

COMMENTS

The Uncertain Future of Foreign Terrorist Fighters in SDF Custody

Merrill Berkowitch*

I.	INTRODUCTION	119
II.	OVERVIEW OF THE SDF AND ITS DETENTION OF FTFs.....	121
III.	ESTABLISHING SUBJECT MATTER JURISDICTION: RELEVANT INTERNATIONAL LAW AND ITS APPLICATION TO ISIS	125
	A. <i>How ISIS Is a Non-State Armed Group Party to a Non- International Armed Conflict</i>	125
	B. <i>International Laws That Apply to ISIS as a Party to a NIAC</i>	128
IV.	PROSECUTION OF FTFs' VIOLATION OF IHL IN THE ICC OR AN AD HOC INTERNATIONAL TRIBUNAL.....	132
	A. <i>Prosecution in the ICC</i>	133
	B. <i>Prosecution Under an Ad Hoc International Criminal Tribunal</i>	136
V.	BROADER CHALLENGES TO INTERNATIONAL PROSECUTION.....	138
	A. <i>The Challenge of Limited Investigatory Resources</i>	138
	B. <i>The ICC's and United Nations' Limited Detention Capability</i>	141
VI.	CONCLUSION.....	143

I. INTRODUCTION

Since the start of the Syrian civil war in 2011, approximately 40,000 individuals have traveled to the Syrian Arab Republic and Iraq to join the

* © 2023 Merrill Berkowitch, 2023 J. D. candidate at Tulane University Law School. She attended Tulane University as an undergraduate and then moved to Washington D.C. where she worked as a paralegal. Merrill was born in New York but lived in London from the age of two to fourteen. When she was fourteen, she moved to California where she attended high school. Her international upbringing has helped foster an interest in international and comparative law. Merrill is passionate about criminal justice reform and prison reform and is interested in pursuing a career in criminal defense upon graduation. She is currently externing at the Innocence Project New Orleans, serves as the Senior Articles Editor of the *Tulane Journal of International and Comparative Law*, and is Senior Writing Fellow.

Islamic State of Iraq and Syria (ISIS).¹ After successfully liberating the last of the Syrian territories considered part of ISIS's caliphate in 2019, the Kurdish-led Syrian Democratic Forces (SDF) became responsible for approximately 2,000 of the foreign terrorist fighters (FTFs) it had captured in the Kurdish autonomous region located in northeastern Syria.² The SDF has created temporary detention sites to hold captured ISIS fighters.³ However, a lack of resources has led to a "sprawling Syrian Guantanamo [with] . . . thousands of men and boys in makeshift prisons all without legal recourse."⁴

The SDF has repeatedly called on countries to repatriate their citizens in SDF custody but many are refusing to do so.⁵ The ongoing conflict in Syria combined with the SDF's limited judicial infrastructure means these FTFs are likely to be detained for an indefinite period of time unless international institutions intervene.⁶ This Comment explores whether the prosecution of FTFs for violations of international humanitarian law (IHL) is a feasible alternative to repatriation. Specifically, this Comment examines how FTFs can be prosecuted for violations of IHL in the International Criminal Court (ICC), or, alternatively, by a United Nations ad hoc international criminal tribunal.

Part II of this Comment provides an overview of the SDF and its detention of thousands of FTFs, as well as the establishment of the Kurdish autonomous region in Syria. Part III assesses the relevant international law and how it applies to ISIS. In doing so, it also establishes how international courts have subject matter jurisdiction over cases brought against FTFs.

Part IV of this Comment then examines the two different avenues available for international prosecution—the International Criminal Court (ICC) and a United Nation's ad hoc international criminal tribunal. It discusses some of the jurisdictional challenges that are likely to arise from prosecution in either of these two forums. For an international court to

1. Fionnuala Ní Aoláin (Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism), *The Death Penalty, Extended Detention, Fair Trial, and Foreign Fighters* 1 (2018); Arsla Jawaid, *From Foreign Fighters to Returnees*, 12 J. PEACEBUILDING & DEV. 102 (2017).

2. Ben Hubbard, *Kurdish-Led Forces End Prison Siege, Defeating ISIS Fighters*, N.Y. TIMES (Jan. 26, 2022), <https://www.nytimes.com/2022/01/26/world/middleeast/syria-isis.html?searchResultPosition=5>.

3. *Id.*

4. *Id.*

5. *Id.*

6. See Dan Stigall, *The Syrian Detention Conundrum: International and Comparative Legal Complexities*, 11 HARV. NAT'L SEC. J. 55, 63-64 (2020).

hear a case it must have personal jurisdiction over the defendants. Although the Syrian Arab Republic is not party to the ICC's founding document,⁷ there are two different forms of personal jurisdiction the ICC can exercise over FTFs: (1) referral by the United Nations Security Council (UNSC) and (2) nationality jurisdiction.⁸ An international tribunal will also require UNSC cooperation, as the UNSC is responsible for establishing a tribunal under the UN Charter.⁹ The need for UNSC involvement in both the ICC and an ad hoc tribunal will likely complicate the international prosecution of FTFs. In the past, permanent members of the UNSC have been wary of international intervention in Syria.¹⁰ Lastly, Part V of this Comment looks at some of the broader challenges to the international prosecution of FTFs, such as the compilation of evidence and the lack of adequate detention space.

II. OVERVIEW OF THE SDF AND ITS DETENTION OF FTFs

The Syrian Democratic Forces is an alliance of non-state actors that formed in 2015 with the support of the United States.¹¹ It is composed “mainly of Kurdish, Arab, Syriac Christian, and Turkmen fighters in Syria.”¹² After the start of the Syrian civil war, Kurds established the Autonomous Administration of North and East Syria (AANES), also known as Rojava.¹³ The Kurds used the conflict in Syria to break away from President Assad's authoritarian regime.¹⁴ The Kurdish population in Syria has long been a target of discrimination and marginalization by “Syrian governments that promoted Arab nationalism.”¹⁵ Although the U.S. government has worked closely with the SDF combatting ISIS, Rojava is not recognized within the international community as an

7. *The State Parties to the Rome Statute*, INT'L CRIM. CT., https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx.

8. *See* Rome Statute of the International Criminal Court, arts. 12(2)(b), 13(b), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

9. *See* U.N. Charter arts. 39, 41.

10. *See* Rep. of the Indep. Int'l Comm'n Inquiry on the Syrian Arab Republic, Hum. Rts. Council, Forty-Sixth Session, ¶ 88, U.N. Doc. A/HRC/46/54 (2021) [hereinafter UN CoI Syria 2021 Report].

11. *See* Stigall, *supra* note 6, at 59.

12. *Id.* *See* Jane Arraf, *Syria's Kurds Wanted Autonomy. They Got an Endless War*, N.Y. TIMES (Feb. 7, 2022), <https://www.nytimes.com/2022/02/07/world/middleeast/syria-kurds.html>.

13. *See* Stigall, *supra* note 6, at 61; Arraf, *supra* note 12.

14. *See* Arraf, *supra* note 12.

15. *Group Denial: Repression of Kurdish Political and Cultural Rights in Syria*, HUM. RTS. WATCH (2009), <https://www.hrw.org/report/2009/11/26/group-denial/repression-kurdish-political-and-cultural-rights-syria>; *see* Arraf, *supra* note 12.

independent sovereign state.¹⁶ However, it is not considered a strictly “rogue territory” either.¹⁷ The AANES has established a local government within its territory and has engaged in cultural diplomatic missions with European countries through art exhibits and representation offices.¹⁸ The United States Commission on International Religious Freedom has recommended the U.S. government “[r]ecognize the AANES as a legitimate, local government.”¹⁹

One source of opposition to international recognition of Rojava is the Turkish government. The Turkish government has a complicated history with the Kurdish people²⁰ and has lobbied to prevent Rojava from gaining any form of official or unofficial international recognition.²¹ Turkey has responded negatively to the opening of Rojava representation offices in European countries, despite assurances from European governments that the representation offices do not hold any official diplomatic status.²² The government’s hostility towards the AANES stems from its strained relationship with the Syrian Kurdish People’s Protection Unit (YPG), which is a core component of the SDF.²³ Turkey views the YPG as an extension of the Kurdistan Workers Party (PKK) — a group the Turkish government has battled since the 1980s, when the PKK first started fighting for Kurdish autonomy in Turkey.²⁴ The Turkish government, along with the U.S. government, has designated the PKK as a terrorist organization, and Turkey views the PKK as one of its top national security threats.²⁵

16. See Hubbard, *supra* note 2.

17. Stigall, *supra* note 6, at 62.

18. See After Belonging *Closing Weekend: Oslo Architecture Triennale*, E-FLUX (Nov. 26, 2016), <https://www.e-flux.com/announcements/78967/oslo-architecture-triennale-2016after-belonging/>; Joey Hood, *Biden’s Envoys Visit North Eastern Syrian to Reassure Mazloum Abdi*, INTEL ONLINE (Sept. 9, 2021), <https://www.google.com/search?client=safari&rls=en&q=Biden%E2%80%99s+Envoys+Visit+North+Eastern+Syrian%2C+Intelligence+Online&ie=UTF-8&oe=UTF-8> (noting that AANES “opened its sixth diplomatic mission, in Geneva, on 9 October,” and has other representation offices in Moscow, Berlin, and Paris).

