

LEGAL MEMORANDUM

No. 225 | JANUARY 22, 2018

Can Captured ISIS Fighters Be Prosecuted for Genocide in an International Tribunal?

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Abstract

The International Criminal Court can exercise jurisdiction over parties for genocide, but it likely cannot do so in connection with the genocide committed by ISIS. There are only a limited number of options available, and thus far, none seems workable. The short-term result is that we are not likely to see the international community formally bring ISIS and its members to book for their crimes any time soon in the ICC. Nonetheless, there is hope that a recent U.N.-initiated investigation might lead to a prosecution by Iraq. If Iraq does so, the resolution spawning that prosecution “may be looked back on as a major milestone in the path toward justice for the countless victims of ISIS in Iraq.”

Consequences of the Fall of ISIS

In the autumn and winter of 2017–2018, the Islamic State of Iraq and Syria (ISIS) saw its claim to be a sovereign nation stymied by its effective defeat as an organized, large-scale military force.¹ Of course, ISIS may try to reconstitute itself as a new government in remote regions of Afghanistan or in one of the so-called failed nations in North Africa or Southwest Asia, such as Libya, Yemen, or Somalia. If it does, the United States will have to decide whether to play an international version of the game whack-a-mole in order to bring the terrorist activities of ISIS to an end.

Regardless of what decision the nation makes, continued military pursuit of ISIS is not the only event we may see played out on the world stage. In October 2017, American forces, consisting of U.S. Navy SEALs along with the FBI’s Hostage Rescue Team, captured Mustafa al-Imam, a suspect in the 2012 attack on the American

KEY POINTS

- Customary principles of international law authorize a nation to prosecute any crimes committed within its borders or to prosecute its nationals for crimes committed elsewhere.
- Pursuant to a September 2017 U.N. Security Council resolution, a team will work with the government of Iraq to collect and preserve evidence of ISIS’s crimes in that nation. Thus, even if the international community cannot use the International Criminal Court, the Iraqi government could hold ISIS accountable for its conduct.
- Nongovernmental organizations have been collecting evidence of ISIS’s crimes, such as the number of people killed, witness statements from survivors, and autopsy reports. That proof could be used if a trial is ever held. The NGOs should share their evidence with the investigators and offer to help them perform their tasks.
- The preservation of evidence should proceed without waiting for Iraq to decide whether to charge ISIS leaders and fighters with genocide.

This paper, in its entirety, can be found at <http://report.heritage.org/lm225>

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consulate in Benghazi, Libya, that left four Americans dead, including U.S. Ambassador J. Christopher Stevens.² The federal government has charged al-Imam with providing material support to terrorists in violation of federal law, and he is in custody awaiting trial in U.S. district court.

A similar scenario might arise in connection with one or more ISIS fighters who escaped from the region of Southwest Asia where the recently ended combat took place. Soldiers, intelligence officers, or some other officials of the American government or a foreign nation might capture one or more ISIS fighters, whether in the near future or a few more years down the road. If so, that event would raise the question of how captured ISIS leaders and fighters should be held accountable for their crimes, including the genocide of Christians.³

The Crime of Genocide

The term “genocide” comes from *genos*, the Greek word for tribe, and *cidium*, the Latin word for killing.⁴ Coined in 1944 by Raphael Lemkin, a Jewish lawyer who had escaped from his native Poland in 1939 during the Nazi invasion and fled to the United States, the term naturally brings to mind the Nazis’ attempted, as they labeled it, “Final Solution to the Jewish Problem.”⁵ Unfortunately, the crime of genocide did not pass into history with the end of World War II.⁶

In 1948, the United Nations approved the Convention on the Prevention and Punishment of the Crime of Genocide. The convention acknowledged genocide to be a distinct international crime, whether committed during war or in a time of peace,⁷ with three essential elements.

First, the prosecution must prove that the perpetrator acted with the specific “intent to destroy, in whole or in part, a national, ethnic, racial, or religious group as such.”⁸ Known as the “chapeau” element,⁹ the intent to be proved is that a perpetrator acted for the purpose of (for example) killing members of one or more of those groups, not in spite of their membership in that group, but “*precisely because*” they belonged to it.¹⁰ The intent is also not simply to punish or even to decimate that group, but to annihilate the group—to wipe it off the face of the Earth.¹¹

Second, the prosecution must prove one or more of five separate means of committing genocide:

- Intentionally killing members of the group;
- Purposefully inflicting serious bodily or mental injury on them by, for instance, using torture or rape;
- Forcing them to live under conditions that are calculated to kill them through, for example, starvation, concentration-camp living, exposure to disease, and so forth;
- Preventing members of the group from being able to reproduce through, for example, forced sterilization; or
- Taking away the children of group members.¹²

Third, the perpetrator must be culpable under general principles of criminal law.¹³

The Factual Proof of Genocide

Have members of ISIS committed numerous instances of the type of crimes that constitute genocide? The answer, without doubt, is “Yes.”

