

ARTICLE

Taking the Islamic State of Iraq and Syria (ISIS) to Court: Prosecuting ISIS's Crimes in Iraq and Syria

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The Islamic State of Iraq and Syria (ISIS) has dominated public consciousness and political discourse for much of this decade as it has indiscriminately pursued a “caliphate”. This article considers the origins, motivations and strategy of ISIS grounded in a clear doctrinal core. This article asserts that ISIS and its members have committed and continue to commit heinous crimes in Iraq and Syria. Focussing on the genocide of the Yazidi people, the potential paths to prosecute ISIS's crimes in Iraq and Syria are evaluated. This article argues that the justification for pursuing the prosecution of ISIS leaders and militants is grounded in principles of transitional justice, the role that prosecutions can play in the counter-propaganda effort against ISIS and international law obligations. The potential charges against ISIS are then detailed before a case is made out that ISIS is guilty of these crimes, appraising reports by the Human Rights Commission. An evaluation of three potential prosecutorial forums follows: the domestic courts of Iraq and Syria, the International Criminal Court and an ad hoc international tribunal. It is argued that an ad hoc tribunal would be the most effective approach to prosecution due to its legitimacy, lack of jurisdictional issues and proximity to evidence.

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I Introduction

This is both a moral and a political question, ... victims and survivors deserve justice, no matter where and when these crimes were committed. There must be no sanctuary, anywhere in this world, for any perpetrator of mass atrocity crimes.

—Simon Adams¹

For much of this decade, the Islamic State of Iraq and Syria (ISIS)² has dominated public consciousness and political discourse due to the acts of terror committed in its name in Europe and its capture of territory in brutal ground offensives in Iraq and Syria.³ ISIS achieved notoriety in 2014 through violent footage of the beheadings of American journalists James Foley and Steven Sotloff by “Jihadi John”.⁴ In the following three years, ISIS claimed responsibility for devastating terrorist attacks across Europe in London, Manchester, Paris, Brussels and Stockholm.⁵ ISIS has exploited social media in an unprecedented way, gaining international attention for its spread of propaganda and recruitment efforts, including posting videos of beheadings.⁶ Notwithstanding that ISIS is recognised internationally for its terrorist attacks in Europe, executions of foreigners and a coordinated internet-driven propaganda campaign, the militant group is based in Iraq and Syria, where its ambitions are concentrated. This has resulted in the civilians of this region suffering the most.⁷ On capturing Mosul, Iraq, then leader Abu Bakr al-Baghdadi denominated the organisation “the Islamic State”, reflecting its intention to create a state from the Mediterranean to the Gulf.⁸ ISIS has systematically fought for territory across Iraq and Syria and has terrorised citizens by forcing Christians and Yazidis to convert to Islam and displacing Kurds.⁹ ISIS has also committed young women to sex slavery and publicly executed children.¹⁰

The international response to ISIS's assaults across Iraq and Syria was initiated through airstrikes on ISIS militants authorised by then President of the United States, Barack Obama, in August 2014 to help the Yazidis, who were being persecuted in Sinjar, Iraq.¹¹ The targeted military action of over 30 countries against ISIS was coordinated by an entity known as “Combined Joint Task Force—Operation Inherent Resolve” established by

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- 1 Geoffrey Johnston “Gathering evidence of genocide” *The Kingston Whig-Standard* (online ed, Ontario, 10 March 2017). Simon Adams is a genocide prevention expert.
 - 2 The militant group has been known as the Islamic State of Iraq and the Levant (ISIL), the Islamic State (IS), and Daesh. For the purposes of this article, it will be referred to as the Islamic State of Iraq and Syria (ISIS).
 - 3 Tewfik Cassis “A brief history of ISIS” *The Week* (online ed, London, 21 November 2015).
 - 4 Victoria Ward “Jihadi John’s victims: who were they?” *The Telegraph* (online ed, London, 13 November 2015).
 - 5 Alice Foster “Terror attacks timeline: From Paris and Brussels terror to most recent attacks in Europe” (18 August 2017) *Express* <www.express.co.uk>.
 - 6 Cassis, above n 3.
 - 7 See *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic: Rule of Terror – Living under ISIS in Syria* A/HRC/27/CRP3 (2014) [Rule of Terror] at [1]–[4].
 - 8 Bobby Ghosh and Quartz “ISIS: A Short History” *The Atlantic* (online ed, Washington DC, 14 August 2014).
 - 9 *Rule of Terror*, above n 7, at 5.
 - 10 At [56] and [59].
 - 11 Dan Roberts, Martin Chulov and Julian Borger “Obama authorises air strikes on ISIS to help Iraqis besieged on mountain” *The Guardian* (online ed, London, 8 August 2014).

the United States Central Command of the Department of Defense.¹² After three years of coalition attacks, ISIS has been severely weakened in the region and has lost control over Mosul, a city whose capture by ISIS represented a symbolic coup due to its role as a vital trade post and key transport centre, with reports suggesting that ISIS is essentially trapped.¹³ The decline of ISIS through the recapture of territories across Iraq and Syria has resulted not only in the killing of ISIS militants but also in the arrests and incarceration of a significant number of them.¹⁴

While ISIS's crimes against religious and ethnic minorities in order to "cleanse" the population and seize territory mirror past crimes such as the Holocaust and, more recently, the genocides in Rwanda and the former Yugoslavia,¹⁵ attitudes towards the prosecution of these international crimes have shifted.¹⁶ The notion that war crimes, genocide and crimes against humanity are beyond the scope of the law has been re-examined over the past two decades as intolerance for impunity has grown, along with acceptance that international peace and stability require culpability for crimes against humanity.¹⁷ This shift in focus towards accountability is reflected in the processes undertaken to achieve redress in fragile times following mass international crimes known as transitional justice processes.¹⁸ The desire for international justice and transitional justice processes to be established in Iraq and Syria is apparent. Calls for the prosecution of ISIS leaders and militants are gaining support as their crimes are exposed.¹⁹ ISIS's actions in Iraq and Syria, particularly against religious minorities, are deemed international crimes by the United Nations based on the accounts of survivors.²⁰

International human rights lawyer Amal Clooney has brought the issue of prosecuting ISIS to the forefront by her representation of Nadia Murad, a Yazidi victim of ISIS's brutality.²¹ It is argued that ISIS can and should be prosecuted for the genocide of the Yazidis.²² This article considers how ISIS can be brought to justice for its past and ongoing crimes in Iraq and Syria. It focusses on the genocide of the Yazidis by ISIS in evaluating the potential ways of prosecuting ISIS. The article takes the following path.

Part II begins with a discussion of ISIS, its origins and its capitalisation on the Arab uprising, and its successes thereafter in capturing territory, recruiting members and

12 Armin Rosen "The US-Led War On ISIS Now Has A Logo" (9 December 2014) Business Insider Australia <www.businessinsider.com.au>.

13 Robert Burns "'ISIS' last stand": Militants caught between converging forces on Iraq-Syria border, says General James Mattis" (22 August 2017) The Independent <www.independent.co.uk>.

14 Mohamed Mostafa "18 ISIS fighters killed, 100 arrested as security forces continue Mosul advancement" (17 November 2016) Iraqi News <www.iraqinews.com>.

15 George William Mugwanya *The Crime of Genocide in International Law: Appraising the Contribution of the UN Tribunal for Rwanda* (Cameron May, London, 2007) at 44.

16 Ralph Zacklin "The Failings of Ad Hoc International Tribunals" (2004) 2 JICJ 541 at 541.

17 At 541.

18 Paul Seils *The Place of Reconciliation in Transitional Justice: Conceptions and Misconceptions* (International Center for Transitional Justice, 28 June 2017) at 2.

