

ACCOUNTABILITY FOR THE YAZIDI GENOCIDE

**Position Paper for
Dutch Parliament**

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Introduction

On 27 October 2021, the Parliamentary Committee on Foreign Affairs convened a public roundtable on the situation of the Yazidi community. Invited experts discussed the current situation of the Yazidis and shared personal experiences.¹ Experts called for several steps to be taken towards healing of the collective trauma of Yazidis and, among others, underlined the importance of holding those responsible for crimes committed against the Yazidis accountable. To build on this discussion, the Parliamentary Committee convenes a second public roundtable with legal experts on 17 February 2022 to discuss accountability options under international law for the Yazidi genocide.

This position paper for the Dutch parliament outlines the options for accountability for the perpetrators of the Yazidi genocide, committed by the Islamic State of Iraq and Syria (ISIS).² First, the paper discusses the crimes against the Yazidi and the qualification of genocide. Second, the paper connects the crimes committed against the Yazidi to the options and obligations of states under the Genocide Convention to prosecute perpetrators. Third, the paper discusses the available accountability options, split between the options to prosecute where the crimes were committed, through international courts and tribunals, and through domestic courts elsewhere, as well as their challenges. The position paper ends with a summary of the conclusions and recommendations.

Background and Context: the Yazidi Genocide

On 3 August 2014, ISIS initiated attacks amounting to genocide against the Yazidi community in Sinjar in northern Iraq. Nearly 10,000 Yazidis were either killed or kidnapped during these attacks. According to reports, over 3,000 Yazidi men and boys were killed and about 6,800 women and girls were abducted to be sold into sexual slavery.³ Yazidis who were not murdered or kidnapped fled to Mount Sinjar, where they remained trapped without food and water until Syrian Kurdish forces managed to open a humanitarian corridor to areas under Kurdish control. Due to lack of food and water, many people died on the mountain from hunger, thirst, or exhaustion. Reports indicate that victims were subjected to torture,

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¹ Tweede Kamer der Staten-Generaal, *Rondetafelgesprek Jezidi's* (Oct. 27, 2021), available at https://www.tweedekamer.nl/debat_en_vergadering/commissievergaderingen/details?id=2021A05145. Invited experts included Brenda Stoter Boscolo, journalist and author of the book 'Het vergeten volk: het verhaal van de Jezidi's over de laatste genocide', professor İlhan Kizilhan, a German psychologist specialized in psychological treatments of Yazidi refugees, Wahhab Hassoo, Yazidi activist and founder of 'NL helpt Yezidis', Amjad Al-Karaf, Yazidi from Sinjar, and Hadil Khalaf, Yazidi activist, Stichting Yezidi's Affairs.

² This briefing uses the term "Islamic State in Iraq and Syria" (ISIS) to refer to the jihadist group who is responsible for the crimes committed against the Yazidi community, as well as other minority groups. Other synonyms include "Islamic State" (IS), "Islamic State in Iraq and the Levant" (ISIL), and "Daesh", but these terms all refer to the same group. See Faisal Irshaid, *ISIS, ISIL, IS or Daesh? One group, many names*, BBC, Dec. 2, 2015, available at <https://www.bbc.com/news/world-middle-east-27994277>.

³ Lin Taylor, *Nearly 10,000 Yazidis killed, kidnapped by Islamic State in 2014, study finds*, REUTERS, May 9, 2017, available at <https://www.reuters.com/article/us-mideast-crisis-iraq-yazidis-idUSKBN18527I>.

sexual slavery, forced marriage, and forced religious conversion.⁴ Around 3,000 Yazidis are estimated to still be missing.⁵

Since 2014, several states and international organizations have formally recognized that the crimes committed by ISIS against the Yazidis and other minorities constitute genocide.

According to the legal definition, genocide constitutes acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, such as killing members of the group and causing serious physical or mental harm to members of the group.⁶ Importantly, the crime of genocide requires the special intent or *dolus specialis* of the perpetrators to destroy the group.⁷

Both the UN Commission of Inquiry (CoI) on Syria⁸ in 2016 and the UN Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL (UNITAD)⁹ in 2021 have concluded that ISIS committed genocide against the Yazidis as a religious group.¹⁰ ISIS had been explicit about their intent to destroy the Yazidi community, which they consider as “infidels” and “devil-worshippers.”¹¹ The intent of ISIS to commit genocide against the Yazidis is for instance demonstrated by public statements made by ISIS fighters, the

⁴ Sarah Fuchs, Who are the Yazidis?, Yazidi Legal Network (April 1, 2021), *available at* <https://www.yazidilegalnetwork.org/blog/Blog%20Post%20Title%20One-yp2rr>.

⁵ Following the 2014 attacks by ISIS, the majority of the Yazidi community of Sinjar (that consisted of almost 400,000 people), have been displaced, captured, or killed. Many Yazidis are still living in Internally Displaced People camps. Some Yazidis have since returned to Sinjar to rebuild their communities, but parts of the mountain are still not accessible due to explosives left behind by ISIS. Moreover, the Yazidis who survived the attacks, abductions, and sexual slavery are struggling with trauma, depression, and other mental illnesses. While some psychological support is available, access to adequate health care is limited.

⁶ Convention on the Prevention and Punishment of the Crime of Genocide, art. 2, Dec. 9, 1948, U.N.T.S. 78 (1948), *available at* https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf.

⁷ The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-04, Judgment, para. 498 (Sep. 2, 1998), *available at* <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/ICTR-96-04/MS15217R0000619817.PDF>.

⁸ Based on interviews with survivors, religious leaders, smugglers, activists, lawyers, medical personnel, and journalists, as well as extensive documentary material from statements, satellite images, and reports, the CoI concluded that ISIS committed genocide against the Yazidi community. Moreover, the CoI determined that the atrocities against the Yazidis amount to war crimes and crimes against humanity. See Independent International Commission of Inquiry on the Syrian Arab Republic, “*They came to destroy*”: *ISIS Crimes Against the Yazidis*, para. 201, delivered to the UN Human Rights Council, U.N. Doc. A/HRC/32/CRP.2 (June 15, 2016), *available at* https://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A_HRC_32_CRP.2_en.pdf.

⁹ In 2018, the UN Security Council (UNSC) called for an investigative team to collect evidence of the international crimes committed by ISIS, see Security Council Resolution 2379, para. 2, U.N. Doc. S/RES/2379 (Sept. 21, 2017), *available at* [https://undocs.org/S/RES/2379\(2017\)](https://undocs.org/S/RES/2379(2017)).

¹⁰ Security Council, *ISIL/Da'esh Committed Genocide of Yazidi, War Crimes against Unarmed Cadets, Military Personnel in Iraq, Investigative Team Head Tells Security Council*, U.N. Doc. SC/14514 (May 21, 2021), *available at* <https://www.un.org/press/en/2021/sc14514.doc.htm>.

