <https://www.statelessness.eu/blog/citizenship-deprivation-differential-treatment-or-discrimination>.

81. *Syria: France backs anti-Assad coalition*, BBC NEWS (Nov. 13 2012), <https://www.bbc.com/news/world-middle-east-20319787>.

82. *Foreign Secretary meets Syrian opposition*, Gov.Uk, (Nov. 21 2011), <https://www.gov.uk/government/news/foreign-secretary-meets-syrian-opposition>

83. Karen de Young, *Clinton meets with Syria opposition*, WASHINGTON POST, (Dec. 6, 2011), https://www.washingtonpost.com/world/middle-east/clinton-meets-with-syria-opposition/2011/12/06/gIQApzQ9ZO_story.html?utm_term=.df03a4bac6db.

process in the different layers of the Syrian judicial system.⁸⁴ Photos that depicted blatant human rights abuses leaked from Syrian prisons led to the adoption of a bipartisan bill in the US House of Representatives “Cesar, Syrian Civilian Protection Act”. The bill aims to financially sanction Syrian Government officials. As of 2019, the act has become part of the National Defense Authorization Act for Fiscal Year 2020 (S1790),⁸⁵ which was signed by the President into law, in December 2019.⁸⁶ It is therefore realistic to assume that prosecution of foreign and national fighters alike by Syrian courts would raise serious concerns about the lack of due process and violation of human rights norms.

Likewise, compliance with due process of law in Iraqi courts in cases relating to ISIL fighters is questionable.⁸⁷ Zeid Ra’ad al-Hussain, UN High Commissioner for Human Rights⁸⁸ “expressed serious concerns at the creation of a committee tasked with making recommendations to accelerate implementation of death sentences in Iraq”.⁸⁹ In a landmark case before the European Court of Human Rights, *Soering v. United Kingdom*, the Court held that states would violate the convention if they consciously deliver a fugitive – no matter how heinous the crime he is suspected of committing – to another country in which a belief exists that a risk of torture is a serious concern.⁹⁰ If European states, which ratified the European Convention on Human Rights implicitly, allow their nationals to be transferred to Iraq to face trials, they could be in violation of the Convention. If due process of law is to be respected in the trials of ISIL fighters, trials in Syrian and Iraqi courts should not be an option. Nevertheless, public opinion seems in favor of prosecuting suspected fighters abroad, notwithstanding due process, to preserve national security. As such, Governments are deploying very little effort to

84. *Syria: Human Slaughterhouse: Mass Hangings And Extermination At Saydnaya Prison, Syria*, Amnesty International (Feb. 7, 2017), <https://www.amnesty.org/en/documents/mde24/5415/2017/en/>.

85. S.1790 - National Defense Authorization Act for Fiscal Year 2020, www.congress.gov/bill/116th-congress/senate-bill/1790

86. *Id.*

87. Human Rights Watch, *Iraq 2018 World Report*, (2019), <https://www.hrw.org/world-report/2019/country-chapters/iraq>.

88. Served as United Nations High Commissioner for Human Rights from 2014 to 2018.

89. *Iraq: Fast-tracking executions will only accelerate injustice – Zeid Ra’ad Al Hussain*, OHCHR (Aug. 1, 2016), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20324&LangID=E>.

90. *Soering v. United Kingdom* 161 Eur. Ct. H.R. (ser. A) (1989)

repatriate them. Some states are even attempting to secure prosecutions in Iraqi courts in clear violation of international law.

Given the nature of the crimes allegedly committed by ISIL fighters, some courts could also exercise universal jurisdiction regardless of personal and territorial links to respective and eventual cases.⁹¹ Nevertheless, it is unlikely that Governments would allow the transfer of thousands of fighters to domestic courts due to national security concerns. Further, states that have courts capable of exercising universal jurisdiction are generally those who are reluctant to repatriate their nationals to prosecute them domestically (such as Belgium, Spain, France, and the United Kingdom). Though punctual trials addressing crimes committed by ISIL have started in Germany,⁹² it is improbable that those trials will be expanded to include thousands of ISIL fighters.

2. *National Security Considerations*

Governments have feared the effects of blowback ever since jihadists started migrating to engage in belligerent activities overseas.⁹³ States are naturally reluctant to welcome highly trained fighters home, especially if they adhere to an aggressive belligerent doctrine. For example, Aburajik Abu Bakar Janjalani, who previously fought in Afghanistan, created the Abu Sayyaf group upon returning to the Philippines.⁹⁴ Likewise, Abu Mohamad al-Jolani, current leader of Hay'at Tahrir al-Sham (HTS) in Syria, had previously joined al-Qaeda in Iraq to fight off the US invasion in 2003, and provided support to Jund al-Sham in Lebanon.⁹⁵

