

# Public International Law Perspectives on the Prosecution of Daesh Crimes Against Women And Girls

The perpetration of gender-based crimes by Daesh against women and girls has been widely reported by competent international bodies<sup>1</sup> as well as in the media, raising concern and indignation amongst the public worldwide<sup>2</sup>. From a legal perspective, the question is how to address such crimes, and in particular how to prosecute their perpetrators.

On 13 October 2016, the European Parliament's Committees on Legal Affairs (JURI) and on Women's Rights and Gender Equality (FEMM) held a joint hearing on 'Public international law perspectives on the prosecution of Daesh's crimes against women and girls before international jurisdictions'<sup>3</sup>. During the hearing, three experts were heard. The present briefing builds on discussions held during the hearing, as well as on academic and judicial developments in the field of international criminal law, with the aim of highlighting possible avenues to ensure that sexual and gender-based crimes committed by Daesh do not remain unpunished.

## 1. INTERNATIONAL CRIMINAL LAW: A BRIEF INTRODUCTION

International criminal law, as a separate branch of public international law, is a recent concept, but it incorporates notions and ideas dating back at least to Grotius's time. The first international criminal tribunal effectively set up to try international crimes was the Nuremberg Tribunal, established after the Second World War to prosecute those most responsible for the commission of Nazi crimes<sup>4</sup>. Already at that time, however, prosecutions were also taking place before national courts – those who could not be tried at Nuremberg, or at its twin tribunal in Tokyo, were prosecuted at national level: for instance, the well-known trial of Adolf Eichmann took place in Israel<sup>5</sup>.

From a substantive law perspective, while war crimes were already a rather well-defined concept in international law thanks to the 1899 and 1907 Hague Conventions, and were further developed in the four Geneva Conventions adopted in 1949, the notion of 'crimes against humanity' was newly defined in the London Charter for the Nuremberg Tribunal. Moreover, in 1949, the UN General Assembly adopted the Genocide Convention, which defined genocide for the first time. Yet no other international criminal tribunals were set up in the following years, and it seemed that Nuremberg would remain an isolated case.

In 1993, however, the UN Security Council adopted Resolution 827, establishing an international criminal tribunal to try crimes committed in the former Yugoslavia: the ICTY was thus set up under Chapter VII of the Charter of the United Nations as a reaction to a threat to international peace and security<sup>6</sup>. A similar procedure led, the following year, to the establishment of the Rwanda tribunal (ICTR)<sup>7</sup>.

Discussions on the possible establishment of a permanent international criminal court, having jurisdiction to try any international crime committed anywhere in the world, had been ongoing for many years, but were often considered as an academic dream. However, with the setting up of the two special tribunals the momentum was built for the establishment of the International Criminal Court: the Statute of the ICC ('Rome Statute') was thus adopted in Rome in 1998 and entered into force in 2002<sup>8</sup>. The Court is an independent tribunal, set up

outside the framework of the United Nations, and has jurisdiction over the international crimes listed in its Statute when committed on the territory of States Parties or by their nationals, or when referred to it by the UN Security Council. The Court is conceived as a 'subsidiary' court, acting under the principle of complementarity: under Article 17 of the Rome Statute, a case is not admissible if it is being investigated or prosecuted by a state which has jurisdiction over it, unless that state is unwilling or genuinely unable to carry out the investigation or prosecution. Moreover, cases that are not of sufficient gravity to justify further action by the Court are also inadmissible (Article 17(1)(d)).

At around the same time, the Special Court for Sierra Leone was set up through an agreement between the UN and the Government of Sierra Leone<sup>9</sup>; the Court has jurisdiction over international crimes as well as a list of crimes under Sierra Leonean law, and its judges are appointed partly by the UN and partly by the Government of Sierra Leone. Other so-called 'mixed' or 'hybrid' tribunals have been established since, including in particular the Extraordinary Chambers in the Courts of Cambodia in 2003, and the Special Tribunal for Lebanon in 2007<sup>10</sup>. The latter's jurisdiction is, however, limited to the prosecution of persons responsible for the attack that killed former Lebanese Prime Minister Rafiq Hariri and killed or injured others.