¹¹ BBC, *Who, What, Why: Who are the Yazidis?*, Aug. 8, 2014, *available at* <https://www.bbc.com/news/blogs-magazine-monitor-28686607>.

atrocities they committed against the Yazidi community in Sinjar, and the systematic destruction of Yazidi religious and cultural sites.¹²

On 10 May 2021, the special adviser and then head of UNITAD, Karim Khan – currently the Chief Prosecutor of the International Criminal Court – briefed the UNSC stating that there was “clear and convincing evidence that the crimes against the Yazidi people clearly constituted genocide.”¹³ Based on thousands of statements, digital evidence, and forensic analysis, UNITAD identified the intent of ISIS to destroy the Yazidis in the ultimatum that they repeated in many villages in Iraq: to convert or to die. Those who refused to convert were executed, which included thousands of men, women, and children. Moreover, UNITAD noted that the crimes against Yazidis included slavery, sexual slavery, and crimes against children. According to UNITAD, the sexual slavery of Yazidi women and girls was intended to exclude them from their community, and ISIS directly and deliberately targeted children to indoctrinate, harm, kill, and brainwash them with their ideology.¹⁴

Furthermore, the Parliamentary Assembly of the Council of Europe adopted a resolution on 27 January 2016 that recognized the crimes committed by ISIS fighters as “genocide and other serious crimes punishable under international law.”¹⁵ Similarly, the European Parliament unanimously adopted a resolution on 4 February 2016 to recognize that ISIS committed genocide against Christians and Yazidis, and other religious and ethnic minorities.¹⁶ National governments and parliaments have also recognized the genocide against the Yazidi community, including parliaments of the US, the UK, France, Italy, Armenia, Scotland, Australia, Canada, Portugal, Belgium,¹⁷ and the Netherlands.

¹² Independent International Commission of Inquiry on the Syrian Arab Republic, *UN Commission of Inquiry on Syria: ISIS is committing genocide against the Yazidis*, UNHCR, June 16, 2016, available at <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=20113&LangID=E>.

¹³ UN News, *ISIL crimes against Yazidis constitute genocide, UN investigation team finds* (May 10, 2021), available at <https://news.un.org/en/story/2021/05/1091662>.

¹⁴ Special Adviser Karim Asad Ahmad Khan QC, *Briefing of the Special Adviser and Head of the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh / Islamic State in Iraq and the Levant, delivered to the Security Council* (May 10, 2021), available at https://www.unitad.un.org/sites/www.unitad.un.org/files/general/sa_khan_6th_briefing_sc_as_delivered_en_0.pdf.

¹⁵ Parliamentary Assembly of the Council of Europe, *Resolution 2091: Foreign fighters in Syria and Iraq*, para. 2, Council of Europe (Jan. 27, 2016), available at <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=22482&lang=en>.

¹⁶ European Parliament, *Systematic mass murder of religious minorities by ISIS*, E.P. Resolution 2016/2529(RSP) (Feb. 4, 2016), available at https://www.europarl.europa.eu/doceo/document/TA-8-2016-0051_EN.html.

¹⁷ On 15 July 2021, the Belgian Parliament adopted a resolution calling for the recognition of the crimes against the Yazidis as genocide, the prosecution of ISIS fighters for the crime of genocide, and humanitarian aid to Yazidis who suffered sexual violence, slavery, or other inhumane or degrading treatment. The resolution called on the Belgian government “to use all avenues available under national and international law to ensure that the crime of genocide perpetrated against the Yazidis in Iraq and Syria by the Islamic State does not go unpunished” and “to encourage and support the efforts of the Belgian courts to identify and prosecute any Belgian perpetrators of crimes against the Yazidi community”. See Belgische Kamer van Volksvertegenwoordigers, *Voorstel van resolutie over de erkenning en de vervolging van de tegen de jezidi's gepleegde genocidemisdaden en over hulp aan de jezidische bevolking*, Doc. 55 1766/001, Jan. 28, 2021, available at <https://www.lachambre.be/FLWB/PDF/55/1766/55K1766001.pdf>; Koen Metsu, *Kamercommissie keurt N-VA-resolutie over Jezidi-genocide door Islamitische Staat goed*, Nieuw-Vlaamse Alliantie (June 30, 2021), available at <https://www.n-va.be/nieuws/kamercommissie-keurt-n-va-resolutie-over-jezidi-genocide-door->

The Dutch Parliament formally recognized the crimes against the Yazidis as crimes against humanity and genocide on 6 July 2021.¹⁸ While it called for the recognition of the crimes against the Yazidis as genocide, it did not specifically refer to legal avenues to prosecute these crimes. The motion therefore seems largely symbolic. Several commentators have called on the Dutch Parliament and the Dutch Government to prosecute ISIS fighters for international crimes in the Dutch criminal law system to prevent impunity for these crimes.¹⁹ Civil society organizations such as PAX have called on the Dutch Government to repatriate Dutch ISIS fighters and their families when there is no prospect of prosecution in the region or when these trials do not adhere to basic fair trial and human rights standards.²⁰ Moreover, the Dutch Public Prosecution (*Openbaar Ministerie*), the Dutch intelligence and security services (*AIVD*), and the counter-terrorism unit (*NCTV*) have reiterated the importance of repatriating Dutch foreign fighters, including ISIS women, and prosecuting them in the Netherlands. This would address impunity and enable the Dutch authorities to follow the movements of foreign fighters.²¹

In addition to the crime of genocide, many other crimes were committed against the Yazidi as well. Several reports have pointed to crimes against humanity, war crimes, torture, and sexual and gender-based crimes.²² These crimes also qualify as international crimes that should be punished and can be prosecuted internationally and domestically.

Obligations of States under the Genocide Convention

The 1948 Convention on the Prevention and Punishment of the Crime of Genocide, ratified by most states, codified the crime of genocide in international law. The International Court of Justice (ICJ) identified the prohibition of genocide as a peremptory norm (or *jus cogens*), meaning that it is a general norm of international law that has been accepted and recognized by the international community as a whole.²³

islamitische-staat-goed; Knack, Kamer erkent genocide tegen jezidi door IS, July 15, 2021, available at https://www.knack.be/nieuws/belgie/kamer-erkent-genocide-tegen-jezidi-door-is/article-belga-1757693.html?cookie_check=1634587042.

¹⁸ Tweede Kamer der Staten-Generaal, *Motie van het lid Kuik c.s. over uitspreken dat IS genocide heeft gepleegd op de jezidi-bevolking*, 29754-610 (July 1, 2021), available at <https://www.tweedekamer.nl/kamerstukken/moties/detail?id=2021Z12453&did=2021D26770>.

¹⁹ Bibi van Ginkel, *Opinie: Laat het niet bij erkenning van genocide op jezidi's, maar berecht daders hier in Nederland*, Volkskrant, July 5, 2021, available at <https://www.volkskrant.nl/columns-opinie/opinie-laat-het-niet-bij-erkenning-van-genocide-op-jezidi-s-maar-berecht-daders-hier-in-nederland~b7ee0d6a/>.

²⁰ PAX, *Berecht Nederlandse ISIS-strijders in Nederland* (Nov. 19, 2019), available at <https://paxvoorvrede.nl/nieuws/berichten/berecht-nederlandse-isis-strijders-in-nederland>.