In March 2016, former Secretary of State John Kerry concluded that ISIS is “responsible for genocide.”¹⁴ His successor, Rex Tillerson, reaffirmed that conclusion in August 2017.¹⁵ The House of Representatives and the Senate passed resolutions condemning the violence against Christians and others as genocide.¹⁶ The European Parliament reached the same conclusion in 2016 and declared ISIS guilty of genocide.¹⁷ Pope Francis—who is not only the sectarian leader of the worldwide Catholic Church, but also the secular head of Vatican City, an independent sovereign—also labeled as genocide the persecution, torture, and murder of Christians in the Middle East as an element of what he called “this third world war.”¹⁸

There is ample proof to support those conclusions. As Professor Ronald Rychlak, a scholar in genocide studies, has argued:

There is little doubt that ISIS has repeatedly committed actions that are criminal under the Rome Statute. It has been systematically murdering, exterminating, enslaving, forcibly transporting, raping, committing other sexually violent acts, persecuting groups based on their religion and ethnicity, and committing “inhumane acts

of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.” The U.N. Assistance Mission for Iraq and the Office of the U.N. High Commissioner for Human Rights released a report on ISIS’s actions against civilians, specifically actions against women and children from July 6, 2014, to September 10, 2014. The report described how ISIS forced children as young as twelve or thirteen years old into service by donating their blood to treat wounded ISIS soldiers, patrolling ISIS controlled towns, and manning ISIS checkpoints. ISIS has also used children as shields in skirmishes with Iraqi and other resistance forces. The report called on the International Criminal Court to launch an investigation into these crimes.

Ever since ISIS first started operating in Iraq (as al-Qaeda in Iraq) it targeted civilians as well as military personnel. Most ISIS fighters are members of the Sunni Muslim sect, and at first ISIS primarily went after Shi’ite targets. (Shi’ites are a majority in Iraq as a whole but a minority in ISIS-dominated northern Iraq.) In 2014, however, ISIS began targeting other ethnic minorities including Christians, Yazidis, Shabak, Shi’ite Turkmen, and those Sunni Muslims who disagreed with ISIS’s religious philosophy and actions.¹⁹

Nina Shea, Director of the Center for Religious Freedom at the Hudson Institute, has reached the same conclusion:

Nowhere today does the term genocide apply more than in Iraq and Syria, where Christian communities have been devastated by targeted killing, hostage taking, rape, forcible conversion, deportation, and the systematic destruction of their churches and every trace of the two-millennia-old Christian presence.²⁰

In February 2015, the world awakened to a graphic demonstration of ISIS slaughtering Christians in a YouTube video. Made by ISIS, the video showed the terror group’s militants methodically beheading a line of bound, kneeling men, all of whom were dressed in orange jumpsuits, on a Libyan beach. These ISIS victims were twenty-one Egyptian Coptic Orthodox Christians and a Christian from Ghana. They had worked in Libya

as migrants, and had been selectively seized from their dormitory after confessing their Christian faith. As they knelt on the beach awaiting their fate, the Lord’s Prayer whispered with their last breath was audible from some of them.²¹

Kevin Cieply, President and Dean of the Ave Maria School of Law, concluded that the evidence establishes genocide:

The situations in Iraq and Syria appear to satisfy the chapeau of genocide. Actions by ISIS and al Qaeda have occurred over an extended period of time, over a wide geographical area, using relatively similar and distinctive methods, such as beheading, and have been preceded by and followed by words that particularly manifest purpose. The purpose clearly appears to be the complete destruction of Christians, and other non-Muslims, in Syria and Iraq. The scale of that destruction has not been limited to a small group, but rather essentially all Christians in any area controlled by ISIS or al Qaeda, satisfying the requirement to have a purpose to destroy “in whole or in part.” The fact that the destruction may be geographically limited to Syria and Iraq, or even localized areas within those States, is not reason to think the element cannot be fulfilled. Their intent to destroy all Christians in any town, or a region they control, suffices. ISIS and al Qaeda have expressed the intent to reach far beyond that—seemingly their intent is to literally destroy all Christians, indeed all non-Muslims, everywhere. The fact that Christians and non-Muslims are being targeted specifically because of their religion fulfills the chapeau sub-elements that the destruction must target groups based on their nationality, ethnicity, race, or religion, as such.

The specific actions that ISIS and al Qaeda have engaged in include each of the listed enumerated actions for genocide: killings, serious bodily harm, inflicting life-threatening conditions, measures to prevent birth, and forcibly transferring children. Of course, any one of those listed actions suffices for the crime of genocide. The overall strategy of both ISIS and al Qaeda, with public beheadings, kidnappings, required conversions and jizya payments, sex slave markets

for fighters, etc., all provide evidence of an intent to create conditions of life calculated to bring about physical destruction. The result of reducing the Christian population from 1.4 million to 250,000 in Iraq, corroborates that intent.²²

Finally, consider the conclusions of former Justice Department lawyer and current Associate Professor of Law Mark Healey Bonner:

Photographs of and articles concerning the crucifixion of Christians in the Middle East by Islamic jihadists are legion.... As related by a U.S. ambassador and reported in the *New York Times Magazine*: “Everyone has seen the forced conversions, crucifixions, and beheadings.” David Saperstein, the United States Ambassador at large for religious freedom, said, “To see these communities, primarily Christians, but also the Yazidis and others, persecuted in such large numbers is deeply alarming.”²³

Detailed accounts of the available evidence strongly support those conclusions.²⁴ In addition, as noted above, that proof comes in part straight from the horse’s mouth because it includes the videotaped execution in Libya broadcast by ISIS and ISIS’s own admissions of its intent and overall purpose. That evidence certainly allows a reasonable trier of fact to conclude that a large number of ISIS fighters are guilty of genocide.²⁵

There are two arguments to the contrary. Some have argued that Christians have not been the victim of genocide because, as “People of the Book”—that is, as one of the three Abrahamic religions (Judaism, Christianity, and Islam)—they may pay a tax called the “jizya” in regions under Islamic governance and thereby earn the right to practice the religion of their choice. In support of that argument, one could point to the 2016 report of the U.N.-created Independent International Commission of Inquiry on the Syrian Arabic Republic (U.N. Syrian Commission).²⁶ The commission concluded that ISIS had targeted the Yazidis—but not Christians—for genocide.²⁷ As described by the commission, the evidence regarding ISIS’s attempted genocide of the Yazidis is compelling.²⁸ At the same time, however, the U.N. Syrian Commission also concluded that ISIS had not subjected Christians to the same atrocities. In that regard, the commission concluded that ISIS’s treatment of the Yazidis was unique.²⁹

Perhaps the commission did not investigate this issue to the depth that it deserves. We know that, as the commission acknowledged, its “mandate [was] limited to violations committed in Syria,” which left Iraq out of the picture.³⁰ Or perhaps the commission intended only to say that ISIS had persecuted the Yazidis more than any other group in Syria or Iraq. If either possibility is the case, the U.N. Syrian Commission’s statement would not be inconsistent with the conclusion that ISIS had also targeted Christians for elimination.