Presumably, foreign fighters ultimately want to attack the 'West'. Yet, research shows that many foreign fighters move to other battlefields or lead relatively pacifist lives in their country of origin upon returning.⁹⁶

91. Tanya Mehra, *Bringing (Foreign) Terrorist Fighters to Justice in a Post-ISIS Landscape Part II: Prosecution by Foreign National Courts*, ICCT (2018)

92. Alexandra Lily Kather and Alexander Schwarz, *First Yazidi Genocide Trial Commences in Germany*, Just Security (2020), <https://www.justsecurity.org/69833/first-yazidi-genocide-trial-commences-in-germany/>

93. Vahid Brown, *Foreign Fighters in Historical Perspective: the Case of Afghanistan* 27, 30–1 (2008), in Brian Fishman, ed., *Bombers, Bank Accounts, and Bleedout: Al-Qa'ida's Road In and Out of Iraq* (West Point, NY: Combating Terrorism Center, 2008).

94. *Abu Sayyaf History*, U.S. Pacific Command (Sept. 21, 2006), archived from the original on Jan. 23, 2009.

95. Qassim Adul-Zahra and Zeina Karam, *Elusive Al-Qaeda leader in Syria stays in shadows*, TIMES OF ISRAEL (Nov. 4, 2013), <https://www.timesofisrael.com/elusive-al-qaeda-leader-in-syria-stays-in-shadows/>

96. See, e.g., *Blowback Revisited*, FOREIGN AFFAIRS (Nov./Dec. 2005),

Nonetheless, even if it were a minor risk, states will remain reluctant to welcome returning fighters. Indeed, the most gruesome attacks were committed by a handful of people on European soil. For example, seven perpetrators committed one of the deadliest attacks ever to take place on French soil, claiming the lives of 130 persons.⁹⁷ On 12 June 2016, a US citizen killed 49 people in Orlando, Florida after pledging allegiance to ISIL.⁹⁸ Even if the majority of ISIL fighters that return to their states of citizenship do not engage in belligerent activities, the risk the minority of fighters pose remains serious and will deter states from repatriating fighters to their states of citizenship.

If militants do return home, prosecution may be difficult or impossible, even for suspected ISIL fighters. Proving *actus reus* on the battlefield to the standards needed in a European court might be difficult.⁹⁹ Gilles de Kerchove, EU Counter-Terrorism Coordinator, confirms that evidence of crimes committed in Syria and Iraq is “difficult to obtain and collect”.¹⁰⁰ However, evidence gathering in the case of ISIL fighters may be feasible as numerous self-incriminating videos and photographs were circulated on various social media platforms.¹⁰¹ Further, nationals of European countries were often depicted in videos for practical reasons, such as language considerations and to serve as propaganda for recruitment purposes. Tribunals have in the past used open source content¹⁰² to issue arrest warrants. For example, in August 2017, the

<https://www.foreignaffairs.com/articles/afghanistan/2005-10-01/blowback-revisited>.

97. Jean Charles Brisard, *The Paris Attacks and the Evolving Islamic State Threat to France*, 8 CTC SENTINEL no. 11 (Nov./Dec. 2015), <https://ctc.usma.edu/the-paris-attacks-and-the-evolving-islamic-state-threat-to-france/>

98. Ralph Ellis, Ashley Fantz, Faith Karimi, and Elliott C. McLaughlin, Orlando shooting: 49 killed, shooter pledged ISIS allegiance (June 13, 2016), <https://edition.cnn.com/2016/06/12/us/orlando-nightclub-shooting/index.html>

99. Michael Peel, *Europe battles problem of returning ISIS fighters*, Fin. Times, (Feb. 18, 2019) <https://www.ft.com/content/acf5a70e-3384-11e9-bd3a-8b2a211d90d5>.

100. Council of the European Union, EU Counter-Terrorism Coordinator, *Foreign fighters and returnees*, 15715/14, at 3 (Nov. 24, 2014), <http://statewatch.org/news/2014/nov/eu-council-foreign-fighters-discussion-paper15715-14.pdf>.

101. Piotr Bąkowski and Laura Puccio, European Parliamentary Research Service, *Foreign fighters – Member State responses and EU action* at 8, Briefing (March 2016), <http://www.europarl.europa.eu/EPRS/EPRS-Briefing-579080-Foreign-fighters-rev-FINAL.pdf>. See also, Charlie Winter ‘Media Jihad: The Islamic State’s Doctrine for Information Warfare’ (London: ICSR, 2017).

102. See e.g., for example, Nikita Mehandru and Alexa Koenig, *Open Source Evidence and the International Criminal Court*, Harvard Human Rights Journal (April 15, 2019), <https://harvardhrj.com/2019/04/open-source-evidence-and-the-international-criminal-court/>

Office of the Prosecutor (OTP) of the International Criminal Court issued an arrest warrant for Mahmoud Mustafa Busayf al-Werfalli. The arrest warrant refers to social media posts by the Media Centre of the Al-Saiqa Brigade¹⁰³ depicting the suspect committing crimes that could be sanctioned by the Rome Statute.

