

# ONLY [\_\_\_] CAN JUDGE: ANALYZING WHICH COURTS HAVE JURISDICTION OVER ISIS

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## I. INTRODUCTION

After the devastating attacks of 9/11, the United States launched massive operations to address the security challenges posed by terrorist groups such as al Qaeda.<sup>1</sup> This effort included the creation or reorganization of 263 governmental organizations, fifty-one of which have the sole purpose of tracking funds linked to terrorist organizations.<sup>2</sup> The result was a greatly weakened al Qaeda, with seventy-five percent of its leadership being captured or killed and its access to resources greatly diminished.<sup>3</sup> Between 2001 and 2011, United States courts resolved 431 out of 578 prosecutions against “jihadist defendants” and roughly eighty-seven percent of resolved cases resulted in convictions.<sup>4</sup> In these prosecutions, the United States chose to utilize its domestic federal courts and military tribunals to hold war criminals responsible for their actions.<sup>5</sup>

Today, the “terrorist” group at the forefront of international attention is the self-proclaimed Islamic State of Iraq and Syria, or better known as ISIS.<sup>6</sup> This group has been characterized as another terrorist organization and has made headlines for committing war crimes through its widespread

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1. Audrey Kurth Cronin, *ISIS is Not A Terrorist Group*, FOREIGN AFFAIRS, March/April 2015 Issue, [http://www.foreignaffairs.com/articles/143043/audrey-kurth-cronin/isis-is-not-a-terrorist-group?cid=nlc-foreign\\_affairs\\_this\\_week-021915-isis\\_is\\_not\\_a\\_terrorist\\_group\\_5-021915&sp\\_mid=4806\\_4185&sp\\_rid=YW5kcmV3ZGFuaWVsc29saXNAZ21haWwuY29tS0](http://www.foreignaffairs.com/articles/143043/audrey-kurth-cronin/isis-is-not-a-terrorist-group?cid=nlc-foreign_affairs_this_week-021915-isis_is_not_a_terrorist_group_5-021915&sp_mid=4806_4185&sp_rid=YW5kcmV3ZGFuaWVsc29saXNAZ21haWwuY29tS0).
2. *Id.*
3. *Id.*
4. N.Y. UNIV. SCH. OF LAW, CTR. ON LAW AND SECURITY, TERRORIST TRIAL REPORT CARD: SEPTEMBER 11, 2001– SEPTEMBER 11, 2011 7 (Karen J Greenberg ed., 2011) available at <http://www.lawandsecurity.org/Portals/0/Documents/TTRC%20Ten%20Year%20Issue.pdf> (defining “jihadist defendants” as criminal defendants being prosecuted for terrorist activities and have connections to global or localized Islamic terrorist groups such as al Qaeda and Hamas).
5. *Id.* at 2–5 (explaining the use of the United States federal court system to prosecute terrorist war criminals).
6. ISIS has gone by several names such as the Islamic State of Iraq and Syria, the Islamic State of Iraq and al-Sham, the Islamic State of Iraq and the Levant (ISIL), and Da’ish. However for purposes of this paper, this group will be referred to as ISIS. See, Faisal Irshaid, *Isis, Isil or Da’ish? What to Call Militants in Iraq*, BBC NEWS (June 24, 2014), <http://www.bbc.com/news/world-middle-east-27994277>.

use of public executions, amputations, beheadings, and recently, the death by burning of a Jordanian pilot.<sup>7</sup> A United Nations (U.N.) report found that ISIS violated its obligations towards civilians amounting to war crimes, denied those under its control basic human rights, and perpetrated crimes against humanity.<sup>8</sup> ISIS militants use systematic terror causing civilians living in ISIS controlled territory to live in fear.<sup>9</sup> Those who dare to oppose ISIS are beheaded, shot, or stoned and their mutilated bodies are often left on public display as a warning to those who fail to submit to ISIS' authority.<sup>10</sup>

When such atrocities are committed, questions arise as to how these war criminals can be brought to justice. This Comment analyzes which types of courts could best try ISIS war criminals and argues that special ad hoc courts are the best type of court for the job. Section II will provide a background of war crimes and international criminal courts. Section III will briefly analyze the legal status of ISIS under international law. Section IV will analyze which types of court systems could best exercise judicial authority over ISIS war criminals.

## II. BACKGROUND

There are several types of courts that could try international war criminals.<sup>11</sup> These include domestic courts, ad hoc courts, the International Criminal Court (ICC), and hybrid courts.<sup>12</sup> Before delving into these different types of courts, it is helpful to review the history of international criminal law to give some context to the creation of judicial structures that try war criminals.

The informal practice of victors holding conquered individuals for crimes of war dates back to ancient times.<sup>13</sup> In 405 B.C., after the Athenian fleet was defeated, the Spartan naval commander Lysander ordered the death of Athenian prisoners who were accused of violating traditions of war.<sup>14</sup> All of the prisoners were executed except one who was believed to

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7. *Jordan Pilot Hostage Moaz al-Kasasbeh 'Burned Alive,'* BBC NEWS (Feb. 3, 2015), <http://www.bbc.com/news/world-middle-east-31121160>.

8. HUMAN RIGHTS COUNCIL, REPORT OF THE INDEPENDENT INTERNATIONAL COMMISSION OF INQUIRY ON THE SYRIAN ARAB REPUBLIC, ¶ 172-73, (Aug. 15, 2015), [http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session30/Documents/A\\_HRC\\_30\\_48\\_ENG.doc](http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session30/Documents/A_HRC_30_48_ENG.doc).

9. *See id.*

10. *Id.* at ¶ 98.

11. *See generally* BETH VAN SCHAACK & RONALD C. STYLE, INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT: CASES AND MATERIALS, 25-198 (2007) (explaining various types of domestic and international criminal courts).

12. *Id.*

13. *See generally*, DONALD A. WELLS, WAR CRIMES AND LAWS OF WAR, 91-107 (2d ed. 1991).