One of the peculiarities of international criminal law is that, for the most part, it incriminates acts that are already qualified as criminal under national law, such as killing or causing bodily harm; however, such acts are requalified as international crimes due to the presence of a contextual element. It is the latter which justifies the involvement of the international community in the prosecution of the crimes, giving them an international relevance due, in particular, to their dimension and gravity. The contextual element varies depending on the type of international crime: according to the Statute of the ICC, for the crime of genocide, it is the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such; for crimes against humanity, the existence of a widespread or systematic attack directed against any civilian population, with knowledge of the attack and pursuant to or in furtherance of a state or organisational policy; and for war crimes, the nexus with an armed conflict, of either an international or non-international character.

## **2. SEXUAL AND GENDER-BASED VIOLENCE AS AN INTERNATIONAL CRIME**

Rape and other acts of sexual and gender-based violence have only been recognised as international crimes after a long and slow process. Indeed, while rape has long been considered a war crime under national laws and certain international treaties, the law was rarely enforced; even after the Nuremberg and Tokyo trials, convictions for rape were rarely, if ever, recorded<sup>11</sup>.

Attention to the widespread commission of acts of rape, sexual slavery and sexual violence during wartime increased over time, however, and in particular during the conflict in the former Yugoslavia; in 1993, the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities therefore decided to appoint a Special Rapporteur on systematic rape, sexual slavery and slavery-like practices during armed conflict<sup>12</sup>.

The adoption of the Statute of the ICTY marked important progress, since it listed rape among crimes against humanity; however, sexual violence was not specifically included in the provisions on war crimes. Moreover, rape was not – and is still not – expressly listed among acts that may qualify as genocide. Many of the existing shortcomings and gaps, however, have been remedied by a progressive jurisprudence that has led to important developments in this field. Indeed, the case-law of international criminal tribunals and of supranational human rights courts has led to numerous developments: for instance, by recognising that rape may also qualify, in certain circumstances, as an act of torture<sup>13</sup>; that rape may be subsumed under the notion of serious bodily or mental harm, and in this way under the crime of genocide<sup>14</sup>; that the general crime of 'enslavement' also encompasses cases of sexual

slavery or servitude<sup>15</sup>; and that sexual violence may be perpetrated even without any physical contact between the accused and the victim (for example in cases of forced nakedness)<sup>16</sup>.

The adoption of the Rome Statute of the ICC marks another very important step forward in this respect: indeed, the Statute lists rape in the definition of both war crimes and crimes against humanity. Moreover, numerous other forms of sexual and gender-based violence are also criminalised: sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation and any other form of serious sexual violence are explicitly listed as both crimes against humanity and war crimes (Articles 7 and 8, Rome Statute). Additionally, the Elements of Crimes, adopted in accordance with the Rome Statute to assist the Court in the interpretation and application of the crimes, include clear definitions of the prohibited conduct, as well as of its contextual element<sup>17</sup>. Moreover, the Office of the Prosecutor of the ICC has adopted a specific Policy Paper on Sexual and Gender-Based Crimes<sup>18</sup>; this shows not only its willingness to investigate and prosecute such crimes, but also its awareness of the challenges that such prosecutions pose in practice.

Indeed, although huge progress has been made over time regarding the international legal definition and criminalisation of rape and sexual violence, the actual prosecution of these crimes still presents numerous difficulties. In the course of the joint hearing of the European Parliament's Committees on Legal Affairs and on Women's Rights and Gender Equality, Dr Kristin Campbell presented some of the findings of the EU-funded project on 'The gender of justice: the prosecution of sexual violence in armed conflict', which focuses on the prosecution of sexual crimes committed during the conflict in the former Yugoslavia<sup>19</sup>. According to this research project, there are several best practices whose implementation is essential to ensure the effective prosecution of sexual crimes.

