# Legal advice International Tribunal ISIS

# Prof. André Nollkaemper

# Law Faculty, University of Amsterdam

# 22 July 2019

# Unauthorized translation March 2 2020

## Introduction

On May 7th the following question was submitted to me on behalf of the Minister of Foreign Affairs:   
  
Which conditions would a yet to be established international tribunal have to meet to effectively and legitimately bring ISIS members to justice for international crimes and other crimes, assuming the absence of a UN Security Council mandate and consent of Syria or Iraq for this. What would be the legal limitations of a multilateral tribunal that is established without a UN Security Council mandate or permission from Syria or Iraq?

The conclusion of my advice is that in the absence of a UN Security Council mandate and the consent of Syria or Iraq, the possibilities of a tribunal for effective and legitimate prosecution of ISIS members are extremely limited. These possibilities are essentially determined by the widest possible participation of States that can exercise jurisdiction over ISIS members, as well as by effective cooperation with Iraq or Syria (also if they do not agree with establishing a tribunal) and other relevant actors, in view of access to suspects, witnesses and evidence. In any case, prosecution by an international tribunal can only be a limited part of a broader strategy aimed at the effective and legitimate prosecution of ISIS members. This strategy will also expressly have to include prosecution on the national level.

To answer the question that was submitted to me (hereafter: the question), I will discuss the following aspects:  
- some limitations to the possibility to come to an effective and legitimate prosecution of ISIS members, resulting from the formulation of the question (para. 1);  
- the possible objectives of an international tribunal (para. 2);   
- the way in which an international tribunal can be established (para. 3);   
- the jurisdiction of an international tribunal over members of ISIS (para. 4);   
- the jurisdiction of an international tribunal over international and other crimes (para. 5);   
- the tribunal’s access to suspects, witnesses and evidence (para. 6);   
- other conditions that an international tribunal would have to meet to be able to effectively and legitimately bring suspects to justice (para. 7)

In paragraph 8 I will summarize the legal limitations of a multilateral tribunal that is established without a UN Security Council mandate or permission by Iraq or Syria and will I formulate my conclusion of the advice.

## **Four Limitations**

Before I answer the question, I will discuss four limitations that the choice for an international tribunal as formulated in the question would present.

First, the question as it is formulated only concerns the option of an *international* tribunal, and does not include *national* prosecution of ISIS members. However, the establishment and organization of an international tribunal cannot be considered separate from national prosecution.   
National prosecution could take place in Iraq or Syria (where ISIS members have committed crimes), or in the states from where nationals have travelled to Syria or Iraq to join ISIS (The Netherlands, for example). An international tribunal certainly would not exclude prosecution in these states, if only because an international tribunal will not be able to try all members of ISIS. National prosecution also has legal and practical advantages over international prosecution. In light of the limitations of international prosecution as discussed below (especially the limitations regarding jurisdiction, extradition of suspects and access to evidence), it is recommended to examine the possibilities of national prosecution, where necessary supported by international cooperation and possibly with a complementary role for an international tribunal. However, international law does require that certain safeguards are guaranteed, especially the right to a fair trial, the exclusion of the death penalty, detention in conformity with international standards and the possibility of consular assistance.

A second limitation following from the question concerns the condition that the international tribunal would be established without the consent of Iraq or Syria and without a UN Security Council mandate. An international tribunal in which neither Syria nor Iraq are taking part will have important limitations in terms of effectivity, for example concerning its jurisdiction over individuals who do not have the nationality of participating states, and access to suspects, witnesses and evidence. Experience has shown that tribunals are more successful if they are supported by the current regime (see for example the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL)) or if they are supported by the Security Council (International Criminal Tribunal for the former Yugoslavia (ICTY)). Therefore, it is recommended to aim for international prosecution *with* the consent of Iraq or Syria, where the condition of the abovementioned guarantees self-evidently applies accordingly, and/or agreement in the Security Council.

Thirdly, the question only focuses on the establishment of a new international tribunal, not on the use of an already existing tribunal. This excludes the option of prosecution by the International Criminal Court (ICC). This is a direct result of the presumed absence of consent of Iraq or Syria and the absence of a Security Council mandate. Without the consent of these parties or such a mandate, the ICC cannot exercise jurisdiction over crimes committed in Iraq or Syria by individuals who do not have the nationality of state parties to the ICC.[[1]](#footnote-2) It may be possible that the ICC can prosecute *foreign terrorist fighters* (FTFs) if they have the nationality of states that are parties to the ICC, like the Netherlands, France and the United Kingdom. However, two comments are appropriate here. First, this will only be a realistic option for FTFs who belong to those most responsible within ISIS.[[2]](#footnote-3) Whether this is the case will have to be determined for each individual suspect. Second, inevitably, the requirements of admissibility have to be met, including the principle of complementarity.[[3]](#footnote-4)

The fourth limitation following from the question is that the tribunal would bring ‘members of ISIS’ to justice. I will make three comments on this.   
  
First, the preliminary question is whether it is desirable for an international tribunal to prosecute individuals for membership of ISIS. A clear criterium for membership that could be applied by an international tribunal seems to be missing so far. Individuals who have joined ISIS could possibly have fulfilled a multitude of roles and actions within ISIS, some of which will be better fit for trial by an international tribunal than others. Reports about death sentences in Iraq, solely on the basis of being a member of ISIS, without consideration of the defendant’s’ further actions,[[4]](#footnote-5) show the risk of applying this criterium.

Second, the boundaries between the groups that were involved in the conflict were fluid. Individuals who initially fought with a different group in Iraq or Syria later joined ISIS, or the other way around. It is not evident how an international tribunal will be able to handle these changes and, for example, if it would disregard international crimes when they appear to have been committed before the individual joined ISIS.

