



**BULAN INSTITUTE**  
for PEACE INNOVATIONS

# **Establishing an Ad Hoc Tribunal to Bring ISIS Fighters into Justice: Prospects, Limits and National Alternatives**

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## **ABOUT US**

The Bulan Institute for Peace Innovations is a research institute and non-governmental organization that aims to promote peacebuilding and human rights-based dialogue on security in Eurasia, Central Asia and South Asia. Its headquarters are located in Geneva, Switzerland, with an additional regional office in Bishkek, Kyrgyzstan. The Institute works to promote peace and human rights through field-centered research, building dialogue and advocacy. Since 2018, the Bulan Institute has been observing state policies regarding returning foreign fighters, with a special focus on women and children.

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## **Abbreviations**

EU	European Union
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
IJP	International Judges and Prosecutors
ISIS	Islamic State of Iraq and Syria
NIAC	Non-international Armed Conflict
STL	Special Tribunal for Lebanon
SDF	Syrian Democratic Forces
UN	United Nations
UNITAD	Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL
UNMIK	United Nations Mission in Kosovo
UNSC	United Nations Security Council
UNTAET	United Nations Transitional Administration in East Timor

## 1. Introduction

The Islamic State of Iraq and Syria (ISIS), following its defeat and territorial losses in the Iraqi and Syrian regions, has entered a long-lasting period of decline. Although the terrorist group's influence in the region is weakened, the persistent environment of instability in both Iraq and Syria has led experts to express concerns regarding the risk of a resurgence.<sup>1</sup> In that light, both regional actors and the international community have been engaged in discussions regarding the challenges posed by former ISIS fighters and their family members.

Following ISIS' defeat in Syria, local forces such as the Syrian Democratic Forces (SDF) have captured a significant number of fighters, allegedly linked to the terrorist organization, as well as their families, including women and children. A complex question must now be resolved: What must be done with these captured individuals and their families, a number of whom are reportedly responsible for international crimes, including war crimes, genocide and crimes against humanity?

Resolving this question is particularly urgent, as the SDF controls numerous camps with limited resources and funding, resulting in an overwhelming number of ISIS fighters and their relatives being held in disastrous living conditions. Non-Syrian or Iraqi nationals (known as foreign fighters) are similarly detained in those camps. Reports have highlighted issues such as overcrowding, limited access to sanitary and health facilities, a lack of medical personnel and equipment, inappropriate accommodation, and an increased risk of physical, mental or sexual violence as well as ill-treatment<sup>2</sup> in camps based in Northern Syria, such as Roj and Al-Hawl.<sup>3</sup> Vulnerable populations, including children, are particularly at risk and may be subject to the most serious abuses.<sup>4</sup>

The conditions perpetuated in these camps represent very challenging humanitarian loopholes. On one hand, while ISIS fighters and their families remain in such camps, there is a struggle to find an appropriate legal instrument with which to conduct legal assessment of any alleged crimes and to bring justice where appropriate. On the other hand, due to an indiscriminate tendency to assume association with ISIS by any means equates to an ongoing risk of harm to others, many governments are opposed to their repatriation. Several options have been discussed by the international community in order to resolve this contradiction. Most relevant actors and entities acknowledge the fact that crimes perpetrated by these individuals while under the influence of the Islamic State must be prosecuted. The challenge, however, remains to determine which approach should be chosen among different prosecution alternatives considering the complexity and specificity of the situation.

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<sup>1</sup> Elizabeth Dent, "Policy Paper: US Policy and the Resurgence of ISIS in Iraq and Syria", *Middle East Institute*, October 2020, <https://www.mei.edu/publications/us-policy-and-resurgence-isis-iraq-and-syria#pt2>

<sup>2</sup> Vera Mironova, "Life Inside Syria's al-Hol camp", *Middle East Institute*, July 2020, <https://www.mei.edu/publications/life-inside-syrias-al-hol-camp>

<sup>3</sup> CTED Trends Report, *The Challenge of Returning and Relocating Foreign Terrorist Fighters: Research Perspectives*, March 2018, <https://www.un.org/sc/ctc/wp-content/uploads/2018/04/CTED-Trends-Report-March-2018.pdf>

<sup>4</sup> Alexandra Brzozowski, "Foreign IS fighters in Northeast Syrian camps - a 'ticking time bomb' for Europe", *Euroactive*, December 2020, <https://www.euractiv.com/section/defence-and-security/news/foreign-is-fighters-in-northeast-syrian-camps-a-ticking-time-bomb/>; see also REACH, *Camp Profile: Roj (Al-Hasakeh governorate, Syria)*, October 2020, [https://reliefweb.int/sites/reliefweb.int/files/resources/REACH\\_SYR\\_Factsheet\\_NES\\_CampProfile\\_Roj\\_November-2020.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/REACH_SYR_Factsheet_NES_CampProfile_Roj_November-2020.pdf)

The burden of prosecuting ISIS fighters for their crimes primarily lies with states. As a non-state actor, the SDF's power to prosecute ISIS members is limited, and its right to establish a court under International Humanitarian Law (IHL) is still largely debated.<sup>5</sup> Moreover, the SDF lacks both the infrastructure and the resources to undertake such a task on its own. States are under an obligation to bring to justice those who have participated in international crimes and are expected to repatriate their nationals to ensure their prosecution, as reaffirmed by the United Nations Security Council (UNSC).<sup>6</sup> Yet only a small number of states have shown genuine leadership on this front,<sup>7</sup> while most governments have adopted other strategies such as the deprivation of nationality, *in absentia* trials, refusal to repatriate, negotiations with Iraq regarding prosecution there, or expressing support for "ad hoc alternatives". The latter might be considered as an attempt by governments to comply with their prosecution duties, while simultaneously evading their obligation to repatriate their nationals. Consequently, national prosecution of foreign fighters is limited and the risk of some ISIS members in the camps reverting to or engaging in violent extremism remains.<sup>8</sup>

Until now, Iraq, encouraged by other states, has widely engaged in the prosecution of individuals, including minors, suspected of ties with ISIS. However, in addition to the limited jurisdiction of the Iraqi courts, suspects and defendants detained in Iraq have reportedly been subjected to severe abuses, including breaches of their judicial and procedural rights, as well as violations of their right not to be subject to torture or ill-treatment.<sup>9</sup>

In light of the above, this policy paper aims to offer an overview of the main prosecution options that states may pursue to ensure that crimes committed by ISIS members will not remain unpunished. Firstly, this paper examines the possibility of prosecuting ISIS fighters under the framework of the International Criminal Court (ICC). Although this option *prima facie* seems relevant, using the ICC structure to try ISIS members is hindered by obstacles relating to its jurisdiction, accessibility, and procedural and geographic limits.

Secondly, the prospect of creating a new special court, following the approach of previously established "ad hoc" tribunals is assessed. Although subject to support by some states, this option still has pitfalls. Therefore, different kinds of ad hoc structures will be discussed in this paper: international ad hoc courts and hybrid or mixed tribunals, relying on both international and domestic legislations, personnel and structures. The difficulties encountered in creating such a tribunal to focus on ISIS fighters' crimes in Syria will be highlighted, based on the experience of previous "ad hoc" courts.

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<sup>5</sup> Beatrice Walton, Paul Strauch, "Three Lingering Questions about the Legality of Withdrawal from Syria: Part II - Duty to ensure Respect & Releasing ISIS Detainees", *Opinio Juris* (blog), January 2020, <http://opiniojuris.org/2020/01/08/three-lingering-questions-about-the-legality-of-withdrawal-from-syria-part-ii-duty-to-ensure-respect-releasing-isis-detainees/>

<sup>6</sup> *Resolution 2396 (2017)*, United Nations Security Council, December 2017, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/460/25/PDF/N1746025.pdf?OpenElement>

<sup>7</sup> See for example Anna Gussarova, "Repatriating Foreign Fighters: The Case of Kazakhstan", *European Eye on Radicalization*, April 2020, <https://eeradicalization.com/repatriating-foreign-fighters-the-case-of-kazakhstan/>

<sup>8</sup> "Research Paper: Breaking the Cycle of Violence: Transitional Justice for the Victims of ISIS in Syria", *Chatham House*, April 2020, <https://www.chathamhouse.org/sites/default/files/CHHJ8101-Justice-in-transition-%28Victims-of-ISIS%29-RP-INT-200408-WEB.pdf>

<sup>9</sup> "Iraq: ISIS Child Suspects Arbitrarily Arrested, Tortured", *Human Rights Watch*, March 2019, <https://www.hrw.org/news/2019/03/06/iraq-isis-child-suspects-arbitrarily-arrested-tortured>; see also "Detention and Prosecution of Former ISIS Fighters in Iraq: Lessons Learned and an Assessment of the Deficits of the Judicial System", *Bulan Institute for Peace Innovations*, 2020, <https://bulaninstitute.org/wp-content/uploads/2021/01/Policy-Paper-on-Iraq.pdf>

Finally, this paper addresses the possibility of establishing an ad hoc tribunal to try ISIS fighters, limits of international courts and the role of national courts in prosecuting ISIS fighters and suggests that their individual criminal liability should primarily be dealt with by domestic institutions in their country of origin.<sup>10</sup> This option is rooted in states' primary obligation to prosecute international crimes committed by their nationals following their repatriation, notably anchored in the UNSC Resolution 2396. As discussed further, repatriation and national prosecution are subject to political and security challenges but remain crucial elements to guarantee justice for ISIS' crimes, and to engage in a reintegration process for fighters and their families.

## 2. Prosecution through International Law: The System of the International Criminal Court and its Limits

The International Criminal Court (ICC), as a judicial institution aiming to “put an end to impunity for the perpetrators of the most serious crimes of concern to the international community” and to “contribute to the prevention of such crimes” is an interesting prosecution option in light of the gravity of crimes perpetrated by ISIS.<sup>11</sup>

Crimes falling under the ICC's jurisdiction *ratione materiae* are listed under Article 5 of the Rome Statute: crimes against humanity, war crimes, the crime of genocide and the crime of aggression.<sup>12</sup> According to Article 12 of its Statute, the Court's jurisdiction covers crimes perpetrated on the territory of a state party to its Statute (territorial jurisdiction) or by individuals who are nationals, at the time of the commission, of a state party.<sup>13</sup> The Rome Statute highlights that the ICC Prosecutor “may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court” (if authorized by the Pre-Trial Chamber), or on the basis of a referral from a state.<sup>14</sup> The two above-mentioned conditions of territorial or personal jurisdiction are not required if the situation at stake is referred to the Court by the UNSC. As a reminder, the ICC remains a complementary structure, supplementing states' “obligation to prosecute or extradite” (*aut dedere aut judicare*).<sup>15</sup> Therefore, the court will only preside over a situation if states whose jurisdiction covers the violations at stake refuse or fail to prosecute those crimes.<sup>16</sup>

The ICC, designed to centralize the system of international prosecution and “provide consistent justice”, was aimed to overcome some of the challenges faced by the pre-existing

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<sup>10</sup> See Tanya Mehra, “Bringing (Foreign) Terrorist Fighters to Justice in a Post-ISIS Landscape Part II: Prosecution by Foreign National Courts”, *International Centre for Counter-Terrorism (ICCT)*, January 2018, <https://icct.nl/publication/bringing-foreign-terrorist-fighters-to-justice-in-a-post-isis-landscape-part-ii-prosecution-by-foreign-national-courts/>

<sup>11</sup> “Understanding the International Criminal Court”, *International Criminal Court*, 1, <https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf>

<sup>12</sup> “Rome Statute of the International Criminal Court” (hereinafter the “Rome Statute”), adopted on the 17 July 1998, *United Nations Treaty Series*, vol. 2178 (3), art. 5, <https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280025774&clang=en>

<sup>13</sup> *Ibid.* art. 12

<sup>14</sup> *Ibid.* art. 14-15

<sup>15</sup> “The obligation to extradite or prosecute (*aut dedere aut judicare*)”, *International Law Commission*, 2014, 2-3, [https://legal.un.org/ilc/texts/instruments/english/reports/7\\_6\\_2014.pdf](https://legal.un.org/ilc/texts/instruments/english/reports/7_6_2014.pdf)

<sup>16</sup> Yitiha Simbeye, *Immunity and International Criminal Law* (Routledge, 2016).

system based on “ad hoc arrangements”,<sup>17</sup> and to tackle the international community’s fear of fragmentation within the legal regime of international criminal law.<sup>18</sup> However, expectations that the ICC would utterly substitute hybrid criminal justice were eventually undermined by jurisdictional or practical obstacles encountered by the Court, as will be discussed further in this chapter. These obstacles are illustrated by the difficulties encountered in prosecuting international crimes committed in Iraq or Syria, particularly when associated with ISIS fighters.