Firstly, early and in-depth investigations of such crimes are crucial, as they lay the groundwork for their subsequent prosecution; thus, for instance, the investigations carried out by the UN Commission of Experts at the time of the Yugoslav war were key to the subsequent prosecution of acts of rape and sexual violence<sup>20</sup>. Secondly, it is necessary to overcome the specific challenges that substantive and procedural law (in particular the law on evidence) may present when it comes to the prosecution of sexual crimes: for instance, modes of liability are sometimes misinterpreted so that it is incorrectly assumed that leaders may only be held responsible for acts of sexual violence committed by their subordinates if the latter have systematically perpetrated rape. International prosecution of sexual crimes also requires the contextualisation of single acts of gender-based violence, capturing the broader patterns of illegality in which the single rape took place. Finally, gender stereotypes and institutional obstacles may also hinder effective prosecutions, for instance when investigative or judicial institutions lack gender competence or expertise. Best practices to remedy this obstacle include providing adequate training and developing and implementing specific policies for the prosecution of sexual crimes.

Moreover, Dr Campbell clarified that experience from the ICTY points to the need to link international criminal liability with post-conflict justice processes: since international tribunals can only prosecute a limited number of persons, focusing on leaders more than on direct perpetrators, national prosecutions remain essential.

It is therefore clear that acts of sexual and gender-based violence, as committed by Daesh in a context of widespread violence against civilians and of armed conflict, qualify as international crimes and deserve specific attention in investigations and prosecutions. However, the question that remains is how to ensure prosecution – which tribunals have jurisdiction over their perpetrators?

### **3. INTERNATIONAL AND NATIONAL AVENUES TO PROSECUTE DAESH CRIMES AGAINST WOMEN AND GIRLS**

In the course of the JURI-FEMM hearing, experts presented their views on possible avenues to ensure that the international crimes committed by Daesh against women and girls are indeed prosecuted.

The simplest option, of course, would be to ensure their prosecution in the state where the crimes have been committed, in application of the basic principle of territorial jurisdiction. However, the tribunals of these states are unable to prosecute these crimes at present, since in most cases the justice systems – and even the states themselves – are collapsing. Moreover, the transnational nature of Daesh and its ability to commit crimes over the territory of several states is in itself a challenge for the application of the principle of territoriality. Several alternative avenues were therefore discussed.

#### **Prosecution at the International Criminal Court: challenges**

The solution that first comes to mind would be to trigger the jurisdiction of the International Criminal Court. Indeed, the ICC is a permanent international court, established specifically with the aim of putting an end to impunity for international crimes; moreover, its Statute and its Rules of Procedure specifically criminalise most sexual and gender-based crimes.

However, as stressed by Jérôme de Hemptinne, this avenue is, in practice, very difficult to follow. Indeed, according to Article 12 of the Rome Statute, the ICC has jurisdiction over crimes committed on the territory of States Parties to the Court, or having accepted its jurisdiction (territorial jurisdiction), or by nationals of such states (active nationality principle). However, of the states that have been most affected by Daesh crimes, only Nigeria is a State Party: the ICC therefore does not have territorial jurisdiction over most Daesh crimes<sup>21</sup>. As regards active personality jurisdiction, it could surely lead to the international prosecution of so-called 'foreign fighters' who are nationals of a State Party to the ICC and who have joined Daesh and committed international crimes on the territory of a state that is not a party to the ICC. However, the ICC Prosecutor has recently ruled out the possibility of opening an investigation into such crimes, based on the finding that the leaders of ISIS, who are most responsible for its crimes, are mostly nationals of non-States Parties<sup>22</sup>: an investigation focusing on foreign fighters alone would therefore not ensure that those most responsible<sup>23</sup> for international crimes committed by Daesh are brought to justice.

