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RESEARCH ARTICLE

# Prosecuting Crimes of International Concern: Islamic State at the ICC?

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The rise of Islamic State (IS) has fundamentally altered the conception of terrorism, a development which international criminal law is arguably unprepared for. Given the scale and gravity of the group's crimes, questions abound as to how those responsible will be held accountable. In the absence of significant domestic prosecutions and short of the establishment of a dedicated accountability mechanism, the International Criminal Court (ICC) stands as the forum of last resort in which IS members could stand trial. Such a proposition is not without significant challenges, however. This article addresses some key issues facing any potential prosecutions from the perspective of: (i) jurisdiction; (ii) applicable crimes; and (iii) modes of liability. First, as Syria, Iraq, and Libya are not States Parties to the Rome Statute, the available avenues for asserting jurisdiction will be assessed, namely: a Security Council referral; jurisdiction over so called 'foreign fighters' who are State Party nationals; and jurisdiction over attacks on the territory of a State Party and whether they could be considered part of a broader series of criminal acts in IS held territory. Second, as there is no crime of terrorism in the Rome Statute, the question of prosecuting acts encapsulated in a systematic campaign of terror through existing provisions will be assessed. Third, the regime of accountability at the ICC will be analysed in light of IS's purported structure and the crimes with which it stands accused. Focus will be directed to those responsible for the propagation of genocidal propaganda and individuals who provide aid or assistance to IS which contributes to its crimes. These questions are far from theoretical. The UN has designated IS a threat to international peace and security. There follows an expectation that international criminal law should play a role in tackling one of the major criminal concerns of our time and ensure that impunity for those responsible for IS's atrocities is avoided.

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**Keywords:** Islamic State; International Criminal Court; Jurisdiction; Security Council referral; Foreign fighters; Terrorism; Other inhumane acts; Modes of liability; Incitement

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## I. Introduction

The rise of Islamic State (IS)<sup>1</sup> represents an unprecedented challenge to international criminal law. Unlike non-State actors carrying out serious but relatively contained periodic attacks, IS has succeeded in capturing and holding State-run territory using sustained and extreme violence. The group's stated aim of establishing a caliphate in western Iraq, eastern Syria and Libya is a cause to which thousands of foreign fighters have flocked.<sup>2</sup> Additionally, IS has advocated for the commission of attacks worldwide –with insurgent groups and individuals carrying out terrorist acts in the name of IS in Europe, South East Asia, Africa and North America. The scale and gravity of IS's crimes have been deemed a threat to international peace and security by the UN Security Council (UNSC),<sup>3</sup> raising the legitimate expectation of a legal response. Nationally, while some IS members have been tried in domestic courts, prosecution invariably involves breaches of domestic anti-

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<sup>1</sup> For the purposes of this article 'IS' encapsulates the terms ISIS, ISIL and Da'esh.

<sup>2</sup> See eg UNSC 'Security Council Unanimously Adopts Resolution Condemning Violent Extremism, Underscoring Need to Prevent Travel, Support for Foreign Terrorist Fighters' (24 September 2014) Meetings Coverage SC/11580.

<sup>3</sup> UNSC Res 2255 (22 December 2015) UN Doc S/RES/2255.

terror statutes which do not cover crimes committed in IS held territory. Though the UNSC has the power to establish an *ad hoc* tribunal that could adjudicate these crimes,<sup>4</sup> as it did in the situations of Rwanda and the former Yugoslavia, the likelihood of that happening in the context of IS appears limited. Under these circumstances, it remains to be seen whether the International Criminal Court (ICC or Court)—set up to end impunity for the perpetrators of the most serious crimes of concern to the international community—should play a role. While a tempting solution, there are a number of potential obstacles to the Court's involvement. This article sets out the primary impediments to adjudicating crimes of IS and suggests ways in which these difficulties might be overcome. At the outset, the article will analyse why the ICC should seek to assert jurisdiction over IS, rather than leave prosecution to domestic forums. It then deals with the three primary spheres in which challenges present themselves: (1) jurisdictional—given the limitations contained in the Rome Statute in terms of what events can be prosecuted; (2) subject matter—focusing specifically on acts of terrorism in light of the absence of a specific criminalisation thereof in the Statute; and (3) the means of holding certain types of participants in IS crimes to account—looking at the regime of liability contained in the Rome Statute.

## II. Why the ICC Should Seek to Assert Jurisdiction over IS

The ICC operates on the basis of complementarity, with the primary responsibility for exercising criminal jurisdiction over those responsible for international crimes resting on States Parties.<sup>5</sup> The ICC will only step in where there are no national proceedings occurring in States with jurisdiction,<sup>6</sup> or where such States are unable or unwilling genuinely to investigate or prosecute.<sup>7</sup>

With the obvious absence of prosecutions in Syria, Iraq and Libya, some domestic prosecutions of IS members and sympathisers have taken place in the jurisdiction of ICC States Parties.<sup>8</sup> These cases invariably involve nationals posing a domestic threat as a result of either being involved in recruitment or supporting activities for IS within the State, or returning to the State after fighting for IS.<sup>9</sup> Identification and detention of returning fighters also presents a challenge.<sup>10</sup> Where prosecuted, offences in the domestic sphere therefore tend to be breaches of domestic anti-terror laws as opposed to offences committed in IS held territory.<sup>11</sup> Consequently there is a near complete accountability gap for IS members active in Syria, Iraq, and Libya. A core difficulty for domestic authorities who might otherwise assert jurisdiction is that of apprehending such individuals in areas under IS control. Even if suspects were to be detained, extradition for the purposes of domestic prosecution may be hampered, given the limitations of the existing legal framework combating terrorism through extraditions.<sup>12</sup> Other issues likely to arise include the differences between legal systems with regard to classification of offences and punishments.<sup>13</sup> This includes possible questions of prosecutorial integrity and the upholding of due process rights, where, for example, there is public anger regarding a suspect or where the suspect is deemed to be an intelligence asset.<sup>14</sup> States may also decide for security

<sup>4</sup> Christopher Greenwood, 'International Law and the "War Against Terrorism"' (2002) 78 *International Affairs* 301, 305.

<sup>5</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute) prmb1, art 1.

<sup>6</sup> *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (Judgment on the Appeal of Mr Germain Katanga Against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case) ICC-01/04-01/07-1497 (25 September 2009) para 78.

<sup>7</sup> *The Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* (Judgment on the Appeal of the Republic of Kenya Against the Decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute') ICC-01/09-01/11-307 (30 August 2011) para 41.

<sup>8</sup> See eg Karen J Greenberg and others, 'Case by Case: ISIS Prosecutions in the United States' (2016) Center on National Security at Fordham Law Report.

<sup>9</sup> Tina Bellon, 'Germany Arrests Suspected ISIS Fighter Returning from Syria' (*Business Insider*, 18 March 2016) <<http://www.businessinsider.com/isis-fighter-germany-arrested-suspect-2016-3>> accessed 27 February 2017; The Crown Prosecution Service, 'Anjem Choudary and Mohammed Rahman Charged for Inviting Support of ISIL' (5 August 2015) <[http://www.cps.gov.uk/news/latest\\_news/anjem\\_choudary\\_and\\_mohammed\\_rahman\\_charged\\_for\\_inviting\\_support\\_of\\_isil/index.html](http://www.cps.gov.uk/news/latest_news/anjem_choudary_and_mohammed_rahman_charged_for_inviting_support_of_isil/index.html)> accessed 27 February 2017.

<sup>10</sup> HL Deb 28 April 2016, WA8065.

<sup>11</sup> See eg US Department of Justice, 'Virginia Teen Pleads Guilty to Providing Material Support to ISIL' (Press Release, 11 June 2015) <<https://www.justice.gov/opa/pr/virginia-teen-pleads-guilty-providing-material-support-isis>> accessed 27 February 2017.

<sup>12</sup> See eg Pouyan A Mazandaran, 'An International Legal Response to an International Problem: Prosecuting International Terrorists' (2006) 6 *International Criminal Law Review* 503, 522.

<sup>13</sup> *ibid* 525.

<sup>14</sup> *ibid* 524–525.

reasons that trying IS members is too dangerous,<sup>15</sup> with the potential risk of causing a suspect to become a high profile figure around whom extremists may rally.<sup>16</sup>

Fundamentally, IS constitutes a transnational criminal threat of such degree that piecemeal domestic prosecution is unsuitable. IS, with its innately criminal *modus operandi*, represents a *sui generis* non-State group and a particularly grave and novel threat to international law. First, it is an entity that publicises its violations of international and humanitarian law, using unspeakable barbarity, for recruitment and marketing purposes. Second, it has successfully —through methodical and planned brutality— captured and controlled vast swathes of previously State-run territory, establishing administrative, bureaucratic and military structures. Third, IS seeks to spread its militarised ideology in order to establish a worldwide caliphate, encouraging attacks on civilians in States across the globe. Given the magnitude of the widespread atrocities alleged against IS, including genocide, mass executions, sexual slavery, rape and other forms of sexual and gender-based violence, torture, mutilation, enlistment and forced recruitment of children, and ethnic and religious cleansing ‘on a historic scale’,<sup>17</sup> as well as destruction of cultural property,<sup>18</sup> the impunity gap caused by the lack of prosecutions for these crimes justifies the ICC’s involvement.<sup>19</sup> Doing so would demonstrate that the Court —mandated to tackle the worst criminality affecting the international community and address the shortcomings of domestic jurisdictions<sup>20</sup>— is capable of dealing with matters of immediate and pressing international concern and ensure that perpetrators of the most egregious violations of international law do not go unpunished.

### III. Bringing IS Members before the ICC – Jurisdictional Obstacles

The ICC, as a treaty based institution, only has a basis to act where one of the following is engaged:<sup>21</sup> the State in which the alleged conduct occurred is a party or has accepted jurisdiction of the Court;<sup>22</sup> the State of the alleged perpetrator’s nationality is party to or has accepted the Court’s jurisdiction;<sup>23</sup> or any situation referred to the Prosecutor by UNSC,<sup>24</sup> regardless of whether a State Party is involved. For IS, the primary difficulty in securing the Court’s involvement is that IS’s actions are predominantly centred in Syria, Iraq and Libya —none of which are parties to the Rome Statute. In April 2015, Chief Prosecutor Bensouda publicly addressed the question of exercising jurisdiction over alleged crimes by IS, concluding that ‘the jurisdictional basis for opening a preliminary examination into [alleged crimes] is too narrow at this stage’.<sup>25</sup> In light of this statement and developments in the intervening period, the three potential avenues for ICC jurisdiction over IS members will each be dealt with in turn beginning with a referral from the UNSC —arguably the clearest way to anchor jurisdiction in the circumstances.

#### A. Jurisdiction Conferred by Security Council Referral

The role of the UNSC in the realm of international criminal justice and its relationship to the ICC has been beset with concerns since the negotiation of the Rome Statute. The UNSC’s ability to grant jurisdiction to the Court where it might otherwise have been unable to act is a significant power. This section discusses the unspecified and undefined notion of a ‘situation’ for the purposes of a UNSC referral, the innately tied

<sup>15</sup> See eg Christian Much, ‘The International Criminal Court (ICC) and Terrorism as an International Crime’ (2006) 14 Michigan State International Law Review 121, 135.

<sup>16</sup> See eg Christopher Knaus, ‘Neil Prakash Extradition Risks Creating ‘Totem to Other Islamic Radicals’ *The Guardian* (London, 29 November 2016) <<https://www.theguardian.com/australia-news/2016/nov/29/neil-prakash-extradition-risks-creating-totem-to-other-islamic-radicals>> accessed 27 February 2017, quoting a former Australian army chief.

<sup>17</sup> Amnesty International, ‘Ethnic Cleansing on a Historic Scale: Islamic State’s Systematic Targeting of Minorities in Northern Iraq’ (2014) Amnesty Report MDE 14/011/2014 <[https://www.es.amnesty.org/uploads/media/Iraq\\_ethnic\\_cleansing\\_final\\_formatted.pdf](https://www.es.amnesty.org/uploads/media/Iraq_ethnic_cleansing_final_formatted.pdf)> accessed 27 February 2017.