The ICC structure was similarly designed to alleviate certain disadvantages encountered by national tribunals. In the case of trials against ISIS members under national legal frameworks, domestic courts have a tendency to focus on charging individuals with counter-terrorism offences, when their acts may also amount to international crimes under the Rome Statute.<sup>19</sup> ISIS members have reportedly committed serious offences in the region, some of which amount to core crimes, namely war crimes, crimes against humanity and even genocide.<sup>20</sup> For instance, the armed group’s deliberate attempts to fully “erase the Yazidis through killings; sexual slavery, enslavement, torture and inhuman and degrading treatment and forcible transfer causing serious bodily and mental harm; the infliction of conditions of life that bring about a slow death”, as exposed by the Independent International Commission of Inquiry on Syria, are constitutive of a genocide.<sup>21</sup> However, a focus on terrorism-related charges at national level may be counter-productive, since these offences, enacted under domestic law, remain easier to prove than international crimes,<sup>22</sup> and lack consistency and precision, which may result in interpretation gaps and cause unnecessary harm to defendants. Indeed, prosecuting “atrocities as international crimes presents sounder legal bases and is less subject to domestic – and political – discretion than terrorism”.<sup>23</sup> Prosecution under the ICC framework may therefore *prima facie* seem to be the preferred option to try ISIS fighters. However, as demonstrated further in this chapter, prospects that this mechanism will play an extensive role in the Syrian conflict are limited.

## 2.1. Jurisdictional Obstacles and Political Considerations

The ICC cannot prosecute ISIS fighters for their crimes in Iraq and Syria, as these two states are not parties to the Rome Statute, limiting the territorial jurisdiction of the Court.<sup>24</sup> Moreover, as declared in 2015 by the ICC Chief Prosecutor, Fatou Bensouda, the Court also has limited power to prosecute ISIS members under its personal jurisdiction, according to

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<sup>17</sup> Caitlin E. Carroll, “Hybrid Tribunals are the Most Effective Structure for Adjudicating International Crimes Occurring Within a Domestic State”, *Setton Hall Law School Student Scholarship*, 90, 2013: 9, [https://scholarship.shu.edu/cgi/viewcontent.cgi?article=1090&context=student\\_scholarship](https://scholarship.shu.edu/cgi/viewcontent.cgi?article=1090&context=student_scholarship)

<sup>18</sup> Margaret Burnham, “Fragmentation in International Criminal Law and the Rights of Victims”, in *The Diversification and Fragmentation of International Criminal Law*, ed. Larissa van den Herik and Carsten Stahn, Marinus Nijhoff., 2012, <https://brill.com/view/book/edcoll/9789004236912/B9789004236912-s024.xml>

<sup>19</sup> “Terrorism and international crimes: prosecuting atrocities for what they are”, *Trial International*, 2020, 11, [https://trialinternational.org/wp-content/uploads/2020/03/TRIAL-International\\_UJAR-2020\\_DIGITAL.pdf](https://trialinternational.org/wp-content/uploads/2020/03/TRIAL-International_UJAR-2020_DIGITAL.pdf)

<sup>20</sup> See *Elements of Crimes*, International Criminal Court, (ICC, 2011), art. 6, 7 and 8, <https://www.refworld.org/docid/4ff5dd7d2.html>

<sup>21</sup> Independent International Commission of Inquiry on the Syrian Arab Republic, “They came to destroy”: ISIS Crimes Against the Yazidis”, *United Nations Digital Library*, 2016, 36, [https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/A\\_HRC\\_32\\_CRP.2\\_en.pdf](https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/A_HRC_32_CRP.2_en.pdf)

<sup>22</sup> *Ibid.* 11

<sup>23</sup> “Terrorism and international crimes: prosecuting atrocities for what they are”, *Trial International*, 2020, 12, [https://trialinternational.org/wp-content/uploads/2020/03/TRIAL-International\\_UJAR-2020\\_DIGITAL.pdf](https://trialinternational.org/wp-content/uploads/2020/03/TRIAL-International_UJAR-2020_DIGITAL.pdf)

<sup>24</sup> “Rome Statute”, art. 12

Article 12 of the Rome Statute.<sup>25</sup> Although some foreign ISIS fighters (non-Syrian or Iraqi nationals) could fall under the Court’s jurisdiction under Article 12(2)(b) of the Statute,<sup>26</sup> the ICC’s mandate is limited to the most serious crimes.<sup>27</sup> To assess the threshold of gravity of the crimes, factors such as “the scale...the severity...the systematic nature...and the impact on victims” of crimes must be taken into consideration for the Court to exercise its jurisdiction.<sup>28</sup> Therefore, the ICC’s jurisdiction will unlikely cover crimes of all foreign fighters. Indeed, most high-ranked positions within ISIS leadership and governance structure have been assumed by Iraqi or Syrian nationals. This situation does not at first sight concur with the prerequisite that the Court shall try “the most responsible” for atrocities.<sup>29</sup> While the prosecution of lower-ranked or indirect perpetrators is essential, as illustrated by the recent *Al Mahdi* case,<sup>30</sup> the Court is unlikely to preside over a situation on the basis of that prospect alone.<sup>31</sup>

Difficulties in applying the ICC system to the case of ISIS fighters are closely linked to political and security considerations. Syria and Iraq are reluctant to consent to the jurisdiction of the Court through a declaration of acceptance (as provided by Article 12(3) of the Statute), and their decision to reject the mandate of the ICC is deeply correlated to the ongoing conflicts and crises in these two states.<sup>32</sup> Therefore, the adoption of such a declaration by Iraq or Syria is almost inconceivable until a process of conflict resolution and reconciliation is initiated in the region.

A referral of the situation to the Court by the UNSC is similarly doubtful. Indeed, the complex and internationalized nature of the Syrian conflict will foreseeably trigger the use of veto by one or more UNSC member states, in order to defend their national interests or partnerships in the area.<sup>33</sup> In 2014, this presumption was substantiated by both Russia and China who vetoed the adoption of a resolution, initiated under Chapter VII of the United Nations (UN) Charter, referring the Syrian situation to the ICC.<sup>34</sup> Indeed, since upon referral

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<sup>25</sup> Fatou Bensouda, “Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the alleged crimes committed by ISIS”, *International Criminal Court*, 8 April 2015, <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-08-04-2015-1>

<sup>26</sup> “Bringing ISIS to justice: towards an international tribunal in North East Syria”, Rojava Information Center, 2019, <https://rojvainformationcenter.com/storage/2019/07/Bringing-ISIS-to-justice-Rojava-Information-Center-Report-2019-Website.pdf>

<sup>27</sup> Stephen E. Schemenauer, *Using the Rule of Law to Combat the Islamic State*, United States Army War College, 2016, 6, [https://www.jcs.mil/Portals/36/Documents/Doctrine/Education/jpme\\_papers/schemenauer\\_s.pdf?ver=2017-12-29-142155-737](https://www.jcs.mil/Portals/36/Documents/Doctrine/Education/jpme_papers/schemenauer_s.pdf?ver=2017-12-29-142155-737)

<sup>28</sup> Susana SaCouto, Katherine Cleary, “The Gravity Threshold of the International Criminal Court”, *American University International Law Review*, vol. (23)5, 2007: 810, <https://core.ac.uk/download/pdf/235401602.pdf>

<sup>29</sup> Fatou Bensouda, “Statement of the Prosecutor”

<sup>30</sup> *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Judgment and Sentence, ICC-01/12-01/15, Trial Chamber VIII, ICC, 27 September 2016, [https://www.icc-cpi.int/courtrecords/cr2016\\_07244.pdf](https://www.icc-cpi.int/courtrecords/cr2016_07244.pdf)

<sup>31</sup> Carla Del Ponte, “Address to the Security Council by Carla Del Ponte, Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda, to the UN Security Council”, *International Criminal Tribunals for the former Yugoslavia*, 24 November 2000, <https://www.icty.org/en/press/address-security-council-carla-del-ponte-prosecutor-international-criminal-tribunals-former>

<sup>32</sup> Cedric M. J. Ryngaert, Duco W. Hora Siccama, “Justice for Sexual Crimes Committed by IS: Exploring Accountability and Compliance Mechanisms”, *Utrecht University Repository*, 65, 2018, <http://dspace.library.uu.nl/handle/1874/348268>

<sup>33</sup> *Ibid.*

<sup>34</sup> *Draft resolution S/2014/348*, United Nations Security Council, 22 May 2014, [https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s\\_2014\\_348.pdf](https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2014_348.pdf)

the ICC can extend its investigative power over crimes committed by different parties to the conflict, several states may have feared that their own responsibility would be engaged.

### 3. Creation of Ad Hoc Tribunals: Growing Support and Legal Constraints

#### 3.1. Ad Hoc Tribunals: Options and Precedents

Given the aforementioned hurdles in the ICC framework to prosecute ISIS fighters, in addition to the urgent need to address their crimes, as well as the overall concerns relating to SDF-administered camps, certain states decided to support the creation of an ad hoc tribunal to prosecute ISIS fighters. In particular, Sweden and the Netherlands have sought to garner support for setting up a hybrid tribunal, backed by global and European stakeholders within the United Nations. Sweden's Minister of Home Affairs, Mikael Damberg, envisions the formation of an Iraq-based ad hoc international tribunal similar in scope and capacity to those established in former Yugoslavia and Rwanda.<sup>35</sup> To that effect, the Swedish government hosted an expert meeting on the issue with state representatives from Sweden, Norway, Finland, Denmark, Austria, Germany, Belgium, the Netherlands, France, Switzerland and the UK, alongside delegations from the European Union (EU) and the Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL (UNITAD) partaking in the summit.<sup>36</sup> Additionally, in 2019 the Dutch Minister of Foreign Affairs, Steff Blok, vowed to support local and regional actors with Dutch legal expertise, stressing the importance of the task at hand as well as the time and effort required to successfully establish an ad hoc tribunal.<sup>37</sup>

As illustrated by this discussion, there is continuous and growing support for this option. However, various obstacles may impede the effective creation of such a court. In order to adequately assess the risks posed by these obstacles – which will be detailed further – the creation and development processes of pre-existing ad hoc tribunals should be analyzed. Past experience can serve as a compass to help policymakers navigate into the future, relating to an endeavor as important as the establishment of an ad hoc tribunal to prosecute ISIS fighters.