²¹ NRC, *OM, AIVD en NCTV: 'Haal IS-gangers op voor berechting'*, June 15, 2021, available at <https://www.nrc.nl/nieuws/2021/06/16/om-aivd-en-nctv-haal-is-gangers-op-voor-berechting-a4047599>.

²² Security Council, *Letter dated 15 November 2018 from the Special Adviser and Head of the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh/Islamic State in Iraq and the Levant addressed to the President of the Security Council*, S2018/1031, para. 9, available at <https://undocs.org/en/s/2018/1031>.

²³ Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 23 (May 28), available at <https://www.icj-cij.org/public/files/case-related/12/012-19510528-ADV-01-00-EN.pdf>.

Under the Genocide Convention, states parties have several legal obligations, including not to commit genocide as well as to prevent genocide committed by others.²⁴ The ICJ confirmed that states have the responsibility to take all measures to prevent genocide “which were in their power, and which might have contributed to preventing the genocide.”²⁵

In addition to taking measures to prevent genocide, Article 1 of the Genocide Convention also includes an obligation on states to punish the crime of genocide. Moreover, Article 6 of the Genocide Convention provides that persons charged with genocide shall be tried by a domestic court of the state where the genocide occurred or an international criminal tribunal. The rationale behind the Genocide Convention and state practice since demonstrate that these two options in Article 6 are not exhaustive: other states may also prosecute perpetrators of genocide in their own national criminal courts.

There are several bases of jurisdiction to ground such prosecutions on. First, a state can prosecute suspects that are their nationals, such as foreign fighters (active personality principle). Second, a state can prosecute suspects of crimes committed against their nationals: the victim has the state’s nationality (passive nationality principle). Third, for the most serious crimes, states may also prosecute on the basis of universal jurisdiction. Genocide falls under these most serious crimes. However, states have limited the exercise of universal jurisdiction to require a nexus between the state and the crime, for example that the perpetrator is on the state’s territory.

The obligation to punish under Article 1 is understood as part of the *aut dedere aut judicare* obligation: states should either extradite or punish themselves. It entails that states should not shield perpetrators of genocide from justice.

Although some European prosecution offices are investigating and prosecuting ISIS fighters for international crimes committed against the Yazidis, the perpetrators of the genocide remain largely unpunished.²⁶ The challenges to prosecute ISIS fighters are legal, evidentiary and practical and will be discussed in the next sections that explore the accountability options for the Yazidi genocide.

Prosecution in Iraq and Syria

The default starting point in considering where to prosecute is always to first examine whether it is possible in the state where the crimes were committed. This has the benefits of being closer to the evidence and witnesses as well as the victims. It also better reaches the

²⁴ Convention on the Prevention and Punishment of the Crime of Genocide, art. 1, Dec. 9, 1948, U.N.T.S. 78 (1948), available at https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf.

²⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 2007 I.C.J. 221, para. 430 (Feb. 26), available at <https://www.icj-cij.org/public/files/case-related/91/091-20070226-JUD-01-00-EN.pdf>.

²⁶ Zachary Kaufman, Addressing the Islamic State’s Genocide Against the Yezidi at the Belgian Parliament, *Opinio Juris*, June 24, 2021, available at <http://opiniojuris.org/2021/06/24/addressing-the-islamic-states-genocide-against-the-yezidi-at-the-belgian-parliament/>; Independent International Commission of Inquiry on the Syrian Arab Republic, “*They came to destroy*”: *ISIS Crimes Against the Yazidis*, para. 195, delivered to the UN Human Rights Council, U.N. Doc. A/HRC/32/CRP.2 (June 15, 2016), available at https://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A_HRC_32_CRP.2_en.pdf.

region or society that was impacted by the crimes. Only when a state is unable or unwilling to prosecute or when there are other reasons why prosecution elsewhere is more appropriate, are international and foreign prosecutions considered.

Iraq and Syria have jurisdiction to prosecute the alleged perpetrators of the Yazidi genocide based on the territoriality and personality principle, as crimes against the Yazidi community were committed within the territory of Iraq and many ISIS fighters were Iraqi and Syrian nationals.

However, neither Iraq nor Syria has incorporated international crimes in its domestic legislation and courts therefore cannot prosecute perpetrators for genocide specifically.²⁷ Instead, many ISIS fighters are prosecuted under either Iraq's Anti-Terrorism Law no. 13 of 2005,²⁸ or Syria's Counter Terrorism Law no. 19 of 2012. These trials do not as such recognize that the perpetrators committed genocide. Moreover, trials in both countries have been accused of violating fair trial rights and both the Iraqi and Syrian Terrorism Laws allow for the death penalty.²⁹

Supported by UNITAD, the Kurdish Regional Government (KRG) in the Kurdish Autonomous Region of Iraq introduced legislation to the Kurdish parliament to establish a special criminal court to prosecute ISIS members that are accused of international crimes committed in Iraq.³⁰ However, the Federal Supreme Court of Iraq rejected the plan on the basis that the Iraqi constitution prohibits the establishment of a "special or extraordinary court."³¹

Furthermore, the Kurdish authorities in North East Syria, known as the Autonomous Administration of North and East Syria (AANES), announced they will prosecute thousands of ISIS fighters according to local laws. Many alleged members of ISIS are still held in the Al-Hol camp by the Kurdish-led Syrian Defense Forces (SDF), including foreign fighters.³² The AANES has effective control over the *de facto* autonomous region of Rojava since 2012, and established a constitution and legal system based on democratic values, abolishing the

²⁷ Tanya Mehra, *Bringing (Foreign) Terrorist Fighters to Justice in a Post-ISIS Landscape Part I: Prosecution by Iraqi and Syrian Courts*, International Centre for Counter-Terrorism (Dec. 22, 2017), available at <https://icct.nl/publication/bringing-foreign-terrorist-fighters-to-justice-in-a-post-isis-landscape-part-i-prosecution-by-iraqi-and-syrian-courts/>.

²⁸ *Anti-Terrorism Law no. 13* (Iraq, 2005), available at http://www.vertic.org/media/National%20Legislation/Iraq/IQ_Anti-Terrorism_Law.pdf.

²⁹ Human Rights Watch, *Flawed Justice: Accountability for ISIS Crimes in Iraq* (Dec. 2017), available at https://www.hrw.org/sites/default/files/report_pdf/iraq1217web.pdf; Tanya Mehra, *Bringing (Foreign) Terrorist Fighters to Justice in a Post-ISIS Landscape Part I: Prosecution by Iraqi and Syrian Courts*, International Centre for Counter-Terrorism (Dec. 22, 2017), available at <https://icct.nl/publication/bringing-foreign-terrorist-fighters-to-justice-in-a-post-isis-landscape-part-i-prosecution-by-iraqi-and-syrian-courts/>.

³⁰ Martin Chulov, *Iraqi Kurds plan special court to try suspected Islamic State fighters*, Guardian, April 30, 2021, available at <https://www.theguardian.com/world/2021/apr/30/iraqi-kurds-plan-special-court-try-suspected-islamic-state-fighters>.

³¹ Khazan Jangiz, *Iraq rejects Kurdish attempts to establish court for ISIS crimes*, Rudaw, June 27, 2021, available at <https://www.rudaw.net/english/kurdistan/270620212>; Iraq Const. art. 95 (2005), available at <https://investpromo.gov.iq/wp-content/uploads/2013/06/iraqi-constitution-En.pdf>.