19. U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, ANNUAL REPORT 44 (2021).

20. See *Turkey v Syria’s Kurds: The Short, Medium and Long Story*, BBC (Oct. 23, 2019), <https://www.bbc.com/news/world-middle-east-49963649>.

21. See *Turkey Said “Uneasy” Over Syrian Kurdish Office in Sweden*, HURRIYET (Apr. 29, 2016), <https://www.hurriyetdailynews.com/turkey-uneasy-over-pyd-office-stockholm-says-no-diplomatic-status-granted-98470>.

22. See *Turkey Said “Uneasy” Over Syrian Kurdish Office in Sweden*, *supra* note 21.

23. See Stigall, *supra* note 6, at 61; *Turkey v Syria’s Kurds: The Short, Medium and Long Story*, *supra* note 20.

24. *Turkey v Syria’s Kurds: The Short, Medium and Long Story*, *supra* note 20.

25. See Stigall, *supra* note 6, at 61; *Turkey v Syria’s Kurds: The Short, Medium and Long Story*, *supra* note 20.

Rojava is primarily governed by local civilian councils²⁶ and has a “nascent judicial architecture.”²⁷ Counterterrorism matters are exclusively dealt with in the Defense and Peoples Courts, but these proceedings lack sufficient procedural rules that ensure fair trials and due process of law.²⁸ Therefore, even if the SDF had the judicial infrastructure necessary to prosecute FTFs, it is unlikely those convictions will be recognized abroad.²⁹ The international community is also unlikely to accept AANES prosecution of FTFs because Rojava is not an internationally recognized state.³⁰

When the U.S.-backed SDF brought an end to ISIS’s caliphate in 2019, the SDF took custody of the 2,000 FTFs that had come from over fifty countries.³¹ Many of the FTFs came from European countries, such as Belgium, France, and the United Kingdom, but nearly half came from nations in the Middle East and Africa, such as Tunisia, Egypt, Saudi Arabia, and Yemen.³² ISIS FTFs are motivated by their religious ideology and served vital roles in the “religious, educational and judiciary ‘systems’ established within” the ISIS caliphate.³³ Most Western FTFs are on average twenty-six years old and come from Muslim immigrant families.³⁴ Moreover, a majority of FTFs were single when they left to join ISIS and roughly fifteen percent were converts to Islam.³⁵ While many Western FTFs come from the “lower socioeconomic ranks of society” this is not consistent across all Western countries that FTFs originate from.³⁶ A research paper published by the International Centre for Counter-Terrorism—The Hague notes that foreign fighters that came

26. See Stigall, *supra* note 6, at 60.

27. *Id.* at 63.

28. See *id.* at 64.

29. Amr Jomaa, *Addressing Jurisdictional Challenges in Prosecuting ISIL Fighters*, 11 BERKELEY J. MIDDLE E. & ISLAMIC L. 18, 32 (2020).

30. See Elian Peltier & Constant Méheut, *Europe’s Dilemma: Take in ISIS Families, or Leave Them in Syria?*, N.Y. TIMES (May 28, 2021), <https://www.nytimes.com/2021/05/28/world/europe/isis-women-children-repatriation.html?action=click&module=RelatedLinks&pgtype=Article>.

31. Charlie Savage, *The Kurds’ Prisons and Detention Camps for ISIS Members, Explained*, N.Y. TIMES (Oct. 13, 2019), <https://www.nytimes.com/2019/10/13/us/politics/isis-prisoners-kurds.html> [hereinafter *The Kurds’ Prisons and Detention Camps*].

32. See Jawaid, *supra* note 1, at 102-03; Savage, *supra* note 31.

33. UN CoI Syria 2021 Report, *supra* note 10, ¶¶ 125, 127.

34. Lorne L. Dawson, *A Comparative Analysis of the Data on Western Foreign Fighters in Syria and Iraq: Who Went and Why?*, INT’L CTR. FOR COUNTER-TERRORISM 2 (2021), <https://icct.nl/app/uploads/2021/02/Dawson-Comparative-Analysis-FINAL-1.pdf>.

35. *Id.*

36. See *id.*

“from North America and to a lesser extent the United Kingdom” did not fit neatly into the “low prospects” model.³⁷

The SDF recognizes that it lacks the judicial infrastructure necessary to adequately prosecute the roughly 2,000 ISIS FTFs it currently has in custody.³⁸ The Kurdish-led group originally intended for its detention sites and makeshift prisons to serve as a short-term solution.³⁹ That is why it has repeatedly asked countries to repatriate their citizens.⁴⁰ However, many of the countries from which FTFs originated are refusing to take them back.⁴¹ Governments fear that incarcerating former ISIS fighters in national prisons will radicalize their domestic prison populations.⁴²

The SDF’s inability to adequately hold and prosecute captured ISIS members has resulted in prolonged pre-trial detentions and will continue to do so.⁴³ If states refuse to repatriate their citizens and international institutions, such as the United Nations and ICC, do not intervene, then FTFs will be detained for indefinite periods of time or will escape SDF custody and rejoin ISIS.⁴⁴ Therefore, it is in the global community’s interest to find a way to promptly remove FTFs from Rojava and prosecute them for any crimes they committed in furtherance of the purpose and objectives of the ISIS caliphate. Moreover, with the recent attack on the SDF-controlled Hasakah prison and a series of strikes against Iraqi military forces, it is clear that ISIS has not disappeared and is working to reorganize.⁴⁵ This means the issue posed by SDF detention of FTFs will persist and may potentially grow as ISIS has proven to possess an international draw.⁴⁶

37. *Id.*

38. *See* Stigall, *supra* note 6, at 64-65.

39. *See* Hubbard, *supra* note 2.

40. *See* Helen Maguire et al., *Syria’s Kurdish Forces Call for UN Tribunal for Foreign ISIS Fighters*, DPA INT’L (Feb. 18, 2019).

41. *See* Stigall, *supra* note 6, at 65; Hubbard, *supra* note 2.

42. *See* Stigall, *supra* note 6, at 65; Charlie Savage, *As ISIS Fighters Fill Prisons in Syria Their Home Nations Look Away*, N.Y. TIMES (July 18, 2018), <https://www.nytimes.com/2018/07/18/world/middleeast/islamic-state-detainees-syria-prisons.html>.

43. *See Thousands of Foreigners Unlawfully Held in NE Syria*, HUMAN RIGHTS WATCH (Mar. 23, 2021), <https://www.hrw.org/news/2021/03/23/thousands-foreigners-unlawfully-held-ne-syria#> (“The foreign detainees have never been brought before a court, making their detention arbitrary as well as indefinite.”).

44. *See* Savage, *supra* note 31; Hubbard, *supra* note 2.

45. *See* Jane Arraf & Sangar Khaleel, *U.S. Allies Retake Control of Prison in Syria, Subduing ISIS Fighters*, N.Y. TIMES (Jan. 30, 2022), <https://www.nytimes.com/2022/01/30/world/middleeast/isis-prison-syria.html?searchResultPosition=1>; Jane Arraf & Ben Hubbard, *As Islamic State Resurges, U.S. Is Drawn Back into the Fray*, N.Y. TIMES (Jan. 25, 2022), <https://www.nytimes.com/2022/01/25/world/middleeast/isis-syria.html?searchResultPosition=1>.

46. *See* Arraf & Hubbard, *supra* note 45.