Although the history of international criminal tribunals begins with the Nuremberg and Tokyo trials, it would take fifty years before political conditions would favor the establishment of new ones. Within the last thirty years, as we will see, eight different ad hoc tribunals have been established. While they share certain common attributes, they may differ in the applicable law, jurisdiction and scope. Despite these differences, two broad categories of ad hoc tribunals emerge: international ad hoc tribunals, and mixed or hybrid tribunals assisted by the UN.<sup>38</sup>

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<sup>35</sup> Hellen Warell, "Sweden Proposes International Tribunal to Try Isis Fighters", *Financial Times*, May 2019, <https://www.ft.com/content/9086250e-7802-11e9-bbad-7c18c0ea0201>

<sup>36</sup> "Sweden to Host Expert Meeting on ISIS Tribunal", *Regeringskansliet*, Press Release, June 2019, <https://www.government.se/press-releases/2019/06/sweden-to-host-expert-meeting-on-isis-tribunal/>

<sup>37</sup> "The Netherlands: ISIS Cannot Go Unpunished", *Ministerie van Buitenlandse Zaken*, Press Release, September 26, 2019. Available at: <https://www.government.nl/latest/news/2019/09/26/the-netherlands-isis-cannot-go-unpunished>

<sup>38</sup> "International and Hybrid Criminal Courts and Tribunals", *United Nations*, accessed 22 January 2020, <https://www.un.org/ruleoflaw/thematic-areas/international-law-courts-tribunals/international-hybrid-criminal-courts-tribunals/>

### 3.1.1. *Learning from the Experience of the ICTY and ICTR*

The first category of tribunals developed in the 1990s amid a brief moment of cooperation at the UNSC. Two ad hoc tribunals, namely the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), were created to prosecute individuals responsible for international crimes during the crises that ravaged both regions. The severity of the atrocities and massacres characterizing both conflicts prompted the UNSC to unanimously adopt resolutions (see resolutions 827 (1993) and 955 (1994)) establishing these courts.<sup>39</sup> Certain attributes permeated both tribunals in terms of their bounded jurisdiction (with certain geographical and temporal limitations), both in terms of primacy over domestic courts and international personnel (judges, prosecutors etc.), thus differentiating them from other ad hoc tribunals.

The legacy of these two tribunals reflects both far-reaching consequences and shortfalls in the work they produced. In terms of the contribution to international criminal law, both have had an extensive effect on the evolution of international and domestic jurisprudence. Alongside such key advancement in relevant case law, these contributions also entailed the dissuasion of future crimes of that magnitude and served to build faith in the judicial system.<sup>40</sup>

However, such enterprise did not come without cost or criticism. Critics have taken aim at the cost and length of the procedure (the work of the ICTR and ICTY being partially completed only in 2015 and 2017 respectively). The overall cost of the tribunals, which amounted to 10 percent of the UN's annual budget, has led critics to think twice before setting up an international tribunal with resources provided for by the UN.<sup>41</sup> Moreover, concerns have been raised regarding the extent to which justice has been truly fair, with claims of "victor's justice" being leveled against the tribunals, partly due to the disproportionate allocation of resources in favour of the prosecution.<sup>42</sup> As a result of these criticisms, and in the face of conflict-ravaged states that sought justice for similar crimes, the UN has been reluctant to undertake the formation of new similar tribunals, opting instead for the second category of ad hoc tribunals: mixed/hybrid courts.

### 3.1.2. *Mixed/Hybrid Courts*

Although formed in the image and aspiration of the ICTY and ICTR, mixed ad hoc tribunals are identified as an alternative category. Their jurisdiction, administration and composition rely on national judicial systems, resting upon domestic foundations supplied with

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<sup>39</sup> Both UNSC resolutions establishing those two courts were enacted under Chapter VII of the UN Charter, conferring power to the UNSC to apply measures necessary "to maintain or restore international peace and security". See "Charter of the United Nations", *United Nations*, adopted 24 October 1945, <https://www.refworld.org/docid/3ae6b3930.html>

<sup>40</sup> Michael P. Scharf, Milena Sterio, "Introduction", in *The Legacy of Ad Hoc Tribunals in International Criminal Law*, eds. Milena Sterio and Michael Scharf, Cambridge University Press, 2019, 1–8; see also Richard Goldstone, "International Criminal Court and Ad Hoc Tribunals", in *The Oxford Handbook on the United Nations*, eds. Sam Daws and Thomas G. Weiss, Oxford University Press, 2008, 567–83

<sup>41</sup> Goldstone, "International Criminal Court and Ad Hoc Tribunals", *ibid.*

<sup>42</sup> Leslie Haskell, Lars Waldorf, "The Impunity Gap of the International Tribunal for Rwanda: Causes and Consequences", *Hastings International and Comparative Law Review*, 34, 2011: 49–86; see also Victor Peskin, "Beyond Victor's Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda", *Journal of Human Rights*, 4, no. 2, April 2005): 213–31; see also Michael Humphrey, "International Intervention, Justice and National Reconciliation: The Role of the ICTY and ICTR in Bosnia and Rwanda", *Journal of Human Rights*, 2, no. 4, December 2003: 495–505

international components pertaining to judicial capacity and trial fairness.<sup>43</sup> In turn, mixed tribunals can be divided into two subcategories: exogenously established and endogenously established.

The first subcategory includes four previous instances: East Timor (Special Panels for Serious Crimes), Kosovo (International Judges and Prosecutors), Bosnia and Herzegovina (State Court of Bosnia and Herzegovina) and Lebanon (Special Tribunal for Lebanon). Characteristically, these tribunals were either established by UN administrators, UN-mandated authorities, or through UN initiative. In the case of East Timor, the UNSC, acting under Chapter VII, voted unanimously in favor of Resolution 1272, which mandated the UN Transitional Administration in East Timor (UNTAET) to bring justice and stability.<sup>44</sup> Following a report of the UN High Commissioner for Human Rights in 2000, UNTAET established “mixed panels”, consisting of a mix of international and East Timorese judges, international lawyers, and under the administrative control of the district General Prosecutor.<sup>45</sup> Although the mixed panels proved resilient, a lack of Indonesian cooperation, coupled with weak UN supervision on implementation and the financial and administrative shortcomings, significantly impaired their work.

In the case of Kosovo, the UN Interim Administration Mission in Kosovo (UNMIK), realizing the deficiencies of the Kosovar judicial infrastructure, established a program for International Judges and Prosecutors (IJP), effectively adding an international component to the Kosovo judicial system.<sup>46</sup> Through the IJP, international judges or prosecutors could assist domestic colleagues or replace them altogether. As a result, regardless of the scarcity of resources, the IJP brought the rule of law to Kosovo, with its domestic judicial system being internationalized to a certain degree.

The State Court of Bosnia and Herzegovina, on the other hand, granted authority by Article V of Annex 10 to the 1995 Dayton Agreement, was specifically conceived to handle cases transferred from the ICTY. As such, although considered as a domestic court, it was operated jointly by domestic and international judges, administrators and prosecutors.<sup>47</sup>

Finally, the Special Tribunal for Lebanon (STL), created by the UNSC Resolution 1664 to investigate the February 2005 assassination of Lebanon’s prime minister Rafic Hariri, is limited in its jurisdiction to “connected cases” between October 2004 and December 2005.<sup>48</sup> Rooted in Lebanese criminal law, seated in the Hague with an office in Beirut, and organized

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<sup>43</sup> Goldstone, “International Criminal Court and Ad Hoc Tribunals.”

<sup>44</sup> *Resolution 1272 (1999)*, United Nations Security Council, 25 October 1999, <http://unscr.com/en/resolutions/1272>

<sup>45</sup> Goldstone, “International Criminal Court and Ad Hoc Tribunals”; see also Sylvia de Bertodano, “Current Developments in Internationalized Courts”, *Journal of International Criminal Justice*, 1, no. 1, April 2003: 226–44

<sup>46</sup> Michael E Hartmann, “International Judges and Prosecutors in Kosovo: A New Model for Post-Conflict Peacekeeping”, *United States Institute of Peace*, October 2003, <https://www.usip.org/publications/2003/10/international-judges-and-prosecutors-kosovo-new-model-post-conflict>; see also Tom Perriello, Marieke Wierda, “Lessons from the Deployment of International Judges and Prosecutors in Kosovo.” *International Security Sector Advisory Team (ISSAT)*, March 2006, <http://issat.dcaf.ch/Learn/Resource-Library/Policy-and-Research-Papers/Lessons-from-the-Deployment-of-International-Judges-and-Prosecutors-in-Kosovo>

<sup>47</sup> Goldstone, “International Criminal Court and Ad Hoc Tribunals.”

<sup>48</sup> “About the STL | Special Tribunal for Lebanon.”, *Special Tribunal for Lebanon*, Accessed 17 December 2020, <https://www.stl-tsl.org/en/about-the-stl>

with both local and international judges, its novelty consists of the provision to “conduct trial proceedings in the absence of the accused”.<sup>49</sup>

The second subcategory of mixed courts can be described by state initiative and consequently the politicized character of the procedures under which they were established. The Special Court of Sierra Leone and the Extraordinary Chambers for Cambodia, unlike other mixed courts, were established following a request by each government to the UN Secretary-General for assistance in the prosecution of human rights abuses and war crimes during the 1990s Sierra Leone civil war and 1970s Khmer Rouge regime respectively.<sup>50</sup> The case of the Khmer Rouge trials and the approval of the draft agreement between the UN and Cambodia establishing the court, are indicative of the politicized character of the creation of these tribunals. In fact, in a separate report referred to in the annex to the agreement, the Secretary-General cautioned against institutional insufficiencies and the lack of credibility of the Extraordinary Chambers.<sup>51</sup>

The formation and operation of the two tribunals have been marred with issues pertaining to their credibility and overall institutional capacity in bringing about meaningful justice to those aggrieved.<sup>52</sup> Three main issues were manifest across the board. First, whether domestic or international law had primacy over the other, finally settling over national penal codes intersected with international law where necessary in the statutes. Second, the legal validity of amnesties discerned to perpetrators prior to the establishment of the courts (Lomé Peace Agreement in the case of Sierra Leone and extension of the statute limitations of the 1956 Penal Code by 30 years in the case of Cambodia). Finally, the agreements establishing the tribunals had to account for unique issues related to the nature of the crimes, such as the absence of genocide in its strict definition in both cases (for instance, the UNSC and Secretary-General did not include the crime of genocide in its recommendation to Sierra Leone) or the way in which to prosecute crimes committed by children upon coerced enlistment by hostile groups.<sup>53</sup> Other issues regard the lack of funding, political meddling, general lack of independence of the courts, selective prosecutions and unequal resource allocation to the prosecution and the defense.<sup>54</sup>

Tellingly, international and mixed criminal ad hoc tribunals have come a long way since the early 1990s, both in number and variation in their institutional design. Most commonly, they

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<sup>49</sup> “Statute of the Special Tribunal for Lebanon | Special Tribunal for Lebanon.”, *Special Tribunal for Lebanon*, Accessed 17 December 2020. Available at: <https://www.stl-tsl.org/en/documents/legal-documents/statute-of-the-tribunal>

<sup>50</sup> Goldstone, “International Criminal Court and Ad Hoc Tribunals.”

<sup>51</sup> “Approval of Draft Agreement, A/57/806, Annex”, *United Nations General Assembly*, 85th Plenary Session, May 6, 2003, <https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Cam%20ARES%2057%20228B.pdf>; see also “Report of the Secretary-General on Khmer Rouge Trials, A/57/769”, *UN General Assembly*, 57th Plenary Session, March 31, 2003, <https://digitallibrary.un.org/record/491564?ln=fr>

<sup>52</sup> Avril McDonald, “Sierra Leone’s Shoestring Special Court.” *International Review of the Red Cross*, 84, no. 845, March 2002: 121; see also Heather Ryan and Laura McGrew, *Performance and Perception: The Impact of the Extraordinary Chambers in the Courts of Cambodia*. eds. Kelly Askin, David Berry., New York: Open Society Foundations, 2016, 65–70.

<sup>53</sup> Goldstone, “International Criminal Court and Ad Hoc Tribunals”; see also “Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, S/2000/915”, *United Nations Security Council*, October 2000

<sup>54</sup> Heather Ryan, Laura McGrew, *Performance and Perception: The Impact of the Extraordinary Chambers in the Courts of Cambodia*; see also Charles Chernor Jalloh, “Special Court for Sierra Leone: Achieving Justice?” *Michigan Journal of International Law*, 32, no. 3, 2011: 412-43

find themselves conditioned by the context of the conflicts which they are called upon to bring justice to. A condition of paramount importance to their success is that of effective international guarantees, in pair with the political will to support what is often a difficult task, and even more so when local rivalries, politics and sensibilities influence tribunals' proceedings into uneven judgments on complex conflicts. Accordingly, and as we discuss below, similar concerns apply to the prospective prosecution of ISIS fighters by an ad hoc tribunal.