Overall, the matter of prosecuting returning jihadists is political. The gruesome crimes committed by groups such as ISIL and al-Qaeda have traumatized the public. These crimes were transnational, and the victims were from various nationalities. The self-incriminating videos did nothing to quell public fears. Any politician that favored the return of fighters to their country of origin for prosecution would expose themselves to the ire of public opinion. The often-preferred solution of governments is to discreetly treat the problem abroad.

In sum, fear of blowback, considerations of national security, and fear of failure to secure indictments justify the reluctance of some governments to repatriate their nationals to institute domestic legal proceedings against them. Hence, international tribunals specialized in trying the “most serious crimes” could be a viable alternative to domestic prosecution.

II. EXAMINING THE JURISDICTION OF INTERNATIONAL COURTS

The Swedish Ministry of Foreign Affairs has suggested creating an international tribunal to try ISIL fighters.¹⁰⁴ The Swedish proposal has some clear merits, and allows for the prosecution of fighters in Syria, Iraq or neighboring countries. Nevertheless, the creation of such a tribunal requires overcoming considerable political hurdles.

A. *Jurisdiction of the International Criminal Court*

1. *Complementarity Principle*

Numerous self-incriminating videos in addition to the in-depth investigations conducted by international mechanisms such as the Independent International Commission of Inquiry on the Syrian Arab Republic (COI),¹⁰⁵ the International Impartial and Independent

103. Situation in Libya in the Case of the Prosecutor v. Mahmoud Mustafa Busayf Al-Werfalli, Case No. ICC-01/11-01/17, Warrant of Arrest (15 August 2017).

104. See Hellen Warrel, Sweden Proposes International Tribunal to try ISIS fighters, *Financial Times* (May 2019), <https://www.ft.com/content/9086250e-7802-11e9-bbad-7c18c0ea0201>

105. See, e.g., OHCHR, *Syrian victims reveal ISIS's calculated use of brutality and indoctrination* (2014),

Mechanism to for Syria (IIIM),¹⁰⁶ the Investigative Team to Promote Accountability for Crimes Committed by ISIL (UNITAD),¹⁰⁷ provide overwhelming evidence of crimes committed by ISIL. The Office of the United Nations High Commissioner for Human Rights (OHCHR),¹⁰⁸ the COI,¹⁰⁹ and various non-governmental organizations have made credible allegations that ISIL committed widespread and systematic international humanitarian law violations.¹¹⁰ Crimes committed by ISIL fighters may amount to war crimes, crimes against humanity, and even genocide.¹¹¹ IHL prohibits all acts that are normally designated as ‘terrorist’ including executions of civilians, persons ‘hors de combat’, and hostage taking. These violations of IHL are usually considered war crimes, and neither combatant immunity nor POW status apply.¹¹² These crimes therefore could fall, *prima facie* within the scope of crimes sanctioned by the Rome

(<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15295&LangID=E>

106. See, e.g., Report of the 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, A/74/699 (2020).

107. See, e.g., UNITAD, Fourth report of the Special Adviser and Head of the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da’esh/Islamic State in Iraq and the Levant, S/2020/386 (2020).

108. OHCHR and UNAMI, *Report on the Protection of Civilians in Armed Conflict in Iraq* (July 6–Sept. 10, 2014, Oct. 2 2014).

109. See Commission of Inquiry on Syria reports, www.ohchr.org/en/hrbodies/hrc/iicisyria/pages/independentinternationalcommission.aspx.

110. For more on Open Source Evidence, see Matt Carrieri, *Open Source Evidence and the International Criminal Court*, HARVARD HUMAN RIGHTS JOURNAL (2019), <https://harvardhrj.com/2019/04/open-source-evidence-and-the-international-criminal-court/>.

111. See, e.g., Amnesty International, *Gruesome Evidence of Ethnic Cleansing in Northern Iraq as Islamic State Moves to Wipe Out Minorities* (Sep. 2, 2014), www.amnesty.org/en/news/gruesome-evidence-ethnic-cleansing-northern-iraq-islamic-state-moves-wipeout-minorities-2014-0; Amnesty International, *Rule of Fear: ISIS Abuses In Detention In Northern Syria*, (Dec. 19 2013), www.amnesty.org/en/library/asset/MDE24/063/2013/en/32d380a3-cc47-4cb6-869f-2628ca44cb99/mde240632013en.pdf.

UN “may include” *ISIS on Syrian War Crimes List*, BBC (July 26 2014), www.bbc.com/news/world-middle-east-28498661. See also, Robert Cryer, *International Criminal Law and Daesh* (Apr. 212016), <https://blog.oup.com/2016/04/international-criminal-law-and-daesh/>.