III. ESTABLISHING SUBJECT MATTER JURISDICTION: RELEVANT INTERNATIONAL LAW AND ITS APPLICATION TO ISIS

A. *How ISIS Is a Non-State Armed Group Party to a Non-International Armed Conflict*

The Syrian civil war meets the legal threshold of a non-international armed conflict (NIAC).⁴⁷ The classification of the civil war as a NIAC is important because it establishes which international humanitarian laws are applicable to parties involved in the fighting.⁴⁸ Although there is no formal definition of a NIAC, a definition has developed within international legal jurisprudence.⁴⁹ The International Criminal Tribunal for the Former Yugoslavia determined a NIAC exists when there is “armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”⁵⁰

When determining whether hostilities fall under NIAC there are two relevant criteria to consider: (1) the intensity of the conflict; and (2) the organization of the conflict.⁵¹ The intensity of the conflict focuses on the battleground conditions and the impact the hostilities have on people and property.⁵² Pertinent questions to ask when assessing intensity are: (1) “How often do individual confrontations occur and how long do they last?;” (2) “What types of weapons and military equipment are being used?;” (3) “How many casualties have there been?;” (4) “What is the extent of material damage?;” and (5) “Is there a large refugee population?”⁵³ The organization of the conflict, on the other hand, looks at the logistical capabilities of the armed groups taking part in the fighting.⁵⁴ Factors that are relevant to organization are: (1) whether the armed group has a command structure and enforces disciplinary rules; (2) whether a headquarters exists; (3) the armed group’s “ability to

47. UN CoI Syria 2021 Report, *supra* note 10, ¶ 4.

48. See Johan de Wittlaan, *Cumulative Prosecution of Foreign Terrorist Fighters for Core International Crimes and Terrorism Related Offenses*, EUROJUST 8 (2020), https://www.eurojust.europa.eu/sites/default/files/Partners/Genocide/2020-05_Report-on-cumulative-prosecution-of-FTFs_EN.PDF.

49. See Jelene Pejic, *The Protective Scope of Common Article 3: More Than Meets the Eye*, 93 INT’L REV. RED CROSS 189, 191-92 (2011).

50. Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgement of the Trial Chamber, ¶ 561 (Int’l Crim. Trib. For the Former Yugoslavia May 7, 1997) (footnote omitted).

51. de Wittlaan, *supra* note 48, at 8; Pejic, *supra* note 49, at 192.

52. See de Wittlaan, *supra* note 48, at 8; Pejic, *supra* note 49, at 192.

53. See Pejic, *supra* note 49, at 192.

54. See de Wittlaan, *supra* note 48, at 8; Pejic, *supra* note 49, at 192.

procure, transport, and distribute arms;” and (4) the “group’s ability to plan, co-ordinate, and carry out military operations, including troop movements and logistics.”⁵⁵

Although the Syrian civil war had already been classified as a NIAC when ISIS emerged in 2014, it is still important to explain why ISIS constitutes a non-state armed group subject to IHL.⁵⁶ The United Nations, the news, and governments primarily refer to ISIS as a terrorist organization.⁵⁷ However, since 2014, ISIS has committed violent attacks as part of a broader policy aimed at establishing and maintaining its caliphate or proto state.⁵⁸

In its attempt to establish a caliphate, ISIS has carried out attacks across Iraq and Syria and used violence and fear to maintain order in territories it captured like Mosul, Raqqa, and Tikrit.⁵⁹ ISIS did not commit violent crimes across Syria and Iraq for the sole purpose of provoking a state of terror in the general public or to compel the Syrian government to do or abstain from some act, which are two prevailing definitions of terrorism within international law.⁶⁰ Rather, ISIS used violence and force to establish and maintain authority over a political-religious proto state or quasi-state.⁶¹ Once ISIS established its caliphate in 2014, it moved beyond the designation of a terrorist group or insurgency, as for years it ruled over a population of some eight million people, controlled a territory larger

55. Pejic, *supra* note 49, at 192.

56. See UN CoI Syria 2021 Report, *supra* note 10, ¶ 4.

57. See de Wittlaan, *supra* note 48, at 7; Rukmini Callimachi, *ISIS Caliphate Crumbles as Last Village in Syria Falls*, N.Y. TIMES (Mar. 23, 2019), <https://www.nytimes.com/2019/03/23/world/middleeast/isis-syria-caliphate.html> (“A four-year military operation to flush the Islamic State from its territory in Iraq and Syria ended on Saturday as the last village held by the terrorist group was retaken . . .”).

58. See Brynjar Lia, *Understanding Jihadi Proto-States*, 9 PERSPS. ON TERRORISM 31 (2015).

59. See Willem Theo Oosterveld & Willem Bloem, *The Rise and Fall of ISIS: From Evitability to Inevitability*, THE HAGUE CTR. FOR STRATEGIC STUD. 7-8 (2017); *ISIS Fast Facts*, CNN EDITORIAL RESEARCH (Mar. 9, 2022), <https://edition.cnn.com/2014/08/08/world/isis-fast-facts/index.html> [hereinafter *ISIS Fast Facts*]; Rep. of the Indep. Int’l Comm’n of Inquiry on the Syrian Arab Republic, Human Rights Council, Twenty-Eighth Session, ¶ 52, U.N. Doc. A/HRC/28/69 (2015) [hereinafter UN CoI Syria 2015 Report].

60. See *Defining Terrorism*, UN OFFICE ON DRUGS AND CRIME, <https://www.unodc.org/e4j/en/terrorism/module-4/key-issues/defining-terrorism.html>.

61. See Oosterveld & Bloem, *supra* note 59, at 9; Will McCants, *How the Islamic State Declared War on the World*, FOREIGN POL’Y (Nov. 16, 2015), <https://foreignpolicy.com/2015/11/16/how-the-islamic-state-declared-war-on-the-world-actual-state/> (“We have only recently grown accustomed to thinking of the Islamic State as an actual state . . .”).

than the United Kingdom, and established “an extensive bureaucracy, infrastructure, police, courts, and many other state attributes.”⁶²

The intensity of ISIS’s attacks and the group’s level of organization speak to why ISIS should be viewed as an armed party to a NIAC and subject to IHL.⁶³ The fighting between ISIS and other armed groups has resulted in a staggering number of casualties and deaths.⁶⁴ ISIS is also responsible for inflicting wide scale property damage through “indiscriminate attacks using mortars and rockets, as well as improvised munitions.”⁶⁵ This includes destroying culturally significant sites such as a holy tomb from the eighth century BC in Iraq and a 500-year-old shrine and tomb in Palmyra, Syria.⁶⁶ Moreover, according to a report by the Independent International Commission of Inquiry on the Syrian Arab Republic (UN CoI Syria) more than 11.5 million people have been displaced by the conflict in Syria, and many of their homes have been damaged or destroyed.⁶⁷

During its peak between 2014-2016, ISIS was considered a “well-organized, dominant armed force in control of extensive territory.”⁶⁸ It set up governing committees in territories it captured to ensure sharia law was enforced,⁶⁹ and in Raqqa, the group’s de facto headquarters, ISIS maintained a “harsh, rigid administrative system,” which included police forces, courts, and agencies responsible for media, recruitment, and education.⁷⁰

As such, ISIS’s actions in Syria and Iraq should not be viewed as acts of terrorism, but rather as part of an organized policy that centered on promoting the continued existence of its caliphate or proto-state.⁷¹ The ISIS caliphate possessed many of the characteristics of a “jihadi proto-state.”⁷² For example, it promoted iconoclasm and framed its mission as an international project that was acting in solidarity “with other jihadi proto-state projects.”⁷³ Moreover, the caliphate acted aggressively

62. Lia, *supra* note 58, at 32.

63. See de Wittlaan, *supra* note 48, at 7, 9-10.

64. *More Than 9,000 Killed in Battle for Mosul*: AP, AL JAZEERA (Dec. 20, 2017), <https://www.aljazeera.com/news/2017/12/20/more-than-9000-killed-in-battle-for-mosul-ap>.

65. See UN CoI Syria 2021 Report, *supra* note 10, ¶ 30; *ISIS Fast Facts*, *supra* note 59.

66. See *ISIS Fast Facts*, *supra* note 59.

67. UN CoI Syria 2021 Report, *supra* note 10, ¶ 43.

68. *Id.* ¶ 33.