### **3.2. Adequacy of Different Ad Hoc Alternatives for ISIS Fighters: Legal Implications and Challenges**

#### ***3.2.1. International Ad Hoc Tribunals***

As detailed before, the UNSC has established two international ad hoc criminal tribunals, namely, the ICTY and ICTR. So far, attempts to refer the Syrian situation to the ICC by the UNSC have been vetoed by Russia and China in May 2014, rejecting conclusions made by the Independent International Commission of Inquiry on Syria, which encouraged a referral of the situation to the ICC.<sup>55</sup> This would suggest, *a priori*, that any attempt within the UNSC to establish an ad hoc tribunal whose jurisdiction would cover crimes committed by all parties to the Syrian conflict would face the same result.

An alternative solution would be for the UNSC to set up an ad hoc international criminal tribunal, following the ICTY and ICTR model, which would only prosecute crimes perpetrated by ISIS members. As the consent and participation of states in which crimes were committed is crucial to the creation of a mixed or hybrid tribunal, the establishment of a court following the model of the ICTY and ICTR *prima facie* seems appropriate, as it would only require the adoption of a resolution by the UNSC.

The possibility to restrict an international ad hoc-tribunal's personal jurisdiction to ISIS-fighters would rightly raise objections regarding partiality. Nevertheless, there is no specific rule in international law prohibiting the establishment of a special tribunal for one party to an armed conflict, as illustrated by the Nuremberg and Tokyo Tribunals, which nevertheless were heavily criticized for becoming institutions merely serving the winners' side.<sup>56</sup>

The challenge, however, remains to determine which crimes will fall under the jurisdiction of such a tribunal, and, in particular, whether it should include a specific crime for acts of terrorism. With the exception of the STL,<sup>57</sup> ad hoc criminal tribunals established so far never had jurisdiction to prosecute persons suspected of having committed terrorist acts alone. Rather, as it emerges from the jurisprudence of the ICTY and the Special Court for Sierra Leone, the only acts of terror which may fall under the jurisdiction of such structures are

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<sup>55</sup> "Russia, China Block Security Council Referral of Syria to International Criminal Court", *United Nations News*, 22 May 2014, Accessed 22 January 2021, <https://news.un.org/en/story/2014/05/468962-russia-china-block-security-council-referral-syria-international-criminal-court>

<sup>56</sup> Rachel Behring, "One-Eyed Prosecution?: On the Possibility to Restrict the Personal Jurisdiction of an International Ad Hoc-Tribunal for ISIS-Fighters", *Völkerrechtsblog*, February 2020, <https://voelkerrechtsblog.org/de/one-eyed-prosecution/>

<sup>57</sup> It should be noted that the Statute of the Tribunal only describes the acts of killing the former Lebanese Prime Minister Rafiq Hariri and others as a terrorist act in its preamble and does not provide any definition of what constitutes terrorism (art. 314 of the Lebanese Criminal Code provides for such a detailed definition).

those constitutive of the war crime of spreading terror among the civilian population during an armed conflict.<sup>58</sup>

There are several reasons for that. First, there is no consensus on the definition of the crime of terrorism, and the elements of this crime are not identified by an international agreement. Although in 2011 the STL, in a somewhat controversial judgment, held that since 2005 a definition of “transnational terrorism” existed in customary international law, but emphasized that such a definition only existed “*in times of peace*”.<sup>59</sup> Indeed, while the regulations governing terrorism in peacetime may have some common ground with the legal framework governing armed conflicts, these two legal regimes remain fundamentally different as they have distinct rationales, objectives and structures.

Second, most of these tribunals are established for prosecuting crimes which occurred during an armed conflict. The law of armed conflict has developed a realistic approach to limit the brutality of war by legitimizing specific use of violence by all non-state or state parties to an armed conflict, be it a state or a non-state actor. Thus, most of the acts that constitute acts of terrorism in times of peace, constitute “the very essence of armed conflict”,<sup>60</sup> and thus cannot be legally defined as “terrorism”.

Accordingly, and in line with the operative paragraph 5 of the UNSC Resolution 2178 (2014) requiring states to adopt preventive and suppressive measures in compliance with international law and IHL,<sup>61</sup> it can be argued that the crimes falling under the jurisdiction of such a tribunal will be the most important crimes that inherently endanger humankind, meaning genocide, war crimes, and crimes against humanity, and not the mere participation in armed conflict. This would not suggest that the jurisdiction *ratione materiae* of such an ad hoc tribunal cannot go beyond ICC crimes, especially as it is mandated to prosecute crimes committed by members of a non-state actor. However, acts that remain lawful under IHL, such as mere participation in armed conflict, cannot be criminalized.

The main disadvantage of such a tribunal is that its establishment requires political will and resources from the international community. Considering the experience of the ICTY and ICTR, even if UNSC members agree on establishing such a tribunal, an important amount of time will be spent determining a sound legal framework, to find appropriate facilities, or to recruit competent personnel. Knowing that there are tens of thousands of ISIS fighters, both foreign and local, as well as their families and children, under SDF control in the Al-Hawl

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<sup>58</sup> See for example *Prosecutor v. Galic*, (*Galic case*) ICTY IT-98–29-T, Trial Chamber I, Judgment, 5 December 2003, [SEP] para. 66; see also *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-1-T, Special Court for Sierra Leone, 18 May 2012, paras. 402–410

<sup>59</sup> *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, STL-11-01/1, Special Tribunal for Lebanon, 16 February 2011, para. 85. The Tribunal describes the elements as follows: “This customary rule requires the following three key elements: (i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; (iii) when the act involves a transnational element.”

<sup>60</sup> “The Applicability of IHL to Terrorism and Counterterrorism”, ICRC, 1 Oct. 2015, <https://www.icrc.org/en/document/applicability-ihl-terrorism-and-counterterrorism>

<sup>61</sup> *Resolution 2178 (2014)*, United Nations Security Council, 24 September 2014, 5, <https://www.un.org/securitycouncil/s/res/2178-%282014%29>

and Roj camps in northeastern Syria,<sup>62</sup> in a situation that is described by the UN Commission of Inquiry on Syria as “deplorable and inhumane”,<sup>63</sup> such a disadvantage makes this option wholly questionable.

### 3.2.2. *Hybrid and Mixed Tribunals*

Mixed or hybrid tribunals, as they reached a certain degree of efficiency, have become important elements of the general transitional justice system. Although the idea to create such a court to focus on ISIS members’ crimes has often been described as relevant and necessary, its practical application remains subject to substantial obstacles.<sup>64</sup> Its creation is in itself challenging due to political and jurisdictional considerations. Even if a hybrid or mixed tribunal were to be supported by all necessary and relevant states or entities, additional considerations may impair the efficiency of its mandate.

As previously explained, while international ad hoc tribunals (such as the ICTR or ICTY) rely on international standards, resources and staff, hybrid or mixed courts are composed of “both international and domestic judicial officials” and are “located in the countries where the crimes were committed”.<sup>65</sup> Such combinations of “international and domestic law, procedure, and staff” *prima facie* seem to satisfy all necessary conditions for an adequate prosecution of criminal behavior, particularly for the Syrian situation, considering the above-mentioned difficulties in relying on a fully international structure.<sup>66</sup> Indeed, judicial proceedings could be initiated and conducted with an appropriate level of objectivity, due to the expertise and neutrality of international judges, while maintaining a significant degree of legitimacy and respect for cultural and regional features, as partly operated by national staff under domestic criminal and procedural norms.<sup>67</sup>

#### *a. Jurisdiction, Political and Security Implications*

Hybrid and mixed courts have been extensively used to deal with crimes related to a specific territory or conflict, and are often set for a limited duration. The establishment of such a tribunal focusing on the Syrian situation is encouraged by certain states, but is unlikely to be supported by Syria, considering the government’s role in the commission of core crimes and its unwillingness to accept international interference in its sovereign matters.<sup>68</sup> Moreover, even if Syria consents to the establishment of a special court, it is very doubtful that other states will cooperate with it, as its legitimacy may be questioned by the international

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<sup>62</sup> Bulan Institute for Peace Innovations, “UN Special Rapporteur Reflects on States Obligations To Repatriate Under UN Resolutions”, 25 January 2021, accessed 20 April 2021, <https://bulaninstitute.org/un-special-rapporteur-reflects-on-states-obligations-to-repatriate-under-un-resolutions/>

<sup>63</sup> “UN Report on Syria Conflict Highlights Inhumane Detention of Women and Children”, *United Nations News*, 11 September 2019, accessed 20 October 2020, <https://news.un.org/en/story/2019/09/1046102>

<sup>64</sup> Joël Hubrecht, “Ne laissons plus impunis les crimes de Syrie”, *Esprit*, February 2019: 4, <https://esprit.presse.fr/actualites/comite-syrie-europe-apres-alep-et-joel-hubrecht/ne-laissons-plus-impunis-les-crimes-en-syrie-41956>

<sup>65</sup> “Syria: Criminal Justice for Serious Crimes under International Law”. *Human Rights Watch*, December 2013, 17, <https://www.hrw.org/news/2013/12/17/syria-criminal-justice-serious-crimes-under-international-law>

<sup>66</sup> Cedric M. J. Ryngaert, Duco W. Hora Siccama, “Justice for Sexual Crimes Committed by IS: Exploring Accountability and Compliance Mechanisms”, *Utrecht University Repository*, 65, 2018: 7, <http://dspace.library.uu.nl/handle/1874/348268>

<sup>67</sup> *Ibid.*

<sup>68</sup> *20th report of the Commission of Inquiry on the Syrian Arab Republic*, Independent International Commission of Inquiry on the Syrian Arab Republic, (A/HRC/44/6), OHCHR, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/224/45/PDF/G2022445.pdf?OpenElement>

community (mainly due to Syria's involvement in international crimes). Iraq's consent to the creation of a hybrid tribunal is more plausible, but its capacity to achieve justice may be impaired by malfunctions in the Iraqi judicial system. Indeed, such flaws have been widely reported by organizations and independent expert missions, drawing attention to the severity of abuses reserved to defendants suspected of joining ISIS, including allegations of forced confession, extensive reliance on counterterrorism laws implicating death penalties, violations of Human Rights and IHL fundamental principles, as well as minors' prosecution.<sup>69</sup> At this stage, the creation of an ad hoc tribunal relying on Iraqi institutions and legal framework would not be appropriate, as the "severe shortcomings present in Iraq's judicial system" cannot be resolved by the mere inclusion of international judges and staff, for instance.<sup>70</sup>

These jurisdictional and legal issues can be linked to another problem: where should such ad hoc courts be established? Determining the trial location of such courts is crucial to ensure the success of international crimes' adjudication. Considering the ongoing conflicts and crises in the region, the prospect of creating an ad hoc court in Iraq or Syria is limited. Indeed, beyond the important symbolic aspect of its location for populations and victims in particular, the trial position may have meaningful repercussions on several aspects of the judicial process, including in terms of funding and legitimacy of the court, and more importantly, in terms of safety of the staff, witnesses and defendants. This last point can be illustrated by the decision to relocate the STL to the Netherlands.<sup>71</sup> A court trying ISIS members would undoubtedly be subject to intense media coverage and public attention, raising important security concerns, notably regarding a foreseeable increase in the risk of terrorist attacks against such an institution and its personnel.<sup>72</sup> Therefore, the internationalized character of crimes perpetrated by ISIS members and the plurality of their nationalities could encourage states to accept the creation of a geographically distant ad hoc court. So far, however, suggestions made by states have focused on establishing such a tribunal in the region. While this last approach is usually justified by the easier access to evidence, the experience of international tribunals show that a geographically distant location does not hamper the efficiency of criminal proceedings. In this light, it may be argued that certain states' emphasis on creating such a tribunal in the region is purely grounded in a motivation to avoid the relocation of thousands of individuals held in Syrian camps.