112. Hans-Peter Gasser, ‘Acts of terror, “Terrorism” and international humanitarian law’, IRRIC September 2002 Vol. 84 No 847, 560.

Statute in Articles 6, 7, 8.¹¹³

According to Article 13 of the Rome Statute, the Court has jurisdiction if the state in which the crime was committed ratified the Rome Statute, or if the state of which the person accused of the crime is a national.¹¹⁴ Since the court acts as a subsidiary, it is only competent if no other ongoing investigation or prosecution exists. Inaction on the part of a state makes a case, *a priori*, admissible before the Court, subject to Article 17 (1) (d) of the Statute.¹¹⁵ Many foreign fighters are citizens of states such as France, Germany, the Netherlands, the United Kingdom, Jordan, Belgium, Sweden, Norway, Finland, and Denmark¹¹⁶ the majority of which have ratified the Rome Statute.¹¹⁷ According to Article 13, the court could be competent to try cases involving these nationals, provided national courts are *unwilling* and *unable* to investigate or prosecute returning fighters.

The informal expert paper published by the Office of the Prosecutor in 2003, “The Principle of Complementarity in Practice” explains that the principle of complementarity “governs the exercise of the Court’s jurisdiction”. Which according to the paper “distinguishes the Court in several significant ways from other known institutions, including the international criminal tribunals for the former Yugoslavia and Rwanda (the ICTY and the ICTR)”. The experts add that the “ICC may only exercise jurisdiction where national legal systems fail to do so, including where they purport to act but in reality, are unwilling or unable to genuinely carry out proceedings”.¹¹⁸ The paper also stresses the

113. See Rome Statute of the International Criminal Court, Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Jul. 17, 1998, UN Doc. A/CONF.183/9 [hereinafter Rome Statute], Art. 6,7,8, available online.

114. *Id.*

115. Appeals Chamber, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber 11 of June 12, 2009 on the Admissibility of the Case, Sept. 25, 2009, ICC-01/04-01/07-1497, at ¶ 78. See also Appeals Chamber, Corrigerium to the Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber m of 24 June 2010 entitled “Decision on the Admissibility and Abuse of Process Challenges ,” October, 19 2010, ICC-01/05-01/08-962-Con-, ¶¶ 107-109.

116. For an infographic on countries of origin of ISIS fighters, see, *Foreign Fighters in Iraq and Syria*, Radio Free Europe, (May 2019), <https://www.rferl.org/a/foreign-fighters-syria-iraq-is-isis-isil-infographic/26584940.html>.

117. The States Parties to the Rome Statute, ICC Website, (https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx#J)

118. Office of the Prosecutor, *The principle of complementarity in practice*, Informal expert paper (2003), <https://www.icc-cpi.int/NR/rdonlyres/20BB4494-70F9-4698-8E30->

importance of considering complementarity in a broader context. In other words, the Court should consider laws, procedures and practice standards of the state when examining complementarity.¹¹⁹ The Court should also observe the principles of due process recognized by international law.¹²⁰

A state's support to mechanisms tasked with investigating crimes committed by ISIL (UNITAD or IIIM), be it financial or political, could be read as a willingness to investigate said crimes. Nevertheless, the support does not absolve states of their responsibility to prosecute their nationals, even more so when evidence is provided by the UN mechanisms. The OTP of the ICC declared, in a highly criticized¹²¹ statement¹²², that it would not conduct a preliminary examination into crimes committed by ISIL fighters. This paper argues nevertheless, that if states remain reluctant to prosecute their nationals in the future, the complementarity requirement imposed by the Rome Statute would be easily surmountable.

2. *International Human Rights Standards in Terrorism Cases*

Article 17 of the Rome Statute specified that the court is the appropriate authority to examine alleged crimes if a state is “[. . .] unable to genuinely carry out the investigation or the prosecution”. The Rome Statute leaves the word *genuine* undefined. Nevertheless, the 2003 OTP expert paper explains that even though the ICC is “not a human rights court, human rights standards may still be of relevance and utility in assessing whether the proceedings are carried out genuinely”. The paper adds that the ICC should not act as a human rights monitoring body, as its role is not to ensure perfect procedures and compliance with international standards.¹²³ Is it reasonable to assume that trials on terrorism-related matters would respect international human rights standards, and therefore be “carried out genuinely”?

Decisions of the European Court of Human Rights are naturally not binding on the International Criminal Court, yet their interpretation can be used as persuasive precedent by the ICC. In the case of the extradition of

[907F631453ED/281984/complementarity.pdf](https://www.icc-ctd.org/record/907F631453ED/281984/complementarity.pdf).

119. *Id.* at 13.