³² Tanya Mehra and Matthew Wentworth, *New Kid on the Block: prosecution of ISIS fighters by the Autonomous Administration of North and East Syria*, International Centre for Counter-Terrorism (March 16, 2021), available at <https://icct.nl/publication/prosecution-of-isis-fighters-by-autonomous-administration-of-north-east-syria/>.

death penalty and implementing certain human rights standards.³³ Commentators argue that international humanitarian law implicitly authorizes non-state armed groups, such as the AANES, to establish courts and prosecute perpetrators of crimes committed within the territory they control if these courts apply the minimum standards of impartiality and fair trial rights.³⁴ However, the AANES courts are currently not able to prosecute ISIS fighters for international crimes, such as genocide.³⁵ They are able to prosecute ISIS fighters for terrorism-related crimes. But the AANES courts are still rudimentary and the prisons in the autonomous region of Rojava are overcrowded.

To conclude, Iraq, Syria or the Kurdish regions cannot prosecute the crime of genocide. Moreover, violations of the minimum standards to guarantee the right to a fair trial are prevalent in the trials that are held for terrorism-related crimes.

International Courts and Tribunals

If the state where the crimes occurred is unable or unwilling to prosecute, the international community may consider prosecuting perpetrators of genocide at the International Criminal Court (ICC) or an international criminal tribunal. These international courts and tribunals are not intended and unable to replace the domestic system: they only investigate and prosecute “the most responsible” perpetrators of international crimes rather than the large numbers of perpetrators that are (usually) involved in committing genocide. For example, in Rwanda and the former Yugoslavia, the tribunals prosecuted the more senior perpetrators, while the domestic legal systems try to address the vast majority of the perpetrators. Therefore, an international court can only play a (limited) part in an accountability strategy for ISIS-crimes. The majority of the prosecutions would only be possible within domestic courts of law (in Iraq and Syria and other states that have jurisdiction over perpetrators) or in a new type of hybrid court with involvement of Iraq and Syria.

The purpose of accountability sought and the focus on specific crimes may influence the choice of accountability mechanism, as well as the scope of jurisdiction of such a mechanism. If the international community considers international types of accountability, it is important to determine what purposes the prosecutions serve, which affect the choices that need to be made as to, for instance, who is (not) prosecuted, for what, how, where, and the role of victims. International courts have been associated with unrealistic goals that include accountability, prevention of new crimes, truth telling and establishing a historical record, didactical purposes, reconciliation, reparation, and peace and stability. With regard to the Yazidi situation, European states have also connected accountability to a purpose of keeping foreign terrorist fighters from returning to their states.

³³ *Charter of the Social Contract* preamble, arts. 25-26 (Rojava, 2014), available at https://peaceinkurdistancampaign.com/wp-content/uploads/2014/03/english-version_sc_revised-060314-1.pdf.

³⁴ Daragh Murray, *Non-State Armed Groups in NIAC: Does IHL Provide Legal Authority for the Establishment of Courts?* EJIL:Talk! (June 4, 2014), available at <https://www.ejiltalk.org/non-state-armed-groups-in-niac-does-ihl-provide-legal-authority-for-the-establishment-of-courts/>.

³⁵ Tanya Mehra and Matthew Wentworth, *New Kid on the Block: prosecution of ISIS fighters by the Autonomous Administration of North and East Syria*, International Centre for Counter-Terrorism (March 16, 2021), available at <https://icct.nl/publication/prosecution-of-isis-fighters-by-autonomous-administration-of-north-east-syria/>.

Keeping the purposes vague and all-encompassing has in the past led to contradicting strategies and unrealistic expectations.³⁶ Every purpose leads to a particular set of choices that contradicts achieving other purposes. Moreover, certain purposes may lead to a conclusion that different kinds of transitional justice mechanisms are more appropriate than criminal accountability, such as truth-telling, reconciliation processes, reparation and institutional reform.³⁷

As Nollkaemper explained in his advice on the establishment of an ISIS-tribunal, determining the purposes of a tribunal is a political choice that needs careful consideration and articulation to develop an accountability strategy.³⁸

International Criminal Court

Article 5 of the Rome Statute provides that the ICC has subject-matter jurisdiction over the crime of genocide. However, limitations to territorial and personal jurisdiction, as well as the referral of cases, may make it difficult for the Court prosecute those responsible for the Yazidi genocide.

Jurisdiction through ICC State Parties

Under the Rome Statute, the ICC may exercise its territorial jurisdiction where the alleged perpetrator is a national of a state party to the Statute.³⁹ Since neither Iraq nor Syria are parties to the Rome Statute, the ICC does not have territorial jurisdiction over crimes committed in the territories of the two states, including genocide against the Yazidis.

In addition to the basis of territorial jurisdiction, the ICC may exercise personal jurisdiction over alleged perpetrators who are nationals of a state party, even where the Court has no territorial jurisdiction.⁴⁰ As such, the ICC would be able to prosecute foreign fighters who have played a role in the Yazidi genocide that are nationals of one of the parties to the Rome Statute. In 2015, the ICC's Office of the Prosecutor (OTP) gathered information that a significant number of foreign fighters are nationals of states parties, including from Tunisia, Jordan, France, the UK, Germany, Belgium, the Netherlands, and Australia.⁴¹

However, in accordance with its prosecutorial policy, the ICC would only prosecute those most responsible within ISIS. According to the information available to the OTP, the

³⁶ Marieke de Hoon, *The Future of the International Criminal Court. On Critique, Legalism and Strengthening the ICC's Validity*, 17 *International Criminal Law Review* 1-24 (2017).

³⁷ Marieke de Hoon, *Transitional Justice*, in: Milena Sterio & Paul Williams, *Research Handbook on Post-Conflict State Building* (Edward Elgar Publishing, 2020)

³⁸ André Nollkaemper, *Legal Advice International Tribunal ISIS*, 6 (Jul. 22, 2019), available at <https://www.rijksoverheid.nl/documenten/rapporten/2019/07/24/advies-internationaal-tribunaal-isis>.

³⁹ *Rome Statute of the International Criminal Court* art. 12 (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 available at <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>.

⁴⁰ *Rome Statute of the International Criminal Court* art. 12 (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute) available at <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>.

⁴¹ Office of the Prosecutor, *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the alleged crimes committed by ISIS*, International Criminal Court (Apr. 8, 2015), available at <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-08-04-2015-1>.

Yazidi genocide was primarily led by nationals of Iraq and Syria rather than foreign fighters.⁴²

Moreover, the ICC's requirements of admissibility include the complementarity principle, which provides that the ICC cannot exercise its jurisdiction if states are able and willing to prosecute their own nationals. Some states, such as the UK, have already initiated proceedings against their own nationals who have committed crimes in Iraq and Syria,⁴³ and, as such, a case with the ICC to investigate and prosecute crimes committed by the lower-ranking individuals over which it has jurisdiction may not be admissible.