#### *b. Transparency, Independence and Legitimacy*

An important asset of ad hoc tribunals lies in their efforts to enhance transparency and facilitate a "truth-revealing process".<sup>73</sup> Allocating funds to the research of truth positively impacts the perception of the institution's work on the part of the populations and

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<sup>69</sup> *Human Rights in the Administration of Justice in Iraq: Trials under the anti-terrorism laws and implications for justice, accountability and social cohesion in the aftermath of ISIL*, United Nations Assistance Mission for Iraq, Office of the United Nations High Commissioner for Human Rights, iv, [https://reliefweb.int/sites/reliefweb.int/files/resources/Iraq - ISIL trials under the anti-terrorism laws and the implications for justice 28012020.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/Iraq_-_ISIL_trials_under_the_anti-terrorism_laws_and_the_implications_for_justice_28012020.pdf)

<sup>70</sup> "Detention and Prosecution of Former ISIS Fighters", Bulan Institute, 14.

<sup>71</sup> Kirsten Ainley, Mark Kersten, "Special Court for Lebanon", The Hybrid Justice Project, accessed 22 January 2020, <https://hybridjustice.com/special-tribunal-for-lebanon/>

<sup>72</sup> Sandra L. Hodgkinson, "Are Ad Hoc Tribunals an effective tool for prosecuting international terrorism cases?", *Emory International Law Review*, 2010: 520, <https://www.law.upenn.edu/live/files/5913-session424emoryintlrev515pdf>

Ibid. 517

communities who suffered from the atrocities committed.<sup>74</sup> However, transparency may be limited in the case of ISIS members' prosecution, considering the ongoing global terrorist threat posed by the Islamic State. States' restrained "ability to publicly share ample information regarding...foreign government cooperation on counterterrorism efforts, and evidence acquired through methods of intelligence-gathering" could lead to confidential proceedings and affect the court's legitimacy.<sup>75</sup> Regardless of the prosecution option selected by states to deal with ISIS fighters, they must take into consideration the importance of ensuring sufficient transparency within the relevant prosecution mechanism. Additionally, to prevent the court's legitimacy from being impaired, defendants should receive similar sentences when charged for "similar behavior within the same contexts", as reaffirmed by the Dakar Guidelines on the Establishment of Hybrid Courts.<sup>76</sup>

Hybrid courts' legitimacy may also be undermined by financial issues. Firstly, even when partly relying on pre-existing domestic institutions, ad hoc tribunals will require the establishment of new structures, buildings and reforms, as well as the training and recruitment of new staff members.<sup>77</sup> Such important financial needs will likely depend on assessed or voluntary international contributions, considering the limited funding capacity of Iraq and Syria. Insufficient funding may negatively impact the court's efficacy and legitimacy, as illustrated by the case of the Sierra Leone Special Court. Indeed, although its budget was revised and reduced several times, the very limited voluntary contributions of member states resulted in the Special Court being in a "far more precarious financial position than the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), which were funded directly out of the UN budget".<sup>78</sup> The incidence of economic difficulties on ad hoc courts is also reflected in the experience of the Special Panels for Serious Crimes (East Timor Tribunals), which "suffered from a... lack of ownership by East Timor and a crisis in funding".<sup>79</sup> The adoption of a model resorting to assessed funding should therefore be privileged, as voluntary contributions may put the court at risk of judicial bias, and may require considerable "time and energy being devoted to fundraising rather than core tribunal work".<sup>80</sup> If voluntary contributions are considered, a committee "with duties related to oversight of [the court's] non-judicial matters" should be established, and political agreements should secure the funding process.<sup>81</sup> With regards to the specific case of prosecuting ISIS fighters, most states have not expressed their intent to financially assist those countries in such a judicial process. However, considering that ad hoc prosecution could be used as a way to circumvent their obligations (notably in terms of fighters' repatriation and national prosecution), certain states may demonstrate interest in providing funds for the establishment of hybrid or mixed tribunals.

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<sup>74</sup> Ibid. 517-518

<sup>75</sup> Ibid. 518

<sup>76</sup> The Dakar Guidelines is a reference guide on the establishment of hybrid tribunals, which offers key elements, options and strategies to be taken into consideration when creating such a court. See Kisten Ainley, Mark Kesten, *Dakar Guidelines on the Establishment of Hybrid Courts*, LSE Institute of Global Affairs, 2019, 47, [https://hybridjustice.files.wordpress.com/2019/08/dakar-guidelines\\_digital-version.pdf](https://hybridjustice.files.wordpress.com/2019/08/dakar-guidelines_digital-version.pdf)

<sup>77</sup> Rupert Skilbeck, "Funding Justice: The Price of War Crimes Trials", *Human Rights Brief*, 2008, vol. 15(3): 3, <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1028&context=hrbrief>

<sup>78</sup> Avril McDonald, "Sierra Leone's Shoestring Special Court", 139

<sup>79</sup> "Special Panels for Serious Crimes (East Timor)", *International Bar Association*, Accessed 22 December 2020, [https://www.ibanet.org/Committees/WCC\\_EastTimor.aspx](https://www.ibanet.org/Committees/WCC_EastTimor.aspx)

<sup>80</sup> Kisten Ainley, Mark Kesten, *Dakar Guidelines on the Establishment of Hybrid Courts*, 34

<sup>81</sup> Ibid. 34; See also Mistale Taylor, "Financing Lady Justice: How the Funding Systems of Ad Hoc Tribunals Could Lend Themselves to the Possibility of Judicial Bias" in *The Legitimacy of International Criminal Tribunals*, eds. Nobuo Hayashi, Cecilia Bailliet (Cambridge University Press 2017)

Secondly, funds must be adequately allocated, to ensure that the domestic judicial system will not be impaired by the establishment of a hybrid court in the country. Indeed, a disproportionate allocation of funds, resources and staff to ad hoc prosecution may cause a “reverse legacy”, dissuading national staff to work for domestic courts, diverting “the focus away from investment in the necessary domestic legal reforms or contributing to negative perceptions of the local legal system”.<sup>82</sup> Therefore, it is essential to “avoid a mere replacement of local with international resources”, but also to guarantee that the funds allocated to the hybrid tribunal will be used in a way to strengthen national institutions, whose role in post-conflict reconciliation is key.<sup>83</sup> Independence and transparency in the court’s funding are similarly critical to ensure its legitimacy, and may be impaired if donor-states have been extensively involved in the conflict at stake.<sup>84</sup>

Questions of amnesty may also challenge the functioning of ad hoc courts for ISIS members.<sup>85</sup> Indeed, as illustrated by the Lomé Peace Agreement, amnesties may have an important role in the prosecution process of ad hoc tribunals, as they may be considered as the “price of peace”.<sup>86</sup> However, in accordance with customary international law, amnesty should not be granted for commission of international core crimes.<sup>87</sup> Additionally, limitations regarding the nature of crimes covered by the courts’ jurisdiction may negatively impact their mandate. As shown by the Statute of the Special Court for Sierra Leone, some of the most severe crimes may not be included in the new court’s foundational treaty or agreement, including the crime of genocide or slavery.<sup>88</sup>

### *c. Specific Needs and Principles of Justice*

If a hybrid court were to be established to prosecute ISIS members, it should adopt mechanisms adequately responding to the “needs and circumstances of the concerned state(s) and to the conflict or situation that gave rise to the crimes at issue”.<sup>89</sup> Because of the global nature of the Islamic States’ crimes, and their repercussions on several states around the globe, a tendency to disregard those specific needs could be observed. Such “needs assessments” do not stop with the creation of a hybrid court, but must be pursued during the whole process. The Dakar Guidelines outline some of the necessary elements to consider in the course of a needs assessment. For instance, alternatives to ad hoc courts should be discussed on the basis of the prosecution capacity of “local institutions and law enforcement authorities”, political and socio-economic analysis of the relevant countries should be initiated, the trial location, duration of the proceedings or degree of victims’ participation

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<sup>82</sup> *Rule-of-Law tools for post-conflict states: maximizing the legacy of hybrid courts* (2008), Office of the United Nations High Commissioner for Human Rights, 15, <https://www.ohchr.org/Documents/Publications/HybridCourts.pdf>

<sup>83</sup> *Ibid.* 16

<sup>84</sup> Mark Lattimer, Shabnan Mojtahedi, Lee Anna Tucker, “A Step towards Justice: Current accountability options for crimes under international law committed in Syria”, *Syria Justice and Accountability Centre and Ceasefire Centre for Civilian Rights*: 14, <https://syriaaccountability.org/wp-content/uploads/A-Step-towards-Justice1.pdf>

<sup>85</sup> Kisten Ainley, Mark Kesten, *Dakar Guidelines on the Establishment of Hybrid Courts*, 21

<sup>86</sup> Avril McDonald, “Sierra Leone’s Shoestring Special Court”, 123

<sup>87</sup> “Customary IHL - Rule 159. Amnesty”, *ICRC*, accessed 26 January 2021, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule159](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule159)

<sup>88</sup> *Ibid.* 140

<sup>89</sup> Kisten Ainley, Mark Kesten, *Dakar Guidelines on the Establishment of Hybrid Courts*, 100

should be finalised, and solutions to manage “domestic and external opposition” should be anticipated.<sup>90</sup>

The needs of the local population in terms of reparation must also be carefully assessed. Whether or not the mandate of hybrid mechanisms includes the courts’ participation in the reparation process, it should investigate and recommend solutions to ensure appropriate compensation for victims.<sup>91</sup> Hybrid mechanisms are indirectly part of a broader counterterrorism framework but should remain focused on the reality on the ground, regarding both the accountability and reparation processes. In dismissing reality characteristics and nuances, justice achieved through hybrid tribunals aiming to try ISIS fighters (whose actions are criminalized under counter-terrorism laws) could be flawed. Indeed, courts may be tempted to satisfy international calls to quickly prosecute the Islamic State by applying pre-programmed penalties, thus impairing the pursuit of truth.<sup>92</sup>

As illustrated in this chapter, ad hoc arrangements for new courts will be particularly difficult to achieve, considering the nature and complexity of the situation at stake. Indeed, political changes, consent given by states, or peace agreements may drastically change the situation in the region and create new opportunities for the creation of mixed or hybrid tribunals. However, other options, including mechanisms of repatriation and of national prosecution, may appear to be more achievable on a short-term basis, and thus should be prioritized.