14. *Id.* at 91.

have opposed the alleged violations of traditions of war.<sup>15</sup> There was neither a formal trial nor clear formal rules that the prisoners had violated, rather, the victors imposed their judgment upon the vanquished by virtue of military dominance (“victor’s justice”).<sup>16</sup> During the middle ages, the rules of war and prosecutions of war crimes became more formalized.<sup>17</sup> In the year 989, the Catholic Church issued the following prohibitions punishable by excommunication: seizing livestock; seizing peasants and making them pay for freedom; seizing church lands; and robbing merchants.<sup>18</sup> In 1102 King Henry IV issued rules forbidding attacks against clergy, merchants, women, or Jews.<sup>19</sup> In 1305 William Wallace was executed for the crime of indiscriminately killing women, children, and clergy during his rebellion.<sup>20</sup>

The first International Red Cross Conference occurred in 1864 and brought international attention to how prisoners of war should be treated.<sup>21</sup> Although mainly concerned with fair treatment of prisoners of war, General Orders 100, Article 59 allowed the warden state to hold war prisoners accountable for war crimes they committed before capture.<sup>22</sup> During the United States Civil War, the North used Article 59 as justification to try Confederate prisoner Captain Wirtz for war crimes.<sup>23</sup> Wirtz was a Swiss doctor who was in charge of the Andersonville prison camp where poor conditions and treatment of prisoners amounted to crimes of war.<sup>24</sup> Despite compelling evidence that Wirtz inherited the poor conditions and that there were only limited resources available to him, Wirtz was tried and sentenced to death.<sup>25</sup>

While the use of “victor’s justice” to try war criminals has a long history, international judicial systems are a relatively modern phenomenon that came to prominence after World War I.<sup>26</sup> The international community witnessed the failure of diplomacy and arbitration to solve the problems that led to the outbreak of World War I, and at the 1919 Paris Peace Conference the League of Nations created the Permanent Court of International Justice (PCIJ).<sup>27</sup> The goal of the PCIJ was to create a court

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15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 92–93.

19. *Id.* at 93.

20. Gregory P. Noone, *The History and Evolution of the Law of War Prior to World War II*, 47 *NAVAL L. REV.* 176, 181 (2000).

21. WELLS, *supra* note 13 at 94.

22. *Id.* at 95.

23. *Id.*

24. *Id.*

25. *Id.*

26. MARK W. JANIS & JOHN E. NOYES, *INTERNATIONAL LAW: CASES AND COMMENTARY*, 359 (2014).

27. *Id.*

system that could hold nations responsible to the international community and prevent major military conflicts.<sup>28</sup> However, the League of Nations and the PCIJ both failed to solve the major international problems that led to World War II.<sup>29</sup> The League of Nations and PCIJ were dissolved in 1945 and were replaced by the U.N. and International Court of Justice (ICJ), respectively.<sup>30</sup> Despite the failures of the previous attempts to resolve international disputes, the U.N. believed that an international court was the appropriate means to resolve international disputes and prevent future conflicts and hold nations accountable for their actions.<sup>31</sup>

The ICJ is given jurisdiction over the States by the States themselves and can hear “all cases which the parties refer to it and all matters specially provided for in the Charter of the U.N. or in treaties and conventions in force.”<sup>32</sup> Although Article 36 of the Statute of the International Court of Justice says that parties have the option to subject themselves to compulsory jurisdiction of the ICJ, the U.N. Charter was amended to require that all U.N. member States are “*ipso facto* parties to the Statute of the International Court of Justice.”<sup>33</sup> Considering that nearly every state is a member of the U.N. and subject to compulsory jurisdiction of the ICJ, the ICJ is one of the largest international judicial systems and has broad jurisdiction to hear nearly every state dispute of international concern.<sup>34</sup> However, the ICJ rulings are not necessarily binding and can be difficult to enforce against states.<sup>35</sup>

While the ICJ exercises general jurisdiction over states, this Comment will focus on judicial structures that can hold individual perpetrators responsible for their crimes. With the goal of finding jurisdiction over ISIS war criminals, and acknowledging the uncertainty over ISIS’ statehood, courts with jurisdiction over individuals are the ideal judicial systems.

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28. *Id.*

29. *Id.*

30. *Id.*

31. The purpose of the PICJ was to “hear and determine any dispute of an international character” and to provide advisory opinions upon request. The ICJ was intended to be an extension of the failed PICJ and inherited its purpose. INTERNATIONAL COURT OF JUSTICE, *The Court: History*, <http://www.icj-cij.org/court/index.php?p1=1&p2=1#International> (last visited Feb. 2, 2015).

32. Statute of the International Court of Justice art. 36, June 26, 1945, 59 Stat. 1031, T.S. No. 993.

33. Statute of the International Court of Justice art. 36, June 26, 1945, 59 Stat. 1031, T.S. No. 993; U.N. Charter art. 93.

34. UNITED NATIONS MEMBER STATES, ORG/1469, <http://www.un.org/press/en/2006/org1469.doc.htm>.

35. *See, e.g.*, Jesse Townsend, Note, *Medellín Stands Alone: Common Law Nations Do Not Show A Shared Poststratification Understanding of the ICJ*, 34 YALE J. INT’L L. 463, 464 (2009) (explaining how the United States Supreme Court in *Medellín v. Texas*, 553 U.S. 491 (2008) held that an ICJ decision did not create directly enforceable law that trumped state law).

### A. Domestic Courts and Military Tribunals

The states themselves exercise jurisdiction over their subjects and over conquered or occupied territories through “victor’s justice.”<sup>36</sup> There are four justifications for states to exercise domestic jurisdiction over actors whose actions may have international consequence: territoriality, nationality, protection, and universality.<sup>37</sup> However, when states conduct trials over war criminals, the international community often doubts the ability of the court to use objective and meaningful judicial procedures.<sup>38</sup>

At the end of WWI, the Allied victors created a special Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties tasked with investigating war crimes and recommending punishments.<sup>39</sup> The Commission recommended a High Tribunal be created, to be composed of three members from each of the five major victor powers and one member from each of the other victor powers.<sup>40</sup> Over the United States’ objections, the victor powers proceeded with the High Tribunal and sent to the German ambassador in France a list of 896 alleged war criminals to be tried.<sup>41</sup> The German ambassador refused the list, as did the German Cabinet, and the victor powers eventually agreed to allow the Supreme Court of the Reich of Leipzig to try the war criminals.<sup>42</sup> The court received a shortened list of 45 alleged war criminals and agreed to try only twelve, of which only four were found guilty and were given light sentences.<sup>43</sup> The ineffectiveness of the Leipzig Trials can be attributed the general unwillingness of the German courts, opposition to the idea that soldiers could be prosecuted for following orders, and the lack of prior laws prescribing the offenses alleged and the punishments sought.<sup>44</sup>

The severe violations of human rights and war crimes committed during World War II led to the Moscow Declaration of German Atrocities in which the United States, United Kingdom, France and Soviet Union (Allies or Allied powers) decided that they would not settle for holding the abstract nation responsible, or let the state try its own subjects, but would try individuals for their involvements in war crimes.<sup>45</sup> The Charter of the

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36. VAN SCHAACK, *supra* note 11, at 82-83.

37. *Id.* at 82.

38. For example, Germany tried German war criminals in the Leipzig Trials following WWI and the proceedings were known to be highly ineffective. WELLS, *supra* note 13, at 96.