19 Aldo Zammit Borda "Here's how to prosecute ISIS fighters for war crimes" (16 March 2016) Business Insider <www.businessinsider.com>.

20 Pieter Omtzigt *Prosecuting and punishing the crimes against humanity or even possible genocide committed by Daesh* (Committee on Legal Affairs and Human Rights, Doc 14402, 22 September 2017) at [7]–[8].

21 Eoin Blackwell "Is Amal Clooney's Plan To Drag ISIS To Court Possible?" (20 September 2016) Huffington Post <www.huffingtonpost.com.au>.

22 Omtzigt, above n 20, at [48].

propagating its divisive messages.²³ This Part evaluates the background of ISIS's operations and structure, and considers the motivations of the organisation in detail.

Part III provides an overview of the Yazidi genocide. It considers the history of the Yazidis, their religious beliefs and the reasons for their persistent persecution. It outlines the events of the Yazidi genocide and describes the prevailing situation of the victims today, more than three years later. It focusses particularly on the status of Yazidi women captured as slaves.

Part IV considers the justification for actively seeking the prosecution of ISIS leaders and militants. It evaluates the principles and motivations of transitional justice as a mechanism to avoid impunity. This Part also considers whether prosecution can be a key part of the counter-propaganda effort to dissuade potential recruits. It argues that there are clear obligations to prosecute under international law, such as those provided in the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).²⁴

Part V discusses the potential charges of ISIS commanders and soldiers. It considers the option of incorporating international crimes into the domestic laws of Iraq and Syria.

Part VI demonstrates that there is a strong case to be made that ISIS and its agents are guilty of perpetrating these international crimes. It considers the elements of the offences, referring to United Nations reports and United States Department of State reports on ISIS's actions.

Part VII evaluates the details, benefits and challenges of three potential prosecutorial forums: the domestic courts of Iraq and Syria, the International Criminal Court (ICC) and an ad hoc international tribunal. This Part includes an appraisal of the mechanisms that exist to meet the evidence requirements of a prosecution.

Part VIII argues an ad hoc international tribunal would be the most effective mechanism by which to prosecute ISIS. This argument is made with regard to the justifications for prosecution discussed in Part IV.

II ISIS's Origins, Motivations and Strategy

The origin of ISIS is the "Al-Qaeda in Iraq" group founded by Abu Musab Al-Zarqawi in 2004.²⁵ Following his death in 2006, the group "merged with other Iraqi jihadist groups and renamed itself Islamic State of Iraq".²⁶ In 2011, with Abu Bakr al-Baghdadi as its leader, the group joined forces with an Al Qaeda affiliate group fighting in Syria, accelerating its recruitment as the Syrian uprising against Bashar al-Assad's government began.²⁷ It split with this affiliate group in 2013. The Islamic State of Iraq and Syria emerged with the aim to establish a state by using territorial gains in Iraq in 2014 and by targeting community leaders in Syria to reinforce its resources.²⁸ ISIS functions in a hierarchical structure: at the top is a leader with absolute power, below whom is a military council, and then a network of emirs and commanders.²⁹

23 See Jessica Stern and JM Berger *ISIS: The State of Terror* (William Collins, London, 2015) at 42.

24 Convention on the Prevention and Punishment of the Crime of Genocide 78 UNTS 277 (signed 9 December 1948, entered into force 12 January 1951) [Genocide Convention], art 1.

25 Omtzigt, above n 20, at [5].

26 At [5].

27 Ghosh and Quartz, above n 8.

28 *Rule of Terror*, above n 7, at [7]–[8].

29 Omtzigt, above n 20, at [7].

The ideological core of ISIS is the marriage of two conservative doctrines: “Salafism”, which advocates for the reversion to the “perfect state” associated with Islamic society in the time of Prophet Muhammad’s life; and “takfir”, which is the practice of labelling those who do not subscribe to Salafism as non-believers or “infidels” who should face death.³⁰

In June 2014, ISIS declared the re-establishment of a caliphate over its territories and professed its motivation to build a nation state.³¹ The prophetic call to establish a caliphate was religiously legitimised by constant reference to the Salafist-takfiri worldview of ISIS.³² ISIS has a binary vision of the world—a person is either an ISIS-aligned Sunni Muslim or not—and it is this ideology that motivates ISIS’s takfirist practices to wage holy war, or jihad, and seek refuge in a caliphate free of infidels.³³ The rise of ISIS has been attributed in part to the political instability in Iraq, whose government was corrupt and lacked transparency, allowing sectarianism and violent rhetoric to flourish.³⁴ ISIS’s commitment to building a nation state serves as a direct counter to this governance of the past. ISIS’s central Salafist ideology is manifested in its call for both non-combatants, such as doctors and engineers, and combat fighters to build the state.³⁵ ISIS’s narrative has resonated with the disenfranchised Muslim population as the organisation has orientated itself around the needs of this community by providing employment and social services.³⁶ ISIS has further justified its motivations by reference to Muslim oppression by Western campaigns in the Middle East.³⁷

ISIS extended its influence significantly beyond Iraq and Syria into the homes of billions of people worldwide in an unprecedented manner by exploiting technology, particularly social media platforms.³⁸ The aforementioned gruesome beheading of American journalist James Foley, posted on social media sites in August 2014, gained the world’s attention. ISIS’s message, and its brand of unrelenting, non-negotiable malevolence, suddenly had a limitless platform for visibility.³⁹ The propagation of its doctrine, including that it was a caliphate, through social media motivated new recruits to join ISIS.⁴⁰ ISIS also published an online magazine, *Dabiq*, in many languages including English, detailing the core ideology of the caliphate and presenting its audience with its warped worldview.⁴¹ ISIS has forged a radical new path for movements to exploit a social and political landscape to

30 Leonard C Robinson “Just Terror: The Islamic State’s Use of Strategic ‘Framing’ to Recruit and Motivate” (2017) 61 *Orbis* 172 at 173.

31 Matt Bradley “ISIS Declares New Islamist Caliphate” *The Wall Street Journal* (online ed, New York, 29 June 2014).

32 Robinson, above n 30, at 181.

33 Haroro J Ingram “An analysis of Islamic State’s *Dabiq* magazine” (2016) 51 *Aust J Political Sci* 458 at 460.

34 Toby Dodge and Becca Wasser “The Crisis of the Iraqi State” in Toby Dodge and Emile Hokayem (eds) *Middle Eastern Security, the US Pivot and the Rise of ISIS* (Routledge, Oxford, 2014) 13 at 32.

35 Stern and Berger, above n 23, at 74.

36 Ian R Pelletier and others “Why ISIS’ Message Resonates: Leveraging Islam, Sociopolitical Catalysts, and Adaptive Messaging” (2016) 39 *Stud Confl Terror* 871 at 890.

37 Axel Heck “Images, visions and narrative identity formation of ISIS” (2017) 7 *Global Discourse* 244 at 256.

38 Ingram, above n 33, at 459.

39 Simone Molin Friis “‘Beyond anything we have ever seen’: beheading videos and the visibility of violence in the war against ISIS” (2015) 91 *Intl Aff (London)* 725 at 744.

40 *Rule of Terror*, above n 7, at [17]–[18].

41 Ingram, above n 33, at 474.

achieve their own specified end, transcending physical borders and resources, in a relatively short time.⁴²

III The Yazidi Genocide

A *The Yazidi people*

An understanding of the history and belief system of the Yazidis is necessary to understand their current situation in Iraq and Syria.