Third, the question seems to assume that a tribunal would only prosecute members of ISIS. On a political level, this choice would perhaps be understandable, but it also comes with risks. In general, international tribunals are organized in such a way that they can exercise jurisdiction over all persons who are suspected of crimes in a certain conflict or situation, *independent* of the party to which they belong. That applies for example to the ICC, the ICTY and the SCSL. With the decision to prosecute members of ISIS only, and not members of the groups that were in conflict with ISIS, a tribunal would follow the example of the Nuremberg Tribunal. Aside from the problem of individuals who joined multiple groups, this limitation and the selectivity that comes with it could have adverse effects for the legitimacy of a tribunal.[[5]](#footnote-6)

In light of these three considerations, it is recommended to strive for a mandate that extends to all parties to the conflict when establishing a tribunal. In that way, it would not be necessary to determine for every individual suspect whether they were a member of ISIS at the time they committed a crime. We thus may conclude that the importance of a broad jurisdiction will have to be balanced against the importance of obtaining broad support, since a broad jurisdiction, which includes all parties involved in the conflict, also could imply other states.

It is within these four restrictions as implied by the way the question is formulated, that I will discuss whether and under which conditions an international tribunal could guarantee an effective and legitimate prosecution of members of ISIS.

## **Objectives**

A tribunal’s objectives will determine which conditions the tribunal will have to meet to bring members of ISIS to justice in an effective and legitimate manner. They will, for instance, determine which states should be involved in the tribunal, the choice of the individuals who will be brought to justice and the crimes that should fall within the jurisdiction of the tribunal.

The question does not provide what the objectives of a tribunal should be. From statements made by the Dutch government, as well as from other states involved in the discussion about the prosecution of ISIS members, it seems to me that prosecuting ISIS members could serve a number of different purposes. These include the prevention of impunity of members of ISIS who committed (international) crimes;[[6]](#footnote-7) realizing peace and security in the region;[[7]](#footnote-8) meeting the right to justice of victims of ISIS;[[8]](#footnote-9) and contributing to the process of truth finding.[[9]](#footnote-10) The restoration of the legal system of Iraq and Syria has also been mentioned as an objective.[[10]](#footnote-11) Furthermore, it seems that avoiding the threat posed by returning FTFs could also be an objective.[[11]](#footnote-12)

A number of comments on the objectives will be made here. First, each of the objectives will make specific requirements to the competence and functioning of a tribunal. For instance, the objective of preventing impunity would require prosecuting a broader category of individuals than the objective of prosecuting returning FTFs. Therefore, it is essential that prior to the establishment of a tribunal, it is determined which specific objectives should be realized by the tribunal.

Secondly, not all objectives are equally realistic. Given the assumed absence of consent of Iraq and Syria, the restoration of the legal order of these states will not materialize. Neither the objective of contributing to peace and security in the region seems to be realistic, given the fact that a tribunal will only be able to prosecute a limited number of suspects and given the fact that the causes of the conflict are extremely fundamental and complex.[[12]](#footnote-13) The objective of truth finding will also be hard to realize: given the limitation of only prosecuting members of ISIS and the non-participation by Iraq and Syria, the findings of a tribunal can only contribute to finding parts of ‘the truth’.[[13]](#footnote-14) It is recommended to limit the objectives of a tribunal to objectives which, on the basis of the political context and the experiences with earlier tribunals, can be assumed to be achievable.

My third comment concerns the possible objective to avoid the threat of returning FTFs. My interpretation of this objective is that by establishing an international tribunal, FTFs would be prevented to return to their state of nationality. This would mean that the tribunal would have to be located in the region, and that after a possible conviction, the custodial sentences would have to be exercised outside the state of the nationality of the accused. I consider this objective to be problematic. On the basis of international law, persons have the right to return to their own country.[[14]](#footnote-15) According to the Universal Declaration of Human Rights, everyone has a right to nationality,[[15]](#footnote-16) the right to return to one’s own country is inherently linked to this right. It is incompatible with this right to cooperate with international prosecution that is aimed at preventing individuals from returning to the state of their nationality. In any case, prosecution by an international tribunal will only contribute to this objective temporarily. If prosecution is based on membership of a (terrorist) organization, it should be taken into account that sentences will be relatively low. Hence, it will only be a matter of time before these individuals return to the state of their nationality. Under international law, their return cannot be stopped.

In the end, which objectives a tribunal would have is a political choice. With due consideration of the aforementioned comments, it is recommended to properly formulate which objectives are being pursued, before a process to establish a tribunal shall be set in motion.

For the purpose of this legal advice, I will adopt the most common objective of international tribunals in practice and literature: the prevention of impunity. Naturally, this can also include the impunity of FTFs, but it is not limited to this.

## **Establishment of an international tribunal**

A tribunal for the prosecution of ISIS members will be an *international* tribunal if it is established by international law (a treaty or decision by an international organization) and if its competences are controlled by international law.[[16]](#footnote-17) In the situation as formulated in the question, there is in fact only one way to establish such an international tribunal: through a treaty involving two or more states (other than Syria or Iraq) establishing a tribunal. In such a treaty, it is up to the parties who have jurisdiction over ISIS members, to transfer their jurisdiction to the tribunal. Of the international tribunals established after World War II, such a tribunal would be most similar to the Nuremberg Tribunal.

The lack of support in the Security Council excludes the establishment of a tribunal on the basis of Chapter 7 of the UN Charter. Therefore, a tribunal for the prosecution of ISIS members will not follow the model of the ICTY or ICTR.