Consequently, in order to trigger the jurisdiction of the ICC, a referral by the UN Security Council, acting under Chapter VII of the UN Charter, would be needed<sup>24</sup>. However, while the Security Council has unequivocally condemned actions carried out by Daesh<sup>25</sup>, such a referral appears most unlikely. Indeed, given the transnational nature of Daesh, and the fact that it is committing crimes over the territory of several states, the Security Council would need to refer the situation in each of these states to the ICC, which appears to be politically complex – and even more so in the current political climate as regards the ICC<sup>26</sup>. Moreover, a draft resolution to refer, more specifically, the situation in Syria to the ICC was discussed at the Security Council in May 2014, but was not passed, as it was vetoed by two of the permanent members<sup>27</sup>. It is essential to keep in mind that, while the Security Council may refer a 'situation' to the ICC, it may not limit its jurisdiction only to crimes committed by one of the parties to the conflict (for instance, Daesh).

Moreover, the ICC is already investigating the situation in nine different states: Uganda; the Democratic Republic of the Congo; Darfur, Sudan; the Central African Republic; the Republic of Kenya; Libya; Côte d'Ivoire; Mali; and Georgia<sup>28</sup>. At the moment, it is therefore already swamped with cases, and it would be very difficult for it to carry out investigations into Daesh crimes – especially since such investigations would need to be carried out over the territory of several states, and possibly even across continents. Even though the ICC could concentrate its investigations and prosecutions on those most responsible for Daesh crimes<sup>29</sup>, such as its leaders, their identification – in a structure such as that of Daesh, which seems to be

characterised by the lack of clear and fixed hierarchies – would require extensive and complex investigations.

Additionally, de Hemptinne recalled that Daesh has not only committed international crimes falling within the jurisdiction of the ICC, but also acts of terrorism which cannot qualify as war crimes as they have been committed in a context of peace (for instance in France or Belgium); for such crimes, the ICC might not even have jurisdiction. According to some scholars, however, the Paris attacks could amount to crimes against humanity, given that they represented a widespread and systematic attack against a civilian population: Professor Ambos has therefore argued that the ICC would have territorial jurisdiction over Daesh crimes committed in France<sup>30</sup>. However, the exercise of such jurisdiction would still be subject to the principle of complementarity (whereas France is currently investigating the attacks) and would in no case extend to Daesh crimes specifically committed against women and girls.

### **Prosecution at an ad hoc international criminal tribunal**

An alternative solution, which would still ensure that international crimes committed by Daesh are prosecuted at international level, would be to set up an ad hoc international criminal tribunal. This option has been discussed by scholars and practitioners, and has even led to the approval of a proposal for a draft Statute for a Syrian tribunal to prosecute atrocities<sup>31</sup>. According to de Hemptinne, such a tribunal could clearly not be established – as was, for instance, the Special Court for Sierra Leone – through an agreement between the UN and the interested states: such an agreement would require lengthy negotiations between the international community and numerous states, many of which are currently in a politically instable situation. Thus, the model to be followed would be that of the ICTY and the ICTR: an ad hoc court, established by a UN Security Council resolution adopted under Chapter VII of the UN Charter<sup>32</sup>. Such a court would need to have jurisdiction over the territory of all states affected by the commission of Daesh crimes and over all such crimes, including acts of terrorism. Options for the setting up of an international tribunal having jurisdiction over acts of terrorism have already been explored by prominent scholars and, although the definition of ‘terrorism’ under international law is still very much subject to discussion, such scholarly works could form a basis for the establishment of the ad hoc tribunal<sup>33</sup>.