The Yazidis are a religious and ethnic minority concentrated in and around Sinjar, Iraq. Their religion is based on the Zoroastrian religion of Ancient Persia, Christianity, and Islam.⁴³ They worship the fallen Peacock Angel, Melek Taus, who, unlike Satan, was forgiven by God and returned to heaven.⁴⁴ Consequently, the Yazidis have been incorrectly labelled devil worshippers and subjected to brutal persecution since the time of the Ottoman Empire.⁴⁵ ISIS has labelled the Yazidis “the ‘worst type of infidel’” as the Yazidis do not adhere to a holy book as their governing doctrine.⁴⁶ ISIS’s view of Yazidi religion was the basis for the persecution of the Yazidis in Sinjar in 2014.⁴⁷

B *The assault on Sinjar in August 2014*

The horrific crimes against the Yazidis that ultimately led to calls to prosecute ISIS began in the early hours of the morning on 3 August 2014 when ISIS fighters attacked Sinjar.⁴⁸ The Kurdish Peshmerga withdrew and did not notify the Yazidis of the impending attack, so they were unable to evacuate.⁴⁹ Yazidi men showed resistance to allow their families to escape. 80 men were killed in the process, and 700 more deaths followed as the offensive continued.⁵⁰ An estimated 12,000 more Yazidis were killed or abducted in the hours and days following the initial siege.⁵¹

At the request of the Iraqi Government, the United States launched airstrikes and provided airdrops of water and other supplies to help the Yazidis trapped on Mount

42 Stern and Berger, above n 23, at 7.

43 Raya Jalabi “Who are the Yazidis and why is Isis hunting them?” *The Guardian* (online ed, London, 11 August 2014).

44 Meera Vijayann “Helping traumatized Yazidi refugees requires a different kind of care” (18 April 2017) TVO <www.tv.org>.

45 Jalabi, above n 43.

46 Owen Bowcott “Amal Clooney calls for collection of evidence of Isis atrocities” *The Guardian* (online ed, London, 30 March 2017).

47 Bowcott, above n 46.

48 United Nations Human Rights Council “*They came to destroy*”: *ISIS Crimes Against the Yazidis* A/HRC/32/CRP2 (2016) [UNHRC] at [23].

49 At [24].

50 *Report of the Office of the United Nations High Commissioner for Human Rights on the human rights situation in Iraq in the light of abuses committed by the so-called Islamic State in Iraq and the Levant and associated groups* A/HRC/28/18 (2015) at [19].

51 Valeria Cetorelli and others “Mortality and kidnapping estimates for the Yazidi population in the area of Mount Sinjar, Iraq, in August 2014: A retrospective household survey” (2017) 14(5) *PLoS Med* at 9.

Sinjar.⁵² ISIS fighters shot at planes attempting to provide aid and at helicopters attempting to evacuate the most vulnerable Yazidis.⁵³

The captives were separated into three groups: young women and girls who were used as sex slaves and wives, prepubescent boys who were radicalised, and men who were forced to convert or executed.⁵⁴ There were accounts of men who refused to convert being shot en masse at a farm.⁵⁵ Young girls were taken from site to site and sold for between USD 200 and USD 1,500.⁵⁶ A Committee for the Buying and Selling of Slaves operated slave markets where girls as young as nine years old were paraded in front of fighters who raised their hands to choose their slave.⁵⁷ As slaves, the girls were subject to sexual violence and beaten and made to work as domestic servants for fighters and their wives; they were subject to greater terror if they tried to escape.⁵⁸

Today, over three years after the Yazidi genocide, of the 7,000 Yazidis estimated to have been captured in the 2014 siege, approximately 3,000 have been freed while 3,400 men and women are still unaccounted for or in captivity.⁵⁹ Those that survived or returned from ISIS captivity continue to suffer, with thousands residing in refugee camps, unable and, in many cases, unwilling to return to their villages, which have been destroyed.⁶⁰ Consequently, many Yazidis have sought refuge in foreign countries such as Canada, which has accepted large numbers of Yazidi refugees and has committed to accepting more.⁶¹ Women returning from captivity, some after three years, have arrived burdened with severe psychological trauma and physical injuries.⁶² True refuge can only be provided through psychological support as many Yazidi fear returning to their villages due to the reminders of their suffering that linger in their former homes.⁶³

IV The Case for Prosecuting ISIS: Killing an Ideology

A *Transitional justice and avoiding impunity*

The discourse concerning the approach to achieving justice for the victims of ISIS's crimes is underscored by the argument between a commitment to prosecute ISIS leaders and members for their crimes on the one hand and the view that they should simply be "bombed out of existence" on the other.⁶⁴ The latter opinion does not accord with the

52 Roberts, Chulov and Borger, above n 11.

53 UNHRC, above n 48, at [27].

54 Yazda: Global Yazidi Organization *An Uncertain Future for Yazidis: A Report Marking Three Years of an Ongoing Genocide* (September 2017) at 5.

55 UNHRC, above n 48, at [19].

56 At [60].

57 At [58]–[59].

58 At [64], [66] and [72]–[73].

59 Yazda: Global Yazidi Organization, above n 54, at 14.

60 Neville Teller "The Persecuted Yazidis—OpEd" (15 September 2017) Eurasia Review <www.eurasiareview.com>.

61 Terry Pedwell "Canada to give asylum to 1,200 primarily Yazidi refugees by end of 2017" *The Globe and Mail* (online ed, Ottawa, 14 April 2017).

62 Rukmini Callimachi "Freed From ISIS, Yazidi Women Return in 'Severe Shock'" *The New York Times* (online ed, New York, 27 July 2017).

63 Henry Ridgwell "As ISIS Threat Recedes, Mental and Physical Barriers Keep Iraqis From Returning Home" (20 September 2017) VOA News <www.voanews.com>.

64 Interview with Amal Clooney, international human rights lawyer (Cynthia McFadden, NBC Nightly News, 19 September 2016).

aforementioned shift in perspective from the notion that perpetrators of mass atrocity crimes are beyond the law's ambit to the attitude that impunity for such crimes should be actively avoided.⁶⁵ The concept of transitional justice is representative of this shift and is crucial in understanding the commitment of the international community to avoid impunity and protect human rights.⁶⁶ The United Nations defines transitional justice as follows:⁶⁷

... the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.

Transitional justice mechanisms advocate primarily for the victims' right to justice and attempt to administer justice where "both the scale of the violations and the fragility of the context" in conflict or post-conflict situations result in the failure of affected states' traditional justice systems to provide justice themselves.⁶⁸ These motivations of transitional justice provide a compelling argument for prosecuting international crimes perpetrated by ISIS. The emphasis on providing victims justice gives a clear motive for the prosecution of ISIS and, in the case of the Yazidi victims, is a response to the demand for justice in the form of criminal prosecutions.⁶⁹ International peace is threatened by mass atrocity crimes, particularly those that amount to "ethnic cleansing". These crimes cannot be addressed entirely by simply ceasing military combat. To ensure true peace and stability, the legacies of the crimes must be addressed.⁷⁰ ISIS's crimes took place in Iraq and Syria, a region that has experienced an almost constant state of conflict.⁷¹ Prosecuting ISIS could serve a key role in attempting to create ongoing stability.

Mechanisms of transitional justice include prosecution in international criminal courts and tribunals.⁷² The achievements of one such tribunal, the International Criminal Tribunal for the former Yugoslavia (ICTY), were instrumental in holding perpetrators accountable, establishing facts and providing a voice for victims.⁷³ Prosecuting ISIS soldiers and commanders would achieve the same and prevent impunity, so that perpetrators could not simply meld back into the community or claim to have been non-violent members of ISIS, such as cooks.⁷⁴

For the Yazidis, the official recording and detailing of the atrocities that prosecution would offer provides justification for prosecuting their terrorisers, preventing those atrocities being denied as part of the Middle East's history and conflicts.⁷⁵ Providing the

65 See Zacklin, above n 16, at 541.

66 *The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary-General/S/2004/616* (2004) at [5].