If the option of establishing an international tribunal through a multilateral treaty would be chosen, the question arises how many and which states should become party to such a treaty. International law does not set any minimum conditions, other than that a tribunal should be established by two or more states who have jurisdiction over the suspects. The Netherlands and Sweden could, for instance, establish a tribunal for the prosecution of individuals over whom they have jurisdiction.

Given the limitations that follow from the jurisdiction of the states involved (see para. 4), a tribunal with a small number of establishing states will only be able to make a limited contribution to the prevention of impunity of members of ISIS. If the objective of a tribunal would be formulated in terms of contributing to the prevention of impunity of ISIS members, including the most responsible individuals, it shall be necessary that states with jurisdiction over these individuals will also be parties to the establishing treaty of a tribunal.

Apart from this legal condition for an effective international tribunal, the more political dimension of legitimacy will also have to be taken into account. In the conflict, that resulted from the activities of ISIS, a large number of states was involved, i.e. states in the region, states outside of the region that were military involved in the conflict in Syria (like Russia and the United States) and states whose nationals joined ISIS. In this situation, it certainly cannot be assumed that the establishment of a tribunal by a limited number of states that are located outside the region – especially if it concerns suspects who do not have the nationality of these states – will have broad support from other states involved. In such a situation, it certainly cannot be argued that a tribunal brings justice on behalf of the international community – as it is assumed for the ICC. Nor can it be assumed that in such a situation, a tribunal would get cooperation from other involved states, which would be necessary for access to suspects, witnesses or evidence or for financing.

Based on these considerations, it is recommended to seek participation of as many states as possible in the establishment of an international tribunal, including at least some states with jurisdiction over the crimes committed in Iraq or Syria.

Alternatively, the UN General Assembly could establish an international tribunal on the basis of Art. 22 of the UN Charter. The consent of Iraq or Syria, or of the permanent members of the Security Council would not be required in such a case. However, an extremely expansive interpretation of Art. 22 would be needed. The General Assembly cannot transfer any greater power to subsidiary organs than it, itself, possesses.[[17]](#footnote-18) The International Court of Justice decided in its Advisory Opinion “Effect of awards of compensation made by the U.N. Administrative Tribunal” that Art. 22 in itself does not grant competence to establish a tribunal, since the General Assembly does not have any judicial competences.[[18]](#footnote-19) However, the Court decided that the General Assembly in this case did have the competence to establish a tribunal, based on its implicit competences, but this construction cannot be assumed to be applicable to the establishment of an international criminal tribunal.[[19]](#footnote-20) In any case, such a tribunal would not be a solution to the legal and practical limitations concerning, for example, the jurisdiction over non-nationals of establishing states and the access to evidence and witnesses.

Even if the construction as specified above is chosen, i.e. if a tribunal would be established by a relatively limited number of states, it would be recommended for reasons of legitimacy that the establishment be supported by the UN, for instance on the basis of a mandate by the UN General Assembly,[[20]](#footnote-21) or a regional organization like the League of Arab States or the European Union.

Naturally, upon establishment, the location of the tribunal should also be determined. The prosecution of crimes within the state where they have been committed has important benefits and should in principle be preferred.[[21]](#footnote-22) However, assuming that Iraq and Syria do not consent with the establishment, the tribunal will have to be located somewhere outside of these states. Besides, the choice of location is mainly a political choice led by considerations of costs, safety and legitimacy.

Questions regarding the role of non-state actors could come up with respect to the choice of parties establishing the tribunal as well as the tribunal’s location. Recently, the *Syrian Democratic Forces (*SDF) requested support for the establishment of a tribunal in the northeast of Syria, to prosecute the FTFs that they are holding in custody.[[22]](#footnote-23) This initiative would be in line with the preference for prosecution within the region, and would contribute to the solution of the problems concerning custody of suspects and obtaining access to evidence. I will make two comments on this. First, the SDF will not be capable to establish an international tribunal through a treaty. In principle, agreements concluded by *de facto-*regimes with states have no status under international law.[[23]](#footnote-24) This does not mean that the SDF cannot be involved with a treaty that is concluded by two or more states. Second, locating an international tribunal in a (semi-) autonomous parts of Iraq or Syria without their consent would not be legally possible. While the SDF has *de facto* control over Northeast Syria, and although a legal system seems to exist under Kurdish rule,[[24]](#footnote-25) establishing a tribunal in Northeast Syria will be at odds with the principle of non-intervention and Syria’s sovereignty.[[25]](#footnote-26)

## **Jurisdiction over members of ISIS**

An international tribunal will have to be provided with jurisdiction over members of ISIS in its founding treaty. Generally, the principle of territoriality is the most important foundation for assigning such a (personal) jurisdiction. States in whose territory crimes were committed would, on the basis of this principle, transfer their jurisdiction to an international tribunal.   
However, since Iraq and Syria do not accept a tribunal, prosecution on the basis of the principle of territoriality will not be a possible basis for jurisdiction. In this case, the jurisdiction of an international tribunal over individuals will mainly have to be based on the active nationality principle and the universality principle. According to international law, states that exercise jurisdiction on these grounds, are able to transfer jurisdiction to an international tribunal by way of a treaty.[[26]](#footnote-27)

On the basis of the active nationality principle, states can prosecute nationals for crimes committed in Iraq and Syria. States can transfer this jurisdiction to an international tribunal by treaty. Whether a state is actually able to exercise jurisdiction over a certain suspect will depend on national law. In this regard, the requirement of double criminality can be of relevance. In case that the tribunal is established by a limited number of (Western European) states, it can be assumed that this type of jurisdiction will lead to the prosecution of a limited number of suspects. Most probably, this will not concern the most responsible suspects, like it did with, for example, the SCSL and the ECCC.[[27]](#footnote-28)