69. See de Wittlaan, *supra* note 48, at 9.

70. UN CoI Syria 2021 Report, *supra* note 10, ¶ 36. See de Wittlaan, *supra* note 48, at 9.

71. See Lia, *supra* note 58, at 32 (classifying the ISIS caliphate as a jihadi proto-state).

72. *Id.* at 35-36.

73. *Id.* at 36. See *ISIS Fast Facts*, *supra* note 59.

towards its neighboring states and the international community as a whole.⁷⁴ An ISIS strategy manual explicitly “advocates attacking civilians in enemy lands to deter their governments from interfering in jihadi state-building projects.”⁷⁵ Lastly, ISIS developed an administrative bureaucracy that allowed it to govern its territory and maintain authority, a key component of jihadi proto-states.⁷⁶

B. International Laws That Apply to ISIS as a Party to a NIAC

As an armed non-state party to a NIAC, ISIS is subject to IHL and Common Article 3 of Geneva Convention III.⁷⁷ Common Article 3 governs the treatment of prisoners of war and civilians in “conflicts not of an international character.”⁷⁸ Although Protocol II to the Geneva Conventions also sets out rules for the protection of POWs and civilians in NIACs, it is not applicable to the conflict in Syria because Syria is not party to Protocol II.⁷⁹ The UN CoI Syria has accused multiple armed parties in Syria of perpetrating war crimes and crimes against humanity in violation of IHL.⁸⁰ These are two of the four core international crimes.⁸¹

The Geneva Conventions set forth acts that constitute war crimes under IHL.⁸² Article 50 of Geneva Convention I describes “grave breaches” of the Convention as acts such as “wilful killing, torture or inhumane treatment . . . wilfully causing great suffering or serious injury . . . and extensive destruction or appropriation of property.”⁸³ Geneva Convention I is not applicable to NIACs in a formal sense because it only applies to international armed conflicts.⁸⁴ However, the rules contained in

74. See Lia, *supra* note 58, at 36.

75. McCants, *supra* note 61.

76. See *id.*

77. See de Wittlaan, *supra* note 48, at 8.

78. Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3316 [hereinafter Common Article 3].

79. See de Wittlaan, *supra* note 48, at 8.

80. See UN CoI Syria 2021 Report, *supra* note 10, ¶¶ 34-35.

81. *Core International Crimes*, EUROJUST, <https://www.eurojust.europa.eu/crime-types-and-cases/crime-types/core-international-crimes>.

82. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 50, Aug. 12, 1949, 6 U.S.T. 3114 [hereinafter Geneva Convention I]; Common Article 3, *supra* note 78; Rome Statute, *supra* note 8, art. 8 (incorporating acts listed in the Geneva Conventions into the Rome Statute’s definition of war crimes).

83. Geneva Convention I, *supra* note 82, art. 50.

84. *War Crimes*, UN OFFICE ON GENOCIDE PREVENTION AND THE RESPONSIBILITY TO PROTECT, <https://www.un.org/en/genocideprevention/war-crimes.shtml>.

the treaty have long been considered part of customary international law (CIL) that is binding on all parties to an armed conflict.⁸⁵

The illegality of the depraved conduct outlined in Article 50 is reinforced in Common Article 3, which states that parties to a NIAC must treat “[p]ersons taking no active part in the hostilities” humanely.⁸⁶ The Article sets out four broad categories of actions forbidden under the Convention, specifically: (1) “violence of life and person,” with particular emphasis on “murder of all kinds, mutilation, cruel treatment and torture[;]” (2) the “taking of hostages[;]” (3) “outrages upon personal dignity, in particular humiliating and degrading treatment[;]” and (4) “the passing of sentences and the carrying out of [extrajudicial] executions”⁸⁷ The Rome Statute, which is the founding document of the ICC, incorporates the acts listed in the Geneva Conventions into its definition of war crimes.⁸⁸ The Rome Statute also specifies that the Court has jurisdiction over these crimes, particularly when they are “committed as part of a plan or policy or as part of a large-scale commission of such crimes.”⁸⁹ The applicability of Common Article 3 and CIL to ISIS FTFs is important in establishing the ICC’s and an ad hoc tribunal’s subject matter jurisdiction over cases brought against FTFs under international law.

ISIS committed a slew of war crimes during the years it spent establishing and trying to maintain its caliphate.⁹⁰ As such, FTFs in SDF custody could, and should, be prosecuted for war crimes through international courts. ISIS committed acts of violence, primarily extrajudicial executions and torture, against civilian populations and detainees under its control to ensure complete allegiance to the armed group and strict adherence to sharia law.⁹¹ Often ISIS would stone or execute civilians in public spaces who were accused of violating sharia law or affiliating with other armed groups and would force passersby to watch.⁹² ISIS is also accused of having committed enforced disappearances, “cruel treatment, hostage-taking, rape and sexual violence, forced pregnancy,

85. *See id.*

86. Common Article 3, *supra* note 78.

87. *Id.*

88. *See* Rome Statute, *supra* note 8, art. 8.

89. *Id.*

90. *See* UN CoI Syria 2021 Report, *supra* note 10, ¶¶ 34-35; UN CoI Syria 2015 Report, *supra* note 59, ¶¶ 52, 75, 82; de Wittlaan, *supra* note 48, at 12-13.

91. *See* Rep. of the Indep. Int’l Comm’n of Inquiry on the Syrian Arab Republic, Human Rights Council, Twenty-Seventh Session, ¶¶ 40-38, 65-68, U.N. Doc. A/HRC/27/60 (2014) [hereinafter UN CoI Syria 2014 Report].

92. *Id.* ¶ 30.

the use and recruitment of children in hostilities and attacking protected objects . . . as well as other serious violations of IHL.”⁹³

Furthermore, in regard to the Rome Statute’s definition of war crimes, there is compelling evidence that ISIS committed these atrocities “as part of a plan or policy.”⁹⁴ The UN CoI Syria noted in a 2015 report that ISIS “organize[d] these acts of violence against civilians, evincing an organizational policy.”⁹⁵ ISIS implemented this policy as a way to ensure submission to its authority and the continued existence of its caliphate.⁹⁶

Unlike genocide and war crimes, crimes against humanity are not codified in their own specific treaty.⁹⁷ However, Article 7 of the Rome Statute sets forth which acts constitute crimes against humanity and “reflects the latest consensus among the international community on this matter.”⁹⁸ Many of the acts listed in Article 7 are also considered war crimes.⁹⁹ The key difference between war crimes and crimes against humanity is that the latter are “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”¹⁰⁰

“[K]nowledge of the attack”¹⁰¹ in this context means knowledge the act was perpetrated in furtherance of a broader policy or systematic attack against the civilian population.¹⁰² It does not mean that the individual perpetrator, here an FTF, had knowledge of all of the specifics of ISIS’s policy.¹⁰³ According to the Appeal Chamber of the International Criminal Tribunal for Former Yugoslavia, to determine whether an attack is “widespread” one must look to the “large-scale nature of the attack and the number of targeted persons.”¹⁰⁴ “Systematic” on the other hand refers to “the organised nature of the acts . . . and the improbability of their random occurrence.”¹⁰⁵

93. de Wittlaan, *supra* note 48, at 12-13.

94. Rome Statute, *supra* note 8, art. 7.

95. UN CoI Syria 2015 Report, *supra* note 59, ¶ 52.

96. *See id.*; de Wittlaan, *supra* note 48, at 14.

97. *Crimes Against Humanity*, UN OFFICE ON GENOCIDE PREVENTION AND THE RESPONSIBILITY TO PROTECT, <https://www.un.org/en/genocideprevention/crimes-against-humanity.shtml>.

98. *Id.*

99. *See* Rome Statute, *supra* note 8, art. 7.

100. *Id.*

101. *Id.*

102. *See* INT’L CRIM. CT., ELEMENTS OF CRIMES 3 (2013).

103. *See id.*

104. Prosecutor v. Kordic, Case No. IT-95-14/2-A, Judgment of the Appeals Chamber, ¶ 666 (Int’l Crim. Trib. For the Former Yugoslavia Dec. 17, 2004) (footnote omitted).