#### **4. Repatriation and National Prosecution: Resolving the Issue of Foreign Fighters?**

As demonstrated above, even if one assumes, for the sake of argument, that the UNSC will adopt a resolution creating an international ad hoc tribunal to investigate crimes committed by ISIS, a significant amount of time and expense would be required (as illustrated by the experience of the ICTR and ICTY). Mixed or hybrid tribunals may first appear to be an attractive alternative, as they can benefit from pre-existing national and regional structures. However, the creation of a hybrid Syrian court is unrealistic due to political and contextual considerations, and an Iraqi ad hoc tribunal may not be adequate in respecting the minimum standards and judicial guarantees under international criminal law. In this regard, it should be added that, considering the well-known deficits of the Iraqi juridical system,<sup>93</sup> which may amount to violations of the minimum standard of fair trial under international human rights law, any assistance by other states in the commission of such violations would engage their international responsibility. Accordingly, one can argue that national criminal mechanisms remain the only adequate mechanisms to prosecute crimes committed by ISIS members. Indeed, ad hoc tribunals established so far, regardless of their form (international, hybrid or mixed), have all been created in response to states’ incapacity to ensure justice for the situations concerned. The proposal to establish ad hoc tribunals for foreign ISIS fighters, however, is fundamentally different, as states whose nationals joined ISIS can rely on active nationality to overcome jurisdictional hurdles, and more importantly, have the capacity to

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<sup>90</sup> Ibid. 12-13; see also, “Options for Justice: a Handbook for Designing Accountability Mechanisms for Grave Crimes”, *Open Society Foundations*, 2018, <https://www.justiceinitiative.org/uploads/89c53e2e-1454-45ef-b4dc-3ed668cdc188/options-for-justice-20180918.pdf>

<sup>91</sup> Kisten Ainley, Mark Kesten, *Dakar Guidelines on the Establishment of Hybrid Courts*, 42

<sup>92</sup> Jean-Marc Sorel, “Les tribunaux pénaux internationaux: ombre et lumière d’une récente grande ambition”, *Revue Tiers Monde*, vol. 1(205), 2011: 32, <https://www.cairn.info/revue-tiers-monde-2011-1-page-29.htm>

<sup>93</sup> For further study on this issue, see “Detention and Prosecution of Former ISIS Fighters”, *Bulan Institute*,

prosecute their nationals. In light of this, the tendency to promote “ad hoc alternatives” can be seen as an attempt by foreign states to place the burden of prosecution and justice on other entities and avoid repatriating and prosecuting their own nationals.

Although acts of international terrorism are considered as threats to international peace and security by the UNSC,<sup>94</sup> they mostly fall out of the scope of core international crimes and do not amount to war crimes, genocide or crimes against humanity. Therefore, the primary criminal justice response rests on states, based on their obligation to incorporate crimes defined in conventional international law into their domestic criminal legislations and to punish them according to their gravity.<sup>95</sup> In this regard, while the existing universal treaties combating terrorism address very specific aspects of terrorism, the UNSC resolutions adopted after 2001 impose “upon all member states far-reaching new legal obligations.”<sup>96</sup> For example, the UNSC Resolution 2178 (2014) requires states to criminalize a series of terrorism-related activities that were not previously criminalized in any universal international instrument governing the prevention and suppression of terrorism by stipulating that “providing or receiving terrorist training” and “recruitment” as prohibited acts.<sup>97</sup> This Resolution recalls the Council’s decision in Resolution 1373 (2001), that all member states shall ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice, and that their domestic law establishes “serious criminal offences” applicable to: (a) their nationals or other individuals who travel or attempt to travel from their territories for the purpose of participating in terrorist acts or receiving terrorist training; (b) those who fund travel for terrorist purposes; and (c) those who organize or otherwise facilitate such travel.<sup>98</sup>

States must comply with their obligation to bring ISIS fighters to justice in accordance with other international rules and principles directly applicable to the domestic criminal response to terrorism. For this purpose, repatriation is key. As stated by the Special Rapporteur on the promotion and protection of Human Rights and fundamental freedoms while countering terrorism, “repatriation of nationals is the only effective and legally sound means available to ensure that the obligations set out in prior UNSC resolutions are realized”.<sup>99</sup> Similarly, the UN High Commissioner for Human Rights clearly indicated that “foreign family members should be repatriated, unless they are to be prosecuted for crimes in accordance with

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<sup>94</sup> See for example *Resolution 2462 (2019)*, United Nations Security Council, 28 March 2019, preambular paragraph, <https://www.un.org/securitycouncil/fr/content/sres24622019>

<sup>95</sup> See Article 2 of the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft; Article 3 of the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; Article 2(1) and (2) of the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons; Article 2 of the 1979 International Convention against the Taking of Hostages; Article 7(1) and 7(2) of the 1979 Convention on the Physical Protection of Nuclear Materials; Article 5 of the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and Article 5 of the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf; Articles 4 and 5 of the 1997 International Convention for the Suppression of Terrorist Bombings; and Article 4 of the 1999 International Convention for the Suppression of Financing of Terrorism.

<sup>96</sup> Martin Scheinin, “Back to Post-9/11 Panic? Security Council Resolution on Foreign Terrorist Fighters”, *Just Security*, September 2014, <https://www.justsecurity.org/15407/post-911-panic-security-council-resolution-foreign-terrorist-fighters-scheinin/>

<sup>97</sup> *Resolution 2178 (2014)*, United Nations Security Council, 24 September 2014, 5, <https://www.un.org/securitycouncil/s/res/2178-%282014%29>

<sup>98</sup> *Ibid.* 6

<sup>99</sup> Fionnuala Ní Aoláin, “The Challenges of a New UN Security Council Resolution on Foreign Fighters”, *Just Security*, 17 August 2020, <https://www.justsecurity.org/72052/the-challenges-of-a-new-un-security-council-resolut>

international standards”.<sup>100</sup> While the term repatriation is not mentioned in the text of any UNSC resolutions,<sup>101</sup> such an obligation is a necessary condition for the fulfillment of other obligations mentioned in these instruments. On the one hand, Resolutions 2178 (2014) and 2396 (2017) call upon states to develop and implement prosecution, rehabilitation and reintegration strategies for returning foreign fighters.<sup>102</sup> On the other hand, Resolution 2396 (2017), in its operative paragraph 17, clearly puts states under the legal obligation to “ensure” that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in support of terrorist acts “should be brought to justice”.<sup>103</sup> In light of these, it can be argued that where no other venue for prosecution of ISIS fighters exists, the necessary implication of the obligation to ensure justice requires states to repatriate their nationals.<sup>104</sup>

There might be some doubts about this obligation in the case of prosecution carried out by SDF. While so far SDF has not tried any individual in the camps, recently news has spread that the Swedish Foreign Ministry has held meetings with the Kurdish authorities to discuss the possibility of prosecuting ISIS members in prison camps locally.<sup>105</sup> The question whether IHL gives permission to non-state actors to establish courts is beyond the scope of this paper.<sup>106</sup> What is important for our discussion is that two scenarios can be imagined. The first scenario is when the SDF acts on behalf of a state, or under its control or direction. Of course, in this case, the acts of a non-state actor will be attributed to the state concerned,<sup>107</sup> which means that its international responsibility will be engaged when the conditions of pretrial detention do not meet the requirements of international law. Second, SDF establishes its own court without any support from any state. In this case, as “*non bis in idem*” principle does not apply to the decisions of the courts established by non-state actors,<sup>108</sup> and since the UNSC resolutions mentioned above address only “states” to bring into justice foreign fighters, states cannot evade their obligations to prosecute by the acts of non-state actors, and thus the obligation to repatriate will remain.

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<sup>100</sup> Ibid.

<sup>101</sup> For this reason, the Special Rapporteur on counter-terrorism and human rights expresses her hopes that any further Security Council resolution on the topic will expressly include the term “repatriation” as if “the word repatriation does not appear in this resolution, and we don’t see positive encouragement of and support for repatriation, we can judge the outcome as an exercise in political draft-dodging.” *ibid.*

<sup>102</sup> *Resolutions 2178 (2014)*, 4; see also *Resolution 2396 (2017)*, United Nations Security Council, 21 December 2017, 29.

<sup>103</sup> *Resolution 2396 (2017)*, 17, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/460/25/PDF/N1746025.pdf?OpenElement>

<sup>104</sup> For similar argument see for example, Dan E. Stigall, “Repatriating Foreign Fighters from Syria (Part 1)”, *Just Security*, 18 March 2020, <https://www.justsecurity.org/69244/repatriating-foreign-fighters-from-syria-international-law-and-political-will-part-1>

<sup>105</sup> “Swedish Female ISIS Supporters May Be Tried in Syria for Terrorism Offences”, *The National*, accessed 13 October 2020, <https://www.thenational.ae/world/swedish-female-isis-supporters-may-be-tried-in-syria-for-terrorism-offences-1.1092495>.

<sup>106</sup> For a detailed analysis of the subject see: Pouria Askary and Katayoun Hosseinnejad, “*Non-State Courts: Illegal or Conditional?: The Case of Da’esh Courts*”, *Journal of International Humanitarian Legal Studies*, 10, n o. 2 (23 November 2019): 240–64, <https://doi.org/10.1163/18781527-01002001>.

<sup>107</sup> *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, International Law Commission, available at: <https://www.refworld.org/docid/3ddb8f804.htm>, art. 8.

<sup>108</sup> Michael Bothe, K. J. Partsch, and W. A. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*. Second Edition. Reprint Revised by Michael Bothe (Martinus Nijhoff Publishers, 2013) 745

In accordance with the UNSC Resolution 2178 (2014) and 2396 (2017),<sup>109</sup> states must interpret their obligations against ISIS fighters consistently with IHL, and international Human Rights law.<sup>110</sup> Thus, when criminalizing terrorism-related acts, states should make a distinction between acts occurring during peacetime and acts committed during an armed conflict, by parties to the conflict. As explained by the ICRC, IHL prohibits both specific acts of terrorism committed in armed conflict and, as war crimes, a range of other acts of violence when committed against civilians or civilian objects. If States choose to additionally designate such acts as “terrorist” under international or domestic law, this will in effect duplicate their criminalization. However, acts that are not prohibited by IHL (e.g. attacks targeting lawful military objectives) should not be labelled as “terrorist” at international and domestic levels, as it creates “conflicting obligations”.<sup>111</sup> Therefore, the UN Working Group on mercenaries noted the importance of distinguishing foreign fighters from participating in armed conflict, in accordance with IHL.<sup>112</sup> Accordingly, the UNSC Resolution 2379, requesting the creation of an Investigative Team “to support domestic efforts to hold ISIL (Da’esh) accountable”,<sup>113</sup> adopted unanimously in 2017, provides that the investigative team should collect, preserve, and store evidence of “acts that may amount to war crimes, crimes against humanity and genocide” if perpetrated by ISIS, including acts such as murder, kidnapping, hostage-taking, suicide bombing, enslavement, rape, sexual slavery, attacks on cultural heritage, trafficking of cultural property, etc.<sup>114</sup> This suggests that states should make sure that in prosecuting ISIS, their involvement in the commission of core crimes is not forgotten or overshadowed by governments’ focus on terrorism-related offences.

Of course, states may face different challenges in prosecuting members of ISIS at a national level, including issues linked to evidence access or post-trial reintegration. Since states enjoy a wide discretion regarding the definition of crimes and the determination of sanctions, former ISIS members may face very different punishments for similar acts. This could heavily impair the adequacy of such a prosecution option. Respecting the human rights and judicial guarantees of those who are suspected of committing terrorist acts may be subject to criticism and resistance from the public, who, as a potential target of terrorist attacks, may expect states to treat terrorist suspects with more severity. Nevertheless, the example of states who have taken concrete holistic approaches in implementing their obligations under the Security Council resolutions to repatriate, prosecute, and reintegrate foreign fighters proves that the key in resolving this dilemma lies in the hands of states.

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<sup>109</sup> *Resolution 2178 (2014)*, United Nations Security Council, 24 September 2014, preamble, 5, 11 and 17, <https://www.un.org/securitycouncil/s/res/2178-%282014%29>; see also *Resolution 2396 (2017)*, United Nations Security Council, 21 December 2017, preamble, 4, 7, 11, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/460/25/PDF/N1746025.pdf?OpenElement>

<sup>110</sup> For a detailed analysis of these obligations see OSCE Office for Democratic Institutions and Human Rights, *Guidelines for Addressing the Threats and Challenges of ‘Foreign Terrorist Fighters’ Within a Human Rights Framework*, OSCE/ODIHR, 2018, 34-45, [https://www.osce.org/files/f/documents/4/7/393503\\_2.pdf](https://www.osce.org/files/f/documents/4/7/393503_2.pdf)

<sup>111</sup> “The Applicability of IHL to Terrorism and Counterterrorism”, *ICRC*.