In fact, any other conclusion simply would ignore the evidence and would be, as Nina Shea has written, “preposterous.”³¹ Just as the robber’s demand “Your money or your life!” does not offer someone a real choice, ISIS’s option of paying jizya is better viewed as extortion than as a tax.³² As Nina Shea has explained:

Christian clergy have been killed or disappeared, including bishops. Lay persons, too, have been singled out for attack. They have been targeted for “unIslamic” dress, speech, behavior, and businesses. Many thousands of Christians have been taken hostage and tortured or killed. Some Christians have been forced to convert to Islam with swords to their or their children’s throats. Some who refused have been crucified. Scores of Christian women and girls have been taken as sex slaves for ISIS jihadists, along with thousands of Yazidis. An occasional video or report of an ISIS demolition of a church or monastery has reached the international media, but few in the West understand that within ISIS-controlled territory, all churches have been shut, desecrated, or destroyed, all clergy have been assassinated or driven out, and no Christian community has been left intact....

Such assaults are solely for religious reasons; these Christians are members of a small minority that lack political power and have not taken up arms for any side in the region’s conflicts. ISIS’s own public statements frequently claim credit for the murder of Christians, exult in the enslavement of Christian women and girls, and express the intent to wholly eradicate Christian communities from its “Islamic State.” ISIS threatened: “We will conquer your Rome, break your crosses, and enslave your women,” in a recent issue of its propaganda magazine *Dabiq*, which also carried a

cover photo of St. Peter's Basilica in Rome with a black flag replacing the cross atop its dome....

Superficially, ISIS may appear to have revived the medieval Islamic practice that provided limited toleration for Jewish and Christian "People of the Book" which was formally abandoned over a century and a half ago under the last Ottoman caliphate. Closer examination of ISIS's treatment of Christians, which includes all three major cases where jizya was claimed to have been offered as an option, however, reveals that these ISIS claims are a deception or a propaganda ploy. ISIS does not tolerate Christians. Its demands for payment from Christians, which it calls jizya, are actually extortion and ransom. ISIS has never given a traditional jizya option to Christians at any time. Even when it extorts payments and calls them jizya, this always, within a short time, results in dispossession, rape, murder, kidnapping, and enslavement of Christians—all acts evidencing the crime of genocide. Nowhere in ISIS-controlled territory are there intact Christian communities, only individuals, mostly elderly, who are forced to pay extortion and have no possibility of exercising their religious rights, as their churches are destroyed or closed and their clergy have been killed or forced to flee....

There is no functioning church, no Christian clergy, no Christian liturgies or sacraments, no intact Christian community—in short, no Christian life evident anywhere in ISIS territory. ISIS eradicated these communities and nearly every trace of their two-millennia-old history. These Christian communities were extremely fragile; they had suffered relentless persecution in Iraq for a decade before ISIS and in Syria for three years, at the hands of other Islamists, including those groups from which ISIS emerged. Many assassinations of clergy, cases of hostage taking, and targeted church bombings occurred in the pre-ISIS period in both of these countries. ISIS finished off these Christian communities in areas under its control with a brutality that was both deliberate and systematic.

Far from respecting Christians as "People of the Book," the Islamic State has amply demonstrated its intent is to kill, enslave, and drive out this

indigenous Middle Eastern Christian community. In many cases, ISIS did not even bother to offer a jizya option before brutalizing and killing Christians. Even where ISIS claimed to offer a jizya option for Christians, though, it would not tolerate peaceful coexistence with them.

ISIS believes that the very presence of practicing Christians, whom it routinely calls unbelievers, infidels, polytheists, and Crusaders, defiles its caliphate. In 2015, in the seventh issue of its English-language magazine *Dabiq*, ISIS declared that "the truth is also clear regarding...jihad against the Jews, the Christians," and others, and directed the reader to "go forth for jihad and defend your Islam wherever you may be."

To be sure, ISIS routinely demanded money of Christians and took their property, and sometimes called this "jizya." A review of those situations in Iraq and Syria, where the payment of jizya was claimed to have been offered as an option, reveals that ISIS does not allow Christians to live in security as Christians. The so-called jizya option is not the concept under traditional Islam that, in exchange for money, the caliph purported to undertake a two-fold obligation: respect for Christians as "People of the Book," and the assurance of peaceful coexistence. In every known case where ISIS uses the term "jizya," the Christian payments are clearly forms of ransom or extortion, as they do not allow a right to Christian "rites," which jizya traditionally purported to do.³³

ISIS's propaganda and actions are so violently anti-Christian that it is highly unlikely any sane Christian would actually believe that paying jizya would protect him. It is also unlikely that ISIS's foot soldiers would restrain themselves around jizya-paying Christians when the former are so steeped in radical anti-Christian beliefs. Accordingly, the question is whether the world community can prosecute ISIS leaders for its crimes. As discussed below, that legal issue is not as easy to resolve.