Jurisdiction through UNSC Referral

The ICC could also gain jurisdiction to investigate and prosecute those responsible for the Yazidi genocide based on a referral from the United Nations Security Council (UNSC), acting under Chapter VII of the UN Charter. In that situation, the ICC would have jurisdiction over all nationals that have committed the crimes that fall under the ICC's subject-matter jurisdiction rather than being limited to the nationals of ICC state parties.

This option is problematic due to the composition of the UNSC. Permanent members of the UNSC (China, France, Russia, the UK, and the US) have the right to veto decisions. In 2014, a draft resolution that would have referred the situation in Syria to the ICC failed, as China and Russia cast negative votes.⁴⁴ It is unlikely that these states would by now accept resolutions that could bring the situation under the jurisdiction of the ICC.

A possible alternative would be to limit the UNSC referral to only the actions of ISIS and excluding the crimes committed by the Assad Government. This raises concerns since the Assad Government is responsible for the large majority of the international crimes committed in the conflict. While on the one hand prosecutions of ISIS members do not preclude future prosecutions and prosecutions elsewhere of other perpetrators of international crimes in the conflict,⁴⁵ it would on the other hand raise the perception that the international community does not care about the victims of those other crimes. Commentators have argued that selective focusing on ISIS would undermine the Court's legitimacy.⁴⁶ Furthermore, the selective focus on ISIS could pose a problem given that some ISIS members were initially, or at the same time, linked to other groups in Iraq and Syria. This also means that some victims may not be provided with effective access to justice. If the UNSC referral would be limited to crimes committed by ISIS, it is unclear how the ICC would tackle these challenges.

⁴² Office of the Prosecutor, *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the alleged crimes committed by ISIS*, International Criminal Court (Apr. 8, 2015), available at <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-08-04-2015-1>.

⁴³ Anna Marie Brennan, *Prosecuting ISIL before the International Criminal Court: Challenges and Obstacles*, American Society of International Law (Sep. 17, 2015), available at https://www.asil.org/insights/volume/19/issue/21/prosecuting-isil-international-criminal-court-challenges-and-obstacles#_edn8.

⁴⁴ Security Council Department of Public Information, *Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution* (May 22, 2014), available at <https://www.un.org/press/en/2014/sc11407.doc.htm>.

⁴⁵ C oman Kenny, *Prosecuting Crimes of International Concern: Islamic State at the ICC?*, 33 *Utrecht Journal of International and European Law* 120, 124 (2017).

⁴⁶ Mark Kersten, *The ICC and ISIS: Be Careful What You Wish For*, Justice In Conflict (Jun. 11, 2015), available at <https://justiceinconflict.org/2015/06/11/the-icc-and-isis-be-careful-what-you-wish-for/>.

An International or Hybrid Criminal Tribunal

An alternative to the ICC is the creation of a criminal tribunal under international law or in a hybrid form. A hybrid tribunal combines international law with legal provisions of the state concerned.

A tribunal is considered international if it is established and controlled by international law.⁴⁷ This can be done through a UNSC decision, such as the tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR) in the 1990s, or through an agreement between states outside of the context of the UN (such as the Nuremberg Tribunal). The judges, officials, and staff of these tribunals are generally international experts who are not nationals of the states where the crimes were committed.⁴⁸

A hybrid tribunal, such as the Special Court for Sierra Leone (SCSL) and the Special Tribunal for Lebanon (STL), usually employs both international and domestic judicial officials and is located in the state where the crimes were committed. In the establishment of the SCSL and the STL, the UNSC played an important role.

It is currently unlikely that the UNSC would establish either type of tribunal for the Yazidis.

A tribunal could also be created through an agreement between two or more states, outside of the UN context. In line with international law, states creating such a tribunal must have jurisdiction over the alleged perpetrators.⁴⁹ However, without the willingness of Iraq and Syria in creating such a tribunal, the effectivity and legitimacy of such a tribunal would be limited. If a tribunal is created without the participation of the territorial states and without the powers of the UNSC, the only jurisdiction the tribunal would be able to exercise is whatever the states that establish the tribunal themselves could also exercise in their domestic courts: on the basis of the nationality of the suspects and other suspects only when they meet the criteria of universal jurisdiction. For most states, this means that the suspect must be on their territory. Moreover, if such a tribunal would be solely composed of states outside the region, it may be difficult to obtain access to suspects and evidence.⁵⁰ In addition, the location of a tribunal is an important choice, and relates to the question of the purpose of the accountability efforts. If Iraq or Syria do not consent to the establishment of such a tribunal, it will have to be located outside these states, limiting the abilities of inclusion, outreach and ownership.

The hybrid tribunals that have been established so far all have in common with international tribunals that they focus on the perpetrators that are most responsible: those in leadership positions. This excludes the vast majority of the perpetrators. In principle, if Iraq

⁴⁷ See e.g. Roger O'Keefe, *International Criminal Law* 88 (1st edition OUP, 2015).

⁴⁸ Human Rights Watch, *Syria: Criminal Justice for Serious Crimes under International Law* (Dec. 17, 2013), available at <https://www.hrw.org/news/2013/12/17/syria-criminal-justice-serious-crimes-under-international-law#D-Drawbacks>.

⁴⁹ André Nollkaemper, *Legal Advice International Tribunal ISIS*, 6 (Jul. 22, 2019), available at <https://www.rijksoverheid.nl/documenten/rapporten/2019/07/24/advies-internationaal-tribunaal-isis>.

⁵⁰ André Nollkaemper, *Legal Advice International Tribunal ISIS*, 6 (Jul. 22, 2019), available at <https://www.rijksoverheid.nl/documenten/rapporten/2019/07/24/advies-internationaal-tribunaal-isis>.

and Syria would be part of it, options could be explored in establishing a different type of hybrid court, in the form of special chambers within their domestic legal systems with international support and guarantees for fundamental rights, such as the right to a fair trial. Again, as was noted above, for any exploration along these lines, clearly defined purposes for the accountability strategy are crucial for how the trials are viewed when they take place and to what extent they meet the raised expectations.

In 2019, the Swedish government proposed the creation of a tribunal to hold the members of ISIS accountable, which was supported by the Netherlands. Several NGOs and scholars have criticized the idea for being a form of “one-sided justice.”⁵¹ Selective justice which addresses only one group involved in a conflict has been considered detrimental to achieving the goals of international criminal justice. It may also have a negative impact on the rights of the victims.⁵² Furthermore, if only a small number of states are involved in establishing the tribunal, it will likely only make a limited contribution to the prevention of impunity of ISIS members.⁵³ The proposal did not receive much support and it was perceived to be designed for states to avoid their responsibility to repatriate.⁵⁴

Domestic Prosecution in Foreign States

In addition to domestic prosecutions in Iraq or Syria (the geographical location where ISIS has committed crimes), prosecutions can also take place in foreign states if they have jurisdiction over a certain case. Prosecutions within already existing and functioning domestic courts tend to be more efficient and faster than prosecutions in an international court or tribunal.

As discussed above, foreign states may have jurisdiction over the crimes against the Yazidis on the basis of active personality principle or universal jurisdiction.