<sup>18</sup> ICC, ‘Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Alleged Crimes Committed by ISIS’ (Press Release, 8 April 2015) <<https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-08-04-2015-1>> accessed 27 February 2017 (ICC Prosecutor ISIS Statement).

<sup>19</sup> See Rod Rastan, ‘Jurisdiction’ In: Stahn C, (ed), *The Law and Practice of the International Criminal Court* (OUP 2015) 152.

<sup>20</sup> See eg David Scheffer, ‘Staying the Course with the International Criminal Court’ (2002) 35 Cornell International Law Journal 47, 51.

<sup>21</sup> Once the pre-requisites to exercising jurisdiction are met, the Court may only exercise its jurisdiction where the situation is: (i) referred to the Prosecutor by a state party; (ii) referred by the UNSC; or (iii) the Prosecutor initiates an investigation *proprio motu* of conduct occurring within the territory of a state party. See Rome Statute, art 13.

<sup>22</sup> *ibid* art 12(2)(a).

<sup>23</sup> *ibid* art 12(2)(b).

<sup>24</sup> *ibid* art 13(b).

<sup>25</sup> ICC Prosecutor ISIS Statement (n 18).

question of possible interference in the work of the ICC, and finally looks at the possible overlap between contemporary acts of IS and an existing UNSC referral.

To begin with, it is readily apparent that any potential UNSC referral to the ICC regarding IS faces a seemingly insurmountable, non-legal, difficulty. Referrals providing jurisdiction over Syrian State forces or opposition figures are certain to be vetoed by Russia and China who are steadfast in their opposition to resolutions relating to events during the six years of carnage in Syria. This includes vetoing a previous draft resolution referring the situation in Syria to the ICC.<sup>26</sup> The obvious but contentious alternative is to frame the subject matter of a referral solely in terms of IS's actions. Fundamentally, this raises the question of whether a referral may refer a defined group as opposed to a series of criminal events or incidents, thus precluding individuals who are not members of the group, but who have potentially committed crimes, from possible adjudication.

Neither the Rome Statute nor the Court's Rules of Procedure and Evidence define a 'situation'. The sole limitation on the parameters of a situation, contained in Article 13(b), is that it should include 'one or more' crimes falling under the Statute. The drafters thus appear to envision the Court as potentially having jurisdiction over a single crime. Looking forward, the amendment of the Rome Statute to include jurisdiction over the crime of aggression is worth noting in this regard. Aggression as defined by Article 8*bis* includes various actions involving armed forces, including the blockade of a State's ports or coasts by the forces of another State. In a situation involving a State allegedly committing an act of aggression, it is possible that the parameters of the factual 'situation' that comes before the Court, either by referral or otherwise, will consist of one identifiable group of actors (*i.e.* representatives of the State allegedly committing an act of aggression). Take, for example, the Iraqi invasion of Kuwait in 1990 which led to widespread condemnation as a breach of the international legal prohibition on the use of interstate force. Had an ICC referral been possible at the time, it is likely that it would have specifically identified members of the Iraqi government and military as being responsible for the alleged aggression.

To date, the practice of the Court with regard to the interpretation of a 'situation' is arguably mixed. Those who suggest that a referral may not be so specific as to pinpoint a person or group or indicate specific crimes<sup>27</sup> point to Uganda's self-referral. There, the Ugandan government sought to limit the Court's jurisdiction by reference to the acts of the Lord's Resistance Army (LRA) —seemingly to avoid scrutiny of the actions of State authorities.<sup>28</sup> While accepting the referral, the then Prosecutor stated that the Office of the Prosecutor (OTP) would be 'analysing crimes within the situation of northern Uganda by whomever committed'.<sup>29</sup> The OTP thus clearly did not consider it permissible to limit a referral to one party and did not view itself as bound by the terms of the referral.<sup>30</sup>

Perhaps more pertinently, the two UNSC referrals to the ICC to date —in relation to Darfur<sup>31</sup> and Libya<sup>32</sup>— expressly limited the respective situations being referred. In both instances, the referral excluded jurisdiction over certain categories of persons against whom criminal acts or omissions may have been alleged arising out of, or related to, certain operations in the geographic area being referred.<sup>33</sup> Concerns were raised as to the permissibility of the jurisdictional excising done by the UNSC in the Libya and Darfur

<sup>26</sup> See UNSC 'Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution' (22 May 2014) Meetings Coverage SC/11407.

<sup>27</sup> See eg Antonio Marchesi and Eleni Chaitidou, 'Article 14' In: Triffterer, O and Ambos, K, (eds.), *The Rome Statute of the International Criminal Court* (Hart 2016) 703, 717.

<sup>28</sup> *Situation in the Democratic Republic of the Congo* (Decision Assigning the Situation in the Democratic Republic of Congo to Pre-Trial Chamber I – Letter from the Prosecutor to the President) ICC-01/04 (5 July 2004).

<sup>29</sup> *id.*

<sup>30</sup> All judicial proceedings (one trial and five arrest warrants) in the situation of northern Uganda are, to date, related to the LRA only.

<sup>31</sup> UNSC Res 1593 (31 March 2005) UN Doc S/RES/1593 (Darfur Referral).

<sup>32</sup> UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970 (Libya Referral).

<sup>33</sup> See Darfur Referral (n 31) para 6 reads:

*Decides* that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State.

The Libya Referral (n 32) para 6, in turn, states:

*Decides* that nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations in the Libyan Arab Jamahiriya established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State.

referrals,<sup>34</sup> with some commentators describing it as illegal and incompatible with the Statute.<sup>35</sup> The notion of legality appears to be inapt when assessing a UNSC referral, however,<sup>36</sup> because the Council is not bound by the Rome Statute, but by the UN Charter (Charter). Under Article 39 of the Charter, the UNSC is entitled to 'decide what measures shall be taken in accordance with Articles 41 and 42 [of the Charter], to maintain or restore international peace and security'.<sup>37</sup> Article 41 relates to measures not involving the use of armed force and thereby includes referrals to the ICC.<sup>38</sup>

The UNSC has determined that IS constitutes a threat to international peace and security. This, by dint of the Charter, should be sufficient to justify characterising a 'situation', for the purposes of an ICC referral, focusing on the alleged acts of IS, with accompanying temporal and geographic limitations. Such a formulation would be an appropriate measure to restore or maintain international peace and security and is thereby consistent with the Charter. Likewise, this would comport with the ICC's stated aim to establish a relationship with the UN for jurisdiction over crimes 'of concern to the international community as a whole'<sup>39</sup> and would be consonant with the Rome Statute's ordinary meaning,<sup>40</sup> objective, and purpose.<sup>41</sup> Indeed, it has been suggested that where the impunity of specific individuals would constitute a threat to international peace, the UNSC could make such individuals the basis of a 'situation' for referral to the ICC.<sup>42</sup>

During the drafting of the Rome Statute, States Parties' core concern related to referrals was the possibility of politically motivated prosecutions.<sup>43</sup> This point of contention, regarding both UNSC and State referrals, precipitated an early change of terminology in the draft Statute from a 'complaint' naming individual suspects, to the more general language of a 'matter', and finally a 'situation'.<sup>44</sup> The draft's amendment served to reduce concerns of potential political influence as well as address a more practical matter: it was not envisaged that, prior to an investigation, a referral could successfully identify which crimes were committed by which perpetrators.<sup>45</sup> However, it is submitted that referring IS only would not represent political interference by a State or group of States through the UNSC. Instead, it would present an opportunity to bypass, at least in relation to IS, the intractable obstacle of geopolitical intervention into the realm of accountability. Indeed, an IS referral appears to be in the national interests of all UN members (necessarily including ICC States Parties) as concerns over the spread of IS's exported or inspired radicalism are near universal.<sup>46</sup> Further, such a referral would not undermine the independence of the Court as the Prosecutor is not bound to accept a referral if she finds no reasonable basis to proceed.<sup>47</sup> The Prosecutor could also decide—with the authorisation of the Pre-Trial Chamber—to investigate other crimes not encompassed in the referral.<sup>48</sup> Importantly, an IS referral would not preclude any future attempts to ensure accountability in Syria for the atrocities committed by State and non-State forces during the conflict. Given the sheer magnitude of

<sup>34</sup> See eg Kevin Heller, 'Can the Security Council Define the Limits of a "Situation"' (*Opinio Juris*, 27 February 2011) <<http://opinio-juris.org/2011/02/27/can-the-security-council-define-the-limits-of-a-situation/>> accessed 27 February 2017.

<sup>35</sup> William Schabas and Giulia Pecorella, 'Article 13' In: Triffterer, O and Ambos, K, (eds.), *The Rome Statute of the International Criminal Court* (Hart 2016) 690, 700.

<sup>36</sup> See Dov Jacobs, 'Libya and the ICC: On the Legality of Any Security Council Referral to the ICC' (*Spreading the Jam*, 28 February 2011) <<https://dovjacobs.com/2011/02/28/libya-and-the-icc-on-the-legality-of-any-security-council-referral-to-the-icc/>> accessed 27 February 2017.

<sup>37</sup> Charter of the United Nations (adopted 24 October 1945) 1 UNTS XVI (Charter) art 39.

<sup>38</sup> Luigi Condorelli and Santiago Villalpando, 'Referral and Deferral by the Security Council' In: Cassese, A Gaeta, P and Jones, JRWD, (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002) 627, 628–630.

<sup>39</sup> Rome Statute, prmb.

<sup>40</sup> Such a course of action would not contravene the plain wording of Article 13(b) of the Rome Statute or its other provisions. The prosecutor is bound by Article 54 of the Statute to extend an investigation to cover all facts and evidence relevant to assessing whether there is criminal responsibility under the statute. But the prosecutor can still only work within the confines of the jurisdiction that has been granted—thus investigating all facts within the jurisdiction allowed.

<sup>41</sup> Vienna Conventions on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 31(1).

<sup>42</sup> Condorelli and Villalpando (n 38) 632.

<sup>43</sup> See eg ILC, 'Observations of Governments on the Report of the Working Group on a Draft Statute for an International Criminal Court' (18 February 1994) UN Doc A/CN.4/458 (Draft ICC Statute) 26.

<sup>44</sup> See Susana SáCouto, Katherine Cleary and Jennifer Goldsmith, *The Relevance of 'A Situation' to the Admissibility and Selection of Cases before the International Criminal Court* (War Crimes Research Office, American University 2009) 8–22.

<sup>45</sup> *ibid* 17.

<sup>46</sup> See eg Radina Gigova and Azadeh Ansari, 'Russian Forces Kill ISIS Affiliate Cell Leader in Dagestan' *CNN* (London, 4 December 2016) <<http://edition.cnn.com/2016/12/04/europe/russia-isis-affiliate-cell-leader-killed-dagestan/>> accessed 27 February 2017; Michael Auslin, 'China and Japan's Fight Against ISIS' *Forbes* (New York, 2 December 2015) <<http://www.forbes.com/sites/real-spin/2015/12/02/china-and-japans-fight-against-isis/#7f89ea294f67>> accessed 27 February 2017.

<sup>47</sup> Rome Statute, art 53.

<sup>48</sup> *ibid* art 15.



the fighting which engulfed Syria, it is arguably more practical to separate the crimes of IS from those perpetrated in the conflagration between forces loyal to Bashar Al-Assad and the non-State groups seeking his overthrow. Though partially linked both geographically and temporally, the acts in question do not overlap to the point of detrimentally undermining a prosecution of Syrian State or opposition figures.