39. *Id.*

40. *Id.*

41. The United States opposed the High Tribunal claiming there was no precedent for such a tribunal in international law. The United States also opposed the legal doctrine of indirect responsibility of government officials and the trying of heads of state. *Id.*

42. *Id.*

43. *Id.* at 96-97.

44. *Id.*

45. JANIS, *supra* note 26, at 478.

International Military Tribunal established the Nuremberg Tribunals to create a judicial system to try German officials for their war crimes committed during WWII.<sup>46</sup> The Nuremberg Judgment held that individuals cannot be excused for their actions simply because they were commanded to act by the state's legitimate government.<sup>47</sup>

The Tribunal explained that it had jurisdiction through "exercise of sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world."<sup>48</sup> Through the means of the unconditional surrender, the Allied powers assumed the full legal authority held by the German government.<sup>49</sup> They also explained that each party to the Charter had jurisdiction, both severally and jointly, because the crimes committed by Germany had been committed against the nations individually and each had its own legitimate claim of jurisdiction.<sup>50</sup> Furthermore, the Tribunal proffered that the crimes committed by the German war criminals were in violation of international law and considered crimes against all nations, so that every nation in the world was injured by Germany's actions and had jurisdiction to try the German war criminals.<sup>51</sup>

#### B. Ad Hoc International Courts

After World War II, the international community came together through the U.N. and attempted to address violations of war crimes through the creation of ad hoc tribunals.<sup>52</sup> When ad hoc international criminal courts are created, there tend to be four goals advanced, some more aspirational than others: "(1) justice and punishment, (2) deterrence, (3) record-keeping, and (4) the progressive development of international law."<sup>53</sup> The desire for justice and punishment through international courts arises out of an objective lack of faith for the state court system to

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46. This agreement was between the same parties as the Moscow Declaration. *Id.*

47. The Nuremberg Judgment, United States, United Kingdom, France, Soviet Union v. Hermann Wilhelm et al, 6 F.R.D. 69 (1946).

48. U.N. SECRETARY-GENERAL, The Charter and Judgment of the Nürnberg Tribunal—History and Analysis, U.N. Doc. A/CN.4/5, (1949), available at [http://legal.un.org/ilc/documentation/english/a\\_cn4\\_5.pdf](http://legal.un.org/ilc/documentation/english/a_cn4_5.pdf).

49. *Id.*

50. *Id.*

51. *Id.*

52. Ad hoc tribunals are created for specific jurisdictional purposes and usually operate on a temporary basis. See VAN SCHAACK, *supra* note 11 at 37–39.

53. JANIS, *supra* note 26, at 539.

adequately address the atrocities.<sup>54</sup> Another problem is that often times the state's governing party itself was the wrongful actor.<sup>55</sup>

Like all criminal law, there is an underlying hope that effective international court systems will deter future acts of a similar kind.<sup>56</sup> However, the deterrent effect of international courts would be difficult to examine and could be considered "spotty at best."<sup>57</sup> The occurrence of further crimes tends to diminish the effectiveness of deterrence.<sup>58</sup> On the other hand, record-keeping and the progressive development of international law have been the most obtainable goals of international courts.<sup>59</sup> International courts, as opposed to state courts, allow for the global remembrance of atrocities so that they should never occur again.<sup>60</sup> If a criminal is tried by a state's court systems, the records are kept within the state and it is only a concern of that state.<sup>61</sup> By trying the case internationally, the judgment belongs to all nations and all people and it creates international precedent.<sup>62</sup> Justice Goldstone proffered that "collective amnesia doesn't work."<sup>63</sup> "Where there have been violent, systematic human rights abuses a society simply cannot forget."<sup>64</sup> "Such atrocities cannot be swept under the rug."<sup>65</sup>

Some of the most famous of the ad hoc international courts are the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).<sup>66</sup> The U.N. created these ad hoc tribunals to address specific international incidents when there was lack of faith in existing judicial structures to properly try war criminals.<sup>67</sup>

The atrocities that took place in the former Yugoslavia involved murder, torture, rape and ethnic cleansing.<sup>68</sup> Justice Ibrahimagic, President of the Constitutional Court of the Federation of Bosnia-Herzegovina, explained that during the conflict "all humanity was devalued and left senseless . . . . [M]ankind itself had been brought to absurdity."<sup>69</sup> The

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54. See generally, Mark W. Janis, *The Utility of International Criminal Courts*, 12 CONN. J. INT'L L. 161, 163-66 (1997).

55. *Id.*

56. *Id.* at 165.

57. *Id.*

58. *Id.*

59. *Id.* at 166-67.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 187.

64. *Id.*

65. *Id.*

66. See generally, JANIS, *supra* note 26, at 546-47 (generally reviewing the ICTY and ICTR).

67. *Id.*

68. Janis, *supra* note 54 at 163.

69. *Id.* at 163-64.

ICTY was created to prosecute and adjudicate war crimes committed in the former Yugoslavia on or after January 1991.<sup>70</sup> The ICTY statute grants the court personal jurisdiction over those who have committed war crimes, crimes against humanity, and genocide in the former Yugoslavia ranging from the ethnic civil war of the early 1990's to the more recent Kosovo war.<sup>71</sup> The ICTY is a special limited court in terms of its geographical and temporal limitations.<sup>72</sup> Patricia Ward, who served as a judge on the ICTY, explains that the ICTY performs functions of “adjudicating international crimes, developing international humanitarian law, and memorializing important, albeit horrible, events of modern history.”<sup>73</sup> She focuses on the importance of these international courts to create and mold international law because up until recently, there was very little case law for their courts to rely upon.<sup>74</sup>

The international courts do not just provide a venue for these international crimes to be tried but also bring with them an international prosecutorial authority that operates as an independent organ of the court.<sup>75</sup> Ward describes the Prosecutor as the “chief policy maker and political lightning rod of the Tribunal.”<sup>76</sup> In 2001, the Prosecutor for the ICTY was also the prosecutor for the ICTR.<sup>77</sup>

Like the atrocities that took place in the former Yugoslavia, Rwanda suffered an extreme genocide that led to the U.N. taking drastic action by establishing a temporary court for Rwanda just one year after establishing the ICTY.<sup>78</sup> There was concern that there was little will for international intervention, and many feared that the struggles of African victims would not be given the same concern as those of their European counterparts.<sup>79</sup> Before creating the ICTR, the U.N. held a commission of experts to justify the creation of such a court by first determining the extent and type of crimes they believed took place.<sup>80</sup> The commission found evidence to “prove that acts of genocide against the Tutsi group were perpetrated by Hutu elements in a concerted, planned, systematic, and methodical way”

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70. Patricia M. Wald, *The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-to-Day Dilemmas of an International Court*, 5 WASH. U. J.L. & POL'Y 87, 87 (2001).