120. *Id.* at 25.

121. See, e.g., Mohammad Hadi Zakerhossein, *To Bury a Situation Alive – A Critical Reading of the ICC, Prosecutor’s Statement on the ISIS, Situation*, ICL Review 16, 613-641 (2016)

122. Office of the Prosecutor, ICC, *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the alleged crimes committed by ISIS*, 8 April 2015.

123. OTP Expert Paper, *supra* n.118, at 8.

a German national to the United States who was facing charges of capital murder, the European Court for Human Rights decided in 1989 that the extradition would violate Article 3 of the European Convention on Human Rights, in particular, the right against inhuman and degrading treatment.¹²⁴ As previously demonstrated, prosecution of ISIL fighters by Iraqi authorities is unlikely to be considered as respectful of international human rights standards. The European Court also stated in *Saadi v. Italy* that in order to determine whether there was a risk of degrading treatment, the Court had to examine the foreseeable consequences of having the applicant sent back to the country.¹²⁵ If international standards depend on the foreseeable consequences of the applicant being tried in a country, then by analogy, one should examine the consequences of trials by Iraqi and Syrian courts.

Likewise, any prosecution by Syrian Government authorities is unlikely to be respectful of international human rights standards. Collapse of state institutions as a result of the nine-year conflict makes it very unlikely that the Syrian courts would be able to prosecute any of the above-mentioned crimes. Iraqi courts have however recently indicted foreign ISIL fighters, where trials reportedly lasted ten minutes¹²⁶ and ended in the court sentencing French nationals to death.¹²⁷ Moreover, Human Rights Watch in “*Transfer of ISIS Suspects, Including Foreigners, to Iraq Raises Torture Concerns*” details previous ISIL trials that raise serious risks of torture in Iraqi prisons.¹²⁸ In another report, Human Rights Watch details the deficiency of due process and cautions against expedited trials.¹²⁹ Furthermore, many tribes in Iraq are thought to seek vengeance, as they have been victims of crimes committed by ISIL, politicizing the

124. *Soering v. The United Kingdom* (1989) (ECHR).

125. *Saadi v. Italy*, Appl. No. 37201/06, Council of Europe: European Court of Human Rights, 28 February 2008, available at: <https://www.refworld.org/cases,ECHR,47c6882e2.html> [accessed 10 November 2019].

126. See, Alissa Rubin, *France Hands ISIS Suspects to Iraq, Which Sentences Them to Hang*, N.Y. TIMES (May 29, 2019), <https://www.nytimes.com/2019/05/29/world/middleeast/france-iraq-isis-trials.html>.

127. See, *Inside the Iraqi courts sentencing foreign ISIS fighters to death*, THE GUARDIAN (June 2, 2019), <https://www.theguardian.com/world/2019/jun/02/inside-the-iraqi-courts-sentencing-foreign-isis-fighters-to-death>.

128. Belkis Wille *Transfer of ISIS Suspects, Including Foreigners, to Iraq Raises Torture Concerns*, Human Rights Watch (March 2019), <https://www.hrw.org/news/2019/03/04/transfer-isis-suspects-including-foreigners-iraq-raises-torture-concerns>.

129. World Report, Iraq (2019), <https://www.hrw.org/world-report/2019/country-chapters/iraq>.

trials and increasing the likelihood of political interference.¹³⁰

Even though the US is not a state party to the Rome Statute, the treatment of Guantanamo detainees' sheds doubts on the possibility of respect to due process in cases of terrorist fighters globally. The Senate Intelligence Committee Report on CIA torture¹³¹ is telling. Serious human rights violations were reported in the case of Guantanamo detainees. 780 prisoners were detained in the military base, yet only eight trials were completed, and four are currently ongoing.¹³² Likewise, there are serious risks of torture in Guantanamo, which, according to the Bush administration, does not affect the admissibility of statements "if the circumstances in which the statement [by a detainee] was made make it a reliable element with a sufficient probity value [. . .] and if it serves the interest of justice".¹³³ The Obama administration barely limited the scope of the provision as it maintained that confessions "derived from torture" were admissible.¹³⁴ Recently, Donald Trump ordered Guantanamo to remain open and asked Congress to "ensure that in the fight against ISIS and Al Qaeda, we continue to have all necessary power to detain terrorists wherever we chase them down, wherever we find them (. . .) and in many cases for them it will now be Guantanamo Bay".¹³⁵ In his State of the Union speech in 2018, the President also declared that "terrorists are not merely criminals, they are unlawful enemy combatant",¹³⁶ thus echoing the Bush administration doctrine which proclaimed that these combatants would not benefit from POW status. Likewise, the transfer of French fighters from Syria to Iraq in clear violation of international law sheds doubt on the respect of due process of law in future and eventual cases of prosecution of ISIL fighters.