Jurisdiction to Prosecute Genocide

As long as the world community is committed to using the legitimacy of a judicial tribunal to establish the commission of atrocities, the ability to prove beyond any doubt the guilt of someone

who has committed heinous crimes matters little if there is no court available to hear that evidence. To avoid that outcome, the International Military Tribunal at Nuremberg, colloquially known as the Nuremberg War Crimes Trials, brought to justice the Nazi officials responsible for the torture and murder of more than six millions Jews in Europe.³⁴ Other, lesser-known tribunals devoted to similar occurrences of widespread, large-scale mass murder are the International Criminal Tribunal for Rwanda, the International Criminal Tribunal for Yugoslavia, and the Extraordinary Chambers in the Courts of Cambodia, also known as the Cambodia or Khmer Rouge Tribunal, each of which was created to deal with a specific series of atrocities.³⁵ As one scholar has noted, “The tribunals essentially picked up where post World War II trials of major war criminals left off” by fleshing out the elements of genocide and allied offenses.³⁶

In 1998, 120 nations³⁷ negotiated the Rome Statute, a treaty creating today’s International Criminal Court (ICC), which entered into force on July 2, 2002, when the 60th nation ratified the treaty.³⁸ Based in the Netherlands at The Hague, the ICC is responsible for addressing the “most serious crimes of concern to the international community as a whole”—namely, genocide, crimes against humanity, war crimes, and the crime of “aggression” or “aggressive warfare.”³⁹

As Professor Rychlak has noted, however, the ICC is not likely to play a role in meting out punishment to the leaders of ISIS.⁴⁰ The reason is that the Rome Statute does not allow the ICC to try ISIS for genocide. The statute authorizes the ICC to exercise jurisdiction only in limited circumstances. The limitations were designed to protect sovereign nations and their nationals against being hauled before the ICC for political reasons or based on frivolous charges. The principal basis for prosecution lies where the crimes are committed in the territory of, or by nationals of, a party to the Rome Treaty.⁴¹ Neither Iraq nor Syria has ratified or acceded to the treaty, however, and neither is expected to do so in the near future.⁴² Accordingly, that option is not available.

There are alternatives. Syria and Iraq could decide to accept the jurisdiction of the ICC even though they are not parties to the Rome Statute, but that could leave officials from those states vulnerable to an ICC investigation. Or the United Nations

Security Council could refer the matter to the ICC, as it has done in the cases of Darfur and Libya. The Security Council could also create a special tribunal for the purpose of prosecuting ISIS for genocide, which the council did for the crimes committed in Rwanda and Yugoslavia.⁴³ Each of the five permanent members of the council, however, can veto any such action, and the evidence to date indicates that Russia would likely exercise that option.⁴⁴

Finally, either Iraq or Syria could independently prosecute ISIS for acts of genocide committed within its borders. That is the preferred option. Customary principles of international law authorize a nation to prosecute any crimes committed within its borders or to prosecute its nationals for crimes committed elsewhere.⁴⁵ The Syrian government has offered no evidence that it is willing to do so, but there is hope that the Iraqi government might take up that burden.

In September 2017, the U.N. Security Council unanimously adopted a resolution, introduced by the United Kingdom, to launch an investigation into whether ISIS has committed genocide (and other crimes).⁴⁶ A special adviser will head the investigation, and the team will work with the government of Iraq to collect and preserve evidence of ISIS’s crimes in that nation.⁴⁷ The resolution does not limit the investigation to crimes committed against any specific group, like the Yazidis, and does direct the investigation to consider crimes “motivated by religious... grounds.”⁴⁸ The result is that even if the international community cannot use the ICC, the tribunal created precisely to adjudicate the type of atrocities that ISIS has committed, there is a possibility that the Iraqi government will hold ISIS accountable for its conduct. Iraq has indicated that it might be willing to do so.

The preservation of evidence should proceed without waiting for Iraq to make a final decision whether to charge ISIS’s leaders and fighters with genocide. Evidence can be evanescent. Witnesses can move or die, documents can be lost or destroyed, autopsies are impossible if bodies cannot be found, and so forth. Nongovernmental organizations (NGOs) have been collecting evidence of ISIS’s crimes, such as the number of people killed, witness statements from survivors, autopsy reports, and the like. That proof could be used if a trial is ever held. The NGOs should share their evidence with the investigators and offer to help them perform their tasks.

Where does that leave us? As a factual matter, there is no doubt that ISIS and many of its members have committed the types of atrocities that go far beyond ordinary crimes—even mass murder of the type that Josef Stalin committed against the Ukrainians⁴⁹—and that constitute what, in the days of the Nuremberg War Crimes Tribunal, would have been charged as crimes against humanity but today would be prosecuted as genocide. For practical political reasons, however, the ICC, the contemporary descendant of the Nuremberg tribunal, is unlikely to exercise jurisdiction over these crimes. Syria also has not indicated that it will step up to take that responsibility for genocide that ISIS has committed within its borders. Yet there is hope that the government of Iraq might prove itself willing to do so. If so, if Iraq prosecutes the leaders of ISIS for genocide, that proceeding would avoid what many would say, with eminent justification, is the greatest potential miscarriage of justice the world faces today.