71. *Id.*

72. The ICTY was not expected to “finish its work” for at least 10 years after the article was written in 2001. It is 2015 and the ICTY is still operative. *Id.*

73. *Id.* at 89.

74. *Id.*

75. *Id.* at 88.

76. *Id.* at 99.

77. *Id.* at 100.

78. Payam Akhavan, *The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment*, 90 AM. J. INT'L L. 501, 501 (1996).

79. *Id.*

80. *Id.* at 502.



and that such actions constituted genocide.<sup>81</sup> Initially, the U.N. tried to address the situation in Rwanda by extending the jurisdiction of the ICTY to cover Rwanda but they feared that extending the powers of the ICTY would indicate creating a permanent judicial entity, contrary to the ICTY's initial purpose.<sup>82</sup> The ICTR was able to demonstrate the flexibility of ad hoc courts, as the conflicts that occurred within Rwanda were not necessarily of military or international nature, and the definitions of crimes within the ICTR statute reflected this.<sup>83</sup>

While the atrocities of Rwanda and the former Yugoslavia both involved genocide and crimes against humanity, the courts had different subject matter jurisdictions to address the distinctions between the two conflicts.<sup>84</sup> The U.N. Secretary-General reported "the Security Council 'has elected to take a more expansive approach to the choice of the applicable law than the one underlying the statute of the Yugoslav Tribunal.'"<sup>85</sup> Furthermore, while the Federal Republic of Yugoslavia strongly opposed the creation of the ICTY, the Rwandese government petitioned the U.N. to create an international tribunal to address its internal conflicts.<sup>86</sup> The Rwandese government felt that genocide was an international crime that required an international solution and believed that having an international presence would provide an impartial and fair prosecution of the violators of human rights.<sup>87</sup>

### C. The International Criminal Court

Unlike the military tribunals, ad hoc tribunals, or hybrid courts, the ICC was not created to address a particular human rights concern. Rather, the international community desired an independent and permanent mechanism that could follow the legacy of the Nuremberg Tribunal, ICTY, and ICTR in enforcing international human rights obligations and punishing war criminals.<sup>88</sup> In 1998, the international community came together and created framework for the ICC with the purpose of ending "impunity for the perpetrators of 'atrocities that deeply shock the conscience of humanity.'"<sup>89</sup>

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81. *Id.*

82. *Id.*

83. Unlike the ICTY statute, the ICTR definitions of crimes did not require connection to an armed conflict; rather, it required a link between the criminal acts and discrimination. *Id.* at 503.

84. *Id.*

85. *Id.* at 504 (quoting U.N. Doc. S/1995/134, at 3–4 (1995)).

86. *Id.* at 504.

87. *Id.*

88. JANIS, *supra* note 26, at 534.

89. Although many of the contracting states to the Rome Statute of the ICC were also members of the U.N., the ICC was intended to be independent of the U.N. and is only minimally linked to the U.N. through the Security Council's reference power. Leila N. Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 384 (2000).

Despite the strengthening of international structures and cooperation, these structures failed to prevent the nearly 170 million deaths and 250 conflicts that occurred after World War II and had very limited jurisdiction.<sup>90</sup> The ICC was considered revolutionary because it was a permanent and independent international court that could hold individuals responsible for international crimes and place “real people in real jails.”<sup>91</sup>

Any party to the Rome Statute of the ICC (“Rome Statute”) accepts the jurisdiction of the ICC but there are limits on the ICC’s jurisdiction.<sup>92</sup> The ICC exercises complementary jurisdiction in which the ICC’s jurisdiction is secondary to the state’s domestic courts.<sup>93</sup> Under complementary jurisdiction, the ICC must defer to the state’s judicial system unless that system is unwilling or unable to genuinely investigate or prosecute a crime that would otherwise be under the ICC’s jurisdiction.<sup>94</sup> Proving the inability or unwillingness of a state to prosecute a war criminal is a high burden that may require showing that proceedings were taken to protect the individual, there were unjustified delays in the normal proceedings, or the proceedings were not impartial.<sup>95</sup>

The ICC does not have complete criminal jurisdiction either; rather, the scope of its subject matter jurisdiction is limited to four types of crimes: genocide, crimes against humanity, war crimes and crimes of aggression.<sup>96</sup> Furthermore, the ICC’s jurisdiction is chronologically limited to acts that occurred after the entry into force of the Rome Statute in July 1, 2002, or after the statute enters into force on a state joining subsequently.<sup>97</sup> The ICC generally can only exercise jurisdiction if the alleged criminal acts occurred within the territory of a contracting state, and the actor is a national of a contracting state.<sup>98</sup> States that are not parties to the convention can choose to declare themselves subject to ICC jurisdiction for specific concerns, but are not obligated to do so.<sup>99</sup> The ICC can hear a case if the Prosecutor has initiated an investigation on its own volition, or if a matter has been referred by the U.N. Security Council or another state.<sup>100</sup> The ICC has the authority to impose sentences on the convicted of imprisonment up to thirty years,

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90. *Id.*

91. *Id.* at 385.

92. Rome Statute of the International Criminal Court art. 12, July 1, 2002, T.S. No. 2187 [hereinafter Rome Statute].

93. VAN SCHAACK, *supra* note 11, at 65.

94. *Id.*

95. Rome Statute, *supra* note 92 at art. 17(2).

96. *Id.* at art. 5.

97. *Id.* at art. 11.

98. “Contracting state” means a state that is a member of the Rome Statute. *Id.* at art. 12.

99. *Id.*

100. *Id.* at art. 13.

life imprisonment for extreme circumstances, a fine payment, and forfeiture of property.<sup>101</sup>

While other human rights courts, such as the U.N. Human Rights Committee, are permanent judicial structures that protect human rights, they will not be discussed as those courts provide civil remedies and cannot put individuals in prison.<sup>102</sup> Although the jurisdictional limitations of the ICC are complex, if the circumstances are right, the ICC may have jurisdiction to prosecute ISIS war criminals.<sup>103</sup>

#### D. Hybrid Courts

After the creation of the ICTY, ICTR the U.N. Security Council underwent a period of “tribunal fatigue” and became reluctant to create more ad hoc tribunals to address situations of mass violence.<sup>104</sup> Instead, the Secretariat took the lead on addressing situations of mass violence and ensuring the actors were accountable.<sup>105</sup> The result was so called “hybrid courts” that contained elements of both international and domestic personnel and law.<sup>106</sup> The hybrid courts were an attractive alternative to the U.N. because they would theoretically be similarly effective as the ad hoc courts without having logistical burdens of creating a new court from scratch.<sup>107</sup> Furthermore, hybrid courts seem to strike a balance between the legitimacy of domestic courts and the neutrality and objectiveness of international cooperation.<sup>108</sup> Hybrid courts tend to fall within one of three categories: (1) treaty-based institutions, (2) institutions created through U.N. administration, and (3) internationalized domestic proceedings.<sup>109</sup>

Examples of the treaty-based institutions are the tribunal in Cambodia and the Special Court in Sierra Leone.<sup>110</sup> In the 1970’s Cambodia underwent the brutal Khmer Rouge revolution and civil war that resulted in approximately two hundred thousand people killed, genocide, torture, and an Orwell-esque repressive government.<sup>111</sup> In the 1990’s, after the Khmer

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101. *Id.* at art. 77.