130. See, e.g., *Anbar Tribes Seek Vengeance against Iraqi ISIS Members*, AL SHARQ AL-AWSAT (Nov. 14 2017), <https://aawsat.com/english/home/article/1083421/anbar-tribes-seek-vengeance-against-iraqi-isis-members>.

131. Committee Study of the Central Intelligence Agency's Detention and Interrogation Program, Foreword by Senate Select Committee on Intelligence Chairman Dianne Feinstein, Findings and Conclusions, Executive Summary" (2014).

132. Pierre Hazan, *Guantanamo: Into the Heart of a Judicial Frankenstein* (2019), <http://pierrehazan.com/en/2019/01/guantanamo-into-the-heart-of-a-judicial-frankenstein/>.

133. *Id.*

134. *Id.*

135. *Trump orders Guantanamo prison to remain open*, POLITICO (Jan, 2018), <https://www.politico.com/story/2018/01/31/trump-guantanamo-gitmo-cuba-318569>.

136. President Donald J. Trump, State of the Union Address (Jan. 30 2018) (speech) (transcript at <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-state-union-address/>).

*B. Obstacles to Pursuing International Legal Avenues to Prosecute
ISIL Fighters*

1. Limited Resources of the ICC

In its new strategic plan, the Office of the Prosecutor of the ICC¹³⁷ declared that “when appropriate, the Office will consider bringing cases against notorious or mid-level perpetrators who are directly involved in the commission of crimes”¹³⁸ Mid-level ISIL fighters that have allegedly committed crimes that fall within the scope of the Rome Statute could be a case in point. Prosecuting crimes committed by mid-level ISIL fighters will inhibit criticism addressed to the court in terms of afro-centrism, as some suspects are also European.

Furthermore, an examination by the OTP of the ICC into crimes committed by ISIL fighters could eventually provide for some form of justice and accountability for crimes committed in Syria and Iraq. On the other hand, it could lead to victim participation in trials. Sentencing a handful of fighters – who view martyrdom as an ideal ending – to death in Iraq does very little to compensate and represent victims and their families. Article 85 of the Rules of Procedure and Evidence defines victims as “persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court”. Article 86 provides that “a Chamber in making any direction or order, and other organs of the Court in performing their functions under the Statute or the Rules, shall take into account the needs of all victims and witnesses [. . .], in particular, children, elderly persons, persons with disabilities and victims of sexual or gender violence”. For example, recognizing Yazidis¹³⁹ as victims of crimes – in particular sexual and gender-based crimes¹⁴⁰ - committed by ISIL fighters might allow victims of the minority community to benefit from restitution, compensation, and rehabilitation. Given that states such as Iraq and Syria are unlikely to ratify the Rome Statute, the Office of the Prosecutor should take advantage of the opportunity and allow the court to provide for some

137. International Criminal Court Office of the Prosecutor Strategic plan | 2019 – 2021, (May 14, 2019), <https://www.justsecurity.org/wp-content/uploads/2019/05/20190514-Draft-OTP-Strategic-Plan-2019-2021-launch-of-external-conFalsepdf>.

138. *Id.*

139. *See*, UN human rights panel concludes ISIL is committing genocide against Yazidis, UN NEWS (June 16, 2016), <https://news.un.org/en/story/2016/06/532312-un-human-rights-panel-concludes-isil-committing-genocide-against-yazidis>.

140. *See*, International Federation for Human Rights, *Iraq - Sexual and gender-based crimes against the Yazidi Community: the role of ISIL foreign fighters*, No 723a (2018)

form of accountability.

However, the ICC has been criticized for being unable to try cases in a timely manner, some even claiming that the court is inefficient.¹⁴¹ The ICC's budget totaled approximately 147 million euros in 2018¹⁴² and 148 million euros in 2019.¹⁴³ For a recently created organization,¹⁴⁴ almost maintaining a yearly budget, in contrast with budget increases, are signs of relative financial limitations. In its seventeen years of existence, the Court has only managed to convict a handful of criminals,¹⁴⁵ and, at date of writing, has failed to do so outside the African continent.¹⁴⁶ The low conviction rate is due in part to the high standard of proof necessary to establish implication in "the most serious crimes". Investigating and prosecuting crimes committed by ISIL fighters will be no different. Demonstrating personal involvement of each fighter might prove challenging, but not impossible. Yet, the sheer number of cases might in and of itself overwhelm a court that is presently struggling to examine cases in a timely manner.