The active personality principle allows prosecution of perpetrators that have the nationality of the prosecuting state. This is particularly relevant for the Yazidi genocide with regard to the returning foreign terrorist fighters.

Foreign states may moreover rely on the principle of universal jurisdiction because genocide and crimes against humanity fall under the category of “international crimes,” the most serious crimes of international concern. States have adopted different approaches to prosecuting cases on the basis of universal jurisdiction and most, including the Netherlands,

⁵¹ Pax for Peace, *ISIS-only tribunal: selective, politicised justice will do more harm than good* (Oct. 31, 2019), available at <https://paxforpeace.nl/media/download/policybrief-iraq-isis-tribunal-2019-eng.pdf>. See also: Syria Justice and Accountability Centre, *SJAC and Partners Urge Caution with regard to International Tribunal limited to ISIS Crimes* (June 4, 2019), available at <https://syriaaccountability.org/updates/2019/06/04/sjac-and-partners-urge-caution-with-regard-to-international-tribunal-limited-to-isis-crimes/>.

⁵² Pax for Peace, *ISIS-only tribunal: selective, politicised justice will do more harm than good* (Oct. 31, 2019), available at <https://paxforpeace.nl/media/download/policybrief-iraq-isis-tribunal-2019-eng.pdf>.

⁵³ André Nollkaemper, *Legal Advice International Tribunal ISIS* (Jul. 22, 2019), available at <https://www.rijksoverheid.nl/documenten/rapporten/2019/07/24/advies-internationaal-tribunaal-isis>.

⁵⁴ *Opinio Juris, SCSL Symposium: A Legal Legacy that Opens the Way to Justice in Challenging Places and Times—Part II* (March 15, 2021), available at <http://opiniojuris.org/2021/03/15/scsl-symposium-a-legal-legacy-that-opens-the-way-to-justice-in-challenging-places-and-times-part-ii/>.

adopt a restricted approach, limiting universal jurisdiction to perpetrators who are located within their territory.⁵⁵

Cases related to ISIS crimes have been brought in several European states, most notably in Germany, France, Belgium, Finland, and the Netherlands. Additionally, the judicial authorities in Sweden and France, in cooperation with Eurojust, have set up a joint investigation team (JIT) to identify and investigate perpetrators responsible for crimes committed against the Yazidis in Syria and Iraq. The JIT aims to identify victims and witnesses of the crimes committed by foreign terrorist fighters in Syria and Iraq, and cooperates with UNITAD and other organizations that investigate international crimes committed in Syria and Iraq. Coordinating these investigations may help to determine what is the most suitable jurisdiction for prosecuting the foreign terrorist fighters and preventing multiple legal proceedings against perpetrators for the same offence.⁵⁶

Some Examples

There have been several cases in the Netherlands relating to international crimes committed by ISIS fighters. In July 2019, the District Court of the Hague sentenced a Dutch national who returned from Syria to seven and a half years imprisonment for membership of a terrorist organization and committing a war crime (Art. 3(1)(c) Geneva Convention) while serving ISIS between 2014 and 2016. The conviction was supported by material evidence such as documents that proved that the suspect received a salary from ISIS, photographic evidence in which the suspect posed with a deceased person, and incriminating chats.⁵⁷ This case illustrates the importance of material evidence for a successful prosecution.

On 29 June 2021, the District Court of the Hague convicted a Dutch woman to six years imprisonment and mandatory forensic treatment (*terbeschikkingstelling*) for membership of a terrorist organization and participating in an organization that has the purpose to commit war crimes. The court found that she shared large amounts of ISIS propaganda, including two videos in which prisoners of ISIS were burned alive. By sharing these videos in which she humiliated the victims, she affected the personal dignity of the deceased, committing a war crime. Interestingly, the court considered for the first time that ISIS is not only a terrorist organization but also a criminal organization with the purpose to commit war crimes based on its inhumane and cruel treatment of persons who do not adhere to their beliefs.⁵⁸

In January 2022, two independent organizations that collect victim statements from Yazidis in Iraq reported that they found evidence of Dutch ISIS fighters' involvement in crimes committed against the Yazidis. One of the Yazidi victims, Layla Taloo, has testified

⁵⁵ Trial International, *Universal Jurisdiction, the Only Hope for Prosecuting International Crimes Committed in Syria?* (Sep. 6, 2021), available at <https://trialinternational.org/latest-post/universal-jurisdiction-the-only-hope-for-prosecuting-international-crimes-committed-in-syria/>.

⁵⁶ Eurojust, *Support to joint investigation team of Sweden and France targeting crimes against Yazidi victims in Syria and Iraq*, (Jan. 7, 2022), available at <https://www.eurojust.europa.eu/support-joint-investigation-team-sweden-and-france-targeting-crimes-against-yezidi-victims-syria>.

⁵⁷ Rechtbank Den Haag, 09/748003-18 & 09/748003-19, (July 23, 2019), available at <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2019:7430>.

⁵⁸ Rechtbank Den Haag, 09/748012-19, (June 29, 2021), available at <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:6620>.

that she was enslaved and sexually abused by a Danish ISIS fighter and his Dutch wife, Ojone I. However, there is no indication where Ojone I. is at the moment after she escaped from al-Hol detention camp in Syria last year.⁵⁹

Germany applies universal jurisdiction less restrictively than the Netherlands and other states and therefore has more abilities to investigate and prosecute. Consequently, many more cases have been brought before German courts under the principle of universal jurisdiction, including cases relating to the crimes committed against the Yazidi community.

On 30 November 2021, the Higher Regional Court of Frankfurt convicted Taha al J., an Iraqi national, to lifelong imprisonment for genocide, crimes against humanity, and war crimes. This was the first time a court recognized that the crimes committed against the Yazidis amount to genocide.⁶⁰ In addition, the Court ordered him to pay 50.000 euros in compensation for the moral damages that the victim suffered.⁶¹ According to the Court, Taha al J. joined ISIS in 2015 and bought a Yazidi woman and her five-year-old daughter who were captured during the attack on Sinjar in 2014. Together with his wife, he held the woman and child as slaves and forced them to practice Islam. Moreover, he violently beat them and subjected them to other abuses. When the five-year-old girl urinated on her bed due to an illness, he punished her by cuffing her to a window in the scorching heat and letting her die in front of her mother. Taha al J. was charged with international crimes under the German Code of Crimes Against International Law (CCAIL) of 2002. According to Section 6 of the CCAIL, murder and other violent acts against members of a national, religious, or ethnic group may constitute genocide if the perpetrator commits them with the intent to destroy this group in whole or in part.⁶² This means that it may not matter whether the perpetrator commits murder against one individual or an entire group, as long as he or she acts with the intent to destroy the ethnic or religious group in whole or in part.⁶³ The German court specifically concluded that Taha al J. acted against the Yazidi girl and her mother “with the intent to eliminate the Yazidi religious minority.”⁶⁴ In October 2021, the Munich Higher Regional Court convicted Taha al J.’s wife, Jennifer W., to ten years imprisonment for crimes against humanity and her involvement in the death of the five-year-old Yazidi girl.