On a final note regarding possible jurisdiction over IS members emanating from a UNSC resolution, there remains another route to tackling at least some IS crimes. This comes via utilisation of the existing Libya UNSC referral, which could be used to investigate IS members active in Libya. In 2011, in the face of the Gaddafi regime's systematic repression of protests, the UNSC referred 'the situation in [Libya] since 15 February 2011 to the Prosecutor of the International Criminal Court'.<sup>49</sup> To date, this referral has resulted in one case involving three suspects for whom arrest warrants were issued. Of those suspects: Muammar Gaddafi has died; Abdullah Al-Senussi was prosecuted in Libya, with the Appeals Chamber finding that the case was inadmissible at the ICC;<sup>50</sup> while Saif Gaddafi continues to be held in Libya despite repeated requests by the Court for his transfer.<sup>51</sup> This referral is relevant to IS because on 12 May 2015, in a statement before the UNSC, Prosecutor Bensouda stated that the OTP had 'taken note of th[e] Council's call for accountability for the use of violence against civilians and civilian institutions by groups purportedly claiming allegiance to the Islamic State of Iraq and the Levant (...) or Da'esh' and 'considers that ICC jurisdiction over Libya *prima facie* extends to such alleged crimes'.<sup>52</sup> The OTP has thus broadly interpreted UNSC Resolution 1970 such that it could provide a basis of jurisdiction for IS's crimes committed within the Libyan territory, irrespective of the nationality of the perpetrators, from the date of the referral onwards. In the absence of a dedicated referral of IS actions, the ICC could anchor the prosecution of IS members for crimes committed in Libya in the existing UNSC referral. Were this to occur, however, the question may well be raised as to whether having accepted a referral without seeking amendments thereto, the Prosecutor would effectively be acting *proprio motu* by investigating beyond what was referred –without the authorisation of the Pre-Trial Chamber, as required by the Statute.<sup>53</sup> The Prosecutor's *proprio motu* powers were subject to intense debate during the Rome Statute's drafting.<sup>54</sup> Given the acute scrutiny of this issue, it appears unlikely that the States drafting the Statute envisaged the Prosecutor being able to expand a situation without a referral or through the procedure overseen by a Pre-Trial Chamber.<sup>55</sup> Such expansion could make States or the UNSC more reluctant to use the referral procedure and reduce the Court's capability of tackling certain crimes.<sup>56</sup>

### ***B. Jurisdiction Based on the Nationality of the Alleged Perpetrator***

The Prosecutor's 2015 statement on possible jurisdiction over IS noted the apparent presence of 'several thousand foreign fighters (...) including significant numbers of State Party nationals', before concluding that such figures do not appear to be within the IS leadership and thus, not amongst those 'most responsible' for the purposes of prosecution.<sup>57</sup> As a preliminary point, this reference to the potential culpability of any individual appears premature, as it amounts to an assessment of admissibility rather than a determination on jurisdiction.<sup>58</sup>

Developments since 2015 are worth noting. First, it has become apparent that IS's leadership is not entirely dominated by Iraqis or Syrians. For example, in July 2016, IS announced the death of a 'top commander', Abu

<sup>49</sup> Libya Referral (n 32) para 4.

<sup>50</sup> *The Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (Judgment on the Appeal of Mr Abdullah Al-Senussi Against the Decision of Pre-Trial Chamber I of 11 October 2013 Entitled "Decision on the Admissibility of the Case Against Abdullah Al-Senussi") ICC-01/11-01/11-565 (24 July 2014).

<sup>51</sup> *The Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (Judgment on the Appeal of Libya Against the Decision of Pre-Trial Chamber I of 31 May 2013 Entitled "Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi") ICC-01/11-01/11-547-Red (21 May 2014).

<sup>52</sup> ICC, 'Statement of the Prosecutor to the United Nations Security Council on the Situation in Libya, Pursuant to UNSCR 1970 (2011)' (Press Release, 12 May 2015) <<https://www.icc-cpi.int/Pages/item.aspx?name=161109-otp-stat-UNSC1970>> accessed 27 February 2017.

<sup>53</sup> Rome Statute, art 15.

<sup>54</sup> Schabas and Pecorella (n 35) 692–695.

<sup>55</sup> SáCouto, Cleary and Goldsmith (n 44) 24–28.

<sup>56</sup> *ibid* 27–28.

<sup>57</sup> ICC Prosecutor ISIS Statement (n 18).

<sup>58</sup> Mohammed H Zakerhossein, 'To Bury a Situation Alive – A Critical Reading of the ICC Prosecutor's Statement on the ISIS Situation' (2016) 16 International Criminal Law Review 613, 627. See also Draft ICC Statute (n 43) 86; SáCouto, Cleary and Goldsmith (n 44) 31.

Omar al-Shishani,<sup>59</sup> who was regarded by US officials as IS's 'minister of war'.<sup>60</sup> Al-Shishani, also known as 'Omar the Chechen' for having fought in military operations in Chechnya, was born in Georgia and served in the Georgian national military before leaving to go to Turkey and then Syria.<sup>61</sup> Georgia is a party to the Rome Statute<sup>62</sup> and thus, the ICC could theoretically have exercised jurisdiction over a senior figure such as al-Shishani under Article 12(2)(b) on the basis of his nationality. Second, and more significantly, in September 2016 the OTP adopted a policy paper on case selection in which it signalled the need, in certain instances, to prosecute a limited number of mid-level perpetrators to ensure that sufficient evidentiary foundations are established for cases against those deemed 'most responsible'.<sup>63</sup> This new direction also includes the possibility of prosecuting lower-level perpetrators where their conduct is particularly grave.<sup>64</sup> This shift conforms with the wording of the Rome Statute, which refers to the 'most serious crimes' as opposed to the most serious perpetrators.<sup>65</sup> As stated by the Appeals Chamber, 'had the drafters of the Statute intended to limit its application to only the most senior leaders suspected of being most responsible they could have done so expressly'.<sup>66</sup> Thus, foreign fighters who are nationals of State Parties and who may not necessarily rank among the hierarchy of IS's organisation could be targeted for prosecution (provided the admissibility requirements noted earlier are met) both because of the serious crimes for which they are accused, and also with an eye to ensuring that strong crime base evidence is collected for possible related cases of higher level IS figures in future. Reference to the practice of the International Criminal Tribunal for the Former Yugoslavia (ICTY) is noteworthy, as high profile prosecutions such as those against Radovan Karadžić and Ratko Mladić were largely constructed upon previous cases against lower level figures like Momčilo Krajišnik, Dragomir Milošević, and Stanislav Galić. Focusing on lower level individuals such as direct perpetrators may additionally serve victims' desires to see trials of those who were proximate to the crimes,<sup>67</sup> as well as emphasising that accountability does not end with those at the highest echelons.<sup>68</sup>

Obtaining custody of such figures is obviously a practical difficulty facing any prospective prosecution. However, two scenarios are important to note. First, a study by the International Centre for Counter-Terrorism suggests that 30% of approximately 4,000 individuals from EU States such as Belgium, France, Germany, the Netherlands, Spain and the United Kingdom have returned from fighting in Syria and Iraq with either IS or pro-Assad regime ranks and groups such as Jabhat al-Nusra (a former al-Qaeda affiliate active in Syria).<sup>69</sup> The Rome Statute contains a number of provisions outlining the OTP's power to 'take appropriate measures to ensure the effective investigation and prosecution of crimes',<sup>70</sup> including to '[r]equest the presence of and question persons being investigated, victims and witnesses';<sup>71</sup> 'seek[ing] the cooperation of any State or intergovernmental organisation';<sup>72</sup> and 'enter[ing] into such arrangements or agreements (...) as may be necessary to facilitate the cooperation of a State [or] intergovernmental organization'.<sup>73</sup> The OTP has, for example, an existing cooperation agreement with Interpol which provides for the exchange of information.<sup>74</sup>

<sup>59</sup> See 'Iraq: ISIL Says Omar al-Shishani Killed in Air Strike' *Al Jazeera* (Doha, 14 July 2016) <<http://www.aljazeera.com/news/2016/07/iraq-isil-omar-al-shishani-killed-air-strike-160713203202458.html>> accessed 27 February 2017.

<sup>60</sup> See 'Isis Admits 'Minister for War' Omar the Chechen is Dead' *The Guardian* (London, 14 July 2016) <<https://www.theguardian.com/world/2016/jul/14/isis-admits-minister-for-war-omar-the-chechen-is-dead>> accessed 27 February 2017.

<sup>61</sup> *id.*

<sup>62</sup> ICC, 'The States Parties to the Rome Statute' <[https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx)> accessed 27 February 2017.

<sup>63</sup> ICC-OTP, 'Policy Paper on Case Selection and Prioritisation' (15 September 2016) <[https://www.icc-cpi.int/itemsdocuments/20160915\\_otp-policy\\_case-selection\\_eng.pdf](https://www.icc-cpi.int/itemsdocuments/20160915_otp-policy_case-selection_eng.pdf)> accessed 27 February 2017, para 42.

<sup>64</sup> *id.*

<sup>65</sup> See Rome Statute, prmb, and arts 1, 5.

<sup>66</sup> *The Prosecutor v Bosco Ntaganda* (Decision on the Prosecutor's Application under Article 58 to Issue an Arrest Warrant Against Ntaganda) ICC-01/04-02/06 (13 July 2012) para 79.

<sup>67</sup> See ICTY-OTP, 'Statement by the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, Carla Del Ponte, to the UN Security Council' (27 November 2001) Press Release GR/P.I.S./642-e.

<sup>68</sup> *The Prosecutor v Bosco Ntaganda* (Judgment on the Prosecutor's Appeal Against the Decision of Pre-Trial Chamber I Entitled 'Decision on the Prosecutor's Application for Warrants of Arrest') ICC-01/04-02/06 (23 February 2016) para 73.

<sup>69</sup> Bibi van Ginkel and Eva Entenmann, (eds), *The Foreign Fighters Phenomenon in the European Union* (ICCT 2016).

<sup>70</sup> Rome Statute, art 54(1)(b).

<sup>71</sup> *ibid* art 54(3)(b).

<sup>72</sup> *ibid* art 54(3)(c).

<sup>73</sup> *ibid* art 54(3)(d).

<sup>74</sup> Co-operation Agreement between the Office of the Prosecutor of the International Criminal Court and the International Criminal Police Organization-INTERPOL (adopted 22 December 2004, entered into force 22 March 2005) <<https://www.interpol.int/content/download/9463/69422/version/5/file/4-%20ICC.pdf>>, art 2.

Having already received many allegations of '[c]rimes of unspeakable cruelty' committed by IS members,<sup>75</sup> the OTP could, therefore, seek to build an investigation<sup>76</sup> into IS actions through judicial cooperation with States Parties or intergovernmental organisations regarding fighters returning, or in transit to, the territory of States Parties. This could be utilised as either as a means of evidence collection or for possible prosecution of such individuals – depending on the circumstances.

Second, as military operations to take back control of IS held territory, such as the city of Mosul, escalate,<sup>77</sup> the prospect of fighters from ICC States Parties being detained either from combat or desertions<sup>78</sup> increases. By way of analogy, LRA commander Dominic Ongwen, currently being prosecuted for alleged crimes in Uganda, was apprehended by US forces in the Central African Republic.<sup>79</sup> Though not a State Party, the US facilitated Ongwen's transfer to the ICC for prosecution.<sup>80</sup> While capture and removal of IS fighters from the battle field by a party willing to cooperate with the ICC may be difficult, the US –which has publicly supported a referral of the situation in Syria to the ICC<sup>81</sup>– has, for example, troops on the ground in Syria linked to Kurdish forces who have been one of the main groups engaging IS militarily.<sup>82</sup> Regard may be had to David Scheffer's view, albeit expressed following the September 11 attacks –that '[i]f only in its own self-interest, the U.S. will want to collaborate with its allies and friends around the world and explore the utility of the ICC as a potent judicial weapon in the war against terrorism'.<sup>83</sup> Whether the new US administration will view any form of cooperation with the ICC as a means to an end remains an open question. Nonetheless, there is the possibility that, as part of an overall strategic attempt by the international community to weaken IS,<sup>84</sup> foreign fighters could be captured *in situ* and transferred to the ICC for prosecution.