Politically, however, this solution seems as unfeasible as a referral to the ICC, as it still requires a decision by the UN Security Council, if not even more unlikely, given the difficulties surrounding the international legal definition of terrorism. Moreover, prosecution before an ad hoc tribunal would also require long negotiations within the UN Security Council, in the same way as an ICC referral, and while in theory such a tribunal could already be set up while the conflict is still ongoing, negotiations might end up being too lengthy or leading to no result.<sup>34</sup>

### **National prosecutions and the principle of universal jurisdiction**

While international prosecution of international crimes might appear to be the most appropriate solution, it is also a lengthy and complex one.

In the course of the hearing, Professor Cedric Ryngaert pointed to the existence of another avenue for prosecuting crimes committed by Daesh: national courts of states where Daesh has not been actively committing most of its crimes, including courts of the Member States of the European Union, can still prosecute these crimes. Such prosecutions may take place, firstly, based on the active nationality principle: indeed, EU Member States have jurisdiction to prosecute their own nationals who have joined Daesh as ‘foreign fighters’ and who have committed crimes abroad. Moreover, in several EU Member States courts have universal jurisdiction for the prosecution of international crimes: they may therefore prosecute such crimes regardless of where they were committed<sup>35</sup>. However, in numerous cases the application of the universality principle is limited by the requirement that the accused be present on the territory of the state in order to initiate prosecutions. According to Professor Ryngaert, this limitation does not completely rule out the possibility of prosecuting Daesh



crimes in Europe, since some of the perpetrators of such crimes might have fled to Europe. In this context, he argued that better cooperation between immigration authorities and judicial and prosecutorial authorities could help ensure that third-country nationals who arrive in the EU and are suspected of having committed international crimes are referred to the competent prosecutorial authorities<sup>36</sup>.

Universal jurisdiction, however, also presents numerous challenges when it comes to the gathering of evidence, since investigators are usually not in a position to travel to the country where the crime was committed; it is therefore necessary to rely on witnesses' testimony by implementing policies to encourage victims to come forward and speak to national immigration or prosecution authorities. Moreover, as stressed by Dr Campbell during the hearing, universal jurisdiction has not proven very effective thus far in the prosecution of sexual and gender-based crimes, possibly due to the challenges posed by the gathering of evidence and to the lack of specialised expertise<sup>37</sup>.

## **4. OTHER AVENUES TO HOLD PERPETRATORS ACCOUNTABLE**

While criminal investigations and prosecutions are, of course, the most appropriate response to international crimes committed by Daesh, alternative avenues exist to hold perpetrators accountable for their crimes.

### **Tort claims before national courts**

Criminal trials are the most appropriate response to the commission of crimes, as they are meant to ensure the effective achievement of the aims of deterrence and retribution. However, civil trials, and in particular tort claims, may also serve the same purpose, as well as ensuring some form of restoration for victims. In this context, tort claims may also be brought before national courts of the EU Member States.

While universal jurisdiction is only a well-established principle with regard to criminal law, civil courts in the EU may be able to establish jurisdiction, for instance, based on the *forum necessitatis* rule, or on the presence of the defendant. As Professor Ryngaert explained during the hearing, tort cases have been brought by victims of international crimes who were seeking compensation, and in some cases victims have been awarded very high damages<sup>38</sup>. However, whenever the defendant is not present in the state where the judgment is issued and does not have property or assets there, such judgments risk remaining unenforced – symbolic statements with little practical effect. Moreover, establishing civil jurisdiction might be very difficult, if not impossible, in many Member States, as the *forum necessitatis* rule is not generally adopted in the national laws on civil procedure.

### **Administrative sanctions**

Administrative sanctions against terrorists have existed since at least 1999, when the first sanctions against Al Qaeda were imposed<sup>39</sup>. Such sanctions include travel bans, passport withdrawal and asset freezing, and have recently been extended to individuals, groups, undertakings and entities associated with Daesh, through the adoption of UNSC Resolution 2253(2015). The European Union has given effect to the UN sanctions through specific regulations; most recently, Article 3(1)(f) of Council Regulation (EU) 2016/1686 has drawn attention specifically to sexual and gender-based crimes<sup>40</sup>. However, as stressed by Professor Ryngaert, the challenge for the future will be to actually include persons involved in acts of sexual violence on the lists of persons to whom the sanctions apply, thus broadening their focus, which, until now, has been mainly on acts of terrorism.