Many European states are unwilling to prosecute returning fighters as they worry that they will create networks in prisons and infect other prisoners with toxic ideology. If the OTP of the ICC does agree to open a preliminary examination, and if some fighters are eventually charged and convicted, they would similarly constitute a threat in the country in which they would serve their sentence. Recently, the Presidency of the International Criminal Court announced that Ahmad Al Faqi Al Mahdi, a prisoner of the Court, would be transferred to Scotland to serve his sentence.¹⁴⁷ Since British authorities are aggressively battling the return of ISIL fighters, it is unlikely that the same agreement would be reached

141. See, Jessica Hatcher Moore, *Is the world's highest court fit for purpose?*, THE GUARDIAN, (April 5, 2017), <https://www.theguardian.com/global-development-professionals-network/2017/apr/05/international-criminal-court-fit-purpose>.

142. Resolution ICC-ASP/15/Res.1 (2016), https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP15/ICC-ASP-15-Res1-ENG.pdf

143. See Assembly of States Parties concludes its seventeenth session ICC-CPI-20181212-PR1426 (2018) (press release, available at https://asp.icc-cpi.int/en_menus/asp/press%20releases/Pages/PR1426.aspx).

144. See International Criminal Court, The ICC Rome Statute is 20 (press release, available at <https://www.icc-cpi.int/romestatute20>).

145. International Criminal Court, Cases, <https://www.icc-cpi.int/cases> (last visited 19 July 2019).

146. International Criminal Court, Defendants, <https://www.icc-cpi.int/Pages/defendantswip.aspx?ln=fr>] (last visited [19 July 2019]).

147. *Ahmad Al Faqi Al Mahdi transferred to UK prison facility to serve sentence*, ICC-CPI-20190503-PR1451 (May 3, 2019), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1451>.

if ISIL fighters were to be indicted. Likewise, the Dutch authorities are looking to prevent the return of Dutch nationals that allegedly fought within the ranks of ISIL. Would trials in The Hague pose a threat to Dutch national security?

These limitations should not, however, deter the ICC from prosecuting crimes, as the best way to counter terrorism is prosecution. For example, The United Kingdom Strategy for Countering Terrorism Annual Report 2015 states, “conviction in court is the most effective way to stop terrorists”.¹⁴⁸ As such, the limitations and questions about the practicalities of the ICC prosecuting crimes committed by ISIL fighters might have led to the recent proposal by the Swedish Ministry of Foreign Affairs to create a hybrid tribunal to investigate and prosecute the crimes committed by ISIL fighters.

2. *Are Hybrid Courts a Viable Alternative?*

Hybrid courts are “courts of mixed composition and jurisdiction, encompassing both national and international aspects, usually operating within the jurisdiction where the crimes occurred”.¹⁴⁹ The “Dakar Guidelines on the Establishment of Hybrid Courts” offer clarity to national, regional and international actors concerned with the creation of a hybrid court.¹⁵⁰

John Doe, a dual US-Saudi citizen was captured by US-backed Syrian Democratic Forces in Eastern Syria. After holding him for thirteen months, the US opted to free him and deliver him to Bahrain. It is likely that the suspect entered a plea deal in which he agreed to having his citizenship revoked and thus to be deported from the United States, in exchange for not serving time in Guantanamo.¹⁵¹ Seemingly, states apply patchwork solutions on a case-by-case basis. If the court fails to indict fighters, they would be released and would have to return to their countries of origins. Their release would pose a threat either to national security if individuals remain dangerous, or to the security of returnees themselves in

148. The United Kingdom’s Strategy for Countering Terrorism: Annual Report for 2015, ¶ 2.8, pp.12. (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/539683/55469_Cm_9310_Web_Accessible_v0.11.pdf)

149. *Rule-of-law tools for post-conflicts states: maximizing the legacy of hybrid courts*, Office of the United Nations High Commissioner for Human Rights (2008).

150. Kirsten Ainley, Mark Kersten, “*Dakar Guidelines On The Establishment Of Hybrid Courts*” LSE Institute of Global Affairs (2019).

151. See, Robin Wright, *Despite Trump’s Guantánamo Threats, Americans Who Joined ISIS Are Quietly Returning Home*, THE NEW YORKER (June 11, 2019).

the case of private vendettas. If fighters are convicted, it is also unlikely that they would be allowed to return to their state of citizenship after serving their sentences. Post-incarceration in Guantanamo, very few detainees could go back to their countries of origin, and many remain stranded in unfamiliar countries.¹⁵² Prosecuting ISIL fighters poses yet another dilemma opposing national security to individual rights. Other non-signatories of the Rome Statute have also struggled with the issue of returning jihadists. On 5 June 2019, a Lebanese national opened fire on security forces in the city of Tripoli, killing four security personnel before detonating an explosive belt he wore. The gunman had previously joined the ranks of ISIL in Syria and was incarcerated in Lebanon for a year upon his return.¹⁵³ Likewise, some North-African states have also been attempting to find an optimal way to deal with returning fighters, but to no avail.¹⁵⁴

A hybrid court that would conduct legal proceedings against fighters would certainly alleviate many states of a considerable burden. Numerous states concerned with the returning fighters' crisis are not signatories of the Rome Statute, and thus a prosecution by the ICC does little to alleviate non-signatory states of the burden of prosecuting radicalized individuals. The creation of a hybrid court would allow for the prosecution of fighters notwithstanding the ratification of the Statute. The court would also allow for the creation of a unified and streamlined process to prosecute alleged crimes committed by all captured fighters. A hybrid court would allow for fighters of all states to receive the same treatment in the same courts, an outcome that could not be secured by the ICC, as a trial by the ICC would exclusively concern citizens of states that ratified the Rome Statute, unless the situation concerning ISIL is referred to the ICC by the UN Security Council.