While none of the ICC's prosecutions to date appear to have been based on the accused's nationality, the prospect has been raised. First, by former Prosecutor Ocampo in response to allegations of crimes committed by forces from State Parties in Iraq in 2003, which ultimately did not turn into a request for authorisation to initiate an investigation as it was not considered that the gravity threshold had been met.<sup>85</sup> Subsequently, Prosecutor Bensouda re-opened a preliminary examination, again in relation to crimes by nationals of State Parties in Iraq, between 2003 and 2008.<sup>86</sup> Doing so in relation to IS fighters would send a clear signal that the Court will utilise all available means of jurisdiction to ensure that 'the most serious crimes of concern to the international community as a whole [do] not go unpunished'.<sup>87</sup>

### **C. Jurisdiction Based on the Territory on which the Acts Occurred**

Perhaps more problematic than the difficulties associated with the other potential forms of jurisdiction, territorial jurisdiction over IS figures is inherently challenging given the fact that the main territories in question lie in States which are not parties to the ICC. Nevertheless, there remains a potential, though controversial, basis of jurisdiction to prosecute territorially. Article 12(2)(a) of the Rome Statute provides for jurisdiction where

<sup>75</sup> ICC Prosecutor ISIS Statement (n 18).

<sup>76</sup> Rome Statute, art 53.

<sup>77</sup> Alan Yuhas and others, 'Battle for Mosul: Isis City under Attack from Iraqi and Kurdish Forces' *The Guardian* (London, 17 October 2016) <<https://www.theguardian.com/world/live/2016/oct/17/mosul-battle-iraq-isis-islamic-state-peshmerga-latest>> accessed 27 February 2017.

<sup>78</sup> 'Deserters Describe Life under ISIL Rule' *Al Jazeera* (Doha, 14 October 2016) <<http://www.aljazeera.com/news/2016/10/deserters-describe-life-isil-rule-161010132353949.html>> accessed 27 February 2017.

<sup>79</sup> See eg 'LRA Rebel Dominic Ongwen Surrenders to US Forces in CAR' *BBC* (London, 7 January 2015) <<http://www.bbc.com/news/world-africa-30705649>> accessed 27 February 2017.

<sup>80</sup> ICC, 'Dominic Ongwen Transferred to The Hague' (Press Release, 20 January 2015) <<https://www.icc-cpi.int/pages/item.aspx?name=pr1084>> accessed 27 February 2017.

<sup>81</sup> UNSC Draft Res 348 (22 May 2014) UN Doc S/2014/348; Louis Charbonneau, 'Russia U.N. Veto on Syria Aimed at Crushing West's Crusade' (*Reuters*, 8 February 2012) <[www.reuters.com/article/us-un-russia-idUSTRE8170BK20120208#B9tflvUSqB0sUQgC.97](http://www.reuters.com/article/us-un-russia-idUSTRE8170BK20120208#B9tflvUSqB0sUQgC.97)> accessed 27 February 2017.

<sup>82</sup> Roberta Rampton, 'Obama Sends More Special Forces to Syria in Fight Against IS' (*Reuters*, 26 April 2016) <<http://www.reuters.com/article/us-mideast-crisis-usa-syria-idUSKCN0XLOZE>> accessed 27 February 2017.

<sup>83</sup> Scheffer (n 20) 49–50.

<sup>84</sup> See US Department of Statement, 'The Global Coalition to Counter ISIL' (10 September 2014).

<sup>85</sup> ICC, 'Office of the Prosecutor Response to Communications Received Concerning Iraq' (Press Release, 9 February 2006) <[https://www.icc-cpi.int/nr/rdonlyres/04d143c8-19fb-466c-ab77-4cdb2fdebef7/143682/otp\\_letter\\_to\\_senders\\_re\\_iraq\\_9\\_february\\_2006.pdf](https://www.icc-cpi.int/nr/rdonlyres/04d143c8-19fb-466c-ab77-4cdb2fdebef7/143682/otp_letter_to_senders_re_iraq_9_february_2006.pdf)> accessed 27 February 2017.

<sup>86</sup> ICC, 'Prosecutor of the International Criminal Court, Fatou Bensouda, Re-opens the Preliminary Examination of the Situation in Iraq' (Press Release, 13 May 2014) <<https://www.icc-cpi.int/Pages/item.aspx?name=otp-statement-iraq-13-05-2014>> accessed 27 February 2017.

<sup>87</sup> Rome Statute, prmb1.



the 'conduct in question occurred' on the territory of a State Party, irrespective of whether the perpetrator himself/herself belongs to a non-State Party.<sup>88</sup> A broad interpretation of the article could include so-called 'objective territoriality' and the 'effects principle' of territorial jurisdiction. Objective territoriality denotes that a constituent element of an offence or the impact thereof takes place within the territory of the State asserting jurisdiction, while effects based jurisdiction refers to when no element but the effects of an offence take place within the territory.<sup>89</sup> This broadened form of territorial jurisdiction was deemed a principle of international law in 1927 by the Permanent Court of International Justice, which described it as follows:

(...) it is certain that the courts of many countries, even of countries which have given their criminal legislation a strictly territorial character, interpret criminal law in the sense that offences, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offences, and more especially its effects, have taken place there.<sup>90</sup>

Additionally, the potential use of this type of jurisdiction in the context of international criminal justice has found support more recently from judges of the International Court of Justice.<sup>91</sup>

It is, of course, for the ICC to determine its jurisdiction pursuant to its '*compétence de la compétence*'.<sup>92</sup> In doing so, it is bound by the wording of Article 12 but may also resort to accepted rules of international law 'where appropriate'.<sup>93</sup> With regard to Article 12, the adopted wording does not preclude a broad interpretation. For example, subparagraph (a) declares that the Court has jurisdiction where 'the conduct in question occurred' in the territory of a State Party. By comparison, subparagraph (b) utilises the more narrow terminology of the 'crime'. This formulation seemingly adheres to the principle that a State has, as a manifestation of sovereignty, plenary jurisdiction over conduct occurring in its territory,<sup>94</sup> including the constituent elements of a crime or the effects thereof.<sup>95</sup> On this basis, an act occurring in State A (a non-State Party to the ICC) of which either a constituent element, or the act's consequences, occur in State B (an ICC State Party) could provide territorial jurisdiction over the act to the Court through State B.<sup>96</sup> This is supported by a teleological reading of Article 12(2)(a), whereby assertion of jurisdiction under the constituent element/effects principle would allow Court to address jurisdictional loopholes (such as those addressed above in relation to IS) that foster impunity.<sup>97</sup> Additionally, with respect to the rules of international law, it has been asserted that international criminal law accepts that if a constituent element of an act has been committed in the territory of a State,<sup>98</sup> or if the act occurs elsewhere and causes consequences in the territory of a State,<sup>99</sup> then the State in which the constituent element or consequences/effects take place may exercise jurisdiction over the act.

The relevance of this interpretation of Article 12(a) to a situation involving IS lies in attacks that occur within the territory of State Parties, such as those that took place in 2015 and 2016 in France, Belgium and Nigeria that could, theoretically, if categorised as constituent elements or effects of offences originating in Syria, Iraq or Libya, provide jurisdiction over the latter offences. For example, if a domestic terror attack were

<sup>88</sup> See Schabas and Pecorella (n 35) 682.

<sup>89</sup> See eg Danielle Ireland-Piper, 'Prosecutions of Extraterritorial Criminal Conduct and the Abuse of Rights Doctrine' (2013) 9 Utrecht Law Review 68, 78.

<sup>90</sup> *The Case of the S.S. "Lotus" (France v Turkey) (Merits)* [1927] PCIJ Rep Series A No 10, 23.

<sup>91</sup> *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Joint Separate Opinion of Judges Higgins, Kooijmans and Burgenthal) [2002] ICJ Rep 63, 77–78.

<sup>92</sup> Kai Ambos, *Treatise on International Criminal Law*, vol 3 (OUP 2016) 247.

<sup>93</sup> Rome Statute, art 21(1)(a) and (b).

<sup>94</sup> Schabas and Pecorella (n 35) 680.

<sup>95</sup> See eg Harvard Research in International Law, 'Draft Convention on Jurisdiction with Respect to Crime' (1935) 29 American Journal of International Law 495, which states that:

(...) a crime is committed 'in whole' within the territory when every essential constituent element is consummated within the territory; it is committed 'in part within the territory' when any essential constituent element is consummated there.

If it is committed either 'in whole or in part' within the territory, there is territorial jurisdiction.

<sup>96</sup> Rod Rastan, 'The Jurisdictional Scope of Situations before the International Criminal Court' (2012) 23 Criminal Law Forum 1, 19. Rastan also asserts that the perpetrator's *mens rea* could be taken into account when asserting jurisdiction in this manner—namely, that if the perpetrator intended the consequences to occur in the territory of state other than the one in which he acts.

<sup>97</sup> Michail Vagias, *The Territorial Jurisdiction of the International Criminal Court* (Bynkers Hoek 2011) 149–154.

<sup>98</sup> Cedric Ryngaert, *Jurisdiction in International Law* (OUP 2008) 75–76.

<sup>99</sup> Rastan (n 96) 19.

found to be sufficiently linked to a course of conduct<sup>100</sup> in IS held territory in Syria/Iraq/Libya —meaning it was part of an attack involving the multiple commission of criminal acts against a civilian population in furtherance of an organisational policy<sup>101</sup> and with knowledge of the attack,<sup>102</sup> it might be considered either a constituent element of, or the effects of, a crime against humanity taking place in IS territory. The States Parties in question could, therefore, under this broader conception of territorial jurisdiction, refer a situation encapsulating an attack(s) in their territory, deemed either constituent elements or effects of broader criminal acts elsewhere, to the ICC pursuant to Article 14(1) of the Rome Statute. Though unquestionably controversial and likely to face strong opposition that this would circumvent accepted treaty provisions which do not confer jurisdiction over non-State Parties, Article 12(2)(a) appears open to this interpretation. In light of what would be legitimate concerns of overreach, the link between the conduct in each territory would necessarily require a significant level of proximity and coordination so as to characterise it as part of, or a result of, acts within IS territory.

Interestingly, such a possible extended interpretation of territorial jurisdiction has previously been raised before the Court. In 2013, the Comoros referred the Israeli Defence Force's attack on a flotilla carrying humanitarian aid bound for the Gaza strip. Amongst the flotilla were vessels registered in the Comoros and a number of other States Parties to the Court. The Comoros referral expressly noted, when asserting that the requisite jurisdictional elements had been met, that 'the attack on the flotilla has serious consequences for, and effect, on the situation in Gaza. In essence, the Flotilla raid is directly linked to the Gaza situation. These consequences resulted in the commission of Crimes Against Humanity and War Crimes'.<sup>103</sup> When subsequently requested by the OTP to clarify the temporal jurisdiction claimed in its referral, representatives of the Comoros responded:

[a]s it concerns the temporal jurisdiction, it is triggered on 31 May 2010, representing the date the IDF attacked the Mavi Marmara vessel (...) extending —time wise— to encompass all other crimes flowing from this incident including crimes committed on 6 June 2010 *and onwards*.<sup>104</sup>

Ultimately, the OTP declined the referral on the basis that the referred situation did not reach the requisite gravity threshold.<sup>105</sup> The OTP's response did not specifically engage with the referral's claim for jurisdiction over allegedly related events in the Gaza strip, characterising the subject of the referral as the 'flotilla incident'.<sup>106</sup> The decision noted, however, that the Court's territorial jurisdiction was 'limited to events occurring on three vessels in the flotilla and does not extend to any events that occurred after passengers were taken off those vessels'.<sup>107</sup> While this could be taken as a rejection of an 'effects doctrine' type claim of jurisdiction, it arguably arises from an assessment that the flotilla incident did not result in blocking Gazan civilians from accessing humanitarian supplies, that is, it did not directly affect the situation in the Gaza strip.<sup>108</sup> Pre-Trial Chamber I subsequently requested the OTP to review its decision, *inter alia*, on the basis that the OTP erred by:

(...) considering that, as a result of the alleged absence of a significant impact of the identified crimes on the civilian population in Gaza and despite their significant impact on the victims, overall the impact of the identified crimes constituted an indicator of insufficient gravity.<sup>109</sup>

<sup>100</sup> 'Conduct' is considered, according to the Court's Rules of Procedure and Evidence, to 'constitute one or more crimes'. See ICC, *Elements of Crimes* (ICC 2011) para 9.