### **Possibility of holding states accountable**

A final alternative which was mentioned by Professor Ryngaert during the hearing is that of holding states that assist or support Daesh accountable for its crimes – thus, any state that provides money, weapons, or any other form of support to Daesh could be held responsible

for the crimes committed by the latter, provided that such support was given in the knowledge that it would be used to commit crimes. This, however, is also a complex option: indeed, states enjoy state immunity in foreign courts<sup>41</sup>, so unless courts reject the doctrine of state immunity, a state's accountability in national courts would be difficult to establish.

<sup>1</sup> In particular, the Independent International Commission of Inquiry on the Syrian Arab Republic (which was established in August 2011 by the Human Rights Council through its Resolution S-17/1): see its report of 16 June 2016, "They came to destroy": ISIS Crimes Against the Yazidis", in which the Commission also found that ISIL/Daesh is committing genocide against the Yazidis. More information on the Commission and its work is available at: <http://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/IndependentInternationalCommission.aspx>.

<sup>2</sup> On 27 October 2016, the European Parliament announced that the 2016 laureates of the Sakharov Prize for Freedom of Thought are Nadia Murad and Lamiya Aji Bashar, survivors of sexual enslavement by Islamic State (IS). More information available at: <http://www.europarl.europa.eu/sakharovprize/en/home/the-prize.html>.

<sup>3</sup> See the web page of the event, which includes a link to the video-recording of the hearing: <http://www.europarl.europa.eu/committees/en/juri/events-hearings.html?id=20161013CHE00181>.

<sup>4</sup> Documents from the Nuremberg trials may be found at [http://avalon.law.yale.edu/subject\\_menus/imt.asp](http://avalon.law.yale.edu/subject_menus/imt.asp).

<sup>5</sup> The trial of Adolf Eichmann led Hannah Arendt to publish her world-renowned book 'Eichmann in Jerusalem: A Report on the Banality of Evil'.

<sup>6</sup> UN Security Council Resolution 827(1993), adopted on 25 May 1993 and available at [http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_827\\_1993\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_827_1993_en.pdf).

<sup>7</sup> UN Security Council Resolution 955(1994), available at [http://unictr.unmict.org/sites/unictr.org/files/legal-library/941108\\_res955\\_en.pdf](http://unictr.unmict.org/sites/unictr.org/files/legal-library/941108_res955_en.pdf).

<sup>8</sup> Rome Statute of the International Criminal Court, available at [https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome\\_statute\\_english.pdf](https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf). All EU Member States are also States Parties to the Rome Statute.

<sup>9</sup> 16 January 2002 Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Special Court for Sierra Leone, available at <http://www.rscsl.org/Documents/scsl-agreement.pdf>.

<sup>10</sup> Information on the Courts, including their founding documents, may be found on their websites: <http://www.rscsl.org/>, <https://www.eccc.gov.kh/en>, and <http://www.stl-tsl.org/>.

<sup>11</sup> See for example T. Meron, 'Rape as a Crime Under International Humanitarian Law,' in 87 *Am. J. Int'l Law*, 1993, 424-428, at 425; M. C. Bassiouni, 'Crimes against humanity in international criminal law', II ed., Kluwer Law 1999, 344 ff.

<sup>12</sup> Her Final report (UN Doc. E/CN.4/Sub.2/1998/13, 22 June 1998) is available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G98/128/81/PDF/G9812881.pdf?OpenElement>.