On the basis of the principle of universality, states can exercise jurisdiction over individuals who committed crimes on the territory of Iraq or Syria, even if they do not have the nationality of the establishing states. This form of jurisdiction can in principle be transferred to an international tribunal. However, the ability of states (and therefore the tribunal) to exercise personal jurisdiction on these grounds is limited.[[28]](#footnote-29) National law of most involved states will provide universal jurisdiction, but in at least a number of states this is limited to individuals located in their territory. In the Netherlands, this applies on the basis of Art. 2(1)(a) Wet Internationale Misdrijven (Law on International Crimes): The Netherlands can exercise jurisdiction, provided that the suspect is located within the Netherlands.[[29]](#footnote-30) Other States with similar types of universal jurisdiction are France, Denmark and Switzerland.[[30]](#footnote-31)

The limited possibility to exercise universal jurisdiction, and to transfer this to an international tribunal, will be an important limitation to the possibility of establishing an international tribunal capable of an effective and legitimate prosecution, aimed at preventing impunity of the members of ISIS. It is this limitation that leads to the conclusion that there is a strong preference for a tribunal with the cooperation of Iraq or Syria, and/or that strong efforts must be made for the support of national prosecution (see para. 1).

## **Jurisdiction over crimes committed by members of ISIS**

Apart from jurisdiction over individuals, an international tribunal should also have jurisdiction over crimes committed by ISIS members. For the purpose of this legal advice, two types of crimes will be discussed here:   
  
First, a tribunal should have jurisdiction over international crimes as recognized by customary international law, especially war crimes, crimes against humanity and genocide.[[31]](#footnote-32) In conformity with the ICTY, ICTR and the ICC this will not raise any legal barriers, and jurisdiction over these international crimes can be provided for in the founding treaty.[[32]](#footnote-33)

However, it has to be assumed that if Iraq and Syria do not cooperate, it will be extremely difficult to collect the evidence that is needed to establish personal liability of a large number of suspects. Indeed, evidence is being collected by, among others, the *United Nations Investigative Team to Promote Accountability for Crimes Committed by Da’esh/ISIL* (UNITAD),  *International, Impartial and Independent Mechanism to assist in the investigation and prosecution of persons responsible for the most serious crimes under International law committed in the Syrian Arab Republic since March 2011* (IIIM) (see para. 6), but it is unsure whether this will be sufficient to serve as the basis of prosecution and conviction. The establishing of a tribunal that exclusively focuses on personal liability on the basis of customary law bears the risk that, while political and financial investments are huge, the outcome will be extremely uncertain. The establishment of a tribunal will have to be preceded by an accurate analysis of the available evidence, knowledge of the organizational structure of ISIS, and the possibilities to collect evidence in the run up to and during a trial. Moreover, a connection to the work of UNITAD and the IIIM will have to be made.

Second, it could be considered to also provide the tribunal with jurisdiction over crimes under national law, especially the crime of membership of a (terrorist) organization. In itself there is reason to do so, since ISIS has been labelled as a terrorist organization by the UN,[[33]](#footnote-34) the EU[[34]](#footnote-35) and a large number of individual countries.[[35]](#footnote-36) It will then not be necessary to prove that individual members of ISIS have committed international crimes, as it would be adequate to prove a suspect’s membership of ISIS, possibly supplemented by further requirements imposed by national law.

It does, however, not seem possible to include membership of a terrorist organization as an international crime under the competences of an international tribunal. While the Nuremberg Tribunal had the authority to declare certain organizations as criminal,[[36]](#footnote-37) it did not have the authority to convict members of these organizations on the basis of their membership. This competence was allocated to the national, military or occupation courts of the signatories to the Nuremberg Charter.[[37]](#footnote-38) During the American trials that followed the Nuremberg trial under ‘Law no. 10 of the Allied Control Council for Germany’ it became clear that tribunals were reluctant to convict suspects on the mere basis of membership of a criminal organization.[[38]](#footnote-39) Moreover, there is no supporting practice by subsequent international tribunals. The Special Tribunal for Lebanon (STL) has concluded – in a somewhat controversial verdict – that terrorism is an international crime according to customary law,[[39]](#footnote-40) but this cannot automatically lead to the conclusion that this is also true for membership of a terrorist organization. The STL does have jurisdiction over “illicit associations” as well,[[40]](#footnote-41) including “criminal association”; but this is a crime under the national law of Lebanon.[[41]](#footnote-42) The Appeal Chamber of the STL decided that there is no comparable crime in international criminal law.[[42]](#footnote-43)

In this situation, it will only be possible to prosecute individuals on the basis of *national* law for membership of ISIS as a terrorist organization. In itself, this is not problematic. The ECCC, SCSL and STL had jurisdiction over crimes under the national law of, respectively, Cambodia, Sierra Leone, and Lebanon as well.[[43]](#footnote-44) The fact that a tribunal would be established by multiple states does create a complication: the principle of legality will force the tribunal to apply, in every individual case, the national law that matches the accused’s nationality. It will depend on national law whether single membership is sufficient for a conviction, or if additional acts to support the objectives of the (criminal) organization would have to be proved, like it is the case under Dutch law.[[44]](#footnote-45)

However, I have three observations. First, the criterium of membership of ISIS, for any legal purpose, requires a sufficiently clear definition of membership, that also allows for a distinction between the different roles that individuals have fulfilled within ISIS. Given the many roles within ISIS and the different grounds based on which individuals have joined ISIS, the use of an undifferentiated ISIS membership criterion appears undesirable for an international tribunal (see para. 1). Secondly, membership of a (terrorist) organization as such, can in no way be put on an equal footing with prosecution for international crimes. If it is the tribunal’s objective to prevent impunity for crimes committed by ISIS, prosecution on the basis of membership appears to be an extremely limited strategy. Finally, it must be assumed that a tribunal will be reluctant to impose long prison sentences for membership; this too will have consequences for realizing a tribunal’s objectives.