<sup>112</sup> *Report to the UN General Assembly*, UN Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, UN Doc. A/70/330, August 2015, <https://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/AnnualReports.aspx>

<sup>113</sup> *Resolution 2379 (2017)*, United Nations Security Council, 21 September 2017, 2, <https://www.un.org/securitycouncil/content/sres2379-2017>

<sup>114</sup> *Ibid.*

## 5. Conclusion

The prosecution of ISIS fighters represents a complex and multifaceted issue that should be treated with both determination and caution. When addressing this issue, states' concerns (including in terms of domestic security) must be balanced with regards to their international and national obligations. In tune with this intricate exercise, this policy paper sought to elucidate, detail and assess the three main alternatives alluded to by the international community as possible venues to bring ISIS members to justice in a definitive way, thus initiating a long-awaited healing journey for victims of atrocities committed by ISIS in Iraq and Syria.

This paper first addressed the possibility to prosecute fighters through the ICC framework (for crimes amounting to war crimes, crimes against humanity or genocide), following a UNSC referral or a declaration of acceptance by Iraq or Syria. In view of the ICC's limited jurisdiction and mandate, prospects of such a referral to the Prosecutor's office by the UNSC appear irreconcilable with certain states' involvement in the region's conflicts. Considering that Iraq and Syria are not party to the Rome Statute, and due to the numerous political and security elements obstructing both states' willingness to accept the Court's jurisdiction, the primacy of the ICC option has been rejected.

This policy paper turned to recent developments in discussions (notably initiated by Sweden and the Netherlands) suggesting the creation of an ad hoc criminal tribunal. In light of the experience of past ad hoc tribunals and experts' guidance, the possibility to establish an international or hybrid/mixed tribunal to try ISIS fighters was reviewed. The creation of an international ad hoc tribunal (based on the model of the ICTY and ICTR), is dependent upon the UN and international community's assistance, since building an entirely new ad hoc infrastructure would require extensive funding, a considerable amount of time and resources, and would be subject to intense discussions with regard to its scope of application, which may unduly extend people's yearning for justice. Mixed or hybrid tribunals, although more adequate than international courts, remain subject to substantial challenges, mostly pertaining to issues of jurisdiction, transparency, fairness, funding and independence. Even though the establishment of a mixed tribunal is far from certain, it is currently vividly debated and promoted by certain states which, given the drastically changing circumstances in the region, could gradually come to fruition in the distant future. However, considering the important hurdles intrinsic to the creation of such an ad hoc structure, including the difficulties in receiving relevant states' consent or the existing malfunctions present in regional judicial systems, the ad hoc option is currently inappropriate to deal with ISIS fighters.

Consequently, the repatriation of foreign fighters, as part of a process of national prosecution of ISIS members, has been identified as a decisive option to ensure that their crimes will not go unpunished. Considering states' obligations enshrined in several UNSC resolutions, which are of utmost relevance in the absence of any kind of ad hoc prosecution, repatriation and national prosecution should not be seen as mere options for states but instead presented as their primary obligation. Certain afferent issues nevertheless emerge as regards to the domestic practices and legislations by which states live up to said obligation.

From all the above, it can be deduced that, in the absence of concrete moves to establish an international ad hoc tribunal, states should move forward with the fulfillment of their obligations in regard to the prosecution of crimes committed by their nationals. As such, foreign ISIS fighters held in SDF camps, including women and children, should be subjected

to repatriation procedures. Although North Atlantic states lag behind with considerable delay in drawing up plans and policies of *en masse* repatriation, central Asian states have expedited the process, through prosecution upon repatriation of foreign fighters, and rehabilitation and resocialization policies for women and children.

## 6. Bibliography

Alexandra Brzozowski, “Foreign IS fighters in Northeast Syrian camps - a ‘ticking time bomb’ for Europe”, *Euroactive*, December 2020, <https://www.euractiv.com/section/defence-and-security/news/foreign-is-fighters-in-northeast-syrian-camps-a-ticking-time-bomb/>

Anna Gussarova, “Repatriating Foreign Fighters: The Case of Kazakhstan”, *European Eye on Radicalization*, April 2020, <https://eeradicalization.com/repatriating-foreign-fighters-the-case-of-kazakhstan/>

Avril McDonald, “Sierra Leone’s Shoestring Special Court.” *International Review of the Red Cross*, 84, no. 845, March 2002: 121-43

Beatrice Walton, Paul Strauch, “Three Lingering Questions about the Legality of Withdrawal from Syria: Part II - Duty to ensure Respect & Releasing ISIS Detainees”, *Opinio Juris* (blog), January 2020, <http://opiniojuris.org/2020/01/08/three-lingering-questions-about-the-legality-of-withdrawal-from-syria-part-ii-duty-to-ensure-respect-releasing-isis-detainees/>

Bulan Institute for Peace Innovations, “Detention and Prosecution of Former ISIS Fighters in Iraq: Lessons Learned and an Assessment of the Deficits of the Judicial System”, 2020, <https://bulaninstitute.org/detention-and-prosecution-of-former-isis-fighters-in-iraq-lessons-learned-and-an-assessment-of-the-deficits-of-the-judicial-system/>

Bulan Institute for Peace Innovations, “UN Special Rapporteur Reflects on States Obligations To Repatriate Under UN Resolutions”, 25 January 2021, <https://bulaninstitute.org/un-special-rapporteur-reflects-on-states-obligations-to-repatriate-under-un-resolutions/>

Caitlin E. Carroll, Hybrid Tribunals are the Most Effective Structure for Adjudicating International Crimes Occurring Within a Domestic State, *Setton Hall Law School Student Scholarship*, 90, 2013, [https://scholarship.shu.edu/cgi/viewcontent.cgi?article=1090&context=student\\_scholarship](https://scholarship.shu.edu/cgi/viewcontent.cgi?article=1090&context=student_scholarship)

Carla Del Ponte, “Address to the Security council by Carla Del Ponte, Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda, to the UN Security Council”, *International Criminal Tribunals for the former Yugoslavia*, 24 November 2000, <https://www.icty.org/en/press/address-security-council-carla-del-ponte-prosecutor-international-criminal-tribunals-former>

Cedric M. J. Ryngaert, Duco W. Hora Siccama, “Justice for Sexual Crimes Committed by IS: Exploring Accountability and Compliance Mechanisms”, *Utrecht University Repository*, 65, 2018, <http://dspace.library.uu.nl/handle/1874/348268>

Charles Chernor Jalloh, “Special Court for Sierra Leone: Achieving Justice?” *Michigan Journal of International Law*, 32, no. 3, 2011: 396-460

Chatham House, “Research Paper: Breaking the Cycle of Violence: Transitional Justice for the Victims of ISIS in Syria”, April 2020, <https://www.chathamhouse.org/sites/default/files/CHHJ8101-Justice-in-transition-%28Victims-of-ISIS%29-RP-INT-200408-WEB.pdf>

CTED Trends Report, *The Challenge of Returning and Relocating Foreign Terrorist Fighters: Research Perspectives*, March 2018, <https://www.un.org/sc/ctc/wp-content/uploads/2018/04/CTED-Trends-Report-March-2018.pdf>

Dan E. Stigall, “Repatriating Foreign Fighters from Syria (Part 1)”, *Just Security*, 18 March 2020, <https://www.justsecurity.org/69244/repatriating-foreign-fighters-from-syria-international-law-and-political-will-part-1>

Elizabeth Dent, “Policy Paper: US Policy and the Resurgence of ISIS in Iraq and Syria”, *Middle East Institute*, October 2020, <https://www.mei.edu/publications/us-policy-and-resurgence-isis-iraq-and-syria#pt2>

Fatou Bensouda, “Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the alleged crimes committed by ISIS”, *International Criminal Court*, 8 April 2015, <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-08-04-2015-1>

Fionnuala Ní Aoláin, “The Challenges of a New UN Security Council Resolution on Foreign Fighters”, *Just Security*, 17 August 2020, <https://www.justsecurity.org/72052/the-challenges-of-a-new-un-security-council-resolut>

Heather Ryan and Laura McGrew, *Performance and Perception: The Impact of the Extraordinary Chambers in the Courts of Cambodia*. eds. Kelly Askin, David Berry., New York: Open Society Foundations, 2016

Hellen Warell, “Sweden Proposes International Tribunal to Try Isis Fighters”, *Financial Times*, May 2019, <https://www.ft.com/content/9086250e-7802-11e9-bbad-7c18c0ea0201>

Human Rights Watch, “Iraq: ISIS Child Suspects Arbitrarily Arrested, Tortured”, March 2019, <https://www.hrw.org/news/2019/03/06/iraq-isis-child-suspects-arbitrarily-arrested-tortured>

Human Rights Watch, “Syria: Criminal Justice for Serious Crimes under International Law”, December 2013, 17, <https://www.hrw.org/news/2013/12/17/syria-criminal-justice-serious-crimes-under-international-law>

ICC, “Understanding the International Criminal Court”, <https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf>

ICC, *Elements of Crimes*, 2011, <https://www.refworld.org/docid/4ff5dd7d2.html>

ICC, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Judgment and Sentence, ICC-01/12-01/15, Trial Chamber VIII, ICC, 27 September 2016, [https://www.icc-cpi.int/courtrecords/cr2016\\_07244.pdf](https://www.icc-cpi.int/courtrecords/cr2016_07244.pdf)

ICRC, “Customary IHL”, accessed 26 January 2021, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule159](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule159)

ICRC, “The Applicability of IHL to Terrorism and Counterterrorism”, 1 Oct. 2015, <https://www.icrc.org/en/document/applicability-ihl-terrorism-and-counterterrorism>

ICTY, *Prosecutor v. Galic*, (*Galic case*) ICTY IT-98–29-T, Trial Chamber I, Judgment, 5 December 2003

Independent International Commission of Inquiry on the Syrian Arab Republic, *20th report of the Commission of Inquiry on the Syrian Arab Republic (A/HRC/44/6)*, OHCHR, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/224/45/PDF/G2022445.pdf?OpenElement>

Human Rights Council, “*They came to destroy*”: *ISIS Crimes Against the Yazidis*, *United Nations Digital Library*, 2016, [https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/A\\_HRC\\_32\\_CRP.2\\_en.pdf](https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/A_HRC_32_CRP.2_en.pdf)

International Bar Association, “Special Panels for Serious Crimes (East Timor)”, , Accessed 22 December 2020, [https://www.ibanet.org/Committees/WCC\\_EastTimor.aspx](https://www.ibanet.org/Committees/WCC_EastTimor.aspx)

International Law Commission, “The obligation to extradite or prosecute (aut dedere aut judicare)”, 2014, [https://legal.un.org/ilc/texts/instruments/english/reports/7\\_6\\_2014.pdf](https://legal.un.org/ilc/texts/instruments/english/reports/7_6_2014.pdf)

International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, available at: <https://www.refworld.org/docid/3ddb8f804.htm>

Jean-Marc Sorel, “Les tribunaux pénaux internationaux: ombre et lumière d’une récente grande ambition”, *Revue Tiers Monde*, vol. 1(205), 2011: 29-46, <https://www.cairn.info/revue-tiers-monde-2011-1-page-29.htm>

Joël Hubrecht, “Ne laissons plus impunis les crimes de Syrie”, *Esprit*, February 2019, <https://esprit.presse.fr/actualites/comite-syrie-europe-apres-alep-et-joel-hubrecht/ne-laissons-plus-impunis-les-crimes-en-syrie-41956>

Kirsten Ainley, Mark Kersten, “Special Court for Lebanon”, *The Hybrid Justice Project*, accessed 22 January 2020, <https://hybridjustice.com/special-tribunal-for-lebanon/>

Kirsten Ainley, Mark Kersten, *Dakar Guidelines on the Establishment of Hybrid Courts*, LSE Institute of Global Affairs, 2019, [https://hybridjustice.files.wordpress.com/2019/08/dakar-guidelines\\_digital-version.pdf](https://hybridjustice.files.wordpress.com/2019/08/dakar-guidelines_digital-version.pdf)