<sup>13</sup> ECtHR, *Aydin v. Turkey*, Application 23178/94, Judgment of 25 September 1997; IACHR, *Raquel Martí de Mejía v. Perú*, Case 10.970, Report No 5/96, Inter-Am.C.H.R., 1 March 1996; ICTY, *Prosecutor vs. Delalic et al.*, IT-96-21-T, Judgment of 16 November 1998; ICTR, TC, *Prosecutor v. Akayesu*, cit.

<sup>14</sup> ICTR, TC, *Prosecutor v. Akayesu*, Case No ICTR-96-4-T, Judgment of 2 September 1998.

<sup>15</sup> ICTY, *Prosecutor vs. Kunarac et al.*, IT-96-23-T and IT-96-23/1-T, Judgment of 22 February 2001.

<sup>16</sup> ICTR, *Prosecutor v. Akayesu*, cit.

<sup>17</sup> The Elements of Crimes are available at <https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>.

<sup>18</sup> ICC OTP, Policy Paper on Sexual and Gender-Based Crimes, June 2014, available at [https://www.icc-cpi.int/iccdocs/otp/Policy\\_Paper\\_on\\_Sexual\\_and\\_Gender-Based\\_Crimes-20\\_June\\_2014-ENG.pdf](https://www.icc-cpi.int/iccdocs/otp/Policy_Paper_on_Sexual_and_Gender-Based_Crimes-20_June_2014-ENG.pdf).

<sup>19</sup> More information available at <http://www.gold.ac.uk/genderofjustice/>.

<sup>20</sup> The Commission of Experts was established following UNSC Resolution 780 (1992) and published its final report in 1994 (see <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N94/200/60/PDF/N9420060.pdf?OpenElement>).

<sup>21</sup> See also the statement of 8 April 2015 by the Prosecutor of the International Criminal Court, Ms Fatou Bensouda, which expressly recognises that, as Syria and Iraq are not Parties to the Rome Statute, the Court has no territorial jurisdiction over crimes committed on their soil. Statement available on pages 3-4 at: [https://www.icc-cpi.int/iccdocs/PIDS/wu/ED239\\_ENG.pdf](https://www.icc-cpi.int/iccdocs/PIDS/wu/ED239_ENG.pdf).

<sup>22</sup> See the Statement of the Prosecutor of 8 April 2015, cited above. For a critical appraisal of the Prosecutor's decision see, for example, M. H. Zaherhossein, 'To bury a situation alive - a critical reading of the ICC Prosecutor's statement on the ISIS situation', in *International Criminal Law Review*, 2016, 613 ff.

<sup>23</sup> The focus on persons 'most responsible' for international crimes is not enshrined in the Rome Statute itself, but derives from Regulation 34(1) of the Regulations of the Office of the Prosecutor and the OTP Policy paper on case selection and prioritisation of 15 September 2016.

<sup>24</sup> The Commission of Inquiry on Syria has called for action on the part of the UN Security Council, in the form of a referral to the ICC or to an ad hoc international criminal tribunal, several times; see, for example, the statement of 3 August 2016 at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20330&LangID=E>.

<sup>25</sup> In particular in its Resolution 2249 (2015), which is available at [http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s\\_res\\_2249.pdf](http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2249.pdf).

<sup>26</sup> Three States Parties to the Rome Statute have recently announced their intention to withdraw from the Court: Burundi, South Africa and the Gambia. The information on withdrawals is available at: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsq\\_no=XVIII-10&chapter=18&clang=en#2](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsq_no=XVIII-10&chapter=18&clang=en#2).

Moreover, the Russian Federation, a signatory to the Rome Statute, has recently announced its decision to withdraw its signature.

<sup>27</sup> See Draft Resolution S/2014/348, which was vetoed by China and Russia on 22 May 2014, available at [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/2014/348](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2014/348).

<sup>28</sup> See <https://www.icc-cpi.int/pages/situations.aspx> (last accessed on 25 October 2016).

<sup>29</sup> See the abovementioned Regulation 34(1) of the Regulations of the Office of the Prosecutor and the OTP Policy paper on case selection and prioritisation of 15 September 2016.