## **Access to suspects, witnesses and evidence**

Effective prosecution and conviction of members of ISIS will require good cooperation among states and international organizations. The founding treaty will have to provide for effective cooperation aimed at, for instance, the arrest, and transfer of suspects; the collection of evidence and assisting in investigations; and the enforcement of penalties.[[45]](#footnote-46)

Given the fact that Iraq and Syria will not consent to the establishment of a tribunal, and thus will not become parties to the founding treaty, it will have to be determined whether Iraq and/or Syria will be prepared to cooperate with the establishing states on the aforementioned subjects. If not, it will be extremely limiting to the possibilities of realizing effective and legitimate prosecution of members of ISIS. Therefore, it is recommended to maximize the opportunities for cooperation.

In view of the extradition of suspects and access to evidence and witnesses, collaboration with the SDF could also be an option. In so far as the SDF has members of ISIS in custody and has evidence and/or can facilitate access to witnesses, this could be an important contribution to the effective prosecution of members of ISIS. The absence of Syria’s consent is no obstacle to this as is the case with the establishment and location of an international tribunal.

On the issue of the suspects of crimes, I note that it is strongly preferred that a tribunal limits itself to the prosecution of suspects who are being held in custody and are transferred to a tribunal. Although judgment by default is not excluded by international law, it is problematic for multiple reasons. When the suspect does not attend trial, an effective defense is hindered. Art. 14(3)(d) ICESCR lays down the right of the accused to the minimum guarantee to be tried in his presence, to defend himself or receive legal assistance by a counsel of choice. […] Art. 6 ECHR is also interpreted as containing the accused’s right to be present at his or her trial.[[46]](#footnote-47) Therefore, the statutes of the ICTY, ICTR and SCSL did not provide for judgment by default.[[47]](#footnote-48) It is thus not advisable to provide the tribunal with the competence to do so.[[48]](#footnote-49)

An important source of evidence will be the documentation that is collected by UNITAD and the IIIM. UNITAD assists with the collection, preservation, and storing of evidence of war crimes, crimes against humanity and genocide committed by members of ISIS in Iraq.[[49]](#footnote-50) The IIIM investigates crimes committed in Syria since March 2011, complementary to the *Commission of Inquiry on the Syrian Arab Republic*,[[50]](#footnote-51) to facilitate prosecution in national, regional or international tribunals.[[51]](#footnote-52) The IIIM can share information and evidence with national, regional and international tribunals that (will) have jurisdiction over the crimes, in accordance with international law, that the IIM is investigating.[[52]](#footnote-53) In the end, a tribunal will have to decide whether the documentation that is collected by UNITAD and IIIM is in itself sufficient as a basis for prosecution and conviction of members of ISIS. I note that it seems that the IIIM does not have access to the Syrian territory so far, so it does not have access to direct evidence at the location where the crimes were committed;[[53]](#footnote-54) this could limit the value of evidence obtained by IIIM. Additionally, it cannot simply be assumed that the documentation collected by UNITAD, on the basis of a UN Security Council resolution, can be used for the benefit of a tribunal which is established without UN support and serves the interests of only a part of UN member states.

## **Other conditions for an effective and legitimate prosecution of members of** ISIS

Besides the aforementioned conditions, a number of additional aspects will have to be organized properly in order to achieve an effective and legitimate prosecution of members of ISIS:

* Coordination between an international tribunal and national prosecution has to be provided for. As noted above (see para. 1) the granting of exclusive jurisdiction is not an option. An effective strategy to bring ISIS members to justice requires demarcation and cooperation between national and international prosecution, for example, regarding the exchange of information and evidence.
* Evidently, adequate safeguards for the protection of the rights of suspects in accordance with international law have to be provided for, especially the right to a fair trial, including the possibility of appeal,[[54]](#footnote-55) the exclusion of the death penalty,[[55]](#footnote-56) detention in accordance with international legal standards[[56]](#footnote-57) and consular assistance.[[57]](#footnote-58)
* The prosecution of members of ISIS entails unavoidable safety risks for those involved, especially victims and witnesses. For the effective prosecution of members of ISIS, witness statements will be crucial, for instance, regarding the organizational structure and acts of leaders and commanders. Therefore, one of the conditions for effective proceedings is the guarantee of the safety of these individuals. For other tribunals, the safety of the victims and witnesses formed an important starting point as well.[[58]](#footnote-59) This resulted in a variety of safety- and protection measures. These measures could be a starting point for arrangements by a tribunal for ISIS members.[[59]](#footnote-60)
* The tribunal needs sufficient and regular funding that guarantees effectivity over a sufficiently long period, but also prevents the independence from being compromised.[[60]](#footnote-61)

## **Summary of the legal limitations and conclusion**

## 

Based on the aforementioned considerations, I conclude that an international tribunal, established without consent of Iraq or Syria and without a UN Security Council mandate, will experience serious limitations in the pursuit of an effective and legitimate prosecution of members of ISIS. These restrictions mainly concern the fact that the jurisdiction of the tribunal will not – or only to a limited extent – be able to extend to individuals who do not have the nationality of the States parties to the establishing treaty and that there will be large obstacles to obtaining custody over suspects (except for possible suspects taken into custody by the SDF) and acquiring access to witnesses and other evidence.

Therefore, the conclusion of my advice is that in the absence of a UN Security Council mandate and consent of Iraq or Syria, the possibilities for a tribunal for an effective and legitimate prosecution of members of ISIS are extremely limited.