Nonetheless, numerous obstacles to the creation of a hybrid mechanism need to be surmounted, the most important of which is political traction. The meeting of experts convened by the Swedish

152. *Life after Guantanamo: Former Egyptian prisoner stuck in Bosnia limbo*, MIDDLE EAST EYE (March 15, 2017): (<https://www.middleeasteye.net/features/life-after-guantanamo-former-egyptian-prisoner-stuck-bosnia-limbo>)

153. See, Michal Kranz, *After years of calm, Lebanon's Tripoli reels from 'lone wolf' terror attack*, AL-MONITOR R June 9, 2019), <https://www.al-monitor.com/pulse/originals/2019/06/lebanon-tripoli-lone-wolf-attack-terrorism-islamic-state.html#ixzz5qdypz11N>.

154. Fabien Merz, *Politique de sécurité: analyses du CSS, La gestion des djihadistes de retour en Afrique du Nord - No 222*, (March 2018), <http://www.css.ethz.ch/content/dam/ethz/special-interest/gess/cis/center-for-security-studies/pdfs/CSSAnalyse222-FR.pdf>.

Ministry of Foreign Affairs on 3 June 2019, which aimed to discuss matters related to accountability for crimes committed in Syria and Iraq, did not lead to any practical steps. The meeting merely illustrates the increasing will of some states to “explor[e] different ways to increase accountability”.¹⁵⁵ Proving that states remain hesitant on providing the necessary political traction for the creation of an ad hoc tribunal.

A political difficulty would also arise if the “Autonomous Administration” in Syria were to host the hybrid court. States hostile to Kurdish “autonomy” could read the establishment of the court in Northeast Syria as a step towards recognition by donor states of Kurdish independence. It is also unprecedented that a non-state armed group hosts a hybrid or international court in the territory it controls. The establishment of a court in northeast Syria is even more unlikely given the recent Turkish operation on northeast Syria that leaves the future of the region uncertain. The Dakar guidelines highlight the need for personalizing the hybrid court to the conflict that gave rise to the crimes at issue.¹⁵⁶ Any hybrid tribunal would need to absorb the political sensitivities in both Iraq and Syria, a daunting task.

In the interim, and while awaiting sufficient political traction to create such courts, the OTP of the ICC’s role should be to open a preliminary examination into alleged crimes falling within the scope of its jurisdiction. Even more, should states fail to act promptly in light of evidence provided by the IIM or UNITAD. The result would be either that the ICC looking into crimes encourages states to prosecute fighters domestically, or to create the necessary political traction for the creation of a hybrid tribunal, or *a minima* would lead to a prosecution of some fighters in The Hague.

In sum, a prosecution by any institution that respects international human rights standards and due process of law will inject a gasp of justice in a region perpetually plagued by conflict.

RECOMMENDATIONS

- Develop a unified strategy between states of which ISIL fighters are nationals to prevent patchwork solutions. An imminent response aiming to secure the prosecution of ISIL fighters is necessary considering the recent political developments in Iraq and Syria.

155. Government, Offices of Sweden, Sweden hosted expert meeting on tribunal (June 3, 2019) (<https://www.government.se/press-releases/2019/06/sweden-hosted-expert-meeting-on-tribunal/>)

156. Supra 148, pp.6.

- Courts should primarily try their citizens domestically, provided they respect due process of law and human rights standards. States should actively seek to repatriate their citizens and prosecute them domestically.
- Executing suspects who seek martyrdom does little to uphold accountability and is of little benefit for victims' participation and for the promotion of accountability in the Middle East.
- If states are unwilling and unable to investigate crimes committed by their nationals, then the OTP of the ICC should open a preliminary examination into crimes committed by nationals of states that ratified the Rome Statute.
- A hybrid tribunal could constitute a viable alternative to an ICC prosecution, provided sufficient political traction accompanies its mandate.
- Syria and Iraq have been theatres of massive violations of human rights and international humanitarian law. Prosecution of ISIL fighters should not serve to overshadow the prosecution of crimes committed by other states or non-state armed groups. On the contrary, it should catalyze the fight against impunity in the Middle East and North Africa region more broadly.