105. *Id.*

Members of ISIS are guilty of having committed massacres and unlawful killings in many of the territories under its control, such as Ar Raqqa, Dayr az Zawr, Al Hasakah, and Aleppo governorates.¹⁰⁶ ISIS has also routinely committed enforced disappearances, mutilation and torture of civilians, and rape, which are also listed under Article 7 of the Rome Statute.¹⁰⁷ Like with its commission of war crimes, ISIS's actions satisfy the "widespread or systematic" element of crimes against humanity because individual acts of violence were committed as part of a broader organizational policy.¹⁰⁸

The ICC and an international tribunal also have subject matter jurisdiction over the crime of genocide¹⁰⁹ and can prosecute FTFs for genocidal acts if there is evidence linking individual FTFs to the killing or persecution of Yazidis.¹¹⁰ The UN CoI Syria stated in a 2016 report that ISIS has committed the crime of genocide against the Yazidis through killings, sexual slavery, torture, the inflictions of life that bring about a slow death, and other means.¹¹¹ The Commission found that "ISIS commit[ted] the crime of genocide against individual Yazidis, as an incremental step in their overall objective of destroying this religious community."¹¹² Thus, acts of individual violence committed against the Yazidis satisfies the special intent requirement of genocide.¹¹³ It is possible that the SDF has jurisdiction over FTFs who committed acts of genocide against the Yazidi community located in the Al-Hasakah governorate, an area under Rojava's control.¹¹⁴

106. See UN CoI Syria 2015 Report, *supra* note 59, ¶ 91.

107. See de Wittlaan, *supra* note 48, at 13, 14; Rome Statute, *supra* note 8, art. 7.

108. See UN CoI Syria 2015 Report, *supra* note 59, ¶ 52.

109. See Rome Statute, *supra* note 8, art. 6; U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, ¶ 45, U.N. Doc. S/25704 (May 3, 1993) [hereinafter *Report of the Secretary-General*].

110. Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic, "They Came to Destroy": ISIS Crimes Against the Yazidis, Human Rights Council, Thirty-Second Session, ¶ 201, U.N. Doc. A/HRC/32/CRP.2 (2016).

111. *Id.* ¶¶ 201-202.

112. *Id.* ¶¶ 204.

113. See *id.* ¶10.

114. See UN CoI Syria 2014 Report, *supra* note 90, at Annex IV ¶¶ 55-56; Arraf & Khaleel, *supra* note 45; *Overview: Areas of Control*, EUROPEAN UNION AGENCY FOR ASYLUM (last updated Sept. 2020), <https://euaa.europa.eu/country-guidance-syria/overview-areas-control>.

IV. PROSECUTION OF FTFs' VIOLATION OF IHL IN THE ICC OR AN AD HOC INTERNATIONAL TRIBUNAL

The international community can prosecute members of ISIS for these violations of IHL in two different forums. The first is the ICC and the second is an ad hoc international criminal tribunal that operates under the authority of the United Nations.¹¹⁵ The continued fighting in Syria, the constant threat of a Turkish attack on the SDF (an adversary of the Turkish government), and the SDF's inability to adequately hold and prosecute captured FTFs poses a security challenge to the international community as a whole.¹¹⁶ Furthermore, international prosecution is preferable to leaving prosecution of FTFs to the Syrian government. If the SDF were to transfer custody of FTFs over to the Syrian government, any judicial proceedings conducted would be a sham and undermine the legitimacy of international law.¹¹⁷

While there are many benefits to prosecuting FTFs in international institutions, there are also significant challenges. The Syrian Arab Republic is not a signatory to the Rome Statute, which limits the ways the ICC can exercise its jurisdiction.¹¹⁸ For prosecution to occur in either forum, UNSC action is necessary.¹¹⁹ Yet Russia and China—two permanent members of the UNSC—have previously opposed UN interference in Syria.¹²⁰ Additionally, there is likely to be push back from Turkey, which does not wish to see the AANES receive any form of international recognition, whether it be in an official or unofficial capacity.¹²¹ However, Turkey is not a permanent member of the UNSC, so it will be unable to veto a UNSC referral to the ICC or the creation of an international tribunal.

115. See Rome Statute, *supra* note 8, arts. 7, 8(c); UN Charter arts. 39, 41; UN CoI Syria 2015 Report, *supra* note 59, ¶ 96.

116. See Suleiman al-Khalidi, *Syrian Rebels Mobilise for Possible Turkish Attack on Kurdish Fighters*, REUTERS (Nov. 24, 2021), <https://www.reuters.com/world/syrian-rebels-mobilise-possible-turkish-attack-kurdish-fighters-2021-11-04/>; Stigall, *supra* note 6, at 64-65.

117. See Jomaa, *supra* note 29, at 31-32.

118. See Rome Statute, *supra* note 8, art. 13; *The State Parties to the Rome Statute*, *supra* note 7.

119. See Rome Statute, *supra* note 8, art. 13; UN Charter arts. 39, 41.

120. See UN CoI Syria 2021 Report, *supra* note 10, ¶ 81.

121. See Jomaa, *supra* note 29, at 45; *Turkey Said "Uneasy" Over Syrian Kurdish Office in Sweden*, *supra* note 21.

A. Prosecution in the ICC

Although the ICC has traditionally focused on prosecuting those most responsible for violations of IHL, the Office of the Prosecutor announced in 2019 its openness to bringing cases against “notorious or mid-level perpetrators.”¹²² The ICC can exercise its jurisdiction over FTFs in SDF custody through two different means.¹²³ The first is by a UNSC referral and the second is based on the nationality of the FTF.¹²⁴

Article 13(b) of the Rome Statute allows the ICC to investigate and prosecute core crimes when the UNSC refers a “situation” to the Prosecutor.¹²⁵ For this to occur all five permanent members of the Security Council must agree to the referral.¹²⁶ The UN CoI Syria and UN member states have repeatedly called on the UNSC to refer the situation in Syria to the ICC, but this has not yet happened.¹²⁷ In February 2014, the UNSC crafted a draft resolution to refer the situation in Syria to the ICC, but China and Russia vetoed the measure.¹²⁸ Russia shares an alliance with the Assad government, so any action that applies to Syria as a whole will be unsuccessful.¹²⁹

One way to reduce Russian opposition to ICC referral is by narrowly defining the “situation” the UNSC refers to the ICC.¹³⁰ The UNSC could limit the referral to ISIS’s actions,¹³¹ or it could frame the situation even more narrowly by limiting the referral to the actions of FTFs in SDF custody. Russia has shown support for the SDF and AANES and has proposed the Syrian Constitution recognize the autonomous region of

122. OFFICE OF THE PROSECUTOR, INT’L CRIM. CT., STRATEGIC PLAN 2019-2021, at 20 (2019) [hereinafter ICC, STRATEGIC PLAN].

123. See Rome Statute, *supra* note 8, arts. 12(b), 13(b); Coman Kenny, *Prosecuting Crimes of International Concern: Islamic State at the ICC*, 33 UTRECHT J. INT’L & EUR. L. 120, 122, 125 (2017).

124. See Rome Statute, *supra* note 8, at arts. 12(b), 13(b); Kenny, *supra* note 123.

125. Rome Statute, *supra* note 8, at art. 13(b).

126. See *Russia and China Block Security Council Referral of Syria to International Criminal Court*, UN NEWS (May 22, 2014), <https://news.un.org/en/story/2014/05/468962-russia-china-block-security-council-referral-syria-international-criminal-court> [hereinafter UN NEWS].

127. See UN CoI Syria 2015 Report, *supra* note 59, ¶ 96; UN CoI Syria 2021 Report, *supra* note 10, ¶ 79.

128. See UN CoI Syria 2021 Report, *supra* note 10, ¶ 81; UN NEWS, *supra* note 124.

129. See Mona Yacobian, *Understanding Russia’s Endgame in Syria: A View from the United States*, U.S. INST. PEACE 7 (2021), [https://dam.gcsp.ch/files/doc/understanding-russias-endgame?_gl=1*lejvic*_ga*MjEyMDYyMzk2OC4xNjQ5MjcwODc5*_ga_Z66DSTVXTJ*MTY00TI3MDg3OC4xLjAuMTY00TI3MDg3OC4w](https://dam.gcsp.ch/files/doc/understanding-russias-endgame?_gl=1*lejvic*_ga*MjEyMDYyMzk2OC4xNjQ5MjcwODc5*_ga_Z66DSTVXTJ*M TY00TI3MDg3OC4xLjAuMTY00TI3MDg3OC4w) (noting Russia’s primary objective in intervening in Syria in 2015 was to rescue the Assad regime and “bolster[] its grip on power”).