102. *E.g.*, Optional Protocol to the International Covenant on Civil and Political Rights art 4-5, Dec. 16, 1966, T.S. No. 999, 171 (demonstrating the goal of the Human Rights Committee is to reach a civil settlement between the state and the individual).

103. *See generally* VAN SCHAACK, *supra* note 11, at 65–69 (explaining the circumstances in which ICC jurisdiction can be “triggered”).

104. *Id.* at 147.

105. *Id.*

106. Mixed personnel included domestic and international judges, prosecutors, investigators, defense counsel, and support staff. Mixed law included allowed the judges to apply international humanitarian and human rights laws as well as consider local criminal law. *Id.*

107. *Id.*

108. Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT’L L. 295, 306 (2003).

109. *See* VAN SCHAACK, *supra* note 11, at 156, 180, 198.

110. *Id.* at 159, 172.

111. *Id.* at 156–58.

Rouge government was overthrown, the Cambodian government appealed to the U.N. to assist in the creation of a hybrid court to prosecute members of the Khmer Rouge regime.<sup>112</sup> The U.N. issued a special commission, which recommended the creation of another ad hoc court due to concerns about corruption, the quality of legal personnel, and doubts about the ability of Cambodia's proposed court to meet international due process standards.<sup>113</sup> However, on June 6, 2003, the U.N. and the Cambodian government came to an agreement and entered into a treaty which created a court that would apply both Cambodian and international law called the "Extraordinary Chambers in the Courts of Cambodia [(ECCC)] for the Prosecution of Crimes Committed During the period of Democratic Kampuchea."<sup>114</sup>

Likewise, widespread attacks by rebels in Sierra Leone resulted in forced labor, sexual slavery, the deaths of around seventy thousand people, and created millions of refugees.<sup>115</sup> After several failed peace agreements, the government of Sierra Leone requested the U.N. to establish an international tribunal to try rebel leaders.<sup>116</sup> The U.N. was originally hesitant to assist Sierra Leone as Sierra Leone had pardoned actors who committed crimes against humanity and war crimes in its short lived peace agreement with the rebels.<sup>117</sup> However, the U.N. and Sierra Leone entered into negotiations and the final agreement between the nations set forth the statute for the Special Court which did not observe any amnesty given regarding war crimes or crimes against humanity.<sup>118</sup>

While the courts in Cambodia and Sierra Leone were created through cooperation, some hybrid courts, like the "Panels with Exclusive Jurisdiction over Serious Criminal Offenses" in East Timor were imposed upon states.<sup>119</sup> In 1975, Indonesia invaded and sought to annex East Timor, which was considered a non-self-governing territory administered by Portugal.<sup>120</sup> Indonesia eventually agreed to a referendum, which resulted in eighty percent of the East Timor population supporting independence.<sup>121</sup> Following the referendum, East Timor broke out into extreme violence led

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112. *Id.* at 158.

113. *Id.* at 158–59.

114. Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, U.N.-Cambodia, art. 1-2, Jun. 4, 2003, 2329 U.N.T.S. 117.

115. VAN SCHAACK, *supra* note 11, at 163–64.

116. Noah B. Novogrodsky, *Speaking to Africa: The Early Success of the Special Court for Sierra Leone*, 5 SANTA CLARA J. INT'L L. 194, 197–198.

117. *Id.*

118. Statute of The Special Court for Sierra Leone, U.N.-Sierra Leone, art. 10, Jan. 16, 2002, 2178 U.N.T.S. 137.

119. VAN SCHAACK, *supra* note 11, at 180–81.

120. *Id.* at 180.

121. *Id.*

by pro-integration militia and resulted in nearly two hundred thousand displaced people and destruction of the majority of the infrastructure.<sup>122</sup> Because East Timor had not previously been self-governing and because it was in a tragic state, the U.N. Security Council created the U.N. Transitional Administration in East Timor (UNTAET), which assumed the role of government in conducting legislative, executive and judicial functions.<sup>123</sup> The UNTAET subsequently created the Special Panels to investigate, prosecute, and conduct trials of war criminals as well as perpetrators of crimes against humanity and genocide.<sup>124</sup> These Special Panels contained investigation and prosecution units that were conducted almost entirely of international staff while the courts were managed by existing domestic staff.<sup>125</sup>

Unlike the cases in Cambodia, Sierra Leone, or East Timor, some hybrid courts are created domestically, without U.N. intervention, and autonomously decide to apply international law and international due process standards.<sup>126</sup> After the United States toppled Saddam Hussein's regime in Iraq, the Iraqi Governing Council created the Iraqi High Tribunal (IHT) to try cases of genocide, war crimes, crimes against humanity, and violations of certain Iraqi laws.<sup>127</sup> The IHT was formed with the help of international advisors, was staffed by mostly Iraqis, and follows both Iraqi and international standards.<sup>128</sup> The court indicted Saddam Hussein for genocide, crimes of war, and crimes against humanity for which Hussein was sentenced to death and hanged.<sup>129</sup>

### III. WHAT IS ISIS?

Before analyzing which types of courts would best prosecute and adjudicate ISIS defendants, this comment will attempt to identify some of the characteristics and boundaries of ISIS. At its onset, the ISIS movement began as a Sunni extremist group combatting United States forces in Iraq and was known as al Qaeda in Iraq (AQI).<sup>130</sup> After being nearly destroyed, the movement grew again within United States-run prisons within Iraq and the current self-proclaimed Caliph, Abu Bakr Al-Baghdadi, rose to prominence within the group.<sup>131</sup> In 2011, when the rebellions against the

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122. *Id.*

123. *Id.*

124. *Id.* at 180–81.

125. *Id.*

126. *See e.g., id.* at 198–208.

127. *Id.* at 198.

128. The IHT had the option to appoint non-Iraqi staff members and advisors. *Id.* at 198–99.

129. *Id.* at 199–200.