<sup>101</sup> Rome Statute, art 7(2)(a).

<sup>102</sup> *ibid* art 7(1).

<sup>103</sup> *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia* (Decision Assigning the Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia to Pre-Trial Chamber I) ICC-01/13-1-Anx1 (14 May 2013) para 20.

<sup>104</sup> *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia* (Decision Assigning the Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia to Pre-Trial Chamber I) ICC-01/13-1-Anx2 (29 May 2013) (emphasis added).

<sup>105</sup> *Situation on Registered Vessels of Comoros, Greece and Cambodia* (Article 53(1) Report) (6 November 2014) paras 142–148.

<sup>106</sup> *ibid* para 15.

<sup>107</sup> *ibid* para 25.

<sup>108</sup> *ibid* para 141.

<sup>109</sup> *Situation on the Registered Vessels of the Union of the Comoros, The Hellenic Republic and the Kingdom of Cambodia* (Decision on the Request of the Union of the Comoros to Review the Prosecutor's Decision Not to Initiate an Investigation) ICC-01/13 (16 July 2015) para 47.

Thus, though far from dispositive, Pre-Trial Chamber I's ruling appears to leave open the possibility that the question of a broader conception of territorial jurisdiction may be revisited.<sup>110</sup> In any event, if not adjudicated with regard to the Comoros claim, it is submitted that with the advent of cyber warfare and the accompanying likelihood that an attack electronically launched from one territory causes damage in another, the ICC will likely have to address an interpretation of Article 12(2)(a) providing for jurisdiction based on objective territoriality in the near future.

#### IV. Can Terrorists Be Prosecuted as Terrorists under the Rome Statute?

Numerous sources, including the ICC Prosecutor, have referred to clear evidence of IS committing various offences which would constitute crimes against humanity, war crimes and genocide.<sup>111</sup> However, the Prosecutor's 2015 statement was, perhaps not surprisingly, silent on the issue of terrorism. Yet, as a group whose *modus operandi* involves targeting civilians in pursuit of a claimed ideological goal, the international community, through the UNSC, has designated IS as a 'terrorist' group.<sup>112</sup> This raises the question of whether IS, if prosecuted, could or should be prosecuted for terrorist acts.

Terrorism is distinguished by an added intent behind the commission of crimes namely, the particular desire to commit crimes in order to instil terror amongst a civilian population for an ideological purpose. One may validly assert that committing, for example, killings and rapes on a large scale will likely cause terror amongst a population –irrespective of the motives or intention of the perpetrators. Nonetheless, one of the aims of criminal law is to apportion responsibility that accurately reflects the criminality of an individual's conduct. Thus, while the distinguishing factor of terrorism could be taken into consideration at the sentencing stage, it arguably would lessen the normative value of prosecuting terrorists to not specifically criminalise the intentional attacking of civilians to spread terror in pursuit of an ideological goal.

When considering whether terrorists should be punished as such, or simply punished, the developments in international affairs since the negotiation of the Rome Statute should be taken into consideration. The Statute was, for example, negotiated and adopted prior to the 11 September attacks in the United States –an attack which figures such as Antonio Cassese,<sup>113</sup> David Scheffer,<sup>114</sup> and then UN High Commissioner for Human Rights Mary Robinson<sup>115</sup> characterised as a crime against humanity. Moreover, the unparalleled rise of as visible and present a non-State actor as IS represents an additional evolution even from Al Qaeda, the perpetrators of the 11 September attacks. Modern technology and the accompanying pervasive globalisation of radical ideas, coupled with the phenomena of large numbers of foreign fighters flocking to captured State territory in support of an ideology –and the ancillary dangers this creates in terms of radicalised figures with combat experience returning to their home States— represents a significant new form of terrorism. Prosecuting IS members for their terrorist acts would be entirely apposite given the group's crimes and would add to the expressive power of the core categories of international law. Failing to prosecute terrorists as terrorists would arguably be a missed opportunity to ensure international criminal law remains capable of addressing the full extent of changing contemporary criminal threats.

##### A. Terrorism and the Rome Statute

Despite proposals from a number of States, terrorism was not included in the Rome Statute.<sup>116</sup> Concerns centred on whether the incorporation of such a crime would unduly politicise the Court.<sup>117</sup> A broad provision for 'crimes of terrorism' in the Draft Statute, which prescribed: (i) acts of violence against persons/property to create terror, fear or insecurity for political, ideological or other purposes; (ii) offences under various international anti-terror conventions; and (iii) offences involving arms used as a means to perpetuate indis-

<sup>110</sup> See also *Situation on the Registered Vessels of the Union of the Comoros, The Hellenic Republic and the Kingdom of Cambodia* (Decision on the Admissibility of the Prosecutor's Appeal Against the "Decision on the Request of the Union of the Comoros to Review the Prosecutor's Decision Not to Initiate an Investigation") ICC-01/13-0A (6 November 2015).

<sup>111</sup> ICC Prosecutor ISIS Statement (n 18).

<sup>112</sup> UNSC Res 2253 (17 December 2015) UN Doc S/RES/2253.

<sup>113</sup> Antonio Cassese, 'Terrorism is also Disrupting some Crucial Legal Categories of International Law' (2001) 12 *European Journal of International Law* 993.

<sup>114</sup> Scheffer (n 20) 49.

<sup>115</sup> See Cassese (n 113) 994.

<sup>116</sup> See Andreas Zimmerman, 'Article 5' In: Triffterer, O and Ambos, K, (eds.), *Rome Statute of the International Crime Court: A Commentary* (3rd edn, Hart 2016) 113.

<sup>117</sup> Preparatory Committee on the Establishment of an International Criminal Court, 'Summary of the Proceedings of the Preparatory Committee' (25 March – 12 April 1996) UN Doc A/AC.249/1, 26.

criminate violence against persons/groups of persons/property,<sup>118</sup> was culled from the text. Additionally, a stumbling block appeared in the form of the absence of an agreed definition of terrorism—a debate that continues to this day, despite the Appeals Chamber of the Special Tribunal for Lebanon (STL) asserting in 2011 that a customary definition of international law on the crime of terrorism already exists.<sup>119</sup> Despite omission from the Statute, provision was made for the matter to be reconsidered at a Review Conference.<sup>120</sup> Yet, unlike the development of the crime of aggression,<sup>121</sup> there has been neither the will nor agreement to push the discourse on a possible future amendment of the Statute to include a specific crime of terrorism.<sup>122</sup> Though some have called for an amendment of the Rome Statute to include terrorism as a standalone crime within the panoply of crimes against humanity,<sup>123</sup> the possibility of amending the Rome Statute to specifically include a crime of terrorism appears not to be a practical possibility. In addition, the length of time required to attain a sufficient number of ratifications to make it operable as a crime and the accompanying temporal restrictions<sup>124</sup> would nullify its utility in tackling IS's terror acts.

While the subject matter jurisdiction of the Court does not expressly include terrorism, terrorist acts may still come within the confines of certain crimes within the Court's jurisdiction. Indeed, the prosecution of terroristic activity under the rubric of recognised international crimes sidesteps, to some extent, the definitional problems inherent in prosecuting terrorism as a standalone crime.<sup>125</sup> Depending on the factual circumstances, acts of terror could be prosecuted at the ICC either as war crimes or crimes against humanity, each of which will be addressed in turn.

### **B. Terrorism as a War Crime**

International humanitarian law has long proscribed certain forms of terrorism in both international<sup>126</sup> and non-international<sup>127</sup> armed conflict. As far back as 1919, 'systematic terrorism' was presented among a list of customary crimes to the Preliminary Peace Conference after World War I.<sup>128</sup> 'Terrorism' was later prohibited in Article 33 of Geneva Convention IV<sup>129</sup> and subsequently in Article 51(2) of Protocol I and Articles 4(2) and 13(2) of Protocol II to the Conventions. Though undefined in the earlier texts, both Additional Protocols I and II state that a 'civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited'.<sup>130</sup> Drawing upon these provisions, the ICTY held that despite the absence of terrorism from the enumerated offences in its Statute, that 'terrorizing [a] civilian population' was a war crime under customary international law and therefore justiciable at the ICTY.<sup>131</sup> In *Galić*, for example, the Trial Chamber held that 'an offence constituted of acts of violence wilfully directed against the civilian population with the

<sup>118</sup> 'Report of the Preparatory Committee on the Establishment of an International Criminal Court' UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome 15 June – 17 July 1998) (14 April 1998) UN Doc A/CONF.183/2/Add.1. See also 'Recommendation of the Coordinator on "Crimes within the Jurisdiction of the Court"' UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome 15 June – 17 July 1998) (7 July 1998) UN Doc A/CONF.183/C.1/L.44.

<sup>119</sup> *The Prosecutor v Salim Jamil Ayyash et al.* (Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging) STL-11-01/1 (16 February 2011).

<sup>120</sup> 'Final Act of the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court' (17 July 1998) UN Doc A/CONF.183/10.

<sup>121</sup> Aggression was not originally included in the Rome Statute, but work on an acceptable definition continued until articles 8*bis*, 15*bis* and 15*ter* were adopted in an amendment to the Rome Statute.

<sup>122</sup> See Zimmerman (n 116) 115.

<sup>123</sup> Much (n 15) 133–134.

<sup>124</sup> See ICC Res 6 'The Crime of Aggression' adopted at the 13th Plenary Meeting of the Rome Statute of the International Criminal Court Review Conference (11 June 2010) UN Doc RC/Res.6.

<sup>125</sup> Fiona de Londras, 'Terrorism as an International Crime' In: Schabas, W and Bernaz, N, (eds.), *Routledge Handbook on International Criminal Law* (Routledge 2010) 168.

<sup>126</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (Protocol I) art 51(2).

<sup>127</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (Protocol II) art 13(2).

<sup>128</sup> Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, 'Report Presented to the Preliminary Peace Conference' (1919) 14 *The American Journal of International Law* 95, 114.

<sup>129</sup> Geneva Convention Relative to the Protection of Civilians in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287.

<sup>130</sup> Protocol I (n 126); Protocol II (n 127).

<sup>131</sup> *The Prosecutor v Stanislav Galić* (Appeals Chamber Judgment) IT-98-29-A (30 November 2006) paras 87–98. See also *The Prosecutor v Vidoje Blagojević and Dragan Jokić* (Judgment) IT-02-60-T (17 January 2005) para 589.

primary purpose of spreading terror among the civilian population' formed part of the corpus of customary international criminal law.<sup>132</sup> The common thread of these provisions and prosecutions is the prohibition of attacks that do not provide a definitive military advantage and are instead, specifically designed to terrorise civilians.<sup>133</sup>

The Rome Statute, despite its extensive enumeration of war crimes encompassing: grave breaches of the Geneva Conventions;<sup>134</sup> other violations of the laws and customs applicable in international armed conflict;<sup>135</sup> serious violations of common Article 3 to the Geneva Conventions;<sup>136</sup> and, other serious violations of the laws and customs applicable in non-international armed conflict,<sup>137</sup> does not provide for the criminalisation of attacks aimed at terrorising civilians.<sup>138</sup> Instead, Article 8 of the Rome Statute prohibits intentionally directing attacks against civilians. Thus, a terrorist offence could be prosecuted at the ICC as an intentional attack directed against a civilian population or civilians not taking a direct part in the hostilities – irrespective of whether the situation of armed conflict is classified as international<sup>139</sup> or non-international.<sup>140</sup> Terrorist acts that include hostage taking could also qualify as war crimes pursuant to the Rome Statute.<sup>141</sup> The definition of the offence of taking hostages –again irrespective of the qualification of the armed conflict– requires, *inter alia*, that '[t]he perpetrator intended to compel a State, an international organization, a natural or legal person or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or the release of such person or persons',<sup>142</sup> which brings to mind the purposive requirement of terrorism. IS attacks would appear to qualify as occurring in the midst of non-international armed conflict in cases where the group is engaged in protracted armed conflict with the State in which it is operating (*e.g.* Syria and Iraq; the Libyan situation is less clear given the lack of a central governing authority therein) and the extent of the organisation of the parties to said conflict. It could also be said that the presence of foreign States' armed forces has caused the conflicts to become internationalised. In any event, whether deemed international or internal conflicts, certain IS attacks would likely constitute war crimes under Article 8 of the Rome Statute.