130. See Kenny, *supra* note 123, at 123.

131. See *id.*

Rojava.¹³² Therefore, limiting the situation to the prosecution of FTFs in SDF custody increases the likelihood of a successful referral.

The Rome Statute does not define what constitutes a “situation.”¹³³ The one requirement Article 13(b) sets forth is that the situation involves “one or more” of the core international crimes listed in Article 5 of the treaty.¹³⁴ There is debate within academic and legal communities about whether limiting a UNSC referral to specific actors is permissible.¹³⁵ In *Prosecuting Crimes of International Concern: Islamic State at the ICC*, Coman Kenny notes how individuals that oppose limiting the referral to certain actors often point to Uganda’s self-referral.¹³⁶ In its referral, the Ugandan government sought to limit ICC jurisdiction to the actions of the Lord’s Resistance Army.¹³⁷ However, when accepting the referral, the acting Prosecutor stated its office would be “analyzing crimes within the situation of northern Uganda by whomever committed.”¹³⁸ Still, there are other instances when the UNSC has limited its referrals to exclude certain persons from the ICC’s jurisdiction.¹³⁹ For example, in the UNSC’s referral to the ICC on the situation in Darfur, the Council decided that “nationals . . . from a contributing State outside the Sudan which was not a party to the Rome Statute would be subject to the exclusive jurisdiction of that contributing State.”¹⁴⁰ The Office of the Prosecutor has recently stated there are “numerous benefits” to pursuing “narrower cases,” such as facilitating the “development of procedural and substantive jurisprudence,” and providing “deeper and broader accountability” that will increase the “prospect of conviction in potential subsequent cases against higher-level accused.”¹⁴¹

The Office of the Prosecutor has incentive to follow a UNSC referral that is narrowly tailored to the commission of crimes by FTFs in SDF custody. ISIS has perpetrated atrocities in Syria since 2014 and has largely

132. See Jonas Parello-Plesner, *Rojava: Russia’s Next Frozen Conflict?*, HUDSON INST. (Jan. 4, 2018), <https://www.hudson.org/research/14095-rojava-russia-s-next-frozen-conflict>.

133. See Kenny, *supra* note 123, at 123.

134. Rome Statute, *supra* note 8, art. 13(b).

135. See Kenny, *supra* note 123, at 123.

136. *Id.*

137. Letter from Luis Moreno Ocampo, Prosecutor of the Int’l Crim. Ct. to Judge Philippe Kirsch, President of the Int’l Crim. Ct. on the Decision Assigning the Situation in the Democratic Republic of Congo to Pre-Trial Chamber I, Doc. ICC-01/04 (June 17, 2004).

138. *Id.*

139. See Kenny, *supra* note 123, at 123.

140. S.C. Res. 1593, ¶ 6 (Mar. 31, 2005).

141. ICC, STRATEGIC PLAN, *supra* note 122.

gone unpunished.¹⁴² It is in the ICC's interest to ensure these crimes are prosecuted and some form of justice is achieved. If the ICC fails to accept a tailored referral, then FTFs will likely face prolonged pre-trial detention in violation of international law.¹⁴³ Countries are reluctant to repatriate their citizens and the international community has yet to propose an alternate plan.¹⁴⁴ The ICC's failure to act in the face of such brazen human rights violations will undermine the institution's legitimacy, which many already consider compromised.¹⁴⁵

Article 12(b) of the Rome Statute offers an alternative basis of jurisdiction. It allows the ICC to exercise jurisdiction when the accused is a national of a State party to the Rome Statute.¹⁴⁶ The primary drawback to this form of jurisdiction is that the ICC will be unable to prosecute many FTFs in SDF custody. Almost half of the FTFs in SDF prisons are from countries not party to the Rome Statute such as Egypt, Saudi Arabia, and Yemen.¹⁴⁷ However, the ICC can exercise jurisdiction over the hundreds of FTFs who came to Syria from Europe and are nationals of countries like France, the United Kingdom, and Germany who are parties to the Rome Statute.¹⁴⁸ One possible benefit of this approach is that it limits the pool of potential cases the ICC Prosecutor can try, which means more resources can be devoted to each case. Given the ICC's limited resources,¹⁴⁹ the less individuals it has to try, the more likely it will be to take on cases against ISIS FTFs and begin investigating crimes committed by these individuals in Syria.

142. See UN CoI Syria 2021 Report, *supra* note 10, ¶ 99.

143. See *Thousands of Foreigners Unlawfully Held in NE Syria*, *supra* note 43; International Covenant on Civil and Political Rights art. 9, Dec. 16, 1966, 999 U.N.T.S. 171.

144. See Maguire et al., *supra* note 40.

145. Setyo Widagdo et al., *Repatriation as a Human Rights Approach to State Options in Dealing with Returning ISIS Foreign Terrorist Fighters*, 11 SAGE OPEN 1, 5 (2021); Marieke de Hoon, *The Future of the International Criminal Court on Critique, Legalism and Strengthening the ICC's Legitimacy*, 17 INT'L CRIM. L. REV. 591, 591 (2017).

146. Rome Statute, *supra* note 8, at art. 12.

147. See Anne Speckhard & Ardian Shajkovci, *Who Are the ISIS Fighters in Custody, and How Can They Be Repatriated?*, HOMELAND SEC. TODAY (Oct. 7, 2019), https://www.hstoday.us/subject-matter-areas/counterterrorism/who-are-the-isis-fighters-in-custody-and-how-can-they-be-repatriated/#_edn9; *The State Parties to the Rome Statute*, *supra* note 7.

148. See Speckhard & Shajkovci, *supra* note 147; *The State Parties to the Rome Statute*, *supra* note 7.

149. See de Hoon, *supra* note 145, at 599.

B. Prosecution Under an Ad Hoc International Criminal Tribunal

Since 2019, the SDF has called on the United Nations to establish an international criminal tribunal to prosecute FTFs in northern Syria.¹⁵⁰ Chapter VII of the UN Charter gives the UNSC the authority to establish such a tribunal upon a determination of “a threat to peace, breach of peace, or act of aggression.”¹⁵¹ Tribunals are particularly well suited for SDF detention of FTFs as in the past they were “intended to deal with a specific and limited crisis.”¹⁵²

Like with a UNSC referral to the ICC, Russia is likely to obstruct any effort to create an international tribunal tasked with prosecuting violations of IHL in Syria.¹⁵³ However, the UNSC plays a much greater role in the prosecution of individuals in a tribunal than it does through the ICC.¹⁵⁴ The UNSC is responsible for establishing the parameters of a tribunal, including its subject-matter jurisdiction, personal jurisdiction, territorial jurisdiction, and temporal jurisdiction.¹⁵⁵ Additionally, the UNSC has approval over the court’s overall organization and its location.¹⁵⁶ The UNSC’s extensive control over the tribunal should allow it to come up with a proposal that satisfies all parties involved in the process to some extent.

Members of the Security Council can discuss among themselves how much authority to grant an international tribunal when prosecuting FTFs.¹⁵⁷ The UNSC can draft the tribunal’s founding document narrowly so it only pertains to violations of IHL by former ISIS FTFs currently detained in SDF facilities.¹⁵⁸ To achieve this, the UNSC should limit the tribunal’s personal jurisdiction to FTFs in SDF custody. It should also limit the tribunal’s temporal jurisdiction to crimes committed by FTFs between April 2013, when ISIS absorbed the Syrian based terrorist group known as Jabhat al-Nusra, and March 2019 when the SDF reclaimed the last of ISIS’s territory.¹⁵⁹ Alternatively, the UNSC could limit the tribunal’s temporal jurisdiction to core crimes that occurred between 2014

150. See Maguire et al., *supra* note 40.

151. U.N. Charter arts. 39, 41.

152. U.N. S.C. 48th Sess., 3217d mtg. at 7, U.N. Doc. S/PV 3217 (May 25, 1993). See Widagdo et al., *supra* note 145, at 5 (“Tribunals created in the past, such as ICTY and ICTR, focused on only a limited number of perpetrators.”).