130. Cronin *supra* note 1.

131. *Id.*

Assad regime in Syria had developed into a full-blown war, AQI capitalized on the chaos and seized lands in northeast Syria and branded itself ISIS.<sup>132</sup> Additionally, ISIS capitalized on the withdrawal of United States forces in Iraq and the polarizing new Shiite government alienated the Sunni population.<sup>133</sup>

Recent accounts report that ISIS has around 30,000 fighters and has vast territories in Iraq and Syria.<sup>134</sup> Although scholars believe that ISIS is not legally a state, it does possess somewhat of a government structure.<sup>135</sup> ISIS contains an administrative structure led by Baghdadi as the Caliph, with his two chief deputies, one overseeing operations in Iraq and the other overseeing operations in Syria.<sup>136</sup> Twelve officials oversee councils in Syria and Iraq that administer bureaucracies of finance, media and religious concerns.<sup>137</sup> Furthermore, ISIS has obtained substantial funding through various sources including up to \$3 million per day in black market oil sales.<sup>138</sup> ISIS controls several major trade routes in the region and charges tolls on the routes and the group confiscates property from conquered residents to sell on the black market.<sup>139</sup>

#### IV. ANALYSIS

ISIS is a complex entity and it does not fit neatly within the scope of any particular court system. It is not necessarily a “terrorist group” like al Qaeda, but neither is it necessarily a “state.” The conflict spans Iraq and Syria and neither state seems to be able to contain ISIS on its own. Having identified some of the characteristics of ISIS, this Comment will apply the different types of international criminal courts to ISIS and analyze how those courts would be able to adjudicate ISIS war criminals.

##### A. Domestic Courts and Military Tribunals

Because ISIS does not meet the test for statehood, it does not likely have domestic courts which the international community could expect ISIS to try war criminals and violators of human rights. Also, even if ISIS had

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132. *Id.*

133. *Id.*

134. *Id.*

135. *See e.g.*, Cindy Buys et al., *New Islamic State in Middle East?*, INT’L L. PROFESSOR BLOG (June 30, 2014), [http://lawprofessors.typepad.com/international\\_law/2014/06/new-islamic-state-in-middle-east.html](http://lawprofessors.typepad.com/international_law/2014/06/new-islamic-state-in-middle-east.html) (arguing that ISIS fails the test for statehood established by the Montevideo Convention On Rights and Duties of States, because it does not have a permanent population and lacks international recognition).

136. Cronin, *supra* note 1.

137. *Id.*

138. ISIS is believed to control up to 60% of Syria’s oil production capacity and 7 oil fields in Iraq. *Id.*

139. *Id.*

adequate judicial structures, it is unlikely that they would have any interest in prosecuting their own war criminals. A U.N. report indicated that ISIS actively “judges” individuals for crimes; however, these proceedings are in violation of international law, as ISIS frequently sentences and administers punishment (including executions) without due process.<sup>140</sup>

The domestic courts of Iraq and Syria could feasibly try ISIS defendants because the atrocities are being committed in Iraqi and Syrian territories occupied by ISIS forces.<sup>141</sup> However, the international community will likely doubt the ability of Iraq or Syria to conduct meaningful adjudications. In Syria, the Assad regime itself has been accused of violating human rights, committing war crimes, and committing crimes against humanity.<sup>142</sup> More specifically, the Assad regime is believed to have executed about eleven thousand detainees within only three detention facilities, and there are at least fifty-two detention facilities under Assad’s control.<sup>143</sup> The civil war in Syria has cost around two hundred twenty thousand lives as of March, 2015.<sup>144</sup> The political instability and ongoing fighting matched with the evidence of mass executions of detainees undermines any argument that Syria is capable of conducting trials of ISIS defendants to a standard that would satisfy the international community.

Likewise, the international community would likely doubt Iraq’s ability to conduct domestic trials of ISIS defendants. The post-Saddam Hussein government has developed a reputation for widespread corruption and racketeering.<sup>145</sup> This corruption is prevalent in the Iraqi judicial system; political activists claim that even when a judge orders a detainee free, the detainee is often forced to pay for the paperwork and there is the possibility that an officer will detain the individual again demanding money.<sup>146</sup> Reports claim that a prisoner was extorted up to one hundred dollars in order to take a shower.<sup>147</sup> With the corruption infiltrating the

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140. HUMAN RIGHTS COUNCIL, REPORT OF THE INDEPENDENT INTERNATIONAL COMMISSION OF INQUIRY ON THE SYRIAN ARAB REPUBLIC, ¶ 173, (Aug. 15, 2015), [http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session30/Documents/A\\_HRC\\_30\\_48\\_ENG.doc](http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session30/Documents/A_HRC_30_48_ENG.doc).

141. Graeme Wood, *What ISIS Really Wants*, THE ATLANTIC, March 2015, <http://www.theatlantic.com/features/archive/2015/02/what-isis-really-wants/384980> (demonstrating the territory ISIS controls in Iraq and Syria by the graphical representation).

142. Nick Robins-Early, *How Will Syria’s Assad Be Held Accountable For Crimes Against Humanity?*, HUFFINGTON POST (Mar. 28, 2015, 11:38 AM), [http://www.huffingtonpost.com/2015/03/28/syria-war-crimes\\_n\\_6950660.html](http://www.huffingtonpost.com/2015/03/28/syria-war-crimes_n_6950660.html).

143. *Id.*

144. *Id.*

145. Patrick Cockburn, *Iraq 10 Years On: How Baghdad Became A City Of Corruption*, THE INDEPENDENT (Mar. 4, 2013), <http://www.independent.co.uk/news/world/middle-east/iraq-10-years-on-how-baghdad-became-a-city-of-corruption-8520038.html>.

146. *Id.*

147. *Id.*

judicial systems, grave concerns overshadow Iraq's ability to try ISIS defendants to the due process standards acceptable to the international community.

Another option would be for an international coalition military force to come into Iraq and Syria and vanquish ISIS and administer "victor's justice" through a military tribunal similar to the Nuremberg trials. However, unlike WWII, the conflict with ISIS is not a conflict between states. A military coalition would not likely declare war against Iraq or Syria, but rather it would enter the states with the purpose of fighting ISIS. Were the coalition victorious, it would not likely be allowed the "exercise of sovereign legislative power . . . and the undoubted right . . . to legislate for the occupied territories [as] recognized by the civilized world," as was the case in the Nuremberg Trials.<sup>148</sup> This is because a coalition force theoretically would not occupy the territory occupied by ISIS but would liberate the lands on behalf of Iraq and Syria. It is possible a coalition force would occupy the lands long enough to try ISIS defendants but the "host" nations would not likely agree to the infringement on their sovereignty.