⁵⁹ Cyril Rosman, ‘Meer Nederlandse jihadisten betrokken bij misdaden tegen Jezidi’s’, *Algemeen Dagblad* (Jan. 22, 2022), available at <https://www.ad.nl/binnenland/meer-nederlandse-jihadisten-betrokken-bij-misdaden-tegen-jezidi-s~aa0b499d/>; Argos, *Jezidi-getuigenissen ongehoord*, VPRO (Jan. 22, 2022), available at <https://www.vpro.nl/argos/media/luister/argos-radio/onderwerpen/2022/Jezidi-getuigenissen-ongehoord.html>.

⁶⁰ Amnesty International, *Germany/Iraq: World’s first judgment on crime of genocide against the Yazidis*, (Nov. 30, 2021), available at <https://www.amnesty.org/en/latest/news/2021/11/germany-iraq-worlds-first-judgment-on-crime-of-genocide-against-the-yazidis/>.

⁶¹ Higher Regional Court Frankfurt/Main, *Higher Regional Court Frankfurt/Main sentences Taha Al-J. to lifelong imprisonment for genocide and other criminal offences*, (Nov. 30, 2021), available at <https://ordentliche-gerichtsbarkeit.hessen.de/pressemitteilungen/higher-regional-court-frankfurtmain-sentences-taha-al-j-to-lifelong-imprisonment>.

⁶² *Code of Crimes Against International Law, section 6* (Germany, 2002), available in German at <https://www.gesetze-im-internet.de/vstgb/BJNR225410002.html>.

⁶³ Paul Weber, *The Many Firsts of the Frankfurt Genocide Trial*, Public International Law & Law Group (Feb. 22, 2021), available at <https://www.publicinternationallawandpolicygroup.org/lawyering-justice-blog/2021/2/22/the-many-firsts-of-the-frankfurt-genocide-trial>.

⁶⁴ Higher Regional Court Frankfurt/Main, *Higher Regional Court Frankfurt/Main sentences Taha Al-J. to lifelong imprisonment for genocide and other criminal offences*, (Nov. 30, 2021), available at <https://ordentliche-gerichtsbarkeit.hessen.de/pressemitteilungen/higher-regional-court-frankfurtmain-sentences-taha-al-j-to-lifelong-imprisonment>.

In Germany, there have also been cases on the basis of the perpetrator's German nationality.⁶⁵ In July 2021, Omaila A. was sentenced to four and a half years in prison for enslaving two Yazidi girls. Two other women, Nurten J. and Sarah O., were convicted of war crimes and crimes against humanity.

Corporate Liability

While there is no precedent to hold companies accountable for their complicity in the Yazidi genocide, there have been cases in which European national courts have held companies accountable for human rights violations and international crimes.⁶⁶ In relation to the crimes committed against the Yazidis, several Yazidi organizations have called on governments to investigate social media companies such as Facebook, Twitter, YouTube, and Telegram for their role in aiding and abetting ISIS in international crimes committed against the Yazidis.⁶⁷ For instance, the Yazidi Legal Network currently researches the corporate liability of social media platforms such as Facebook.⁶⁸ Moreover, Yazda has condemned the inaction of social media platforms such as Telegram, Facebook, Twitter, and Whatsapp for allowing ISIS to trade Yazidi women and girls.⁶⁹

Challenges: Jurisdictional Limits and Evidence

This position paper outlined the limitations of domestic prosecutions in Iraq and Syria as well as the challenges and feasibility of an international court. Accountability for the crimes against the Yazidi can be further enhanced by prosecutions of perpetrators in foreign courts, as was discussed in this section. While there are promising potentials for this strategy, there are a number of important challenges that determine that also these avenues remain very difficult, lengthy and with uncertain prospect.

Jurisdictional Limits

Since the crimes occurred elsewhere, foreign states do not naturally have jurisdiction over them. They need a connection to the crimes. They can exercise jurisdiction over crimes committed by their own nationals (foreign terrorist fighters) and by using the principle of universal jurisdiction, since the crimes committed against the Yazidis fall under the category of most serious international crimes.

⁶⁵ Justice Rapid Response, *The Pursuit of Meaningful Justice for the Yazidi* (Sep. 28, 2021), available at <https://www.justicerapidresponse.org/the-pursuit-of-meaningful-justice-for-the-yazidi/>.

⁶⁶ For instance, the French Supreme Court indicted the French parent company Lafarge for the alleged crimes of its Syrian subsidiary, which included complicity in crimes against humanity. See Victoria Riello and Larissa Furtwengler, *Corporate Criminal Liability for International Crimes: France and Sweden Are Poised To Take Historic Steps Forward*, Just Security (Sep. 6, 2021), available at <https://www.justsecurity.org/78097/corporate-criminal-liability-for-human-rights-violations-france-and-sweden-are-poised-to-take-historic-steps-forward/>.

⁶⁷ See for more information NL Helpt Yezidis, *Call and Demand for an International Investigation into and Prosecution of Global Technology and Social Media Companies for Aiding and Abetting ISIS in the Persecution, Torture, Enslavement, Human Trafficking and Exploitation of Yezidis and for Facilitating Terrorism Financing through the Human Trafficking of Yezidis, et al.*, (Jan. 2022), available at <https://yezidigenocidejusticecampaign.org/>.

⁶⁸ Yazidi Legal Network, *Our Projects*, available at <https://www.yazidilegalnetwork.org/projects>.

⁶⁹ Harriet Agerholm, *ISIS using Whatsapp and Telegram to sell sex slaves*, Independent (July 7, 2016), available at <https://www.independent.co.uk/news/world/middle-east/isis-using-whatsapp-telegram-sell-sex-slaves-iraq-facebook-a7125551.html>.

However, states have adopted different approaches to prosecuting cases on the basis of universal jurisdiction and most, including the Netherlands, adopt a restricted approach, limiting universal jurisdiction to perpetrators who are located within their territory. Germany has a less restricted law that allows the German prosecution to start investigations sooner than the Dutch prosecution can. In the Netherlands, the prosecution cannot start investigating until a suspect is actually on Dutch territory. Instead, Germany is able to create files against suspects that are not on German territory, for instance based on evidence provided by refugees. Germany may then later determine how best to use this evidence: by trying to get the suspect to Germany and prosecute or by sharing the information with whichever jurisdiction the suspect is in.

Evidentiary Challenges

The crime of genocide is very difficult to prove and the crimes against the Yazidis are committed in an ongoing armed conflict. Evidentiary challenges are therefore an obstacle to achieving accountability through any of the abovementioned mechanisms: domestic or international prosecution.

Because prosecutions are criminal trials, the standard of proof that is required for a conviction is that of proof beyond reasonable doubt. Suspects can only be convicted if there is enough evidence for the court to conclude, without a reasonable doubt, that that person carried out the act with the intention to destroy the Yazidi people.⁷⁰ Because of this high standard of proof, circumstantial evidence such as witness testimonies might not be sufficient for a conviction. Every prosecution, either under international or national law, faces difficulties related to obtaining direct material evidence.

Since the crime scene as well as most victims and witnesses are located within Syrian and Iraqi territories, investigations conducted from abroad face additional challenges. The Dutch or other states' prosecutorial authorities are not allowed to investigate in the states concerned due to sovereignty, the lack of mutual legal assistance agreements, capacity and security. Moreover, the more time passes, the harder it will be to gather evidence since the probative value of testimonies decreases and evidence is destroyed or concealed.