<sup>30</sup> In particular, based on the 'effects doctrine', according to which a crime has been committed on the territory of the state where its effects take place, even if the ideation and planning began elsewhere. See K. Ambos, 'The new



enemy of mankind: the jurisdiction of the ICC over members of the "Islamic State", available at <http://www.ejiltalk.org/the-new-enemy-of-mankind-the-jurisdiction-of-the-icc-over-members-of-islamic-state/>.

<sup>31</sup> See the Chautauqua Blueprint for a Statute for a Syrian Extraordinary Tribunal to Prosecute Atrocity Crimes, available at <http://publicinternationallawandpolicygroup.org/wp-content/uploads/2014/01/Chautauqua-Blueprint-2014.pdf>.

<sup>32</sup> As mentioned, this option has also been suggested by the Commission of Inquiry on Syria: see, for example, the statement of 3 August 2016, cited above.

<sup>33</sup> Reference can be made, *inter alia*, to Cassese's 'International Criminal Law', OUP 2012, III edition, p. 146 ff.; to the *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, adopted by the Appeals Chamber of the Special Tribunal for Lebanon on 16 February 2011, and to scholarly works commenting the decision.

<sup>34</sup> See C.M.J. Ryngaert and D.W. Hora Siccama, 'Justice for Sexual Crimes Committed by IS: exploring accountability and compliance mechanism', available at <https://polcms.secure.europarl.europa.eu/cmsdata/upload/1974d418-7924-4af0-be8a-1b37ea06aaa9/sexual-crimes-committed-by-is-ryngaert-13102016.pdf>.

<sup>35</sup> For a more in-depth analysis of this issue, see, for example, M. Lattimer et al., 'A step towards justice: current accountability options for crimes under international law committed in Syria', available at <https://syriaaccountability.org/wp-content/uploads/A-Step-towards-Justice1.pdf>.

<sup>36</sup> Since 2015, Germany has reportedly implemented an effective policy to this end, which has led to around 2 000 cases being referred to prosecution authorities.

<sup>37</sup> More information on recent cases of prosecutions carried out under the principle of universal jurisdiction may be found at <https://www.hrw.org/report/2014/09/16/long-arm-justice/lessons-specialized-war-crimes-units-france-germany-and> and at <https://trialinternational.org/>.

<sup>38</sup> The proceedings of one such case are available at: [http://www.liesbethzegveld.com/user/file/120327\\_-\\_ljin\\_p120321\\_%28vonnis\\_benghazi\\_hiv\\_procedure%29\\_\[nl\].pdf](http://www.liesbethzegveld.com/user/file/120327_-_ljin_p120321_%28vonnis_benghazi_hiv_procedure%29_[nl].pdf). For more details on tort cases based on international crimes, see C.M.J. Ryngaert and D.W. Hora Siccama, cited above.

<sup>39</sup> See UN Security Council Resolution [1267 \(1999\)](#), adopted under Chapter VII of the UN Charter and imposing an air embargo and assets freeze. On UN sanctions against terrorism, see also the EPRS Briefing [Counter-terrorist sanctions regimes - Legal framework and challenges at UN and EU levels](#).

<sup>40</sup> Council Regulation (EU) 2016/1686 of 20 September 2016 imposing additional restrictive measures directed against ISIL (Da'esh) and Al-Qaeda and natural and legal persons, entities or bodies associated with them.

<sup>41</sup> While state immunity has been called into question in recent years, it has been upheld by the International Court of Justice in its 2012 judgment in the *Jurisdictional immunities (Germany vs Italy)* case.

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Manuscript completed in November 2016

© European Union



ISBN: 978-92-846-0393-0 (paper)

ISBN: 978-92-846-0392-3 (pdf)

CATALOGUE: QA-06-16-358-ENC+N

doi:10.2861/245847 (paper)

doi: 10.2861/09548 (pdf)