#### B. Ad Hoc International Courts

The U.N. recently issued a commission of inquiry, which initially recommended that the Security Council refer the Syrian concerns to the ICC, but, due to Russian opposition, ultimately began considering ad hoc tribunals.<sup>149</sup> Former chief prosecutor of the ICTY, Carla Del Ponte, argued that an ad hoc tribunal would be the best solution.<sup>150</sup> Del Ponte believed that an ad hoc tribunal would be more efficient and work faster than the ICC.<sup>151</sup> When comparing the number of cases the ICC has heard against the number of cases the ICTY has heard and the number of cases the ICTR has heard in roughly the same amount of time, it is clear to see that the ad hoc tribunals are more efficient.<sup>152</sup> The creation of an ad hoc tribunal would allow for regional placement of the court, which could facilitate access to witnesses and documentation, which would be more difficult with

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148. On the contrary, this legal justification seems to legitimize ISIS authority over its occupied territories. Nuremberg Trial, *supra* note 48.

149. Julian Borger, *Call For Special Tribunal To Investigate War Crimes and Mass Atrocities in Syria*, THE GUARDIAN (Mar. 17, 2015, 7:33 PM), <http://www.theguardian.com/world/2015/mar/17/call-for-special-tribunal-to-investigate-war-crimes-and-mass-atrocities-in-syria>.

150. Del Ponte sits on the commission of inquiry. *Id.*

151. *Id.*

152. The ICTY has heard over one hundred twenty cases and the ICTR has heard over seventy cases while the ICC has heard only twenty-two cases. THE ICTY: JUDGEMENT LIST, <http://www.icty.org/en/cases/judgement-list> (last visited Mar 29, 2015); THE ICTR: THE CASES, <http://unictr.unmict.org/en/cases> (last visited Mar 29, 2015); THE ICC: SITUATIONS AND CASES, [https://www.icc-pi.int/en\\_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx](https://www.icc-pi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx) (last visited Mar. 29, 2015).



the ICC.<sup>153</sup> Furthermore, an ad hoc court would allow for development and preservation of a record for the international community to remember the war crimes, where municipal courts would not.

Del Ponte believes that Russia and China would be more supportive of an ad hoc or special tribunal because it could allow for prosecution of extremists and members of the regime.<sup>154</sup> However, the international community has accused the Assad regime itself of war crimes and crimes against humanity, thus the Assad regime may oppose any sort of international tribunal without guarantees that it will not be prosecuted.<sup>155</sup> Because ad hoc tribunals like the ICTY and ICTR are created by the U.N. Security Council, rather than created with the permission of the state, an ad hoc tribunal may be the best type of tribunal in situations where heads of state are unwilling to cooperate or are guilty of crimes themselves.<sup>156</sup>

Likewise, the creation of an ad hoc court would be limited in jurisdiction, scope, and time, which would be more appealing to Syria (and likely Iraq) as well as Russia and China.<sup>157</sup> This option is also attractive because ideally a single ad hoc court could deal with ISIS defendants both from Iraq and Syria similar to how the ICTY can hear cases of defendants from the Kosovo and Bosnia and Herzegovina (the Former Yugoslavia). Although most nations would be supportive, at the end of the day the question still remains whether Russia and China, as permanent Security Council members, would approve of the creation of an ad hoc court to address ISIS war crimes.

Another drawback of the ad hoc courts is that they are usually created after the conflicts have ended. These courts are reactionary and cannot effectively serve the purpose of deterring future or ongoing crimes. Furthermore, it is extremely difficult to seize and jail war criminals while the conflicts are ongoing. However, if the end goal is to bring war criminals to justice, the goal can be achieved after the conflicts have ended.

### C. The International Criminal Court

The major independent international criminal court system is the ICC, which was created by the international community to be an independent judicial body with the ability to investigate cases on its own accord or at the

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153. Borger, *supra* note 149.

154. *Id.*

155. Robins-Early, *supra* note 142.

156. After international “calls emerged for the creation of an *ad hoc* international tribunal in the Nuremberg tradition to assign individual responsibility for the . . . abuses” the Security Council unanimously approved the creation of an international tribunal for prosecuting violators of humanitarian law. VAN SCHAACK, *supra* note 11, at 38.

157. Wald, *supra* note 70, at 87.

request of the U.N. Security Council.<sup>158</sup> Because ISIS is not a state, it is not a member of the Rome Statute and not bound by ICC complementary jurisdiction.<sup>159</sup> However, if Iraq or Syria were parties to the Rome Statute the ICC would have jurisdiction and authority to initiate its own investigations.<sup>160</sup> Iraq is not a party to the Rome Statute, and while Syria is a signatory, it has not ratified the treaty and it is unlikely that the ICC would have the authority to investigate war crimes that occur in Iraqi or Syrian territory under its own authority.<sup>161</sup>

Although the ICC does not have territorial jurisdiction over ISIS, it has jurisdiction over ISIS actors who are nationals of contracting states to the Rome Statute.<sup>162</sup> There are an estimated 17,000 to 19,000 foreign nationals fighting for ISIS, many of who are from contracting states to the Rome Statute.<sup>163</sup> However, whether these nationals would be the type of criminals prosecuted by the ICC is unclear.

Because Iraq and Syria are members of the U.N., the Security Council could present the matter to the ICC by its authority under the Rome Statute to begin investigations and prosecutions.<sup>164</sup> This jurisdiction would be complementary and there would need to be a showing that the courts of Iraq and Syria were unable or unwilling to adjudicate the crimes on their own volition.<sup>165</sup> Furthermore, Russia is known to be a strong supporter of the Assad regime in Syria and would likely oppose any attempt to send the concerns to the ICC for fear the ICC would also prosecute the Assad regime.<sup>166</sup> The ICC does not exercise “victor’s justice” and could investigate both parties to the conflict. Russia and Syria would probably prefer a military conquest over ISIS so that Syrian courts could try and sentence ISIS war criminals while the Assad regime enjoys impunity for its crimes. Similarly, Iraq and Syria could make declarations to give the ICC jurisdiction over specific concerns but would be unlikely for similar fears that the governments themselves would be under ICC investigations.

Aside from the legal and political reasons against the use of the ICC to prosecute ISIS defendants, more practical concerns exist. Even when the

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158. Rome Statute, *supra* note 92 at art. 13.

159. *Id.* at art. 12.

160. *Id.*

161. INTERNATIONAL CRIMINAL COURT, The State Parties to the Rome Statute, [https://www.icc-cpi.int/en\\_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](https://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx).

162. Rome Statute, *supra* note 92 at art. 17.

163. Jessica Stern & J.M. Berger, *ISIS and the Foreign-Fighter Phenomenon*, THE ATLANTIC (Mar. 8, 2015), <http://www.theatlantic.com/international/archive/2015/03/isis-and-the-foreign-fighter-problem/387166>.

164. Rome Statute, *supra* note art. 13.

165. *Id.* at art. 17.

166. Russia is a permanent member of the Security Council and has the veto power to unilaterally stop referral of concerns to the ICC. Berger, *supra* note 149.