A tribunal aimed at the prosecution of ISIS members that are nationals of the establishing states, exclusively on the basis of membership of ISIS (supplemented or not with activities supporting the organization, other than international crimes), has an extremely limited scope. Such a tribunal is in principle legally possible, however complicated for various reasons. Moreover, the contribution of such a tribunal to the objective of preventing the impunity of members of ISIS for committing crimes will be very limited.

The possibilities for a wider contribution to the prevention of impunity are mainly determined by the broadest possible participation of states that can exercise jurisdiction over ISIS members, as well as by effective cooperation with Iraq or Syria (even if they do not consent with a tribunal themselves) and other relevant actors in view of access to suspects, witnesses and evidence.

Anyhow, prosecution by an international tribunal only forms a limited part of a broader strategy aimed at effective and legitimate prosecution of ISIS members. The objective of effective and legitimate prosecution of members of ISIS, aimed at the prevention of impunity will be served by prosecution on the national level, supported by international cooperation where necessary. An international tribunal could play a complementary role in this if the conditions as indicated above are met, but in all cases, the tribunal will be more effective and legitimate when cooperation with Iraq and/or Syria can be assured.

André Nollkaemper   
22 July 2019

Translation Louisa Bergsma, edited by Luna Vollebregt and Frederiek de Vlaming

University of Amsterdam/Nuhanovic Foundation

March 2 2019

1. Art. 12-13 Rome Statute of the International Criminal Court. [↑](#footnote-ref-2)
2. ‘Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Alleged Crimes Committed by ISIS’, International Criminal Court 8 April 2015, https://www.icc-cpi.int/Pages/item.aspx?name=otpstat-08-04-2015-1. [↑](#footnote-ref-3)
3. Art. 17 Rome Statute of the International Criminal Court; see M. Lattimer, S. Mojtahedi en L.A. Tucker (eds.), ‘A Step towards Justice: Current Accountability options for crimes under international law committed in Syria’, Ceasefire Centre for Civilian Rights & Syria Justice and Accountability Centre 2015, p. 12. [↑](#footnote-ref-4)
4. See ‘France hands ISIS suspects to Iraq, which sentences them to hang’, New York Times 29 May 2019, https://www.nytimes.com/2019/05/29/world/middleeast/france-iraq-isis-trials.html. [↑](#footnote-ref-5)
5. Open Society Justice Initiative, Options for Justice. A Handbook for Designing Accountability Mechanisms for Grave Crimes (Open Society Foundation, 2018), p. 57: "Personal jurisdiction should not be defined to shield possible perpetrators on any side of the conflict from legal scrutiny. Exercises in one-sided or “victors’” justice further divide riven societies and underscore perceptions that justice systems serve power rather than law. Although the president of Sierra Leone initially requested United Nations assistance in creating a court to try members of the Revolutionary United Front who committed atrocities (implicitly ignoring crimes by members of other fighting factions), the UN appropriately insisted on removal of this specification in the Special Court’s mandate. In the end, the SCSL convicted members of different factions, including those of a pro-government militia.” [↑](#footnote-ref-6)
6. ‘Speech Minister of Foreign Affairs Stef Blok in the Security Council on Protection of Civilians’, Government of the Netherlands 23 May 2019 (Speech Stef Blok), https://www.government.nl/documents/speeches/2019/05/22/statement-of-minister-of-foreign-affairs-stefblok-in-the-security-council-on-protection-of-civilians; ‘Sweden hosted expert meeting on tribunal’, Government Offices of Sweden 3 June 2019, <https://www.government.se/press-releases/2019/06/swedenhosted-expert-meeting-on-tribunal/>. This is in line with the objectives of the International Criminal Court: Rome Statute of the International Criminal Court, Preambule. [↑](#footnote-ref-7)
7. Speech Stef Blok, n 6. The ICTY and ICTR were also established to realize peace and security, UNSC Resolution 827 (25 May 1993), UN Doc. S/Res/827 and UNSC Resolution 955 (8 November 1994), UN Doc. S/RES/955. [↑](#footnote-ref-8)
8. Speech Stef Blok, n 6. [↑](#footnote-ref-9)
9. Parliamentary Papers II 2018/19, 29 754, no. 492, p. 4. [↑](#footnote-ref-10)
10. M. van Helvert, ‘CDA nota over de aanpak van IS-strijders’, CDA April 2019, p. 2, https://d2vry01uvf8h31.cloudfront.net/Organisaties/Bestuurdersvereniging/Bestuursforum/Uitgaven/CDA Nota over aanpak van IS-strijders.pdf. This was also one of the objectives of the SCSL, see A. Smith, ‘Sierra Leone: The Intersection of Law, Policy, and Practice’, in C.P.R. Romano, A. Nollkaemper, and J.K. Kleffner (eds.), Internationalized Criminal Courts (OUP, 2004), p. 125. In general, hybrid tribunals, in addition to the prosecution of international crimes, are also aimed at restoring the justice system, see A. Pellet, ‘Internationalized Courts: Better Than Nothing…’, in C.P.R. Romano, A. Nollkaemper, and J.K. Kleffner (eds.), Internationalized Criminal Courts (OUP, 2004), p. 440. [↑](#footnote-ref-11)