67 At [8].

68 Seils, above n 18, at 2.

69 *United Nations Security Council 7585th meeting S/VPV7585* (2015) at 7.

70 Madoka Futamura *War Crimes Tribunals and Transitional Justice: The Tokyo Trial and the Nuremberg legacy* (Routledge, Abingdon (UK), 2008) at 22–23.

71 Toby Craig Jones "America, Oil, and War in the Middle East" (2012) 99 *J Am Hist* 208 at 217.

72 See Stuart Ford "A Social Psychology Model of the Perceived Legitimacy of International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms" (2012) 45 *Vand J Transnat'l L* 405 at 407.

73 Futamura, above n 70, at 6.

74 Rod Nordland "Captured ISIS Fighters' Refrain: 'I Was Only a Cook'" *The New York Times* (online ed, New York, 1 October 2017).

75 Peter Walker "Amal Clooney: Full transcript of human rights lawyer's UN speech on Isis" *The Independent* (online ed, London, 10 March 2017).

victims with a voice, as the ICTY did, is a key motivation for prosecuting ISIS; it is an acknowledgement of victims' dignity as bearers of human rights.⁷⁶ This is particularly pertinent for the Yazidis, who have suffered more than 70 genocides throughout their history.⁷⁷

Transitional justice measures, including prosecutions, also provide an opportunity for the making of reparations which, though challenging to quantify, give victims monetary compensation and support and, by extension, a means to rebuild their lives.⁷⁸

As ISIS is losing territory and Iraq and Syria are beginning to transition to a post-ISIS environment, it is important that transitional justice processes are pursued. Prosecuting ISIS would break the cycle of sectarian division and government unaccountability that has contributed to the region's instability for so long.⁷⁹

B *Counter-propaganda and recruitment*

ISIS can just be reborn under a different name if you don't actually change the narrative and change people's minds. They are brainwashing people ... one of the ways to take action against that is to expose their brutality and their corruption and partly you can do that through trials.

—Amal Clooney⁸⁰

Although ISIS's frontlines are in the battlefields of Iraq and Syria, it launched an important parallel offensive to capture the minds of a global audience and recruit fighters through its propaganda.⁸¹ While a coordinated military campaign against ISIS could weaken its stronghold on the ground, it would not be sufficient in itself to ensure ISIS's ideology does not endure.⁸² It has been recognised that there must be a concerted effort to counter the narrative that ISIS champions, as it is this narrative that has driven ISIS recruitment.⁸³ Counter-propaganda, in which the brutality ISIS glorifies is exposed for its shocking reality, can be formed through criminal prosecutions, in which the requirements of due process would ensure the details and motivations of ISIS's crimes are accurately reported. Criminal prosecutions will make clear the conflict between the Western ideological commitment to justice and the malevolent ideals of ISIS. This benefit was noted by Steven Sotloff's family, who expressed that their preference was for "Jihadi John" to be tried because "[t]hat's American justice. That's how our country deals with these situations."⁸⁴ Ultimately,

76 Seils, above n 18, at 2.

77 Avi Asher-Schapiro "Who Are the Yazidis, the Ancient, Persecuted Religious Minority Struggling to Survive in Iraq?" *National Geographic* (online ed, Washington DC, 11 August 2014).

78 Cristián Correa *Getting to Full Restitution: Guidelines for Court-Ordered Reparations in Cases Involving Sexual Violence Committed during Armed Conflict, Political Violence, or State Repression* (International Center for Transitional Justice, 11 April 2017) at 2.

79 Hassan Hassan "Isis may be on its knees but it will rise again if we don't break the cycle" *The Guardian* (online ed, London, 15 July 2017).

80 Interview with Amal Clooney, international human rights lawyer, above n 64.

81 Guy J Golan and Joon Soo Lim "Third Person Effect of ISIS' Recruitment Propaganda: Online Political Self-Efficacy and Social Media Activism" (2016) 10 *Int J Commun* 4681 at 4681.

82 Interview with Amal Clooney, international human rights lawyer, above n 64.

83 Kathleen Bouzis "Countering the Islamic State: US Counterterrorism Measures" (2015) 38 *Stud Confl Terror* 885 at 888.

84 Mark Duell and Lydia Warren "Make Jihadi John face American justice, demand victim Steven Sotloff's family as brutal ISIS executioner is finally unmasked" *The Daily Mail* (online ed, London, 27 February 2015).

criminal prosecutions of ISIS commanders and soldiers can form an integral part of the counter-propaganda effort against ISIS to purge its influence and weaken its hugely successful recruitment campaign.⁸⁵

C International law obligations

The prosecution of ISIS must be pursued because it is a means for the international community to fulfil its obligation to prevent and punish ISIS's brutal crimes.⁸⁶ The atrocities committed by ISIS against the Yazidis were confirmed to have constituted the international crime of genocide by the United Nations in a July 2016 report detailing the findings of the Independent International Commission of Inquiry on the Syrian Arab Republic (Commission of Inquiry).⁸⁷ The report also established that ISIS's actions against the Yazidis constituted war crimes and crimes against humanity.⁸⁸ The United Nation's confirmation of genocide has been affirmed by the European Union⁸⁹ and the United States.⁹⁰

Article 1 of the Genocide Convention states:

The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

Given that the atrocities committed against the Yazidis have been confirmed as genocide, the international community—comprising states, including Iraq and Syria, that are signatories to the Genocide Convention—has a responsibility to take punitive action. In September 2014, the Human Rights Council of the United Nations passed a resolution requesting the United Nations High Commissioner for Human Rights coordinate an inquiry in “Iraq to investigate alleged violations and abuses of international human rights law committed by [ISIS] ... with a view to avoiding impunity and ensuring full accountability”.⁹¹ The most effective way to achieve these goals in light of this recommendation is criminal prosecution. The responsibility to pursue the prosecution of ISIS was recognised by the then United States Secretary of State, John Kerry, who acknowledged the genocide of the Yazidis and committed the United States to holding the perpetrators accountable:⁹²

I want to be clear. I am neither judge, nor prosecutor, nor jury with respect to the allegations of genocide, crimes against humanity, and ethnic cleansing by specific persons. Ultimately, the full facts must be brought to light by an independent investigation and through formal legal determination made by a competent court or tribunal.

85 Omtzigt, above n 20, at [8].

86 See Genocide Convention, art 1.

87 UNHRC, above n 48, at [165].

88 At [166]–[173].

89 Resolution 2016/2529(RSP) on the systematic mass murder of religious minorities by the so-called ‘ISIS/Daesh’ [2018] OJ C35/77 [Genocide Resolution] at [2].

90 On 15 March 2016, the United States House of Representatives voted unanimously to recognise ISIS's genocide of the Yazidis. H Con Res 75, 114th Cong (2016).

91 *The human rights situation in Iraq in the light of abuses committed by the so-called Islamic State in Iraq and the Levant and associated groups* HRC Res S-22/1, A/HRC/Res/S-22/1 (2014) at [10].

92 John Kerry, United States Secretary of State “Remarks on Daesh and Genocide” (speech to the Press Briefing Room, Washington DC, 17 March 2016).

Iraqi and Syrian national forces have recognised the importance of punishing the perpetrators by compiling a list of wanted soldiers and commanders, issuing arrest warrants and arresting thousands of fighters despite the difficulties of capture.⁹³ While the international community failed in its obligations under the Genocide Convention to prevent the genocide of the Yazidis, the duty to punish the perpetrators endures and can be fulfilled through the prosecution of ISIS.⁹⁴

V With What Would ISIS Be Charged?