Leslie Haskell, Lars Waldorf, “The Impunity Gap of the International Tribunal for Rwanda: Causes and Consequences”, *Hastings International and Comparative Law Review*, 34, 2011: 49–86

Margaret Burnham, “Fragmentation in International Criminal Law and the Rights of Victims”, in *The Diversification and Fragmentation of International Criminal Law*, ed. Larissa van den Herik and Carsten Stahn, Martinus Nijhoff., 2012, <https://brill.com/view/book/edcoll/9789004236912/B9789004236912-s024.xml>

Mark Lattimer, Shabnan Mojtahedi, Lee Anna Tucker, “A Step towards Justice: Current accountability options for crimes under international law committed in Syria”, *Syria Justice and Accountability Centre and Ceasefire Centre for Civilian Rights*, <https://syriaaccountability.org/wp-content/uploads/A-Step-towards-Justice1.pdf>

Martin Scheinin, “Back to Post-9/11 Panic? Security Council Resolution on Foreign Terrorist Fighters”, *Just Security*, September 2014, <https://www.justsecurity.org/15407/post-911-panic-security-council-resolution-foreign-terrorist-fighters-scheinin/>

Michael Bothe, K. J. Partsch, and W. A. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*. Second Edition. Reprint Revised by Michael Bothe (Martinus Nijhoff Publishers, 2013)

Michael E Hartmann, “International Judges and Prosecutors in Kosovo: A New Model for Post-Conflict Peacekeeping”, *United States Institute of Peace*, October 2003,

<https://www.usip.org/publications/2003/10/international-judges-and-prosecutors-kosovo-new-model-post-conflict>

Michael Humphrey, “International Intervention, Justice and National Reconciliation: The Role of the ICTY and ICTR in Bosnia and Rwanda”, *Journal of Human Rights*, 2, no. 4, December 2003: 495–505

Michael P. Scharf, Milena Sterio, “Introduction”, in *The Legacy of Ad Hoc Tribunals in International Criminal Law*, eds. Milena Sterio and Michael Scharf, Cambridge University Press, 2019, pp. 1-8

Ministerie van Buitenlandse Zaken, “The Netherlands: ISIS Cannot Go Unpunished”, Press Release, September 26, 2019. Available at: <https://www.government.nl/latest/news/2019/09/26/the-netherlands-isis-cannot-go-unpunished>

Mistale Taylor, “Financing Lady Justice: How the Funding Systems of Ad Hoc Tribunals Could Lend Themselves to the Possibility of Judicial Bias” in *The Legitimacy of International Criminal Tribunals*, eds. Nobuo Hayashi, Cecilia Bailliet (Cambridge University Press 2017), 426-448

Office of the United Nations High Commissioner for Human Rights, *Rule-of-Law tools for post-conflict states: maximizing the legacy of hybrid courts* (2008), <https://www.ohchr.org/Documents/Publications/HybridCourts.pdf>

Open Society Foundations, “Options for Justice: a Handbook for Designing Accountability Mechanisms for Grave Crimes”, 2018, <https://www.justiceinitiative.org/uploads/89c53e2e-1454-45ef-b4dc-3ed668cdc188/options-for-justice-20180918.pdf>

OSCE Office for Democratic Institutions and Human Rights, *Guidelines for Addressing the Threats and Challenges of ‘Foreign Terrorist Fighters’ Within a Human Rights Framework*, OSCE/ODIHR, 2018, [https://www.osce.org/files/f/documents/4/7/393503\\_2.pdf](https://www.osce.org/files/f/documents/4/7/393503_2.pdf)

Pouria Askary and Katayoun Hosseinejad, “Non-State Courts: Illegal or Conditional?: The Case of Da’esh Courts”, *Journal of International Humanitarian Legal Studies*, 10, no. 2, 2019: 240–64

Rachel Behring, “One-Eyed Prosecution?: On the Possibility to Restrict the Personal Jurisdiction of an International Ad Hoc-Tribunal for ISIS-Fighters”, *Völkerrechtsblog*, February 2020, <https://voelkerrechtsblog.org/de/one-eyed-prosecution/>

REACH, *Camp Profile: Roj (Al-Hasakeh governorate, Syria)*, October 2020, [https://reliefweb.int/sites/reliefweb.int/files/resources/REACH\\_SYR\\_Factsheet\\_NES\\_CampProfile\\_Roj\\_November-2020.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/REACH_SYR_Factsheet_NES_CampProfile_Roj_November-2020.pdf)

Regeringskansliet, “Sweden to Host Expert Meeting on ISIS Tribunal”, Press Release, June 2019, <https://www.government.se/press-releases/2019/06/sweden-to-host-expert-meeting-on-isis-tribunal/>

Richard Goldstone, “International Criminal Court and Ad Hoc Tribunals”, in *The Oxford Handbook on the United Nations*, eds. Sam Daws and Thomas G. Weiss, Oxford University Press, 2008, 567-83

Rojava Information Center, *Bringing ISIS to justice: towards an international tribunal in North East Syria*, Rojava Information Center, 2019, <https://rojavainformationcenter.com/storage/2019/07/Bringing-ISIS-to-justice-Rojava-Information-Center-Report-2019-Website.pdf>

Rome Statute of the International Criminal Court adopted on the 17 July 1998, *United Nations Treaty Series*, vol. 2178 (3),

<https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280025774&clang=en>

Rupert Skilbeck, “Funding Justice: The Price of War Crimes Trials”, *Human Rights Brief*, 2008, vol. 15(3): 6-10,

<https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1028&context=hrbrief>

Sandra L. Hodgkinson, “Are Ad Hoc Tribunals an effective tool for prosecuting international terrorism cases?”, *Emory International Law Review*, 2010: 515-25,

<https://www.law.upenn.edu/live/files/5913-session424emoryintlrev515pdf>

Special Court for Sierra Leone, *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-1-T, 18 May 2012

Special Tribunal for Lebanon, “About the STL | Special Tribunal for Lebanon.”, Accessed 17 December 2020, <https://www.stl-tsl.org/en/about-the-stl>

Special Tribunal for Lebanon, “Statute of the Special Tribunal for Lebanon | Special Tribunal for Lebanon.”, Accessed 17 December 2020. Available at: <https://www.stl-tsl.org/en/documents/legal-documents/statute-of-the-tribunal>

Special Tribunal for Lebanon, *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, STL-11-01/1, 16 February 2011, <https://www.legal-tools.org/doc/ceebc3/pdf/>

Stephen E. Schemenauer, *Using the Rule of Law to Combat the Islamic State*, United States Army War College, 2016,

[https://www.jcs.mil/Portals/36/Documents/Doctrine/Education/jpme\\_papers/schemenauer\\_s.pdf?ver=2017-12-29-142155-737](https://www.jcs.mil/Portals/36/Documents/Doctrine/Education/jpme_papers/schemenauer_s.pdf?ver=2017-12-29-142155-737)

Susana SaCouto, Katherine Cleary, “The Gravity Threshold of the International Criminal Court”, *American University International Law Review*, vol. (23)5, 2007: 807-854,

<https://core.ac.uk/download/pdf/235401602.pdf>

Sylvia de Bertodano, “Current Developments in Internationalized Courts”, *Journal of International Criminal Justice*, 1, no. 1, April 2003: 226–44

Tanya Mehra, “Bringing (Foreign) Terrorist Fighters to Justice in a Post-ISIS Landscape Part II: Prosecution by Foreign National Courts”, *International Centre for Counter-Terrorism (ICCT)*, January 2018, <https://icct.nl/publication/bringing-foreign-terrorist-fighters-to-justice-in-a-post-isis-landscape-part-ii-prosecution-by-foreign-national-courts/>

The National, “Swedish Female ISIS Supporters May Be Tried in Syria for Terrorism Offences”, accessed 13 October 2020, <https://www.thenational.ae/world/swedish-female-isis-supporters-may-be-tried-in-syria-for-terrorism-offences-1.1092495>.

Tom Perriello, Marieke Wierda, “Lessons from the Deployment of International Judges and Prosecutors in Kosovo.” *International Security Sector Advisory Team (ISSAT)*, March 2006,

<http://issat.dcaf.ch/Learn/Resource-Library/Policy-and-Research-Papers/Lessons-from-the-Deployment-of-International-Judges-and-Prosecutors-in-Kosovo>

Trial International, “Terrorism and international crimes: prosecuting atrocities for what they are”, 2020, [https://trialinternational.org/wp-content/uploads/2020/03/TRIAL-International\\_UJAR-2020\\_DIGITAL.pdf](https://trialinternational.org/wp-content/uploads/2020/03/TRIAL-International_UJAR-2020_DIGITAL.pdf)

UN Assistance Mission for Iraq, Office of the United Nations High Commissioner for Human Rights, *Human Rights in the Administration of Justice in Iraq: Trials under the anti-terrorism laws and implications for justice, accountability and social cohesion in the aftermath of ISIL*, [https://reliefweb.int/sites/reliefweb.int/files/resources/Iraq - ISIL trials under the anti-terrorism laws and the implications for justice 28012020.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/Iraq_-_ISIL_trials_under_the_anti-terrorism_laws_and_the_implications_for_justice_28012020.pdf)

UN General Assembly, “Approval of Draft Agreement, A/57/806, Annex”, 85th Plenary Session, May 6, 2003, <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Cam%20ARES%2057%20228B.pdf>

UN Secretary General, “Report of the Secretary-General on Khmer Rouge Trials, A/57/769”, 57th Plenary Session, March 31, 2003, <https://digitallibrary.un.org/record/491564?ln=fr>

UN News, “Russia, China Block Security Council Referral of Syria to International Criminal Court”, 22 May 2014, Accessed 22 January 2021, <https://news.un.org/en/story/2014/05/468962-russia-china-block-security-council-referral-syria-international-criminal-court>

UN News, “UN Report on Syria Conflict Highlights Inhumane Detention of Women and Children”, 11 September 2019, accessed 20 October 2020, <https://news.un.org/en/story/2019/09/1046102>

UN Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, *Report to the UN General Assembly*, UN Doc. A/70/330, August 2015, <https://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/AnnualReports.aspx>

United Nations, “Charter of the United Nations”, adopted 24 October 1945, <https://www.refworld.org/docid/3ae6b3930.html>

United Nations and the Rule of Law, “International and Hybrid Criminal Courts and Tribunals”, accessed 22 January 2020, <https://www.un.org/ruleoflaw/thematic-areas/international-law-courts-tribunals/international-hybrid-criminal-courts-tribunals/>

UNSC, “Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, S/2000/915”, October 2000

UNSC, *Draft resolution S/2014/348*, 22 May 2014, [https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s\\_2014\\_348.pdf](https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2014_348.pdf)

UNSC, *Resolution 1272 (1999)*, 25 October 1999, <http://unscr.com/en/resolutions/1272>

UNSC, *Resolution 2178 (2014)*, 24 September 2014, <https://www.un.org/securitycouncil/s/res/2178-%282014%29>

UNSC, *Resolution 2379 (2017)*, 21 September 2017, 2, <https://www.un.org/securitycouncil/content/sres2379-2017>

UNSC, *Resolution 2396 (2017)*, December 2017, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/460/25/PDF/N1746025.pdf?OpenElement>

UNSC, *Resolution 2462 (2019)*, 28 March 2019,  
<https://www.un.org/securitycouncil/fr/content/sres24622019>

Vera Mironova, “Life Inside Syria’s al-Hol camp”, *Middle East Institute*, July 2020,  
<https://www.mei.edu/publications/life-inside-syrias-al-hol-camp>

Victor Peskin, “Beyond Victor’s Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda”, *Journal of Human Rights*, 4, no. 2, April 2005): 213–31

Yitiha Simbeye, *Immunity and International Criminal Law* (Routledge, 2016)