Prosecution under Article 8 would, arguably, diminish the culpable criminality inherent in IS attacks, however. It would, moreover, represent a negatively constrictive development of international humanitarian law. Under customary international law as characterised by the ICTY, the war crime of acts or threats of violence with the primary purpose of spreading terror does not include any ideological requirement common to the notion of terrorism as described above. The ICC's war crimes framework is one step further removed as it does not contain any provision to combat offences with the primary purpose of spreading terror during wartime, let alone attacks designed to spread terror in order to force a government or international organisation to bend to the group's ideological demands. Prosecuting terrorist attacks as war crimes would, therefore, fail to capture the entirety of the criminality of such acts.

### **C. Terrorist Acts as Crimes against Humanity**

Acts of terrorism mirror the essential essence of crimes against humanity, namely, that an attack is directed against a civilian population.<sup>143</sup> It is also readily apparent from the material released by IS into the public domain, that attacks it carries out are committed in accordance with the group's policy.<sup>144</sup> IS's well-documented crimes appear to be both widespread and systematic, encompassing continuing crimes in occupied areas and frequent large-scale atrocities elsewhere. IS acts would therefore *prima facie* come within the parameters of crimes against humanity. Proceeding on the basis that these elements are met, the composite acts involved in terror attacks could, depending on the facts, be prosecuted under the various crimes against humanity contained in Article 7(1), such as murder, extermination, torture, persecution or rape. Like prosecutions proceeding under the rubric of war crimes,

<sup>132</sup> *The Prosecutor v Stanislav Galić* (Trial Chamber I Judgment) IT-98-29-T (5 December 2003) para 138.

<sup>133</sup> Jelena Pejic, 'Terrorist Acts and Groups: A Role for International Law' (2004) 75 *British Yearbook of International Law* 71.

<sup>134</sup> Rome Statute, art 8(2)(a)(i)–(viii).

<sup>135</sup> *ibid* art 8(2)(b)(i)–(xxvi).

<sup>136</sup> *ibid* art 8(2)(c)(i)–(iv).

<sup>137</sup> *ibid* art 8(2)(e)(i)–(f).

<sup>138</sup> *ibid* art 8(2)(a). For example, the grave breaches provision is exhaustive.

<sup>139</sup> *ibid* art 8(2)(b)(i).

<sup>140</sup> *ibid* art 8(2)(e)(i).

<sup>141</sup> *ibid* arts 8(2)(a)(viii), 8(2)(c)(iii).

<sup>142</sup> ICC, 'Elements of Crimes' (n 100) art 8(2)(a)(viii), Element 3; art 8(2)(c)(iii), Element 3.

<sup>143</sup> This is required by the chapeau elements of Rome Statute, art 7(1).

<sup>144</sup> See Mohamed E Badar, 'The Road to Genocide: The Propaganda Machine of the Self-declared Islamic State (IS)' (2016) *International Criminal Law Review* 361.



however, prosecutions of this kind would fail to capture the double intent of acts of terror: the intent to spread terror amongst a civilian population and to do so for the purpose of achieving a particular ideological objective.

There remains a possible means of ensuring that any prosecution for crimes against humanity captures the entirety of the culpable elements of terrorist acts. This is through the residual offence of 'other inhumane acts' in Article 7(1)(k), which provides scope for the prosecution of inhumane conduct not otherwise prohibited as a crime against humanity. Article 7(1)(k) is, as Pre-Trial Chamber I has stated, designed to cover 'serious violations of international customary law and basic rights pertaining to human beings, drawn from the norms of international human rights law, akin to the acts referred to in Article 7(1) of the Statute'.<sup>145</sup> 'Other inhumane acts' was designated as a standalone crime in the Nuremberg Charter, Control Council Law No 10, the Tokyo Charter, the Nuremberg Principles and the Statutes of the ad hoc tribunals.<sup>146</sup> Its inclusion in accountability mechanisms has always been necessary given the unlikelihood of ever crafting an exhaustive list of conduct requiring sanction as a crime against humanity.<sup>147</sup> The offence of 'other inhumane acts' contained in the Rome Statute is somewhat narrower in scope than its international criminal law antecedents<sup>148</sup> with Pre-Trial Chamber II stating that the provision 'must be interpreted conservatively and must not be used to expand uncritically the scope of crimes against humanity'.<sup>149</sup>

When assessing the parameters of 'other inhumane acts' and whether prosecuting acts of terror under this provision would be viable, a number of provisions must be considered. Article 7(1)(k) has two requirements regarding action constituting an inhuman act and the consequences required as a result of that action: (i) the act must be 'of a similar character' to any other act contained in Article 7(1) —which enumerates specifically prohibited crimes against humanity; and (ii) the act in question must 'intentionally caus[e] great suffering, or serious injury to body or to mental or physical health'. The first limb, that an act be of 'similar character', is clarified in the Elements of Crimes as referring to the nature and gravity of the act<sup>150</sup> —meaning it must be of comparable gravity to the other crimes.<sup>151</sup> Further, that it is categorised as an 'other' inhumane act necessitates that the act cannot be subsumed within existing inhumane acts and must thus have at least one materially distinct element not encapsulated within other penalised conduct.<sup>152</sup> Regarding the second part, that the act must cause great suffering or serious bodily or mental injury, guidance on the meaning of 'great suffering' may be garnered from the ICTY. In *Delalić* for example, the Trial Chamber quoted from the Commentaries to the Geneva Conventions which state that 'wilfully causing great suffering': 'refers to (...) the ends in view for which torture is inflicted or biological experiments carried out. It would therefore be inflicted as a punishment, in revenge or for some other motive, perhaps out of pure sadism'.<sup>153</sup> As to whether the underlying conduct alleged regarding IS acts of terror would meet the threshold requirements of Article 7(1)(k), though constituent acts of terror such as murder or rape are separately enumerated in Article 7, the additional elements of intentionally spreading terror in a civilian population to coerce a State

<sup>145</sup> *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (Decision on Confirmation of Charges) ICC-01/04-01/07-717 (30 September 2008) para 448.

<sup>146</sup> Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and the Charter of the International Military Tribunal (adopted 8 August 1945) 82 UNTS 279 (Nuremberg Charter) art 6(c); Statute of the International Criminal Tribunal for the Former Yugoslavia (adopted 25 May 1993, as amended) UN Doc S/RES/827 (ICTY Statute) art 5(i); Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 (adopted 8 November 1994, as amended) UN Doc S/RES/955, Annex (ICTR Statute) art 3(i); Statute of the Special Court for Sierra Leone (adopted 16 January 2002, entered into force 12 April 2002) 2178 UNTS 138 (SCSL Statute) art 2(i); Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, with Inclusion of Amendments as Promulgated on 27 October 2004 (adopted 10 August 2001, as amended) NS/RKM/1004/006 (ECCC Statute) art 5.

<sup>147</sup> ILC, 'Thirteenth Report on the Draft Code of Crimes Against the Peace and Security of Mankind' (24 March 1995) UN Doc A/CN.4/466, 20.

<sup>148</sup> *Katanga and Ngudjolo* (n 145) para 450.

<sup>149</sup> *The Prosecutor v Frances Kirimi Mathura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute) ICC-01/09-02/11-382-Red (23 January 2012) para 269.

<sup>150</sup> ICC, 'Elements of Crimes' (n 100) [30].

<sup>151</sup> Acts which have been criminalised as 'other inhumane acts' by the ICTY, ICTR and ECCC include: forcible transfer of population; biological, medical or scientific experiments; enforced prostitution; other acts of sexual violence; sexual violence to and mutilation of a dead body causing mental suffering to eye-witnesses; enforced disappearances; and deliberate imposition of deplorable conditions of detention. See Chris Hall and Carsten Stahn, 'Article 7' In: Triffterer, O and Ambos, K, (eds.), *Rome Statute of the International Crime Court: A Commentary* (3rd edn, Hart 2016) 238.

<sup>152</sup> See eg *Katanga and Ngudjolo* (n 145) paras 461, 463.

<sup>153</sup> *The Prosecutor v Zejnil Delalić et al.* (Trial Chamber Judgment) IT-96-21-T (16 November 1998) para 507.

or organisation to take some action or engage in inaction and doing so for an ideological purpose, distinguish the crime of terrorism. Terrorist actions therefore, are of sufficiently similar character to other acts in Article 7 in terms of gravity yet also distinct enough as not to be subsumed therein. Second, depending on the facts alleged, it is submitted that acts of the type associated with IS—such as public beheadings and sexual enslavement of captured women and girls<sup>154</sup>— would certainly be considered as intentionally causing great suffering or serious injury to physical or mental health. Interestingly, the inclusion of ‘other inhumane acts’ in national legislation implementing the Rome Statute has, in some instances, been connected to the criminalisation of acts of terrorism.<sup>155</sup>

Beyond the requirements of Article 7(1)(k), Article 22(1) of the Rome Statute prohibits the punishment of an individual for conduct not considered an offence at the time of its commission. It bears remembering in this regard, that the conduct in question is ‘intentionally causing great suffering, or serious injury to body or to mental or physical health’, *i.e.* the elements of ‘other inhumane acts’. It is not a requirement that the act(s) which inflict such intentional suffering or injury are themselves criminal at the time of conduct. To suggest otherwise is to nullify the provision. ‘Other inhumane acts’ as a standalone crime has been accepted in international criminal law since Nuremberg, through to each of the *ad hoc* tribunals.<sup>156</sup> The question of its adherence to the principle of legality has thus been declared settled.<sup>157</sup> Therefore, prosecuting acts of terror under this provision would not violate the legality principle. Neither would prosecuting terrorist acts as an ‘other inhumane act’ fall afoul of Article 22(2), which prescribes strict interpretation of the definitions of crimes. That which is being punished is not terrorism as a separate and distinct offence, but acts of terror amounting to the crime of other inhumane acts. It is not, nor has it been, legal to deliberately inflict great suffering or serious bodily or mental injury. If the conduct fits the parameters of other inhumane acts then it is already criminalised under the Statute.

In terms of defining the parameters of terroristic conduct which might be captured as an ‘other inhumane act’, the elements common to the prohibition of terrorism related offences in international instruments, as already noted above, are: (i) acts of violence normally criminalised under a national system, which are (ii) intended to create or spread fear in the civilian population or coerce a State to take some action, and are (iii) done in order to attain ideological aim.<sup>158</sup> Ultimately, it would be for the OTP to frame the parameters of the terrorist conduct alleged under the prism of an ‘other inhumane act’, but it should be consistent with the existing counter-terrorism regime that many States Parties have agreed to. One such example, which could be drawn upon, is the UN Convention for the Suppression of Terrorist Bombings, which was the basis for Article 25(3)(d) of the Rome Statute.<sup>159</sup> Doing so would break new ground in international criminal law. While the STL has set down a definition of terrorism, it was also bound by its Statute to apply terrorism as defined by Lebanese law, which differed from the definition the STL considered to exist in customary international law.<sup>160</sup> Additionally, the STL opined that the customary international law definition of terrorism required a transnational element,<sup>161</sup> while accepting that the national legislation of countries around the world—and thus *opinio juris*—excludes such an element.<sup>162</sup> Consequently, as well as not being binding, the STL definition of terrorism is of questionable persuasive value. The path would be thus be clear for the ICC to set down the parameters of what it believes should be encompassed within the other inhumane act of terrorising a civilian population.