For that reason, organizations like UNITAD and IIIM are created to collect evidence. For example, UNITAD's investigative team has reportedly recovered the remains of over 100 Yazidis from nine mass graves. Although UNITAD's Term of Reference determines that the evidence gathered would be given primarily to Iraqi authorities, it also provides the possibility of sharing evidence with other states to assist them in domestic prosecutions against members of ISIS.⁷¹ In 2020, UNITAD's Special Advisor announced a series of meetings with UN Member States to discuss "how UNITAD's investigative activities can be conducted in a way that maximizes the potential use of its evidentiary material in domestic

⁷⁰ ICTY Press Release, *Jelusic Case, Goran Jelusic Acquitted of Genocide and Found Guilty of Crimes Against Humanity and Violations of Laws or Customs of War* (Oct. 19, 1999), available at <https://www.icty.org/en/press/jelusic-case-goran-jelusic-acquitted-genocide-and-found-guilty-crimes-against-humanity-and>.

⁷¹ United Nations Security Council, *Letter dated 9 February 2018 from the Secretary-General addressed to the President of the Security Council, Annex*, para. 27, available at https://www.unitad.un.org/sites/www.unitad.un.org/files/general/tor_1.pdf.

proceedings.”⁷² While this collaboration is to be welcomed, it remains unclear to what extent much of the evidence is usable in criminal courts of law. Cooperation with domestic prosecutorial authorities in prosecuting states is therefore important to enhance the usability of the efforts of institutions like UNITAD, IIM and evidence gathering NGOs.

The Netherlands has contributed financially to such investigation efforts. In September 2019, the Dutch Minister of Foreign Affairs announced that the Netherlands would contribute 1.6 million euros to Interpol to help with the identification of prisoners in Iraq.⁷³ In October 2021, the Ministry of Foreign Affairs renewed its support for the investigations, announcing it would provide UNITAD with funding for the support and protection of witnesses, although the exact amount has not been disclosed.⁷⁴

Conclusions and Recommendations

This position paper has outlined the Yazidi genocide and the obligations of states under the Genocide Convention to punish those that were responsible. The paper moreover discussed options and challenges of prosecuting perpetrators of the Yazidi genocide i) in Iraq or Syria, ii) through international courts and tribunals, and iii) in domestic criminal courts of foreign jurisdictions, such as the Netherlands.

With regard to prosecutions in Iraq and Syria, the paper explained why the default starting point in considering where to prosecute is always to first examine whether it is possible in the state where the crimes were committed. However, Iraq, Syria or the Kurdish regions cannot prosecute the crime of genocide. Moreover, the trials that are held for terrorism-related crimes do not guarantee fair trial rights and other fundamental human rights. It is therefore important to consider whether that situation can be improved and to what extent states like the Netherlands can protect their nationals from subjection to these circumstances to prosecute them in accordance with fundamental rights.

With regard to the ICC, the paper concluded that since Iraq and Syria are not member states to the Rome Statute and the UNSC has not been willing to refer the situation, the ICC is very limited in what it would be able to prosecute. Under those jurisdictional limitations, it could only prosecute nationals of member states, such as the Netherlands, but the ICC only prosecutes those that are most responsible for international crimes. Foreign terrorist fighters tend not to have been in leadership positions of ISIS and would therefore fall outside of the scope of the ICC’s prosecutorial policy. In addition, if member states are able and willing to prosecute those individuals themselves, they would not only probably be better able to do so, but also render cases at the ICC inadmissible due to the complementarity principle.

⁷² United Nations Investigative Team to Promote Accountability for Crimes Committed by Da’esh/ISIL (UNITAD), *Promoting Da’esh Accountability Worldwide*, available at <https://www.unitad.un.org/content/promoting-da%E2%80%99esh-accountability-worldwide>.

⁷³ Government of the Netherlands, *The Netherlands: ISIS Cannot go unpunished* (Sep. 26, 2019), <https://www.government.nl/latest/news/2019/09/26/the-netherlands-isis-cannot-go-unpunished>.

⁷⁴ United Nations Investigative Team to Promote Accountability for Crimes Committed by Da’esh/ISIL (UNITAD), *The Netherlands Commits New Funding to UNITAD in Support of Witness Protection in Iraq* (Oct. 5, 2021), available at <https://www.unitad.un.org/news/netherlands-commits-new-funding-unitad-support-witness-protection-iraq>.

It is furthermore unlikely that the UNSC will establish an international or hybrid tribunal for the situation in Syria/Iraq. A tribunal limited to only the ISIS crimes may be more feasible within the UN, but raises the problem of selective justice: a tribunal solely focusing on ISIS crimes and not for the many crimes that other parties have committed, most notably the Assad regime, runs the risk of being seen as if the international community does not care about the majority of the victims in the conflict and only the Yazidis. This may negatively affect the legitimacy of the tribunal, and thereby the impact of the tribunal on achieving long term goals of justice, truth-telling, reconciliation, stability and prevention of new violence.

States may also consider establishing an international tribunal or hybrid tribunal outside of the UN context. For reasons outlined in the paper, this seems problematic unless Iraq and Syria themselves are involved. One form that could be considered in the future, is a hybrid type of tribunal through which the international community assists Iraq and Syria to prosecute not only the most responsible but also a wider group of perpetrators on the basis of fair trial standards. This would require political will and funding.

Since the possibilities for prosecuting the Yazidi genocide in Iraq and Syria and through international courts and tribunals are therefore severely limited, it is important to consider what foreign states like the Netherlands, Germany, France, Sweden, Finland, Belgium, Australia, US, UK, Tunisia and Jordan need in order to investigate and prosecute their nationals (foreign terrorist fighters) and other suspects that they may be able to exercise jurisdiction over through the principle of universal jurisdiction. The paper also addresses the possibility of prosecuting corporations for their possible responsibility.

The paper ended with a discussion on the challenges of domestic prosecution of international crimes. These include legal challenges and evidentiary challenges, such as jurisdictional limitations and the challenges of investigating a conflict abroad.

With regard to the legal challenges, the Netherlands could consider a legislative change resembling the German framework for universal jurisdiction, which would allow the Dutch police and prosecution more space to investigate international crimes.

The Netherlands could also consider whether the capacity and expertise of the various branches involved in investigating and prosecuting the Yazidi genocide is sufficient. While there has been a significant investment in the police's international crimes unit in recent years, increasing also the capacity and specific expertise at the prosecution and judiciary may be necessary to further enhance successful prosecutions.

Lastly, assisting the justice efforts for the Yazidi genocide requires a clear consideration of what goals are pursued and for what reasons. Different purposes lead to different choices regarding who is to be prosecuted, for what, how, where, what role the victims should have in these efforts, and what other transitional justice mechanisms are needed other than criminal trials, to do justice to the Yazidis. These are political choices and when they are avoided, it leads to contradicting strategies and unrealistic expectations, undermining the legitimacy of the justice efforts rather than taking this opportunity to support where support is needed.