Conclusion

The ICC can exercise jurisdiction over parties for genocide, but it likely cannot do so in connection with the genocide committed by ISIS. There are only a limited number of options available, and thus far, none seems workable. The short-term result is that we are not likely to see the international community formally bring ISIS and its members to book for their crimes any time soon in the ICC. Nonetheless, there is hope that a recent U.N.-initiated investigation might lead to a prosecution by the nation of Iraq. If Iraq does so, the resolution spawning that prosecution “may be looked back on as a major milestone in the path toward justice for the countless victims of ISIS in Iraq.”⁵⁰

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Appendix: Restatement (Third) of Foreign Relations Law (1987)

§ 401. Categories of Jurisdiction

Under international law, a state is subject to limitations on

(a) jurisdiction to prescribe, *i.e.*, to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court;

(b) jurisdiction to adjudicate, *i.e.*, to subject persons or things to the process of its courts or administrative tribunals, whether in civil or in criminal proceedings, whether or not the state is a party to the proceedings;

(c) jurisdiction to enforce, *i.e.*, to induce or compel compliance or to punish noncompliance with its laws or regulations, whether through the courts or by use of executive, administrative, police, or other nonjudicial action.

§ 402. Bases of Jurisdiction to Prescribe

Subject to § 403, a state has jurisdiction to prescribe law with respect to

(1) (a) conduct that, wholly or in substantial part, takes place within its territory;

(b) the status of persons, or interests in things, present within its territory;

(c) conduct outside its territory that has or is intended to have substantial effect within its territory;

(2) the activities, interests, status, or relations of its nationals outside as well as within its territory; and

(3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.

§ 403. Limitations on Jurisdiction to Prescribe

(1) Even when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.

(2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:

(a) the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;

(b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;

(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted.

(d) the existence of justified expectations that might be protected or hurt by the regulation;

(e) the importance of the regulation to the international political, legal, or economic system;

(f) the extent to which the regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity; and

(h) the likelihood of conflict with regulation by another state.

(3) When it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction, in light of all the relevant factors, including those set out in Subsection (2); a state should defer to the other state if that state's interest is clearly greater.

§ 404. Universal Jurisdiction to Define and Punish Certain Offenses

A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where none of the bases of jurisdiction indicated in § 402 is present.

Endnotes

1. ISIS is also called ISIL, for the Islamic State of Iraq and the Levant, or Daesh.
2. See Associated Press, *No Bail or House Arrest for Accused Benghazi Attacker*, N.Y. TIMES, Nov. 9, 2017, <https://www.nytimes.com/aponline/2017/11/09/us/politics/ap-us-benghazi-attack.html>; Adam Goldman & Eric Schmidt, *Benghazi Attacks Suspect Is Captured in Libya by U.S. Commandos*, N.Y. TIMES, Oct. 30, 2017, <https://www.nytimes.com/2017/10/30/world/africa/benghazi-attacks-second-suspect-captured.html>. For an account of the Benghazi attack according to the American defenders, see MITCHELL ZUCKOFF, *13 HOURS: THE INSIDE ACCOUNT OF WHAT REALLY HAPPENED IN BENGHAZI* (2014).
3. Most assume that any proceeding would occur before an international tribunal, but other options exist. In particular, national jurisdictions are and should be the first choice if there is reasonable assurance that they would be willing and able to conduct the process properly and fairly, which is far from assured in Syria and Iraq. It is also possible that a captured ISIS fighter could be brought to the United States for trial in federal court. The prosecution of an ISIS fighter in an American court would raise a host of novel legal issues. For example, a threshold issue is whether the United States can exercise jurisdiction over a crime committed in a foreign land. Jurisdiction is generally a matter of territorial sovereignty, with each nation fully entitled to prosecute someone for a crime that he committed within its borders. But that principle is merely the starting point; a nation can prosecute crimes committed by parties beyond its shores under various circumstances. See *Church v. Hubbard*, 6 U.S. (2 Cranch) 187, 234 (1804); (“The authority of a nation within its own territory is absolute and exclusive. But its power to secure itself from injury may certainly be exercised beyond the limits of its territory.”); see also, e.g., *Ford v. United States*, 273 U.S. 593, 620–21 (1927) (opinion by Chief Justice and former President William Howard Taft) (“Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power.”); WAYNE R. LAFAVE, *CRIMINAL LAW* § 4.4, at 223–24 (5th ed. 2010). Under customary principles of international law, a nation may legitimately exercise jurisdiction in four situations: (1) over anything that is or happens within its territory; (2) over its own nationals, wherever they may be or whatever they may do; (3) over anyone and anything that poses an existential threat to its survival, whoever, whatever, or wherever he or it may be; and (4) over crimes and their perpetrators universally deemed a threat to mankind, such as piracy. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 401–04 (1987) (discussing limits on jurisdiction of a nation to prescribe, adjudicate, or enforce its law, another nation’s law, or international law), reprinted at App., *infra*; Kevin Cieply, *International Criminal Law*, in *THE PERSECUTION AND GENOCIDE OF CHRISTIANS IN THE MIDDLE EAST: PREVENTION, PROHIBITION, AND PROSECUTION* 317 (Ronald J. Rychlak & Jane F. Adolphe eds., 2017); CEDRIC RYNGAERT, *JURISDICTION IN INTERNATIONAL LAW* (2d ed. 2015). In the exercise of that authority, Congress has adopted a variety of federal criminal laws governing conduct that occurs overseas. E.g., the Torture Act, 18 U.S.C. 2340–2340A (2012); *United States v. Belfast*, 611 F.3d 783 (11th Cir. 2010); Paul J. Larkin, Jr., *The Dynamic Incorporation of Foreign Law and the Constitutional Regulation of Federal Lawmaking*, 38 HARV. J.L. & PUB. POL’Y 337, 343–44 & nn.20–22 (2015); see also Mark Healy Bonner, *Using the Torture Act Against the Persecution of Christians*, in Rychlak & Adolphe, *supra*, at 287 (arguing for using the Torture Act to prosecute the torture of Christians in the Middle East). The result is that the federal government can charge foreign nationals under federal law for a variety of actions that occur, at least in part, beyond our shores. The Supreme Court, however, has not decided whether a federal court can exercise jurisdiction over a terrorist actor for a crime that does not involve an American victim or pose a risk of injury to the nation, its governments (federal, state, or local), or its people (including businesses) generally. The Court has ruled that the state courts cannot act as a “world court” to adjudicate civil disputes that do not affect one of those domestic interests. See *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014) (ruling that the Fourteenth Amendment Due Process Clause prohibits a state court from exercising jurisdiction over injuries allegedly caused overseas by a foreign defendant to foreign plaintiffs); Paul J. Larkin, Jr., *Closing the Door to Foreign Lawsuits*: *Daimler AG v. Bauman*, HERITAGE FOUND. LEGAL MEMORANDUM No. 126 (June 9, 2014) (discussing the *Daimler* case), http://thf_media.s3.amazonaws.com/2014/pdf/LM126.pdf. But the Court has not had occasion to decide whether the same rule applies to a federal criminal prosecution. See, e.g., *United States v. Alvarez-Machain*, 504 U.S. 655 (1992); *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); *Cook v. United States*, 288 U.S. 102 (1933); *Ford*, 273 U.S. at 620–21; *Benson v. Henkel*, 198 U.S. 1, 15–16 (1905); *United States v. Rauscher*, 119 U.S. 407 (1886). That issue is beyond the scope of this *Legal Memorandum*.
4. Cieply, *supra* note 3, in Rychlak & Adolphe, *supra* note 3, at 287. For examples of scholarly discussions of the history of genocide, as well as the legal, moral, and political issues it raises, see BEN KIERNAN, *BLOOD AND SOIL: A WORLD HISTORY OF GENOCIDE AND EXTERMINATION FROM SPARTA TO DARFUR* (2009); NORMAN M. NAIMARK, *GENOCIDE: A WORLD HISTORY* (2016); NORMAN M. NAIMARK, *FIRES OF HATRED: ETHNIC CLEANSING IN TWENTIETH-CENTURY EUROPE* (2001); SAMANTHA POWER, *“A PROBLEM FROM HELL”: AMERICA AND THE AGE OF GENOCIDE* (2013).
5. Cieply, *supra* note 3, in Rychlak & Adolphe, *supra* note 3, at 287 & n.8. Ironically, the charges brought by the Allied Powers in the Nuremberg War Crimes Trials were for crimes against humanity rather than genocide. The Allies’ Chief Prosecutor (and then-sitting U.S. Supreme Court Justice) Robert Jackson thought that, given its then-recent novelty, the term “genocide” would raise fair notice concerns that could undermine the legitimacy of the charges. *Id.* at 292.
6. See Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 Geo. L.J. 381, 384 (2000) (“[T]he Twentieth Century witnessed atrocities on a truly unprecedented scale. The estimate of 170 million dead in 250 conflicts that have occurred since World War II is a grim testament to the failure of the international community to create a viable mechanism to prevent aggression and enforce international humanitarian law.”) (footnote omitted).
7. Cieply, *supra* note 3, in Rychlak & Adolphe, *supra* note 3, at 287–88.
8. *Id.* at 288.