ICC has jurisdiction, its proceedings tend to be expensive, and since its creation in 2002, the ICC has only tried twenty-two cases and investigated nine situations.<sup>167</sup> Article 25 of the Rome Statute says that the ICC has jurisdiction over anyone who commits a war crime, crime against humanity, or genocide whether “as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible . . . orders, solicits or induces the commission of such a crime . . . aids, abets or otherwise assists in the commission” of the crime.<sup>168</sup> This language seems to indicate that the ICC would have jurisdiction over everyone who commits war crimes, crimes against humanity, or genocide regardless if the actor is the general ordering the atrocities or the foot soldier carrying out the orders. However, the ICC focuses on trying only high-ranking officials and there are fears that the ICC would only prosecute several perpetrators.<sup>169</sup> Even when the ICC has been successful in prosecuting individuals, bringing those individuals before the court can be problematic. For example, the ICC issued an arrest warrant for former Libyan head of state Muammar Gaddafi but the case against him was dismissed when he was killed five months after the issuance of the warrant.<sup>170</sup>

#### D. Hybrid Courts

Hybrid courts present another feasible alternative to the ICC and they have the possibility of being more efficient than ad hoc courts. For example, the ECCC has operated on a three-year budget \$56.3 million and the Special Court in Sierra Leone has operated on a budget of around \$100 million during that same time.<sup>171</sup> Meanwhile, the ad hoc courts of the ICTY and ICTR operate on a budget of approximately \$270 million each per year.<sup>172</sup> While the smaller budget of the hybrid courts may be appealing to financially minded nations during a time of relative economic hardship, the smaller budget means that these courts work with fewer resources.<sup>173</sup>

Another benefit of the hybrid courts is that Iraq is already familiar with the concept and implementation of a hybrid court through its experience creating the IHT to try Saddam Hussein and seven other

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167. THE ICC: SITUATIONS AND CASES, [https://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx](https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx) (last visited Mar. 29, 2015).

168. Rome Statute, *supra* note 92 at art. 25.

169. Borger, *supra* note 149.

170. ICC: THE PROSECUTOR V. SAIF AL-ISLAM GADDAFI, [https://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/icc0111/related%20cases/icc01110111/Pages/icc01110111.aspx](https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0111/related%20cases/icc01110111/Pages/icc01110111.aspx) (last visited Apr. 22, 2015).

171. VAN SCHAACK, *supra* note 11, at 161.

172. *Id.*

173. *Id.*

defendants.<sup>174</sup> However, a closer look at the proceedings of the IHT reveal that they were highly problematic.<sup>175</sup> Throughout the proceedings Saddam Hussein fired several attorneys, several attorneys quit, several judges resigned or were removed mid-trial, and the criminal defendants boycotted the trials.<sup>176</sup> The troubles also plagued the other defendants as the attorney for one co-defendant was kidnapped and murdered, while another defense attorney was killed in a drive by shooting.<sup>177</sup>

Apart from the staffing problems that plagued the IHT, hybrid courts may also suffer from sentencing problems. Saddam Hussein was hanged only four days after the final verdict was issued on his case.<sup>178</sup> This sudden execution would not have happened if Hussein were tried in many other nations and a death sentence could be problematic in the international community.<sup>179</sup> Other international courts, such as the ICTY, issue maximum sentences of life imprisonment and do not sentence defendants to death.<sup>180</sup> Despite this issue, the hybrid courts are still attractive because they allow for some level of domestic sovereignty and involvement while still providing international objectiveness.<sup>181</sup> Still, there may be concerns that, if Syria were to agree to a hybrid court, the Assad regime would focus the proceedings only on extremist or rebel prosecutions. These concerns can be alleviated because, like in the hybrid court in Cambodia, the U.N. (if involved) can reserve the right to withdraw support and funding for a hybrid tribunal.<sup>182</sup>

Like the ad hoc courts, the hybrid courts seem to conduct larger amounts of prosecutions and trials than the ICC. For example, the Special Panels in East Timor were able to conduct fifty-five trials, which led to eighty-four convictions and four acquittals.<sup>183</sup> However, an evaluation of the Special Panels found that many of the judgments issued were lacking in their explanations of legal findings and reasoning.<sup>184</sup> Furthermore, many of the indicted were located in Indonesia and were at large because Indonesia

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174. *Id.* at 198–199.

175. *Saddam Hussein Trial Fast Facts*, CNN (updated March 12, 2015, 7:01 PM), <http://www.cnn.com/2013/10/30/world/meast/saddam-hussein-trial-fast-facts/>.

176. *Id.*

177. *Id.*

178. *Id.*

179. “Over two-thirds of the countries in the world—140—have now abolished the death penalty in law or practice.” AMNESTY INTERNATIONAL: *The Ultimate Denial of Human Rights*, <http://www.amnestyusa.org/our-work/issues/death-penalty> (last visited Mar. 29, 2015).

180. THE ICTY: JUDGEMENT LIST, <http://www.icty.org/sections/TheCases/JudgementList> (last visited Mar 29, 2015) (showing that none of the defendants were sentenced to death, the maximum sentence being life imprisonment).

181. Dickinson, *supra* note 108, at 306.

182. VAN SCHAACK, *supra* note 11, at 162.

183. *Id.* at 181.

184. *Id.* at 182.

would not extradite to East Timor.<sup>185</sup> But this precedent of indicting persons outside of territorial boundaries may be beneficial to Iraq or Syria if they were to negotiate an extradition agreement limited to a hybrid court established in either or both of the states.

## V. CONCLUSION

ISIS is a complex entity and does not fit perfectly with the structure of domestic courts, ad hoc courts, the ICC, or hybrid courts. The best option would be an ad hoc court created by the U.N. Security Council because it would be able to exercise jurisdiction over ISIS defendants with jurisdiction superior to any domestic court. Additionally, an ad hoc court could possibly investigate and try the Assad regime and non-ISIS defendants. However, there remains a political roadblock in Russia and China and it is difficult to tell whether they would approve of an ad hoc court. The second best option would be a hybrid court because it will allow the sovereign state to be involved with negotiations leading up to the creation of the court system as well as being involved in the prosecutions and trials. But after taking a second look at the IHT in Iraq and the Special Panels in East Timor, the quality and effectiveness of hybrid courts are still in question.

At this point, it does not seem that either Iraqi or Syrian domestic courts are capable of trying ISIS war criminals. Likewise, there are pragmatic concerns in exercising “victor’s justice” over ISIS war criminals through a military tribunal because a military force will have to enter Iraqi and Syrian territories and conquer ISIS. Creation of a military tribunal would infringe upon the sovereignty of Iraq and Syria and the ICC is also not an attractive option because Iraq is not a member of the Rome Statute and Syria never ratified the statute. Russia would likely veto a Security Council recommendation and the prosecutor is only interested in a few perpetrators.

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185. *Id.*