As mentioned in Part IV, as a result of investigations by the Commission of Inquiry, the United Nations has confirmed that ISIS has committed genocide, war crimes and crimes against humanity.⁹⁵ It is these crimes that would be pursued when prosecuting ISIS. While the argument that ISIS should be charged with crimes such as rape, torture and kidnapping to reflect the victimhood of individuals is noted,⁹⁶ it must also be recognised that there is no substitute for the charge of genocide. The charges of genocide and crimes against humanity reflect the mass atrocities to which ISIS's crimes amount. They were committed during war with motivations that extended beyond the intention of harming individuals. The prosecution of ISIS commanders and soldiers for these crimes can be pursued regardless of which prosecutorial approach, as discussed in Part VII, is preferred. Prosecuting ISIS commanders and soldiers in the domestic courts of Iraq and Syria would require those states to incorporate these international crimes into their domestic laws, which has been recommended.⁹⁷ The definition of genocide as provided in the Genocide Convention is articulated verbatim in the Rome Statute of the International Criminal Court (Rome Statute), which establishes the ICC, as are the definitions of war crimes and crimes against humanity.⁹⁸ If the option of establishing an international criminal tribunal for the prosecution of ISIS's crimes is preferred, the statute that establishes that tribunal would define the international crimes consistently with the Rome Statute, as did the establishing statutes of the ICTY⁹⁹ and the International Criminal Tribunal for Rwanda (ICTR).¹⁰⁰

The crime of genocide is defined in art 6 of the Rome Statute:

For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;

93 Richard Hall "What happens to ISIS fighters when they are captured" (29 November 2016) PRI <www.pri.org>.

94 Yazda: Global Yazidi Organization, above n 54, at 8.

95 UNHRC, above n 48, at [174].

96 Nadim Houry "Justice after ISIS: time for judicial triage" (25 August 2017) openDemocracy <www.opendemocracy.net>.

97 Houry, above n 96.

98 Rome Statute of the International Criminal Court 2187 UNTS 3 (opened for signature 17 July 1998, entered into force 1 July 2002) [Rome Statute], arts 6–8.

99 Statute of the International Criminal Tribunal for the former Yugoslavia, annexed to *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)* S/25704 (1993), adopted by SC Res 827, S/Res/827 (1993) [ICTY Statute], arts 4–5.

100 Statute of the International Criminal Tribunal for Rwanda, annexed to SC Res 955, S/Res/955 (1994), arts 2–3.

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

Crimes against humanity are established in art 7(1) of the Rome Statute, which emphasises the need for the relevant acts to be “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”. The extensive provisions regarding war crimes are articulated in art 8 of the Rome Statute. Although prosecuting the genocide of the Yazidis by ISIS is a key focus, the provisions regarding crimes against humanity and war crimes allow potential prosecutions to cover a broader scope of actions committed against Yazidis and other civilians in Iraq and Syria. This would establish the specifics of ISIS's crimes against them—for example, torture and rape—while still reflecting the systematic policy-driven nature of the crimes. The universality of these international crimes means there will be no ambiguity regarding their mens rea and actus reus requirements, thus providing clarity, in terms of evidential requirements, for prosecutors, judges and juries.

VI Substantiation of the Offences

The Commission of Inquiry concluded:¹⁰¹

The commanders of ISIS have acted wilfully, perpetrating these war crimes and crimes against humanity with clear intent of attacking persons with awareness of their civilian or hors de combat status. They are individually criminally responsible for these crimes.

For ISIS and its agents to be prosecuted for the aforementioned crimes, there must be a materially plausible case that they are guilty of the crimes. For the crime of genocide, the criminal agents must have committed genocidal actions against a protected group (the actus reus) with the requisite intent (the mens rea).¹⁰² The Yazidis, as a recognised religious minority, clearly constitute a protected group¹⁰³—that is, “a national, ethnical, racial or religious group”.¹⁰⁴ ISIS has been found to have committed all five prohibited actus reus elements of the crime of genocide as defined in the Rome Statute.¹⁰⁵ The Commission of Inquiry has confirmed that ISIS participated in the genocidal action of killing members of the group, such as in the August 2014 onslaught in Sinjar and the subsequent mass executions of men and boys who refused to convert.¹⁰⁶ These conclusions were corroborated by eyewitnesses and Yazidi women and children who reported hearing gunfire and seeing ISIS soldiers lead Yazidi men and boys away and return blood-soaked.¹⁰⁷ The report from Yazda, a global Yazidi organisation, on its investigation of over thirty mass graves and gathered testimonies concerning the events provides further

101 *Rule of Terror*, above n 7, at [78].

102 Rome Statute, art 6.

103 Yazda: Global Yazidi Organization, above n 54, at 6–7.

104 Rome Statute, art 6.

105 Yazda: Global Yazidi Organization, above n 54, at 7.

106 UNHRC, above n 48, at [1]–[2] and [28].

107 At [108].

evidence of the genocidal actions of ISIS in killing Yazidis.¹⁰⁸ The prohibited action of “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part” is evidenced by ISIS’s siege on Sinjar and shooting down of aid supplies.¹⁰⁹ This evidential corroboration is laid out in an extensive report published by the Commission of Inquiry in 2016 detailing acts of genocide committed by ISIS.¹¹⁰ For ISIS’s actions against the Yazidis to be genocide, they must have been undertaken with the “intent to destroy” the Yazidi people “in whole or in part”.¹¹¹ ISIS’s motivation, arising from its perception of the Yazidis as “infidels”, is clear from its core ideology discussed in Part III. ISIS’s intent to destroy the Yazidis is also confirmed by explicit discussion of the Yazidis and what their fate should be in propaganda magazine *Dabiq*, in which it was written: “Their continual existence to this day is a matter that Muslims should question as they will be asked about it on Judgment Day”.¹¹² ISIS soldiers who have been apprehended have also gloated about their crimes and the reasons for them, detailing their intent.¹¹³

ISIS has committed crimes against humanity against the Yazidis¹¹⁴ and other Iraqi and Syrian civilians. ISIS’s crimes against humanity against the Yazidis were “widespread”:¹¹⁵ committed across the Sinjar region in northern Iraq and Mount Sinjar itself, as well as in Syria.¹¹⁶ ISIS’s actions have been described as “systematic”¹¹⁷ by the Commission of Inquiry due to the coordinated nature of the 2014 siege and the organisation of subsequent attacks throughout territories in Iraq and Syria against Yazidis and others.¹¹⁸ The action of killing Yazidis, as evidenced by the Commission of Inquiry, constitutes “the crime against humanity of murder”.¹¹⁹ ISIS’s sexual enslavement, rape and torture of Yazidis, as reported by the United States Department of State, clearly constitute prohibited crimes against humanity.¹²⁰

The Commission of Inquiry also concluded that there have been a considerable number of war crimes committed by ISIS; the acts of sexual violence against Yazidi women, evidenced by testimony and physical assessments, constitute the war crimes of sexual violence and rape as they occurred in a time of armed conflict.¹²¹

Establishing the intent of ISIS fighters when they are caught is straightforward as they actively admit their crimes and motivations.¹²² Connecting specific fighters with crimes

108 Yazda: Global Yazidi Organization *A Report from the Yazda Documentation Project on Mass Graves of Yazidis Killed by the Islamic State Organization or Local Affiliates On or After August 3, 2014* (28 January 2016) at 7–17.

109 UNHRC, above n 48, at [9] and [27].

110 At [106]–[165].

111 Rome Statute, art 6.

112 “The Revival of Slavery Before the Hour” *Dabiq* (Dhul-Hijjah 1435 [September–October 2014]) at 14.