Proceeding in this manner circumvents the impasse on the inclusion of a determinative definition of terrorism by allowing the prosecution of terrorist acts while simultaneously not propagating a distinct crime of terrorism. Concomitantly, the Court would be punishing the specific nature of terror offences and perpetrators would bear responsibility for the entirety of their culpable conduct. By doing so, the Court would signal

<sup>154</sup> See eg Human Rights Watch, ‘Iraq: Women Suffer Under ISIS’ (5 April 2016) <<https://www.hrw.org/news/2016/04/05/iraq-women-suffer-under-isis>> accessed 27 February 2017.

<sup>155</sup> Hall and Stahn (n 151) 237.

<sup>156</sup> Nuremberg Charter, art 6(c); ICTY Statute, art 5(i); ICTR Statute, art 3(i); SCSL Statute, art 2(i); ECCC Statute, art 5.

<sup>157</sup> See *Case 002* (Appeals Chamber Judgment) 002/19-09-2007-ECCC/OCIJ (23 November 2016) para 584.

<sup>158</sup> See Antonio Cassese, ‘The Multifaceted Criminal Notion of Terrorism in International Law’ (2006) 4 *Journal of International Criminal Justice* 933, 936–940; Hans-Peter Gasser, ‘Acts of Terror, “Terrorism” and International Humanitarian Law’ (2002) 84 *International Review of the Red Cross* 547, 553.

<sup>159</sup> Kai Ambos, ‘Article 25’ in O Triffterer and K Ambos (eds), *Rome Statute of the International Crime Court: A Commentary* (3rd edn, Hart 2016) 979, 1010.

<sup>160</sup> *Salim Jamil Ayyash et al.* (n 119) para 145.

<sup>161</sup> *ibid* para 85.

<sup>162</sup> *ibid* para 91.

a willingness to use existing provisions to adapt to developments in international law. While opposition to IS appears to be universal, the precedential effect of a prosecution of terrorist acts through the rubric of other inhumane acts as a crime against humanity may worry States Parties, particularly those who spoke out against the inclusion in the Rome Statute of terrorism as a distinct offence.<sup>163</sup> It bears repeating, however, that the Statute was negotiated prior to the 11 September attacks and therefore long before the new era of terrorist threat heralded by the rise of IS.

## V. How to Prosecute Participation in IS's Crimes

The modes of liability applicable at the ICC are set out in Articles 25 and 28 of the Statute and have generated considerable litigation, debate and uncertainty. While in theory any of the modes of liability across Articles 25 and 28 could apply to members of IS, the present study focuses on three provisions in Article 25 for trying an individual for criminal acts under the Rome Statute. It also addresses why these provisions may be the most suitable for building cases against members of IS and the types of criminal conduct which could be considered under those heads of responsibility. The subparagraphs analysed are: (i) Article 25(3)(b) –relevant for the prosecution of both crimes within IS held territory where a superior-subordinate relationship is not established on the facts and also so-called IS 'inspired attacks' committed beyond areas under IS control; Article 25(3)(d) –relevant for IS members who perpetrate crimes but where the evidence does not establish the individual's control over the crime and also for those who play a significant facilitating role in IS's criminal acts from the outside; and, Article 25(3)(e) –which may be used to prosecute IS propagandists, given the scale and permeation of IS's ideological message and public calls to commit genocidal acts.

### A. Article 25(3)(b)

Article 25(3)(b) provides for the imposition of criminal responsibility where a person '[o]rders, solicits or induces the commission of [a crime within the jurisdiction of the Court] which in fact occurs or is attempted'. The inclusion of ordering (a form of co-perpetration) and inducement or solicitation (accessorial liability) provides for very differing forms of participation under the same provision.<sup>164</sup> Ordering, as a mode of liability, ties significantly with superior responsibility under Article 28; the former criminalising a positive act of an individual wielding authority in (an at least *de facto*) superior-subordinate relationship and the latter penalising omission on the part of such an individual.<sup>165</sup> Article 25(3)(b) may be utilised in two differing scenarios involving IS: attacks inside IS held territory and those committed in other territories. First, depending on the factual circumstances, it may be difficult to prove the existence of a superior-subordinate relationship within IS (whether the suspect is a military commander or quasi-military commander under Article 28(a) or a civilian superior pursuant to Article 28(b)) because IS a non-State armed group which administers captured territory –thus encompassing both military and civilian type hierarchical structures. In such circumstances, it may instead be more viable to proceed under inducement or solicitation,<sup>166</sup> which requires that an individual is influenced, persuaded or coerced to act (or indeed, an individual can be induced to induce another person to commit a crime) and no superior-subordinate relationship is needed.<sup>167</sup>

Inducement or solicitation requires that the alleged conduct have a 'direct effect on the commission or attempted commission of the crime'.<sup>168</sup> While there has been no litigation on the elements of soliciting or inducing at the ICC to date, existing international jurisprudence on 'instigating' is apt for comparison given the similarity of the modes. Instigating is defined as prompting another to commit an offence,<sup>169</sup> though it is not necessary to prove that the crime would not have been perpetrated without the involvement of the

<sup>163</sup> See 'Official Records of the Rome Conference, Vol II' UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome 15 June-17 July 1998) UN Doc A/CONF.183/13, para 142 (Brazil) (6th Meeting, 18 June 1998); para 20 (the Netherlands) (7th Meeting, 19 June 1998); para 117 (the United Kingdom) (5th Meeting, 18 June 1998).

<sup>164</sup> See Ambos, 'Article 25' (n 159) 1001–1002.

<sup>165</sup> *id.*

<sup>166</sup> *ibid* 1003. In practical terms, soliciting and inducing are very similar in that they variously entail something akin to urging, advising, inciting or enticing another to perpetrate a crime.

<sup>167</sup> See *The Prosecutor v Charles Blé Goudé* (Decision on the Confirmation of Charges Against Charles Blé Goudé) ICC-02/11-02/11 (11 December 2014) para 159.

<sup>168</sup> See *The Prosecutor v Bosco Ntaganda* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda) ICC-01/04-02/06 (9 June 2014) paras 143, 153; *The Prosecutor v Laurent Gbagbo* (Decision on the Confirmation of Charges Against Laurent Gbagbo) ICC-02/11-01/11-656-Red (12 June 2014) para 247.

<sup>169</sup> *The Prosecutor v Dario Kordić and Mario Čerkez* (Appeals Chamber Judgment) IT-95-14/2-A (17 December 2004) para 27; *Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze v The Prosecutor* (Appeals Chamber Judgment) ICTR-99-52-A (28 November 2007) para 480.

accused instigator.<sup>170</sup> Rather, it is necessary to demonstrate that the instigation was a factor substantially contributing to the conduct of the person committing the crime<sup>171</sup> and that the accused instigator acted with intent in relation to his or her own instigating,<sup>172</sup> or awareness of the substantial likelihood that a crime will be committed in the execution of that instigation.<sup>173</sup>

Second, inducing or soliciting could equally be relevant for so-called IS 'inspired attacks', if the facts show that IS members had been in contact—either physically or remotely—with an individual(s) for coordination type purposes prior to the latter carrying out an attack. Establishing a link between the conduct (the prompting to commit a crime) and the result (the crime) would be a question of available evidence. Proceeding with a prosecution under inducement or solicitation would have to go beyond evidence of a mere claim by IS of responsibility in the aftermath of an attack—something which occurs frequently.<sup>174</sup> Rather, as in the case of attacks in Brussels and Paris in 2016, for example, information has emerged linking IS members (involved in so-called 'external relations' for the group) with the direct perpetrators and the carrying out of the attacks.<sup>175</sup> In such instances, where the relationship of coordination between IS members and the direct perpetrators is not such as to be considered one of a superior and subordinate, and as the Rome Statute does not, for example, provide for the mode of liability of 'planning' a crime—resort could be had to inducement or solicitation as a means of holding IS members responsible for their significant involvement in attacks committed outside IS held territory.

### **B. Article 25(3)(d)**

Article 25(3)(d) is potentially relevant in two sets of circumstances regarding IS members. The first situation is for those other than direct perpetrators for whom it would not be possible to build a strong case as co-perpetrators under Article 25(3)(a). Co-perpetration is a mode of liability directly relevant to group criminality such as IS and requires that the objective threshold of an accused's involvement is 'control over the crime'.<sup>176</sup> While not requiring that a single participant has overall control over the offence, it does require that an individual has the power to frustrate the commission of the crime by not carrying out his or her task.<sup>177</sup> The level of proof required to meet the *actus reus* would potentially be difficult to prove in a situation of a non-State actor committing numerous ideologically driven crimes across different territories and would not capture the responsibility of IS members at the mid- to lower-level of authority. Looking to Article 25(3)(d), liability is imposed on an individual who 'contributes to the commission or attempted commission of [a crime within the Court's jurisdiction] by a group of persons acting with a common purpose' in any way other than that encompassed in subparagraphs (b) and (c). Importantly, with respect to IS, Article 25(3)(d) applies to those who are assisting the group's crimes and are themselves part of the criminal group.<sup>178</sup> To hold otherwise would, as stated by Pre-Trial Chamber I, exclude criminal responsibility of group members making culpable contributions falling below the threshold required for accountability under the other provisions of Article 25.<sup>179</sup> Article 25(3)(d) thereby encompasses the type of group criminality synonymous with a group such as IS, while not requiring the same exacting threshold of proof of objective control over the commission of a crime by an individual member of the group. The threshold of culpable contribution under Article 25(3)(d) is difficult to elucidate, as it includes that which is not otherwise captured in subparagraphs (b) and (c). It appears, however, to require a relatively low objective participation on the part of an accused.

<sup>170</sup> *Nahimana et al.* (n 169) para 660.

<sup>171</sup> *Kordić and Čerkez* (n 169) para 27; *Nahimana et al.* (n 169) para 660; *François Karera v The Prosecutor* (Appeals Chamber Judgment) ICTR-01-74-A (2 February 2009) para 317.

<sup>172</sup> *Kordić and Čerkez* (n 169) para 27; *Nahimana et al.* (n 169) para 480.

<sup>173</sup> *id.*; *Siméon Nchamihigo v The Prosecutor* (Appeals Chamber Judgment) ICTR-2001-63-A (18 March 2010) para 61.

<sup>174</sup> See eg Jamie Grierson, 'ISIS Claims Istanbul Nightclub Attack as Perpetrator Remains at Large' *The Guardian* (London, 3 January 2017) <<https://www.theguardian.com/world/2017/jan/02/isis-group-claims-responsibility-for-istanbul-nightclub-attack>> accessed 27 February 2017; 'ISIS Claims Responsibility for Berlin Attack' (*Wall Street Journal Video*, 20 December 2016) <<http://www.wsj.com/video/isis-claims-responsibility-for-berlin-attack/AE368ADA-1662-4745-997F-0AD46B0E46E7.html>> accessed 27 February 2017.

<sup>175</sup> See Rukmini Callimachi, 'ISIS Operative Suspected in Paris and Brussels Attacks is Identified' *The New York Times* (New York, 22 November 2016) <[https://www.nytimes.com/2016/11/22/world/europe/isis-paris-brussels-attacks.html?\\_r=0](https://www.nytimes.com/2016/11/22/world/europe/isis-paris-brussels-attacks.html?_r=0)> accessed 27 February 2017.

<sup>176</sup> See eg *The Prosecutor v Germain Katanga* (Trial Judgment) ICC-01/04-01/07 (7 March 2014) paras 1394–1396.

<sup>177</sup> *The Prosecutor v Thomas Lubanga Dyilo* (Judgment Pursuant to Article 74 of the Statute) ICC-01/04-01/06-2842 (14 March 2012) para 994. See also *Katanda and Ngudjolo* (n 145) para 500.

<sup>178</sup> *The Prosecutor v Callixte Mbarushimana* (Decision on the Confirmation of Charges) ICC-01/04-01/10-465-Red (16 December 2011) para 273.

<sup>179</sup> *id.*



Article 25(3)(d) would consequently capture crimes committed by high ranking members of IS, a group acting pursuant to a common purpose as encompassed in its ideological goals, and is also broad enough to try medium and lower IS members. While questions have been raised from the ICC bench as to whether the seemingly low objective threshold in Article 25(3)(d) requires a higher subjective element in order to ensure criminal responsibility accrues only in situations of sufficient culpability,<sup>180</sup> the clear language of Article 25(3)(d) would hold responsible those who contribute, even when they have no intention to further the group's criminal activity, as long as the assistance is made 'in the knowledge of the intention of the group to commit the crime'.