11. Parliamentary Papers II 2018/19, 27 925, no. 651, p. 6. The German Minister of Internal Affairs has indicated that he is in favor of trial by an international tribunal in the region, where preventing the return of FTFs seems to be the main reason for supporting such an initiative, see W. van Wilgenburg, ‘German officials backs Syrian Kurdish call for international ISIS court, Kurdistan24 5 April 2019, <https://www.kurdistan24.net/en/news/6287f546-0d2c-40b4-b46a-9505d9ede6c2>. The Belgian government is in favor of an international tribunal that would focus on the trial of European FTFs, with the apparent aim of preventing the return of Belgian FTFs, see R. Arnoudt, ‘Waar IS-strijders berechten? Premier Michel praat nog met internationale partners’, vrt nws 21 February 2019, https://www.vrt.be/vrtnws/nl/2019/02/21/waar-is-strijders-berechten-michel-praat-nogmet-internationale/; ‘Regering wil internationale berechting voor IS-strijders: “Zullen er alles aan doen om terugkeer te vermijden”, Nieuwsblad 21 February 2019, https://www.nieuwsblad.be/cnt/dmf20190221\_04195915. [↑](#footnote-ref-12)
12. H. van der Wilt, ‘‘No Peace without Justice or No Justice without Peace?’: Some reflections on a Complex Relationship.’, 11(2) Diritti Umani e Diritto Internazionale 2017. [↑](#footnote-ref-13)
13. See on this topic for example L. Douglas, ‘Truth and justice in atrocity trials’, in W.A. Schabas (ed.), The Cambridge Companion to International Criminal Law (CUP, 2016), p. 34-51; M. Findlay & C. Mclean, ‘Emerging International Criminal Justice’, 18(3) Current Issues in Criminal Justice 2007, p. 461-462. [↑](#footnote-ref-14)
14. Art. 3 Protocol No. 4 to the ECHR. [↑](#footnote-ref-15)
15. Art. 15 UDHR. [↑](#footnote-ref-16)
16. See for example R. O’Keefe, International Criminal Law (1st edition OUP, 2015), p. 88. [↑](#footnote-ref-17)
17. See D.E. Khan, ‘Ch. IV The General Assembly, Procedure, Article 22’, in B. Simma et al. (eds.), The Charter of the United Nations: A Commentary, Volume I (3rd edition OUP, 2012), p. 731. [↑](#footnote-ref-18)
18. Effect of awards of compensation made by the U.N. Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1954, p. 47. [↑](#footnote-ref-19)
19. See D.E. Khan, n 17, p. 732: “As a result, art. 22 does not offer a sufficient legal basis, eg to establish an International Court of Criminal Justice as a subsidiary organ.” [↑](#footnote-ref-20)
20. See for example UNGA Resolution 52/135 (12 December 1997), UN Doc. A/Res/52/135; UNGA Resolution 57/228 (18 December 2002), UN Doc. A/res/57/228. [↑](#footnote-ref-21)
21. See for example L. Raub, ‘Positioning Hybrid Tribunals in International Criminal Justice’, 41 NYU Journal of International Law & Politics 2009, p. 1021-1022; D. Cohen, ‘Hybrid Justice in East-Timor, Sierra Leone, and Cambodia: Lessons Learned and Prospects for the Future’, 43 Stanford Journal of International Law 2007, p. 5-6. [↑](#footnote-ref-22)
22. J. Stocker, ‘SDF calls for international tribunal to try ISIS members in Syria’, The Defense Post 25 March 2019, https://thedefensepost.com/2019/03/25/syria-sdf-international-court-isis/; W. van Wilgenburg, ‘SDF Official says international court solution to foreign ISIS problem, Kurdistan24 10 July 2019, https://www.kurdistan24.net/en/news/21bc0a92-185f-413c-bb2a-3bc6ce595dd9. [↑](#footnote-ref-23)
23. A. Nollkaemper, Kern van het internationaal publiekrecht, (8th edition Boom, 2019), p. 50; Prosecutor v. Morris Kallon, Case No. SCSL-2004-15-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, Appeals Chamber, 13 maart 2004, par. 45-48. [↑](#footnote-ref-24)
24. M. Ekman (ed.), ILAC Rule of Law assessment Report Syria 2017 (ILAC, 2017), p. 125. [↑](#footnote-ref-25)
25. The principle of non-intervention prohibits states from intervening in the internal affairs of other states, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), I.C.J. Reports 1986, par. 205. This will also include the exercise of governmental authority through delegation of powers to an international tribunal. [↑](#footnote-ref-26)
26. The Nuremberg Tribunal derived jurisdiction from its founding states: the founding states transferred their territorial jurisdiction in Germany to the Tribunal. The ICC has jurisdiction based on the consent of states, or because states are parties to the Rome Statute, or because they give consent on an ad hoc basis. (Art. 12 Rome Statute of the International Criminal Court). See A. Nollkaemper, n 23, p. 460, 464. [↑](#footnote-ref-27)
27. Art. 1 Statute of the Special Court for Sierra Leone; art. 2 Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed in the Period of Democratic Kampuchea. [↑](#footnote-ref-28)
28. See on universality for example A. Nollkaemper, n 23, p. 246-249. [↑](#footnote-ref-29)
29. Art. 2(1)(a) Law on International Crimes. [↑](#footnote-ref-30)
30. W. Kaleck, ‘From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008, 30 Michigan Journal of International Law 2009, p. 936; 939; 947; Human Rights Watch, ‘Universal Jurisdiction in Europe. The State of The Art’, 2006, p. 28. [↑](#footnote-ref-31)
31. R. O’Keefe, n 16, p. 119-165; E. van Sliedregt, ‘Internationale misdrijven in het Nederlandse Strafrecht en Internationale Strafrechtspraak’, in R. van Elst and E. van Sliedregt (eds.), Handboek International Strafrecht (Wolters Kluwer, 2015), p. 507. [↑](#footnote-ref-32)