113 Paddy Dinham “Captured ISIS jihadi reveals how he killed 500 civilians and raped 200 women during the terror group’s barbaric raids on Yazidi settlements... and boasts: ‘It was normal’” *The Daily Mail* (online ed, London, 19 February 2017).

114 See UNHRC, above n 48, at [165].

115 Rome Statute, art 7.

116 Al Jazeera “Iraqi Kurds launch offensive to retake Sinjar from ISIL” (13 November 2015) <www.aljazeera.com>.

117 Rome Statute, art 7.

118 UNHRC, above n 48, at [167].

119 At [168].

120 United States Department of State *Iran 2016 Human Rights Report* (2016) at 24.

121 UNHRC, above n 48, at [171].

122 Dinham, above n 113.

committed is made possible by the extensive list of named wanted ISIS fighters compiled by the Iraqi National Police.¹²³

VII Approaches to Prosecuting ISIS

A *Domestic courts of Iraq and Syria*

ISIS's mass atrocity crimes against the Yazidis and other civilians took place in Iraq and Syria and any prosecution for these prohibited actions would fall under the national jurisdictions of those countries. Although the domestic courts in Iraq and Syria have begun working through thousands of cases of suspected ISIS militants, the situation is overwhelming; the courts are challenged by the scale of crimes committed, a lack of resources to gather evidence and a volatile, "highly politicized and polarized environment".¹²⁴ A significant difficulty in prosecuting ISIS's large-scale crimes, including the genocide of the Yazidis, in Iraqi and Syrian courts is the deficiency in those countries' legal framework.¹²⁵ In order to prosecute ISIS for genocide, crimes against humanity and war crimes, these crimes must be incorporated into the domestic law of Iraq and Syria.¹²⁶ Domestic incorporation of the international crime of genocide would be consistent with the obligations of Iraq and Syria under art 5 of the Genocide Convention to enact legislation to give effect to the Convention and provide effective penalties. Trials of ISIS agents that have already taken place in these courts indicate the restricted legal framework in which they have had to operate, as there have been no charges for genocide or sexual violence.¹²⁷ Given the inability to prosecute these international crimes in the domestic courts, Iraqi courts have relied on counterterrorism laws. However, these are limited and cannot provide meaningful convictions for ISIS's mass atrocities and, in some cases, suspected militants have been pardoned.¹²⁸

Trying ISIS commanders and soldiers in the domestic courts of Iraq and Syria has prompted serious concerns about the fairness of the judicial process.¹²⁹ The trials of Saddam Hussein and his affiliates before the Iraqi High Tribunal highlighted the limited ability of the domestic courts of Iraq to observe due process and conduct trials prosecuting crimes of an international nature.¹³⁰ Human rights advocates questioned whether the court could handle these cases and claimed that judges would be too prejudiced after Hussein's rule to provide fair trials. Further, although the trials incorporated elements of those held in international tribunals and the ICC, the tribunal had procedural problems and was criticised for failing to observe due process.¹³¹ The United Nations Assistance Mission in Iraq concluded that "a consistent failure to respect due process and fair trial standards" has occurred in Iraqi criminal courts.¹³² Amnesty International found that Iraqi

123 Hall, above n 93.

124 Houry, above n 96.

125 Yazda: Global Yazidi Organization, above n 54, at 12.

126 Houry, above n 96.

127 Amal Clooney "Amal Clooney: 'Finally, We Have A Coordinated Effort To Bring ISIS To Justice'" (22 September 2017) HuffPost <www.huffpost.com>.

128 Houry, above n 96.

129 Clooney, above n 127.

130 Gerald Waltman III "Prosecuting ISIS" (2016) 85 Miss LJ 817 at 835.

131 See Human Rights Watch *The Former Iraqi Government on Trial* (16 October 2005) at 8.

132 United Nations Assistance Mission for Iraq Human Rights Office and Office of the High Commissioner for Human Rights *Report on the Death Penalty in Iraq* (October 2014) at 2.

national security forces have committed human rights abuses themselves, torturing and killing civilians fleeing from ISIS, revealing the volatility of the region and the violence that besieges its governance.¹³³ Captured members of ISIS are also being tortured in prison, interrogated and, in some cases, shot in acts of revenge by government agents. This contributes to a cycle of a lack of due process and violence, which will only cause the extremism to continue and prevent true justice from being achieved.¹³⁴ Iraq has expressed its desire for its jurisdiction to be respected.¹³⁵ However, though willing, it does not currently appear able to prosecute ISIS for its crimes due to the deficiencies in its domestic law, its judiciary's questionable ability to provide fair trials, and the political disharmony and general volatility that endures in the region.

B *The International Criminal Court*

The ICC was established in 2002, reflecting a shift in the global discourse around human rights towards accountability, to focus on the prosecution of crimes against humanity, genocide, war crimes and the crime of aggression.¹³⁶ The court recognised an international obligation to prosecute the perpetrators of mass atrocity crimes.¹³⁷ Considering these objectives, the ICC should be a viable forum in which to prosecute ISIS. The Commission of Inquiry concluded that the ICC “is, at present, the only international criminal tribunal that could have jurisdiction over ISIS crimes against the Yazidis”.¹³⁸

The ICC can exercise jurisdiction over ISIS's crimes against humanity, war crimes and genocide in Iraq and Syria under art 13 of the Rome Statute, which provides the Court can exercise jurisdiction in the following situations:

- (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
- (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
- (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

Prima facie, the ICC does not have territorial jurisdiction over international crimes committed in Iraq and Syria, as neither state is party to the Rome Statute.¹³⁹ However, short of becoming parties to the Rome Statute, which Iraq and Syria have shown no indication of wanting to do, art 12(3) offers a compromise whereby a state that is not party to the Rome Statute can accept the authority of the Court over a specific crime—for example, the Yazidi genocide. In February 2016, the European Parliament adopted a resolution on the systematic mass murder of religious minorities by ISIS, which “[urged]

133 Amnesty International “*Punished for Daesh’s Crimes*”: *Displaced Iraqis Abused by Militias and Government Forces* (October 2016) at 5.

134 See Julian Robinson “‘They are not human beings’: Scores of suspected ISIS fighters sit crammed inside a jail in Mosul... as Iraqi lieutenant who boasts he ‘sent one captive to Hell’ says they deserve to die” *The Daily Mail* (online ed, London, 19 July 2017).

135 SC Res 2379, S/Res/2379 (2017) [Resolution 2379] at [5].

136 Treasa Dunworth “The International Criminal Court” [2002] NZLJ 231.

137 Gozde Turan “‘Responsibility to Prosecute’ in an age of global governmentality: The International Criminal Court” (2016) 51 *Coop & Conflict* 20 at 24–25.

138 UNHRC, above n 48, at [196].

139 Omtzigt, above n 20, at [5].

Syria and Iraq to accept the jurisdiction of the International Criminal Court".¹⁴⁰ Despite this resolution, the ICC does not have jurisdiction over any crimes, specific or general, in Iraq or Syria.