Secondly, Article 25(3)(d) may be relevant to the targeted prosecution of those outside IS who facilitate and assist the commission of crimes. Any non-State actor leading an insurgency and occupying territory can only sustain its operations provided it has the resources to do so. While IS have allegedly established a taxation regime in areas under its control, an undeniable source of its ability to function encompasses the revenue generated from trading oil originating in oilfields within its captured territory and purchasing arms and ammunition to both consolidate and further its expansionist aims.<sup>181</sup> Assistance with and facilitation of trading such core commodities raises the question of how those assisting or facilitating can be prosecuted. Dating back to the Nuremberg trials, individuals have been prosecuted for providing so called 'non-lethal' assistance to groups committing crimes.<sup>182</sup> Non-lethal assistance is that which in other contexts would be legal but, because of the way those committing crimes use the assistance, makes the provider of such aid or assistance complicit with the crimes.<sup>183</sup> Under this rubric, those who are, for example, knowingly purchasing oil or selling arms and munitions –including components for making bombs such as fertiliser– which help sustain IS's terror campaigns, should be criminally liable.

While Article 25(3)(c) is set up to expressly cover the culpability of aiders and abettors, the provision has a potential impediment in its wording. Subparagraph (c) provides for the criminal responsibility of an individual who '[f]or the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission'. Much discussion has revolved around the meaning of the words '[f]or the purpose of facilitating' in Article 25(3)(c). This mirrors the debate on the so-called 'specific direction' element briefly and controversially introduced by the ICTY Appeals Chamber as effectively requiring an intent on the part of the alleged aider and abettor that crimes be committed with their aid or assistance.<sup>184</sup> Interpretations of the significance of the terminology in Article 25(3)(c) differ, with assertions that it requires that the accused need only intend his conduct, that is, that the act of facilitation must be done purposely,<sup>185</sup> or that 'purpose' elevates Article 25(3)(c) 'beyond the ordinary *mens rea* requirement within the meaning of Article 30' of the Statute,<sup>186</sup> requiring that the accused actively willed or desired to facilitate the crime by his conduct. Pre-Trial Chamber I in *Blé Goudé* confirmed aiding and abetting charges on the basis that Blé Goudé's actions 'were intentional *and* were performed for the purpose of facilitating the commission of the crimes'.<sup>187</sup> This bifurcated language seems to support the interpretation that showing 'purpose' requires that the individual contributed with the aim or desire of facilitating a crime. Had the drafters instead required that an accused contribute knowing that they would assist the commission of a crime in the ordinary course of events, the addition of a 'purpose' requirement would have been unnecessary –as it would be captured by the default *mens rea* contained in Article 30.<sup>188</sup> In practice, such a high *mens rea* will likely exclude from prosecution those who intentionally purchase oil from, or sell arms and munitions to, IS while aware that crimes will occur in the ordinary course of events as a result of the trade and that the trade substantially contributes to such crimes.

<sup>180</sup> *The Prosecutor v Germain Katanga* (Minority Opinion of Judge Christine van den Wyngaert) ICC-01/04-01/07-3436-AnxI (7 March 2014) para 287.

<sup>181</sup> See Holli Edwards, 'Does International Law Apply to the Islamic State?' (2017) 1 Strategic Security Analysis 1, 2–3.

<sup>182</sup> See Nicholas Koumjian and Corman Kenny, 'Specific Direction: The ICTY's 'Novel' Attempt to Regulate State Action' (2013) Irish Yearbook of International Law 3, 19–24.

<sup>183</sup> *id.*

<sup>184</sup> *ibid* 8–14.

<sup>185</sup> James Stewart, 'An Important New Orthodoxy on Complicity in the ICC Statute?' (21 January 2015) <<http://jamesgstewart.com/the-important-new-orthodoxy-on-complicity-in-the-icc-statute/>> accessed 27 February 2017.

<sup>186</sup> Ambos, 'Article 25' (n 159) 1009.

<sup>187</sup> *Blé Goudé* (n 167) para 170 (emphasis added).

<sup>188</sup> See *The Prosecutor v Thomas Lubanga Dyilo* (Decision on the Confirmation of Charges) ICC-01/04-01/06-803 (29 January 2007) para 351; *Lubanga* (Trial Judgment) (n 177) paras 1007–1014.



Article 25(3)(d) provides a means of closing any impunity gap for those who assist or facilitate IS crimes in this manner. Utilising Article 25(3)(d) would ensure that individuals who knowingly provide the materials and materiel assistance required by IS to perpetrate crimes, with either callous disregard or even no intention or desire that crimes be committed, are not immunised against criminal consequences for their knowing and telling contributions to heinous crimes. Targeted prosecutions of this category of figures would be the first time the ICC has launched such a prosecution and would set down a marker for upholding the accountability of those removed from the locus of international crimes who do business with non-State actors engaged in mass atrocities, prioritising profit to the fatal detriment of countless innocent civilians.

### C. Article 25(3)(e)

One of the things that sets IS apart as a terrorist force is its ability to operationalise new and old technologies in order to propagate its ideological message, spread fear, and target new recruits. IS has an extensive media infrastructure producing technically high-quality missives in different languages aimed at different audiences.<sup>189</sup> The group has harnessed the power and reach of the internet as well as capitalised on traditional media such as radio and written publications. Its Ministry of Media circulates digital publications, online videos, radio broadcasts, audio statements and feature length films depicting brutal acts committed by the group's members.<sup>190</sup> In addition to core output such as the *Dābiq* online magazine and the Al-Bayan radio broadcast from Mosul,<sup>191</sup> each province within IS controlled territories has its own media operations, which produce and distribute their own content with approval from the Ministry of Media.<sup>192</sup> Through these various platforms, IS spreads graphic and unequivocal messages about how non-followers should be treated. Mirroring the propaganda machine of the Third Reich and the media usage in Rwanda in 1994, IS's declarations to eradicate those who do not follow its course should be viewed under the lens of incitement.

Within the Rome Statute, incitement is justiciable only for the crime of genocide, with Article 25(3)(e) taken from Article III(c) of the 1948 Genocide Convention.<sup>193</sup> This requires that the incitement be (i) direct and (ii) public. The 'direct' element of incitement to genocide means that the expression should specifically provoke another to engage in criminal conduct.<sup>194</sup> The meaning of the expression and whether it provokes criminal conduct is interpreted within the specific context and how the intended audience understood it.<sup>195</sup> That the incitement is 'public' means that the call for criminal action is communicated to the public at large, for example, through means of mass communication.<sup>196</sup> The International Law Commission has characterised public incitement as a 'call for criminal action to a number of individuals in a public space or to members of the public at large by such means as mass media'.<sup>197</sup> In order to find a perpetrator guilty, incitement to commit genocide does not require that the incitement be successful.<sup>198</sup> It must be shown beyond reasonable doubt, however, that the perpetrator held genocidal intent.<sup>199</sup> IS's use of mass media, both digital and print, certainly satisfies the public element of incitement. The content and consistency of IS's dispersed material points towards something greater than mere propagation of hatred. For example, statements that it is impossible to achieve victory over 'the Jews and Christians except by abolishing those apostate agents (...) who must be killed wherever they are found' until there are none who 'walks on the face of the earth' have been printed in the digital propaganda magazine *Dābiq*.<sup>200</sup> Though not dispositive of a specific intent to commit genocide, it is contextually relevant that such messages were printed while religious minorities were actively being targeted and killed on the basis of their membership in religious groups.<sup>201</sup>

<sup>189</sup> Daniel Milton, 'The Islamic State: An Adaptive Organization Facing Increasing Challenges' In: Muhammad al'Ubaydi and others, (eds.), *The Group That Calls Itself a State: Understanding the Evolution and Challenges of the Islamic State* (CTC West Point 2014) 36, 47.

<sup>190</sup> Badar (n 144) 367–368.

<sup>191</sup> *ibid* 381–383.

<sup>192</sup> *ibid* 368.

<sup>193</sup> Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.

<sup>194</sup> See *The Prosecutor v Tharcisse Muvunyi* (Trial Chamber III Judgment) ICTR-00-55A-T (12 September 2006) para 502.

<sup>195</sup> *Nahimana et al.* (n 169) paras 698, 700–703.

<sup>196</sup> *The Prosecutor v Jean-Paul Akayesu* (Trial Chamber I Judgment) ICTR-96-4-T (2 September 1998) para 556.

<sup>197</sup> ILC 'Report of the International Law Commission on the Work of its 48th Session' (6 May–26 July 1996) UN Doc A/51/10, 26.

<sup>198</sup> *Nahimana et al.* (n 169) para 766.

<sup>199</sup> *ibid* para 711.

<sup>200</sup> See Badar (n 144) quoting from Islamic State Magazine *Dābiq*, Issue 13.

<sup>201</sup> European Parliament Joint Motion, 'Resolution on the Systematic Mass Murder of Religious Minorities by the So-called 'ISIS/Daesh'' (3 February 2016) 2016/2529(RSP).

It is asserted, therefore, that individuals sufficiently involved in IS's media organs that publicly espouse messages directing its audience to eliminate certain groups could be prosecuted under Article 25(3)(e) of the Rome Statute. Doing so would target the range of criminality inherent in IS's acts, while demonstrating the importance of prosecuting those involved in the spread of propaganda that contributes significantly to the perpetration of genocide. In today's age of mass media precipitating the easy and rapid proliferation of targeted messages of hatred against identified 'enemies', and the inherent power and effect that such words may have on ideologically predisposed foot-soldiers, prosecutions of those responsible would represent an important development of the law of incitement to genocide at the international level.

## VI. Conclusion

IS represents one of the great contemporary threats to world security, with serious concerns as to the international community's capacity and willingness to forge the necessary alliances in order to deal with the atrocities IS have and are likely to continue to perpetrate as they come under greater military pressure. The changing landscape of international justice since the horrors wrought in various conflicts at the latter end of the twentieth century prompted the establishment of various *ad hoc* institutions and ultimately the ICC. These developments led to an expectation of prosecution for crimes of international concern. While the ICC cannot deal with all of the world's ills and, indeed, is specifically designed to be complementary to national jurisdictions, the threat posed by IS and clear lack of serious judicial reckoning for its crimes inexorably leads to the conclusion that the ICC should pursue all possible avenues to ensure justice is done. While there are real practical considerations regarding the politicisation of the Court were it to prosecute terrorism, as well as the difficulty of securing and obtaining evidence in the absence of State cooperation from Syria, Iraq, or Libya, these problems will always exist for a criminal institution adjudicating crimes on an international level, particularly a Court without a dedicated enforcement mechanism. The ICC appears unlikely at the present time to try the crimes of IS due to the series of obstacles faced. Yet, if the other path to choose is impunity, then the question is rightly asked —is it not better for the institution specifically established to address conscience shaking crimes to endeavour to overcome the impediments in order to ensure accountability? The present article has sought to demonstrate that, within the Rome Statute, there inheres the potential to overcome the main obstacles of: jurisdiction; justiciable subject matter; and, modes of liability that are arguably ill-fitting for the crimes of IS, which stand in the way of building viable prosecutions. Doing so would arguably solidify the rightful place of the Court within the international community: a last resort yes, but not on the sidelines in the face of a criminal threat to international peace and security.

## Acknowledgements

The author would like to thank the anonymous reviewers for their comments on a previous draft. All views expressed herein are those of the author alone.

## Competing Interests

The author has no competing interests to declare.

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**How to cite this article:** C oman Kenny, 'Prosecuting Crimes of International Concern: Islamic State at the ICC?' (2017) 33(84) *Utrecht Journal of International and European Law*, pp. 120-145 DOI: <https://doi.org/10.5334/ujiel.364>

**Submitted:** 02 November 2016    **Accepted:** 19 February 2017    **Published:** 12 April 2017

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