153. See UN CoI Syria 2021 Report, *supra* note 10, ¶ 81.

154. See *Report of the Secretary-General*, *supra* note 109, ¶¶ 31-89, 93-134.

155. See *id.* ¶¶ 9-16.

156. See *id.* ¶¶ 69-72, 133.

157. See *id.* ¶¶ 31-89, 93-134.

158. See *Report of the Secretary-General*, *supra* note 109, ¶¶ 31-89, 93-134.

159. See *ISIS Fast Facts*, *supra* note 59.

and 2019, as it was not until 2014 that ISIS began receiving an influx of FTFs in both Iraq and Syria.¹⁶⁰

The situation in Rojava regarding SDF custody of FTFs is well suited for an international tribunal. The SDF has made it clear that it lacks the resources to prosecute the FTFs in its custody and has repeatedly called on the international community for help.¹⁶¹ The UN CoI Syria and some European nations have also suggested the UNSC should establish a tribunal.¹⁶² While the Syrian government is likely to oppose the creation of an international tribunal within its borders, it is currently confronting multiple challenges that could persuade the Assad regime to consent to UN intervention.¹⁶³ If an international tribunal is not established and countries continue to refuse to repatriate their citizens, then it could fall to the Syrian government to prosecute the FTFs detained in SDF facilities.¹⁶⁴

One of the Syrian's government current challenges is ISIS's continued presence within Syria.¹⁶⁵ ISIS's attack on Hasakah prison in January 2022 illustrates how the group is still strong and has not given up on re-establishing its caliphate.¹⁶⁶ The ISIS threat means fighting will likely continue in Syria for the foreseeable future. Second, throughout the eleven-year civil war Syria has sustained significant amounts of infrastructural damage that will be costly to rebuild.¹⁶⁷ The Syrian government could welcome an international tribunal so it does not have to bear the cost of prosecuting the FTFs in addition to the cost of reconstruction. Third, the dire state of Syria's economy has created domestic discontent that requires immediate attention.¹⁶⁸ The civil war has cost Syria hundreds of billions of dollars and reduced its economy to a third of its size.¹⁶⁹ More than eighty percent of Syrians live in poverty and the Syrian currency has collapsed.¹⁷⁰ The economic problems plaguing

160. See Widagdo et al., *supra* note 145, at 1-2; UN CoI Syria 2014 Report, *supra* note 90, ¶ 17.

161. See Maguire et al., *supra* note 40.

162. See UN CoI Syria 2021 Report, *supra* note 10, ¶ 139; Helen Warrell, *Sweden Proposes International Tribunal to Try ISIS Fighters*, FIN. TIMES (May 19, 2019), <https://www.ft.com/content/9086250e-7802-11e9-bbad-7c18c0ea0201>.

163. See Ben Hubbard, *Syria's Economy Collapses Even as Civil War Winds to a Close*, N.Y. TIMES (June 15, 2021), <https://www.nytimes.com/2020/06/15/world/middleeast/syria-economy-assad-makhlouf.html> [hereinafter *Syria's Economy Collapses*].

164. See Hubbard, *supra* note 2.

165. See *id.*

166. See *id.*

167. See UN CoI Syria 2021 Report, *supra* note 10, ¶ 43.

168. See *id.* ¶ 41; *Syria's Economy Collapses*, *supra* note 163.

169. *Syria's Economy Collapses*, *supra* note 163.

170. *Id.*

the state has led to tension within the ruling elite.¹⁷¹ Syria's collapsed economy could weaken the Assad regime's opposition to an international tribunal, as international intervention could allow the government to turn its resources and attention to the serious domestic issues it is facing.

V. BROADER CHALLENGES TO INTERNATIONAL PROSECUTION

Aside from UNSC cooperation, two of the largest obstacles to international prosecution via the ICC and an ad hoc international tribunal are: (1) compiling sufficient evidence to prosecute FTFs for specific violations of IHL; and (2) determining where to detain FTFs pre-trial as well as post-conviction. International courts' investigative resources are often limited, and it can be difficult to amass evidence that ties individual FTFs to specific war crimes and crimes against humanity.¹⁷² Furthermore, both the ICC and the United Nations lack a detention facility that is large enough to hold the 2,000 FTFs currently in SDF detention while awaiting trial.¹⁷³ The ICC also does not have a long-term detention facility where convicted individuals can carry out their sentences.¹⁷⁴ Rather, it reaches an enforcement agreement with a state party to the situation or Rome Statute that agrees to take custody of the convicted individual.¹⁷⁵ The ICC could have a difficult time reaching enforcement agreements with European countries who have been unwilling to repatriate their citizens in SDF custody out of fear that they will radicalize domestic prison populations.¹⁷⁶ Moreover, although the United Nations does have a long-term detention facility in the Netherlands, it only has the capacity to hold approximately fifty people.¹⁷⁷

A. *The Challenge of Limited Investigatory Resources*

It will be difficult for the ICC Office of the Prosecutor and the prosecutor for an international tribunal to gather evidence of crimes

171. *Id.*

172. See de Hoon, *supra* note 145, at 599; ICC, STRATEGIC PLAN, *supra* note 122, at 30; Stuart Ford, *What Investigative Resources Does the International Criminal Court Need to Succeed?: A Gravity-Based Approach*, 16 WASH. U. GLOB. STUD. L. REV. 1 (2017).

173. See *Detention*, U.N. INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, <https://www.icty.org/en/about/detention> [hereinafter *ICTY Detention*]; *ICC Detention Center*, INT'L CRIM. CT., <https://www.icc-cpi.int/iccdocs/PIDS/publications/DetentionCentreEng.pdf>.

174. See *ICC Detention Center*, *supra* note 173 (noting how the ICC Detention Center "is not a facility made for the purposes of managing a regime of convicted prisoners").

175. See *id.*

176. See Stigall, *supra* note 6, at 65.

177. *ICTY Detention*, *supra* note 173.

committed by FTFs. International courts often have deficient investigative resources and capabilities, which stymie prosecutors' attempts to obtain successful convictions.¹⁷⁸ The investigative challenges international prosecutors face are often a result of their limited budgets and the inherent difficulty of investigating violations of IHL.¹⁷⁹ The preservation of evidence is particularly difficult for international crimes, which are generally not investigated until "quite some time after the crimes have occurred."¹⁸⁰ Therefore, it is likely it will be challenging for prosecutors to obtain a large quantity of evidence that links individual FTFs to the commission of specific war crimes and crimes against humanity.¹⁸¹ For example, witness statements are a key aspect of the investigatory process.¹⁸² However, the Syrian civil war has led to the displacement of millions of Syrian refugees,¹⁸³ which will make it extremely difficult to track down witnesses to the commission of crimes by FTFs. Furthermore, some of these crimes may have occurred more than eight years ago.¹⁸⁴ Thus, even if investigators are able to track down relevant witnesses, their memories may be so faded that their statements are no longer reliable enough to serve as admissible evidence. Additionally, continued fighting in the Syrian Arab Republic means it is unlikely investigators can go and conduct the "boots on the ground" type fieldwork that is often required of criminal prosecutions.¹⁸⁵

There are a few resources available to international prosecutors that could support them in their investigative efforts, such as the UN International, Impartial and Independent Mechanism (IIIM). The UN General Assembly established IIIM in 2016 "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

178. See Ford, *supra* note 172, at 4 ("[T]his lack of resources has contributed to the ICC's relative lack of success so far. The ICC's investigations have been too 'thin' and several prosecutions have collapsed or been compromised as a result.") (footnote omitted).

179. See *id.*; ICC, STRATEGIC PLAN, *supra* note 122, at 30.

180. *Id.* at 30.

181. See *id.*; Ford, *supra* note 170, at 50-51 (noting how witness statements are a "key part of the investigative process").

182. See *id.*

183. See UN CoI Syria 2021 Report, *supra* note 10, ¶ 43.

184. See UN CoI Syria 2014 Report, *supra* note 90, ¶ 17 (noting how ISIS attracted "more experienced and ideologically motivated foreign fighters" after proclaiming itself an Islamic caliphate).

185. See *Investigations*, U.N. INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, <https://www.icty.org/en/about/office-of-the-prosecutor/investigations#investigationsdivision> (explaining how investigators must go to the scene of the crime, "test the information received and look for corroboration").