Article 13(b) of the Rome Statute allows the ICC to exercise jurisdiction over ISIS's crimes in Iraq and Syria where the United Nations Security Council (UNSC) refers the situation to the ICC Prosecutor, notwithstanding the fact that neither state is party to the Rome Statute. This provision was first invoked when the UNSC referred the situation in Darfur to the ICC Prosecutor.¹⁴¹ It is strongly arguable that the situation in Iraq and Syria is appropriate for referral for prosecution in the ICC as the UNSC has labelled ISIS "a threat to international peace and security".¹⁴² All permanent members of the UNSC are also parties to the Genocide Convention, requiring them to prevent and punish genocide,¹⁴³ providing further justification for the UNSC to invoke art 13(b). Despite international will for the UNSC to refer the situation in ISIS territories to the ICC,¹⁴⁴ Russia and China vetoed an attempted referral,¹⁴⁵ which is evidence of the "geo-political" issues at play.¹⁴⁶

Article 13(c) allows the ICC Prosecutor to open an investigation on his or her own accord.¹⁴⁷ However, the Prosecutor can only investigate crimes within the Court's jurisdiction. The facts that the ICC lacks territorial authority over Iraq and Syria and that those states have not accepted the Court's jurisdiction for specific crimes committed by ISIS are reflected in the statement of ICC Prosecutor Fatou Bensouda, who noted in 2015 that "the jurisdictional basis for opening a preliminary examination into this situation is too narrow at this stage".¹⁴⁸

Per art 12(2)(b), the Prosecutor does have jurisdiction over alleged criminal agents who committed crimes in Iraq and Syria but who are nationals of states under the ICC's jurisdiction. There are numerous advantages in the Prosecutor's exercising "personal jurisdiction" over these "foreign fighters", including gathering trial-worthy evidence and testimony that could be used in later prosecutions, providing a detailed record of the atrocities, and further pressuring the UNSC to refer the situation to the ICC.¹⁴⁹ However, Bensouda considers the fact that ISIS leadership consists largely of Iraqi and Syrian nationals limits the justification for the use of personal jurisdiction as it would not target those most responsible.¹⁵⁰ In accordance with the ICC's operating "principle of complementarity", the Court will only exercise jurisdiction over foreign nationals if their own states are opposed to or incapable of prosecuting.¹⁵¹

140 Genocide Resolution, above n 89, at [3].

141 Human Rights Watch "UN Security Council Refers Darfur to the ICC" (31 March 2005) <www.hrw.org>.

142 Cman Kenny "Prosecuting Crimes of International Concern: Islamic State at the ICC?" (2017) 33(84) *Utrecht J Int Eur Law* 120 at 124.

143 Genocide Convention, art 1.

144 Genocide Resolution, above n 89, at [4].

145 Ian Black "Russia and China veto UN move to refer Syria to international criminal court" *The Guardian* (online ed, London, 22 May 2014).

146 Anna Marie Brennan "Prosecuting ISIL before the International Criminal Court: Challenges and Obstacles" (17 September 2015) *American Society of International Law* <www.asil.org>.

147 Rome Statute, arts 13(c) and 15(1).

148 Office of the Prosecutor "Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the alleged crimes committed by ISIS" (8 April 2015) *International Criminal Court* <www.icc-cpi.int>.

149 Omtzigt, above n 20, at [38].

150 Office of the Prosecutor, above n 148.

151 Borda, above n 19.

The configuration of the ICC as an international, independent prosecutorial mechanism commits it to a procedural clarity that not all domestic courts can guarantee.¹⁵² While the ICC was specifically established to prosecute crimes such as the genocide of the Yazidis, the Court's lack of jurisdiction over the matter reflects the Rome Statute's commitment to balancing the interests of state sovereignty with the international rule of law.¹⁵³ The ICC's inability to prosecute ISIS raises questions as to the efficacy of the Court generally—it has only secured three convictions since its inception.¹⁵⁴

But even if the ICC does acquire jurisdiction over ISIS's crimes in Iraq and Syria, as a court physically removed from a volatile conflict zone, the issue of evidence-gathering will prove a challenge. In past prosecutions, difficulties in investigating have caused the scope of charges to be narrowed.¹⁵⁵

(1) Evidence gathering

ISIS does not attempt to hide any evidence of its atrocities. It has been described as “a bureaucracy of evil leaving a trail of evidence behind it that no one is picking up”.¹⁵⁶ This is particularly apparent in the case of the Yazidi genocide: mass graves provide crucial evidence of the atrocities that is not being investigated despite local requests for the ICC to do so.¹⁵⁷ On 21 September 2017, in a breakthrough towards accountability for ISIS, the UNSC unanimously passed a resolution establishing an investigative team led by a special advisor for “collecting, preserving, and storing evidence in Iraq of acts that may amount to war crimes, crimes against humanity and genocide” (the Evidence Resolution).¹⁵⁸ The Evidence Resolution stipulates that the evidence be collected “to the highest possible standards” for use exclusively in “fair and independent criminal proceedings”.¹⁵⁹ The Resolution will ensure that evidence is collected and stored to an international law standard that will maximise the chances of success in any future prosecution, whether domestically in Iraq and Syria or under the ICC's jurisdiction.¹⁶⁰ The UNSC was cautious about launching investigations without Iraq's consent, which has now been received.¹⁶¹ Ultimately, the effectiveness of the Evidence Resolution will be determined by its implementation and the cooperation between Iraq and the United Nations. Nonetheless, at least conceptually, it fills the evidential gap that would otherwise hinder potential prosecutions.¹⁶²

152 Roberta Arnold *The ICC as a New Instrument for Repressing Terrorism* (Transnational Publishers, New York, 2004) at 343.

153 Brennan, above n 146.

154 Courtney Hillebrecht and Scott Straus “Last week, the International Criminal Court convicted a war criminal. And that revealed one of the ICC's weaknesses” *The Washington Post* (online ed, Washington DC, 28 March 2016).

155 Michèle Laborde-Barbanègre and Roxane Cassehgari *Reflections on ICC Jurisprudence Regarding the Democratic Republic of the Congo: Drawing Lessons from the Court's First Cases* (International Center for Transitional Justice, September 2014) at 2.

156 Walker, above n 75.

157 Muhammad Izzaddin “Kurdistan to show Yezidi mass graves to ICC as evidence of ISIS genocide” (17 March 2016) Rudaw <www.rudaw.net>.

158 Resolution 2379, above 135, at [2].

159 At [2] and [5].

160 Clooney, above n 127.

161 Somini Sengupta “For a Yazidi Woman, Justice for ISIS Crimes Is Still Elusive” *The New York Times* (online ed, New York, 17 August 2017).

162 Clooney, above n 127.

C *An ad hoc international tribunal*

Considering the inabilities of the ICC to exercise jurisdiction over the crimes committed by ISIS in Iraq and Syria, and of the domestic courts in those states, at least in the short term, to meet international fair trial standards,¹⁶³ observers¹⁶⁴ and the Commission of Inquiry recommend the establishment of an ad hoc international tribunal with jurisdiction over ISIS's crimes in Iraq and Syria.¹⁶⁵ The UNSC established that ISIS constitutes a "threat to international peace and security",¹⁶⁶ consistent with art 39 of the Charter of the United Nations. The UNSC has the authority to establish international tribunals under ch VII of the Charter in order to "restore international peace and security" where crimes committed represent a "threat" under art 39. The ICTY and ICTR were established by UNSC resolutions under ch VII of the Charter in response to crimes that represented an art 39 "threat".¹⁶⁷

An international tribunal, binding on all member states, could be established under ch VII to have jurisdiction over all ISIS commanders and soldiers for crimes committed in Iraq and Syria from 30 June 2014.¹⁶⁸ The tribunal would not have an end date to its jurisdiction, as ISIS's crimes in Iraq and Syria are ongoing. The territorial jurisdiction for crimes committed in Iraq and Syria would include both land surface and airspace.¹⁶⁹ The enacting statute of the tribunal would establish jurisdiction over the crimes discussed in Part V by replicating the relevant provisions of the Rome Statute.¹⁷⁰ The tribunal would not filter by rank. Instead, it would exercise authority over all agents, from low-level fighters to highly ranked ISIS commanders, representing a commitment to ensuring that no perpetrator is beyond reproach.¹⁷¹ With the authorisation of Iraq, the tribunal would utilise the evidence collected through the Evidence Resolution to prosecute the crimes in its jurisdiction. The tribunal could be based in a neighbouring state, such as Jordan, to facilitate its access to evidence.¹⁷² The tribunal would also ideally involve Iraqi and Syrian judges and jurists to observe the duty these states have to prosecute crimes against their citizens.¹⁷³

VIII The Preferred Approach

Considering the options discussed in Part VII, it is argued that, on balance, the most effective approach is establishing an ad hoc international tribunal similar to the ICTY and ICTR to adjudicate on the prosecution of ISIS's crimes in Iraq and Syria. The United Nations has affirmed its commitment to "fair and independent criminal proceedings"¹⁷⁴ and

163 Clooney, above n 127.

164 Borda, above n 19.

165 UNHRC, above n 48, at [207].

166 SC Res 2249, S/Res/2249 (2015).

167 Alberto Costi "Hybrid Tribunals as a Valid Alternative to International Tribunals for the Prosecution of International Crimes" (2005) 3(5) Human Rights Research 1 at 4.