9. “Chapeau” is the French word for hat. In this context, the term is used to mean that the element of intent sits atop the other elements of the crime. *Id.* at 288 & n.11.
10. *Id.* at 288–89. In that regard, the intent necessary for genocide is comparable to the intent necessary to establish unconstitutional race- or sex-based discrimination under the Fourteenth Amendment Equal Protection Clause. See *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (“‘Discriminatory purpose,’ however, implies more than intent as volition or intent as awareness of consequences.... It implies that the decisionmaker...selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”) (citation and footnotes omitted).
11. Cieply, *supra* note 3, in Rychlak & Adolphe, *supra* note 3, at 288–89 (“[T]he purpose must specifically be to ‘destroy’ the group. Making the group suffer or discriminating against the group does not suffice for genocide. The intended effect must be to actually eliminate the group, physically.”). The prosecution can prove that element without needing to disprove the possibility that a small number of group members could survive. *Id.* at 290 (“The key seems to come down to whether the intent to destroy would qualify as an existential threat to the targeted group.”). The prosecution therefore could establish the chapeau element by showing that ISIS intended to eliminate all Christians within its area of control without also having to prove that it also desired to eliminate Christians in (for example) the Western Hemisphere. Ironically, the International Criminal Tribunal for Yugoslavia so ruled in a case in which Muslims were the victims. *Id.* at 290 (“The killing of all members of the part of a group located within a small geographic area, although resulting in a lesser number of victims, would qualify as genocide if carried out with the intent to destroy the part of the group as such located in this small geographic area.”). The tribunal convicted Serbians for killing 7,000–8,000 Bosnian Muslim men from the city of Srebrenica and its surroundings, not all Muslims worldwide, in Europe, or even just in Yugoslavia.
12. *Id.* at 290–91.
13. *Id.* at 288.
14. Remarks of John Kerry, Secretary of State, Press Briefing Rm., Washington, D.C. (Mar. 17, 2016); see Jane F. Adolphe, *Foreword*, in Rychlak & Adolphe, *supra* note 3, at 3.
15. Remarks of Rex W. Tillerson, Secretary of State, on the 2016 International Religious Freedom Annual Report (Aug. 15, 2017), <https://www.state.gov/secretary/remarks/2017/08/273449.htm> (“To remove any ambiguity from previous statements or reports by the State Department, the crime of genocide requires three elements: specific acts with specific intent to destroy in whole or in part specific people, members of national, ethnic, racial, or religious groups. Specific act, specific intent, specific people. [¶] Application of the law to the facts at hand leads to the conclusion ISIS is clearly responsible for genocide against Yezidis, Christians, and Shia Muslims in areas it controls or has controlled.”).
16. H.R. Res. 75, Expressing the Sense of Congress that the Atrocities Perpetrated by ISIL against Religious and Ethnic Minorities in Iraq and Syria Include War Crimes, Crimes Against Humanity, and Genocide, 114th Cong. (2016); S. Res. 340, A Resolution Expressing the Sense of the Senate that the Atrocities Perpetrated by the Islamic State of Iraq and the Levant (ISIL) against Religious and Ethnic Minorities in Iraq and Syria Include War Crimes, Crimes Against Humanity, and Genocide, 114th Cong. (2016).
17. European Parliament Resolution of 4 February 2016 on the systemic mass murder of religious minorities by the so-called “ISIS/Daesh” (2016/2529(RSP)); see Adolphe, *supra*, note 14, in Rychlak & Adolphe, *supra* note 3, at 3.
18. Pope Francis, Apostolic Journey to Ecuador, Bolivia and Paraguay (July 5–13, 2015), Address for the Second World Meeting of Popular Movements, Bolivia (July 9, 2015) (“Today, we are dismayed to see how in the Middle East and elsewhere in the world many of our brothers and sisters are persecuted, tortured, and killed for their faith in Jesus. This too needs to be denounced: in this third world war, waged piecemeal, which we are now experiencing, a form of genocide—I insist on the word—is taking place, and it must end.”), *quoted at* Adolphe, *supra* note 14, in Rychlak & Adolphe, *supra* note 3, at 3.
19. Ronald J. Rychlak, *Persecution of Christians in the Middle East: The Failed Promise of the International Criminal Court*, in Rychlak & Adolphe, *supra* note 3, at 325.
20. Nina Shea, *ISIS Genocide of Christian Communities in Iraq and Syria*, in Rychlak & Adolphe, *supra* note 3, at 18.
21. *Id.* at 20.
22. Cieply, *supra* note 3, in Rychlak & Adolphe, *supra* note 3, at 319–20.
23. Bonner, *supra* note 3, in Rychlak & Adolphe, *supra* note 3, at 267.
24. See, e.g., KNIGHTS OF COLUMBUS & IN DEFENSE OF CHRISTIANS, GENOCIDE AGAINST CHRISTIANS IN THE MIDDLE EAST: A REPORT SUBMITTED TO SECRETARY OF STATE JOHN KERRY (Mar. 9, 2016).
25. That is the standard the Supreme Court adopted in *Jackson v. Virginia*, 443 U.S. 307 (1979), to measure the sufficiency of the proof to support a conviction used in an American court. *Jackson* directs courts to look to the relevant federal or state law to determine the elements of the offense but to use a standard dictated by the Due Process Clause to determine whether the prosecuted adequately proved those elements. See, e.g., *Coleman v. Johnson*, 566 U.S. 650, 655 (2012) (“Under *Jackson*, federal courts must look to state law for the substantive elements of the criminal offense but the minimum amount of evidence that the Due Process Clause requires to prove the offense is purely a matter of federal law.”) (citation and internal punctuation omitted); *Cavazos v. Smith*, 565 U.S. 1, 7 (2011) (“*Jackson* says that evidence is sufficient to support a conviction so long as after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. It also unambiguously instructs that a reviewing court faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.”) (emphasis in original; citation and internal punctuation omitted).

