

Prosecuting ISIS for committing crimes against humanity and genocide against the Yazidis: The implication and limitations under International Law

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In this article, **Dr Kathleen Vella** will analyse the definitions of genocide and crimes against humanity, provide a brief contextual introduction to ISIS and the atrocities it has committed against the Yazidis. She will also examine the legal challenges in prosecuting perpetrators and propose the best forum wherein the perpetrators acting on behalf of ISIS could be prosecuted for the said atrocities. The rest of the article can be found in id-Dritt XXX.

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1. Introduction

During the past decades, the rise and expansion of terrorist organisations has posed a great challenge to contemporary international law. The Islamic State of Iraq and Syria (hereinafter referred to as ISIS), being one of many such organisations, has been particularly difficult due to its transnational operations and members hailing from every corner of the world. Whilst its members have been committing terrorist attacks across the globe, this article will only address the atrocities committed against the Yazidis, an ethno-religious minority, in Iraq and Syria.

2. Limitations of international law

The following section will deal with the legal challenges and limitations of prosecuting and holding ISIS accountable for the horrors they have committed in Iraq and Syria.

2.1 Who should be prosecuted?

The seemingly spectacular rise of ISIS, along with the West's lack of preparation and underestimation of its potential, were in themselves tempting to many foreign fighters. This was reinforced with ISIS's establishment of the 'Caliphate' in parts of Iraq and Syria which made it seem all the more powerful. Thousands of European foreign fighters voluntarily joined ISIS and, as they return home, fears arise as to the manner with which they should be dealt with: whether to prosecute them for joining a terrorist organisation; to prosecute them for acts committed whilst in Iraq and Syria; or whether greater focus should be afforded to deradicalization. In several States, both joining a terrorist organisation and travelling abroad to conflict zones are now considered to be crimes, and prosecution for such crimes may be quite straightforward; however, prosecuting perpetrators for the atrocities committed in Syria and Iraq may prove to be more challenging than desired.

ISIS is an extremely well-planned organisation with an established hierarchy. The question which one should therefore delve into is who, from the hierarchy, should be prosecuted. The answer lies in Article 258 of the Rome Statute, which explicitly states that whosoever commits such a crime within the jurisdiction of the International Criminal Court, shall be both individually responsible and liable. This degree of participation varies from the actual commission of an act (individually or jointly, through orders or solicitation), to facilitating, aiding or abetting the commission of a crime.¹ However, in the history of the International Criminal Court's prosecutions, due to the lengthy procedure and resources required for a prosecution to take place before the International Criminal Court,

¹ Rome Statute of the International Criminal Court [as amended] (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 38544 <<https://www.international-criminal-court-cpi.int/resource-library/Documents/RS-Eng.pdf>> accessed 23 July 2019.

only those at the top of the hierarchy tend to actually be prosecuted.

Reference must also be made to the principle of active personality which has at times been considered as the ‘easiest’ method of exercising jurisdiction over members of ISIS. This would mean that members of ISIS, who are nationals of International Criminal Court State Parties, would fall within Article 12(2)(b) of the Rome Statute, and may therefore be prosecuted in the domestic courts of their home State. However, *a contrario sensu*, this would mean that those at the highest echelons of ISIS’s hierarchy would escape prosecution, since they are mostly from non-State Parties. Whilst prosecuting members of the lower hierachal levels of ISIS may set an example and act as a deterrent, the seeming impunity of the higher and more responsible individuals is frustrating, to say the least.²

2.2 Who could and should prosecute?

For justice to be served, there must be a court or tribunal which would be competent to hear such cases. Prosecution of such crimes may take place in three different fora: (i) before the International Criminal Court; (ii) through the setting up of *ad hoc* tribunals or hybrid courts; or (iii) by national courts in virtue of the principle of universality, territoriality or personality

2.2.1 Prosecuting by the International Court

Individual criminal responsibility is at the fulcrum of the International Criminal Court, irrespective of whether the perpetrator is a State actor or not. One of the most significant benefits of the International Criminal Court is its permanent structure as well as its explicitly laid out provisions in its Statute to prosecute perpetrators of genocide, crimes against humanity, war crimes and crimes of aggression.³ The International Criminal Court is governed by the principle of complementarity and is only able to exert its jurisdiction if the States concerned do not prosecute the perpetrators themselves. Since the crimes committed against the Yazidis by ISIS constitute crimes which are explicitly mentioned in the Rome Statute, the International Criminal Court has both the material and temporal jurisdiction to prosecute.

According to Article 12 of the Rome Statute, the International Criminal Court has jurisdiction solely over crimes committed within the territory, or by nationals, of its State Parties.⁴ This is mainly problematic since neither Syria nor Iraq are State

² Anna Marie Brennan, ‘Prosecuting ISIL before the International Criminal Court’ (American Society of International Law, 17 September 2015) <<https://www.asil.org/insights/volume/19/issue/21/prosecuting-isil-international-criminal-court-challenges-and-obstacles>> accessed> 1 July 2019.

³ Rome Statute of the International Criminal Court [as amended] (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 38544, Article 5 <https://www.international-criminal-court-cpi.int/resource-library/Documents/RS-Eng.pdf> accessed 23 July 2019.

⁴ Rome Statute of the International Criminal Court [as amended] (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 38544 <https://www.international-criminal-court-cpi.int/resource-library/Documents/RS-Eng.pdf>.

Parties, as well as due to the fact that the leaders of ISIS are often nationals of non-State Parties - as this article has already mentioned. This would mean that in reality, in the current context, although unlikely due to the past practices of the International Criminal Court, charges before the International Criminal Court may only be brought against ‘foreign fighters’ who are nationals of State-Parties and who would have committed such crimes on non-State Party territory in virtue of the active personality principle.

Another method for the International Criminal Court to be able to prosecute perpetrators for crimes committed in non-State Parties is through a referral by the United Nations Security Council, as provided for in Article 13(b) of the Rome Statute. This has already been enforced twice in the cases of Darfur (in virtue of resolution 1593 of 2005) and Libya (in virtue of resolution 1970 of 2011). Although the original attempt to grant the International Criminal Court the authority to investigate the commission of horrendous crimes and the ‘widespread violations of human rights and international humanitarian law committed in a pervasive climate of impunity by the Syrian authorities and pro-government militias as well by non-State armed groups’, was supported by over 60 countries, the referral was blocked by China and Russia, two permanent members on the Security Council.⁵

Another possibility is for the affected non-State Parties, that is Syria or Iraq in this case, to submit themselves to the jurisdiction of the International Criminal Court in virtue of Article 12(3) which states that in order for the Court to exercise jurisdiction in a non-State Party, the said State would need to ‘*accept the exercise of jurisdiction by the Court with respect to the crime in question*’.⁶ This may be quite complex since it would require the agreement between the United Nations and the affected State/s, some of which may not be in a position to negotiate due to their internal state of affairs. Moreover, this might also subject members of the respective national authorities to scrutiny and investigation for crimes committed under their watch, and thus such States might be reluctant to accept the exercise of the International Criminal Court’s jurisdiction.

int/resource-library/Documents/RS-Eng.pdf accessed 23 July 2019.

⁵ UN News Service, ‘Russia, China block Security Council referral of Syria to International Criminal Court’ (22 May 2014) <<https://news.un.org/en/story/2014/05/468962-russia-china-block-security-council-referral-syria-international-criminal-court>> accessed 7 July 2019.

⁶ Rome Statute of the International Criminal Court [as amended] (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 38544 <<https://www.international-criminal-court-cpi.int/resource-library/Documents/RS-Eng.pdf>> accessed 23 July 2019.