168 This is the date ISIS renamed itself "the Islamic State" and announced the re-establishment of the caliphate: see Stern and Berger, above n 23, at xxi.

169 See Statute of the International Criminal Tribunal for Rwanda, art 7.

170 Rome Statute, arts 6-8.

171 Laborde-Barbanègre and Cassehgari, above n 155, at 6.

172 Julian Borger "Call for special tribunal to investigate war crimes and mass atrocities in Syria" *The Guardian* (online ed, London, 17 March 2015).

173 Waltman III, above n 130, at 837.

174 Resolution 2379, above n 135, at [5].

should not assist Iraqi and Syrian domestic courts where there are questions as to their observance of due process.¹⁷⁵ An international tribunal established by the United Nations according to its own standards of best practice will ensure integrity in the prosecutions. While the ICC can provide fair trial processes, it is limited in its efficacy due to its jurisdictional confines, as discussed in Part VII. An ad hoc international tribunal would not be hindered by these jurisdictional restrictions as it would be legally grounded in ch VII of the Charter of the United Nations, binding all member states including Iraq and Syria and imposing obligations of compliance with all requests, including those for the surrender of evidence.¹⁷⁶ The jurisdictional restrictions of the ICC, as well as its established commitment to prosecuting only high-ranking officials, are reflected in the low number of convictions made in the Court.¹⁷⁷ Conversely, an ad hoc tribunal's mandate, extending across the ranks of ISIS, would provide the opportunity to indict hundreds of perpetrators, as was achieved in the ICTY.¹⁷⁸ This indiscriminate pursuit and prosecution of ISIS agents in an international tribunal would fulfil the goal of transitional justice: to achieve accountability and uncompromised justice for victims.¹⁷⁹ Prosecution in an international tribunal would also expose ISIS's brutality to an international audience, helping to form a counter-narrative to its ideology.

A notable criticism of international tribunals is their ineffectiveness in reaching out to the local populations and victims of the crimes they are hearing to gain their support.¹⁸⁰ This was apparent in the case of the ICTY, which was based in the Hague and physically far removed from its territorial jurisdiction. Considering Iraq and Syria are still plagued by conflict, establishing the tribunal in neighbouring Jordan would make it sufficiently close to overcome the outreach problem by implementing an outreach programme.¹⁸¹ A tribunal based in Jordan would also have the advantage of increased capacity to access evidence and witnesses for participation in proceedings. The fact that international tribunals require state cooperation to arrest and detain perpetrators has inspired criticism about their efficacy.¹⁸² In Iraq and Syria there have been procedural shortcomings in the arrests and detention of suspected ISIS militants, as discussed in Part VII.¹⁸³ However, despite these issues, Iraqi and Syrian forces remain committed to arresting perpetrators and achieving accountability.¹⁸⁴ The potentially high operating costs of an ad hoc tribunal are also a concern.¹⁸⁵ Ultimately, though, a tribunal would operate in the most cost-efficient manner possible, and financial concerns should not deter its inception. Further, including Iraqi and Syrian judges and jurists in the proceedings of an international tribunal would legitimise the proceedings as a coordinated effort between the international community and local Iraqi and Syrian governance to avoid impunity.¹⁸⁶

175 Clooney, above n 127.

176 Robert Cryer *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge University Press, Cambridge, 2005) at 133.

177 See Hillebrecht and Straus, above n 154.

178 Borger, above n 172.

179 Seils, above n 18, at 2.

180 Janine Natalya Clark "International War Crimes Tribunals and the Challenge of Outreach" (2009) 9 IntCLR 99 at 100–101.

181 At 100–101.

182 Futamura, above n 70, at 28.

183 Robinson, above n 134.

184 Mostafa, above n 14.

185 Costi, above n 167, at 6.

186 Waltman III, above n 130, at 837.

While an international tribunal has deficiencies, it does appear on balance to be the most effective approach to achieving justice for the victims of ISIS's crimes in Iraq and Syria.

IX Conclusion

My real fear is that once ISIS is defeated ISIS militants [and] ISIS terrorists will just shave off their beards and walk the streets of the cities as if nothing has happened. We cannot let this happen ... so that I can be the last girl to come before you with such a story.

—Nadia Murad¹⁸⁷

The possibility of impunity for the perpetrators of mass atrocity crimes is what Nadia Murad and other victims of the Yazidi genocide and ISIS's atrocities in Iraq and Syria fear most; consequently, it must be avoided. It has been established that the actions of ISIS in Iraq and Syria are grounded in an ideological core that promotes horrendous violence against religious and ethnic minorities.¹⁸⁸ It is an ideology that has caused ISIS soldiers and commanders to commit crimes against humanity, war crimes and the crime of genocide.¹⁸⁹ The international community no longer views the perpetrators of these mass atrocity crimes as being beyond the reproach of the law.¹⁹⁰ But the shift in attitudes towards accountability must not stop at crimes committed by ISIS as a whole; prosecutions of individual ISIS soldiers and commanders should also be pursued. The law requires the international community to punish these atrocities,¹⁹¹ but more than that, prosecutions, which will expose the brutality of ISIS's actions and the perverse motivations of its doctrine, are needed to contribute to the counter-narrative to ISIS's ideology.¹⁹²

The prosecution of ISIS could be pursued through the domestic courts of Iraq and Syria, through the ICC or through an ad hoc international tribunal. Establishing an ad hoc international tribunal with jurisdiction over ISIS's crimes in Iraq and Syria would be the most efficient mechanism to prosecute ISIS.¹⁹³ The international tribunal would have jurisdiction over the perpetrators as well as an increased capacity to receive evidence and to adjudicate fairly on evidence. Further, the tribunal could indict large numbers of criminal agents, regardless of their rank within ISIS. The establishment of an international tribunal would provide the greatest opportunity for comprehensive justice for the victims of ISIS, ensuring that no perpetrator of mass atrocity crimes is unaccountable. Ultimately, the international community must cooperate in the prosecution of ISIS, as "impunity enables further impunity, but international justice can be contagious".¹⁹⁴

187 Nadia Murad Basee Taha, United Nations Goodwill Ambassador for the Dignity of Survivors of Human Trafficking "Appointment as a Goodwill Ambassador" (speech to the United Nations General Assembly, New York, 16 September 2016). Murad is a Yazidi genocide survivor and United Nations Goodwill Ambassador.

188 Robinson, above n 30, at 173.

189 UNHRC, above n 48, at [166]–[174].

190 Zacklin, above n 16, at 541.

191 Genocide Convention, art 1.

192 Bouzis, above n 83, at 888.

193 Borger, above n 172.

194 Johnston, above n 1.