26. As the U.N. Commission summarized: "ISIS has sought to destroy the Yazidis through killings; sexual slavery, enslavement, torture and inhuman and degrading treatment and forcible transfer causing serious bodily and mental harm; the infliction of conditions of life that bring about a slow death; the imposition of measures to prevent Yazidi children from being born, including forced conversion of adults, the separation of Yazidi men and women, and mental trauma; and the transfer of Yazidi children from their own families and placing them with ISIS fighters, thereby cutting them off from beliefs and practices of their own religious community, and erasing their identity as Yazidis. The public statements and conduct of ISIS and its fighters clearly demonstrate that ISIS intended to destroy the Yazidis of Sinjar, composing the majority of the world's Yazidi population, in whole or in part." U.N. HUMAN RIGHTS COUNCIL, INDEP. INT'L COMM'N OF INQUIRY ON THE SYRIAN ARABIC REPUBLIC No. A/HRC/32/CRP.2, at 1 (June 15, 2016) (hereafter U.N. Syrian Commission); see also *id.* at 5-31 (the commission's findings regarding genocide).
27. Kelsey Zorzi, *This UN Resolution Is a Major Step Toward Justice for Victims of ISIS Genocide*, HERITAGE FOUND., DAILY SIGNAL (Sept. 28, 2017), <http://dailysignal.com/2017/09/28/un-resolution-major-step-toward-justice-victims-isis-genocide/>.
28. U.N. Syrian Commission, *supra* note 26, at 1; see also Nick Cumming-Bruce, *ISIS Committed Genocide Against Yazidis in Syria and Iraq*, U.N. Panel Says, N.Y. TIMES, June 16, 2017, <https://www.nytimes.com/2016/06/17/world/middleeast/isis-genocide-yazidi-un.html>.
29. U.N. SYRIAN COMMISSION, *supra* note 26, at 30-31: "No other religious group present in ISIS-controlled areas of Syria and Iraq has been subjected to the destruction that the Yazidis have suffered. Arab villagers who did not flee Sinjar in advance of the ISIS attack were allowed to remain in their homes, and were not captured, killed, or enslaved. While the Christian communities still living in ISIS-controlled territory live difficult and often precarious existences, are viewed with suspicion, and are vulnerable to attack if ISIS perceive they are seeking protection from non-aligned forces, their right to exist as Christians within any Islamic state existing at any point in time, is recognised as long as they pay the jizya tax. Under ISIS's radical interpretation of Islam, however, it is impermissible for Yazidis to live as Yazidis inside its so-called caliphate because they are not People of the Book."
30. *Id.* at 4.
31. Nina Shea, *Falling for ISIS Propaganda About Christians*, HUDSON INST., July 21, 2017, <https://www.hudson.org/research/12664-falling-for-isis-propaganda-about-christians>.
32. See *id.* at 56.
33. Nina Shea, *ISIS Genocide of Christian Communities in Iraq and Syria*, in Rychlak & Adolphe, *supra* note 3, at 20-54 (footnotes omitted).
34. The Tokyo War Crimes Trials served the same function for the Japanese military and civilian leaders responsible for Japan's acts during World War II. Cieply, *supra* note 3, in Rychlak & Adolphe, *supra* note 3, at 284-85.
35. *Id.*
36. *Id.* at 285. The other crimes are crimes against humanity and war crimes. *Id.*
37. The United States was involved in the negotiations leading up to the treaty but ultimately objected to it. For the U.S. perspective at the conference, see David J. Schaeffer, *America's Stake in Peace, Security, and Justice*, U.S. Dep't of State (Aug. 31, 1998), <https://www.mtholyoke.edu/acad/intrel/scheffer.htm>. Nonetheless, as he was about to walk out the door, President Bill Clinton authorized the Department of State to sign the treaty. President Bill Clinton, *Statement Authorizing the US Signing of the Rome Statute of the International Criminal Court*, Dec. 31, 2000, <http://www.iccnw.org/documents/USClintonSigning31Dec00.pdf>. President George W. Bush withdrew the nation from the treaty. Letter from John R. Bolton, U.S. Undersecretary of State for Arms Control, to U.N. Secretary General Kofi Annan regarding the Rome Statute of the International Criminal Court (May 6, 2002), <https://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm> ("This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to this treaty."); see generally Brett D. Schaefer, *How the U.S. Should Respond to ICC Investigation into Alleged Crimes in Afghanistan*, HERITAGE FOUND. ISSUE BRIEF No. 4784, at 1-2 & nn.3-5 (Nov. 15, 2017), http://www.heritage.org/sites/default/files/2017-11/IB4784_0.pdf.
38. Cieply, *supra* note 3, in Rychlak & Adolphe, *supra* note 3, at 285.
39. *Id.* at 285-86. For a discussion of the Rome Treaty and the ICC, see, for example, Schaefer, *supra* note 9; Brett D. Schaefer & Steven Groves, *The U.S. Should Not Join the International Criminal Court*, HERITAGE FOUND. BACKGROUNDER No. 2307 (Aug. 18, 2009), <http://www.heritage.org/report/the-us-should-not-join-the-international-criminal-court>; Lee A. Casey & David B. Rivkin, Jr., *The International Criminal Court vs. The American People*, HERITAGE FOUND. BACKGROUNDER No. 1249 (Feb. 5, 1999), <http://www.heritage.org/report/the-international-criminal-court-vs-the-american-people>.
40. Rychlak, *supra* note 19, in Rychlak & Adolphe, *supra* note 3, at 323. There also are practical problems that could prove insurmountable. To start with, there is the difficulty of apprehending the responsible parties. The ICC has no police force, and the international community has displayed indifference to the crimes committed by several leaders of different African nations. Rychlak, *supra* note 19, in Rychlak & Adolphe, *supra* note 3, at 327-28. Moreover, establishing the guilt of individual participants might be well-nigh impossible given the difficulty of finding credible eyewitnesses or physical evidence in a war zone. Finally, there is the issue of what, if any, nation would be willing to house ISIS leaders if they were convicted. Any nation imprisoning them would paint a target on its back for terrorist attempts to free them.
41. *Id.* at 329.
42. *Id.*