32. W. Schabas, ‘International Criminal Courts’, in C.P.R. Romano, K.J. Alter and Y. Shany (eds.), The Oxford Handbook of International Adjudication, (OUP, 2014), p. 216-217. [↑](#footnote-ref-33)
33. UNSC Resolution 2253 (17 December 2015), UN Doc. S/RES/2253. [↑](#footnote-ref-34)
34. Council Decision (CFSP) 2016/1693 of 20 September 2016 concerning restrictive measures against ISIL (Da'esh) and Al-Qaeda and persons, groups, undertakings and entities associated with them and repealing Common Position 2002/402/CFSP. [↑](#footnote-ref-35)
35. For example by the Netherlands, see decision of the Minister of Security and Justice of 2 March 2017, no. 2050307, establishing the list of organizations that pose a threat to national security, Government Gazette 2017, 13 023; and the US, see ‘Foreign Terrorist Organizations’, U.S. Department of State, https://www.state.gov/foreign-terrorist-organizations/. [↑](#footnote-ref-36)
36. Art. 9 Charter of the International Military Tribunal (8 August 1945) (Nuremburg Charter). [↑](#footnote-ref-37)
37. Art. 10 Nuremburg Charter. [↑](#footnote-ref-38)
38. K. Heller, The Nuremberg Military Tribunals and the Origins of International Criminal Law (OUP, 2011), p. 291. [↑](#footnote-ref-39)
39. Prosecutor v. Ayyash et al., Case No. STL-11-01, Appeals Chamber, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011, par. 83-113. For a critical view, see: R. O’Keefe, n 16, p. 160; K. Ambos, ‘Judicial Creativity at the Special Tribunal for Lebanon: Is There a Crime of Terrorism under International Law?’ 24 Leiden Journal of International Law 2011, p. 655-675; B. Saul, ‘Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism’, 24 Leiden Journal of International Law 2011, p. 677-70. [↑](#footnote-ref-40)
40. Art. 2(a) Statute of the STL. [↑](#footnote-ref-41)
41. In particular Art. 335 Criminal Code of Lebanon. [↑](#footnote-ref-42)
42. Case No. STL-17-07/I/AC/R17bis, Appeals Chamber, Interlocutory Decision on the Applicable Law: Criminal Association and Review of the Indictment, 18 October 2017, para. 29. [↑](#footnote-ref-43)
43. Art. 3 Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed in the Period of Democratic Kampuchea; art. 5 Statute of the Special Court for Sierra Leone; art. 2 Statute of the Special Tribunal for Lebanon. [↑](#footnote-ref-44)
44. Art. 140 Dutch Criminal Code; Supreme Court of the Netherlands, 10 February 2015, ECLI:NL:HR:2015:264, par. 4.3. [↑](#footnote-ref-45)
45. G. Sluiter, ‘Cooperation of States with International Criminal Tribunals’, in A. Cassese (ed.), The Oxford Companion to International Criminal Justice (OUP, 2009), p. 187; G. Sluiter, ‘Legal Assistance to Internationalized Criminal Courts and Tribunals’, in C.P.R. Romano, A. Nollkaemper en J.K. Kleffner (eds.), Internationalized Courts and Tribunals (OUP, 2004), p. 380-381. [↑](#footnote-ref-46)
46. ECtHR 12 February1985, no. 9024/80 (Colozza/Italy), par. 27. [↑](#footnote-ref-47)
47. 47 Art. 21(4)(d) Statute of the ICTY; Art. 20(4)(d) Statute of the ICTR; Art. 17(4)(d) Statute of the SCSL. [↑](#footnote-ref-48)
48. 48 Art. 14(3) ICCPR protects the right of a suspect to be tried in his presence, to defend himself or to have the assistance of a counsel of his choice. [↑](#footnote-ref-49)
49. UNSC Resolution 2379 (21 September 2017), UN Doc. S/Res/2379, par. 2. [↑](#footnote-ref-50)
50. Art. 30 Terms of Reference of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 (ToR). [↑](#footnote-ref-51)
51. UNGA Resolution 71/248 (11 January 2017), UN Doc. A/Res/71/248, par. 4. [↑](#footnote-ref-52)
52. Art. 13-14 ToR. [↑](#footnote-ref-53)
53. Report of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 (IIIM Report) (28 February 2018), UN Doc. A/72/764, par. 70-71; IIIM Report (3 August 2018), UN Doc. A/72/764, par. 40; IIIM Report (13 February 2019), UN Doc. A/73/741, par. 13. [↑](#footnote-ref-54)
54. Art. 10 UDHR; Art. 6 ECHR; Art. 14 ICCPR. [↑](#footnote-ref-55)
55. Second Optional Protocol to the ICCPR; Protocol No. 6 to the ECHR; Protocol No. 13 to the ECHR. [↑](#footnote-ref-56)
56. Art. 7 and 10 ICCPR; art. 3 ECHR; European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. [↑](#footnote-ref-57)
57. Art. 36 Vienna Convention on Consular Relations. [↑](#footnote-ref-58)
58. See for example S. Charters, R. Horn and S. Vahidy, ‘Best-Practice Recommendations for the Protection & Support of Witnesses’, Special Court for Sierra Leone, 2008, p. 20. [↑](#footnote-ref-59)
59. For example art. 16 Statute of the Special Court for Sierra Leone and art. 22 Statute of the ICTY and ICTR in conjunction with art. 34 Rules of Procedure and Evidence are about the creation of a “Victims and Witnesses Unit” with the purpose a.o. ‘[to] recommend protective measures for victims and witnesses […].’. [↑](#footnote-ref-60)
60. See for example T. Ingadottir, ‘The Financing of Internationalized Criminal Courts and Tribunals’ in Internationalized Criminal Courts (OUP, 2014), p. 276; E. Naughton, ‘Committing to Justice for Serious Human Rights Violations. Lessons from Hybrid Tribunals’, Research Report, International Center for Transitional Justice (2018), p. 93. [↑](#footnote-ref-61)