2011.”¹⁸⁶ The IIIM does not actually prosecute individuals but compiles materials to help prepare for future prosecutions.¹⁸⁷ It collects evidence from a variety of different sources such as UN entities, NGOs, foundations, and individuals.¹⁸⁸ It also conducts interviews with witnesses and will collect forensic evidence when appropriate.¹⁸⁹ To facilitate information sharing and ensure organization, the IIIM has created a state-of-the-art IT system to store its evidence collection.¹⁹⁰ The IIIM has also developed an evidentiary module that collects evidence that specifically establishes “the existence of a systematic attack against a civilian population to support charges of crimes against humanity for ISIL-related conduct in the Syrian Arab Republic.”¹⁹¹ Thus, the IIIM database could be extremely helpful to the ICC Prosecutor and the prosecutor of an ad hoc tribunal in prosecuting ISIS FTFs in SDF custody for crimes against humanity.

Another potential source of evidence for prosecutors is the Internet and social media.¹⁹² Individual combatants who are a part of an organized armed group or terrorist group are increasingly “posting self-incriminating material on social media (e.g. Facebook).”¹⁹³ An added benefit of electronic evidence is that it’s quality will not degrade with the passage of time like eyewitness testimony or forensic evidence. The average age of Western FTFs traveling to Syria is twenty-six years old, and research shows persons between the ages of eighteen and twenty-nine constitute a large percentage of Facebook users, Twitter users, and

186. *Mandate*, INT’L, IMPARTIAL, AND INDEP. MECHANISM, <https://iiim.un.org/who-we-are/mandate/>.

187. *See id.*

188. *At a Glance*, INT’L, IMPARTIAL, AND INDEP. MECHANISM, <https://iiim.un.org/who-we-are/at-a-glance/>.

189. *Id.*

190. Rep. of the Int’l, Impartial and Indep. 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, General Assembly, Seventy-Second Session, ¶ 35, U.N. Doc. A/72/764 (2018).

191. Rep. of the Int’l, Impartial and Indep. 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, General Assembly, Seventy-Sixth Session, ¶ 25, U.N. Doc. A/76/690 (2022).

192. *See* Piotr Bakowski & Laura Puccio, *Foreign Fighters – Member State Responses and EU Action*, EUR. PARLIAMENTARY RSCH. SERV. 8 (2016), <https://www.europarl.europa.eu/EPRS/EPRS-Briefing-579080-Foreign-fighters-rev-FINAL.pdf>.

193. *Id.*

Instagram users.¹⁹⁴ Therefore, it is likely that ISIS FTFs are active on social media.

An example of how social media postings can be useful in the prosecution of FTFs can be seen in a 2014 investigation in the United Kingdom.¹⁹⁵ There, the government was investigating a British citizen who was charged with fighting in the Syrian Arab Republic.¹⁹⁶ The investigation turned up thousands of the accused's tweets who was "reported to have been very active on Twitter, posting in the region of 10,000 tweets."¹⁹⁷ Twitter is a particularly useful social media platform to search for evidence on FTFs, as investigative units can conduct location-based searches, user-specific searches, and temporal specific searches.¹⁹⁸

Similarly, in *Prosecutor v. Ladjedvardi*, German prosecutors were able to successfully convict a German FTF for war crimes using social media.¹⁹⁹ The defendant had uploaded photos of himself posing with severed heads of enemy combatants impaled on metal rods to a Facebook page with limited privacy settings.²⁰⁰ There were also stored copies of this image on his mother's phone.²⁰¹ The defendant was convicted of "degrading and humiliating treatment of protected persons" and sentenced to two years imprisonment.²⁰²

B. *The ICC's and United Nations' Limited Detention Capability*

The ICC nor the United Nations have a detention facility that is large enough to hold the 2,000 FTFs in SDF custody while awaiting trial.²⁰³ The UN prison in the Netherlands can only hold approximately fifty individuals, which includes pretrial and post-conviction detainees.²⁰⁴ The

194. See Dawson, *supra* note 34, at 2; *Digital Communications: Social Media Platforms and Demographics*, LONDON SCH. OF ECON., <https://info.lse.ac.uk/staff/divisions/communications-division/digital-communications-team/assets/documents/guides/A-Guide-To-Social-Media-Platforms-and-Demographics.pdf>.

195. U.N. OFFICE ON DRUGS AND CRIME, FOREIGN TERRORIST FIGHTERS: MANUAL FOR JUDICIAL TRAINING INSTITUTES SOUTH-EASTERN EUROPE 71 (2019).

196. *Id.*

197. *Id.*

198. See *id.* at 72.

199. Frankfurt High Regional Court [OLG], July 12, 2016, Case No. 5-3 StE 2/16—4—1/16; <https://www.lareda.hessenrecht.hessen.de/bshe/document/LARE190018662>; see *Prosecutor v. Aria Ladjedvardi*, INT'L CRIMES DATABASE, <https://www.internationalcrimesdatabase.org/Case/3276>.

200. *Id.*

201. Frankfurt High Regional Court [OLG], Case No. 5-3 StE 2/16—4—.

202. *Id.*

203. See ICTY *Detention*, *supra* note 171; ICC *Detention Center*, *supra* note 173.

204. ICTY *Detention*, *supra* note 173.

ICC on the other hand lacks a long-term detention facility for convicted individuals altogether.²⁰⁵ Once defendants are convicted in the ICC, they serve their sentences outside of the Netherlands, “subject to an agreement between the ICC and the State of enforcement.”²⁰⁶

It seems unlikely that States will offer to incarcerate convicted FTFs in national facilities. One of the primary reasons countries have been reluctant to repatriate FTFs is because they fear they will radicalize domestic prison populations.²⁰⁷ A potential solution to the detention issue is having countries provide financial aid to the SDF so they can fortify their detention facilities and minimize overcrowding in them.²⁰⁸ So far, the United Kingdom and the United States are leading the way in helping the SDF expand and secure their detention sites.²⁰⁹ With international aid and improved facilities, the SDF could be willing to continue detaining FTFs and let any convicted individuals carry out their sentences in Rojava. The SDF could use its continued detention of FTFs as a bargaining chip to gain international recognition. If European countries are unwilling to repatriate their citizens and incarcerate them for violations of IHL in national prisons, then SDF custody will be the only other viable option. It is unlikely the Syrian government will be willing to take over custody of the approximately 2,000 FTFs in SDF custody, as the Syrian government will have to use its resources rebuilding Syria’s infrastructure and economy.²¹⁰ The limited number of solutions to the situation in Rojava provides the SDF with some leverage in any international discussions or negotiations concerning the prosecution of FTFs in their custody.

205. See *ICC Detention Center*, *supra* note 173.

206. *Id.*

207. See Stigall, *supra* note 6, at 65.

208. See Jane Arraf & Sangar Khaleel, *Teenage Inmates Found Among the 500 Dead in Syria Prison Attack*, N.Y. TIMES (Jan. 31, 2022), <https://www.nytimes.com/2022/01/31/world/middleeast/syria-prison-isis-boys.html> (noting how the SDF does “not have enough guards to combat increasing ISIS activity” around some of their prisons); Katie Bo Williams, *Coalition Plans to Expand Giant ISIS Prison in Syria*, DEF. ONE (Feb. 24, 2021), <https://www.defenseone.com/policy/2021/02/coalition-plans-expand-giant-isis-prison-syria/172270/>.

209. See Williams, *supra* note 208; *Northeast Syria: Fate of Hundreds Trapped in Siege Unknown*, HUMAN RIGHTS WATCH (Feb. 4, 2022), <https://www.hrw.org/news/2022/02/04/north-east-syria-fate-hundreds-boys-trapped-siege-unknown> (noting how the United Kingdom funded a new prison near al-Sina’a).

210. See *Syria’s Economy Collapses*, *supra* note 163.

VI. CONCLUSION

The imprisonment of thousands of ISIS FTFs in Rojava poses a security risk to the international community and undermines the legitimacy of international law governing armed conflicts. Detainees are experiencing prolonged pretrial detention and are being held in unsecure makeshift prisons that are subject to attack. Countries must act soon to repatriate their citizens in SDF custody or international institutions will be required to offer alternate solutions.

While international prosecution of FTFs is a viable alternative to repatriation in theory, it is unlikely prosecution in the ICC or a tribunal is practically feasible. Even if the UNSC manages to establish a basis for international prosecution in the ICC or a tribunal, the ICC's and UN's limited detention space will remain an obstacle. Furthermore, it will likely be years before an actual prosecution will take place, as prosecutors will need time to investigate violations of IHL and compile sufficient evidence. By that point, many FTFs could have escaped SDF custody given the SDF's inadequate detention facilities and the ongoing fighting in the region. The most expedient solution to the crisis in Rojava is putting pressure on countries to repatriate their citizens.