43. *Id.*

44. Cieply, *supra* note 3, in Rychlak & Adolphe, *supra* note 3, at 319–20 (footnote omitted). Russia has been a longstanding ally of Syria, having provided the country with military weapons before the Six-Day War (also known as the Arab-Israeli War) in 1967. Civil war erupted in Syria in 2011. Russia deployed ground troops and air support to Syria in 2015 and began an air offensive that summer. Russia claimed that it sought to defeat ISIS, but the evidence indicated that it was seeking to bolster its ally against Western-backed rebels. Encyclopedia Britannica, Syrian Civil War, <https://www.britannica.com/event/Syrian-Civil-War>. Russia is unlikely to support any Security Council action that would weaken the government of Syrian President Bashar al-Assad. Any investigation of ISIS's atrocities in Syrian territory would make clear Al-Assad's use of chemical weapons against the rebel forces in his nation, which could be prosecuted as a war crime. The result is that Russia is likely to veto any investigation of atrocities in Syrian territory. The European nations also generally prefer the ICC to a stand-alone tribunal.

45. See *supra* note 3.

46. See Zorzi, *supra* note 27.

47. *Id.*; see Michelle Nichols, *U.N. Team to Collect Evidence of Islamic State Crimes in Iraq*, REUTERS, Sept. 21, 2017, <https://www.reuters.com/article/us-mideast-crisis-iraq-un/u-n-team-to-collect-evidence-of-islamic-state-crimes-in-iraq-idUSKCN1BW26J>.

48. *Id.*

49. See NORMAN M. NAIMARK, *STALIN'S GENOCIDES* (2011).

50. Zorzi, *supra* note 27.