Justice for Sexual Crimes Committed by IS: Exploring Accountability and Compliance Mechanisms

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Prof. dr. C.M.J. Ryngaert and D.W. Hora Siccama, Department of Law, Utrecht University

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1. Introduction

The civil war in Syria has been raging for over almost six years now. Since 2011, several armed groups have been fighting government forces and each other for control over portions of Syrian territory. The most well-known of these groups proclaimed itself as the 'Islamic State' (IS). Under the leadership of Abu Bakr al-Baghdadi, IS controls substantial parts of the territory of Syria and Iraq. It has been documented that IS perpetrated and perpetrates international crimes (war crimes, crimes against humanity, possibly even genocide) against the population living in the territories they control, notably against the ethnic-religious group of the Yezidis.[1]

This contribution focuses on crimes of sexual violence committed against Yezidi women and girls. IS controls every part of life of Yezidi women and girls, dictating them what to wear and with whom they may enter public life. Violations of IS regulations result in physical and psychological punishments. Women and girls are killed, tortured, raped, and traded or held as slaves.[2]

The international community has concentrated its efforts on militarily defeating IS. The question remains, however, whether and how IS and its members could be held accountable for their transgressions. We assess a number of criminal and non-criminal accountability mechanisms that could be envisaged or have already been implemented: international and national criminal proceedings (Sections 3 and 4), national tort (civil) proceedings (Section 5), and international administrative sanctions (Section 6). It also inquires briefly whether and how compliance of IS with international (humanitarian) law could be furthered (Section 7). First, however, any remaining doubts as to the applicability of international humanitarian law to IS will be dispelled (Section 2).

2. The binding character of international humanitarian law

International humanitarian law (hereafter: IHL), also known as the law of war or the law of armed conflict, is found in the Geneva Conventions, its Additional Protocols, and customary international law. IHL protects civilians in times of war and regulates the conduct of hostilities. The Geneva Conventions, for instance, provide that "women shall be protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault".[3]

While the Geneva Conventions primarily govern international armed conflicts (conflicts between states), their Common Article 3 also applies to non-international conflicts, such as the conflict in Syria involving IS. This provision states: "In the case of armed conflict not of an international character occurring in the territory (..) each Party to the conflict shall be bound to apply …(1) persons taking no active part in the hostilities (..) shall in all circumstances be treated humanely,

[1] See for a full overview of the crimes committed: HRC Report, March 2015.
[2] HRC Report, November 2014, p. 9.
[3] Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 1949, art. 27.

without any adverse distinction founded on race, colour, religion or faith, sex. (..) The following acts are and shall remain prohibited at any time (..) (a) violence to life and person, in particular, murder of all kinds, mutilation, cruel treatment and torture (..) (c) outrages upon personal dignity, in particular humiliating and degrading treatment" (emphasis added). Syria and Iraq have ratified the Geneva Conventions, as a result of which Common Article 3 is also binding on IS. Syria and Iraq have not ratified Additional Protocol II to the Geneva Convention (i.e., the Protocol which specifically governs non-international armed conflicts).[4] A considerable number of IHL rules are customary international law, however, and may on that basis bind States and armed groups.[5] The International Committee of the Red Cross (ICRC) has concluded that customary IHL, as applicable in non-international armed conflicts, prohibits sexual violence.[6] Accordingly, when IS commits sexual violence in the context of the armed conflict in Syria and Iraq, it violates IHL. For the application of IHL to IS, it does not matter that IS has not consented to the rules: they are bound in any event on the basis of customary international law, or, with respect to the Geneva Convention, via the principle of legislative jurisdiction (Syria and Iraq have ratified the Convention). Lack of consent by IS nevertheless creates legitimacy and attendant compliance problems. We will return to this in the last part of this contribution, in which we discuss compliance-enhancing techniques. For now, it suffices to state that IHL norms are legally binding on IS.

Rules of international criminal law are the primary rules to provide accountability for violations of IHL norms, at least in respect of violations committed by individual IS members. In the next section, we turn to the applicable norms of substantive international criminal law and, more importantly, examine the prospects for the establishment of international mechanisms to hold IS members to account for violations of international criminal and humanitarian law.

3. International criminal law and tribunals

International criminal law (hereafter: ICL) provides rules and institutions to enforce IHL. Under substantive international criminal law, rape and other forms of sexual violence or assault could qualify as war crimes or crimes against humanity. These crimes are listed in the Rome Statute of the International Criminal Court under art. 7 (1) (g) and art. 8 (e) (vi), and in art. 5 (g) of the Statute for the International Criminal Tribunal for the former Yugoslavia. While these articles specifically mention rape or other forms of sexual violence, other provisions can also be the basis for prosecution

[4] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1977, art. 1.1 stating that the Protocol applies as soon as there is a conflict between armed forces of the State and "dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol".
[5] M. Mack, p. 9 - 10.
[6] J-M Henckaerts, L. Doswald-Beck, p. 323 – 326.

of sexual violence.[7] For example, sexual violence may be subsumed under cruel treatment that in turn may constitute a war crime.[8] In this section, we assume that crimes of sexual violence can qualify as international crimes over which international criminal tribunals may have jurisdiction. We go on to examine which international tribunals could be best suited to prosecute crimes of sexual violence committed by IS. We discuss the International Criminal Court (ICC), ad hoc international tribunals, and hybrid courts in turn.

a. The International Criminal Court (ICC)

At first sight, the ICC may be particularly well-suited to prosecute IS crimes of sexual violence, as it is a permanent international criminal tribunal established to prosecute international crimes, such as those committed by IS. Investigation and prosecution by the ICC would put individuals in senior IS positions on notice that crimes of sexual violence will not go unpunished. Moreover, the European Union is a staunch supporter of the ICC: the EU considers it as an essential mechanism to condemn international crimes, to bring justice to international society and to promote respect for IHL and human rights.[9] The EU funds about 60 % of the expenses of the ICC.[10] It has promoted the ICC universally and sought to include ICC clauses in agreements with third countries.[11]

However, the question is whether the ICC has, or can have, jurisdiction in the first place to prosecute the crimes committed in Syria and Iraq.[12] The ICC has jurisdiction over crimes committed by nationals of states parties to the Rome Statute and over crimes committed on the territory of a state party.[13] Syria and Iraq are not parties to the Statute, nor are there indications that they will ratify the Statute or sign a declaration accepting the ICC's jurisdiction. In this situation, ICC jurisdiction is essentially restricted to persons who are nationals of state parties to the ICC Statute, e.g., the foreign fighters who left Europe to fight for IS in Syria or Iraq. The wider impact of such investigations and prosecutions will be limited, however, as the leaders of IS remain outside the scope of the ICC.[14] Moreover, it is expected that cases brought against nationals will be inadmissible in light of art. 17 of the Rome Statute (which enshrines the complementarity principle), as states parties are likely to carry

[7] P. Viseur Sellers, p. 12.
[8] P. Viseur Sellers, p. 12-13. See also: Prosecutor v. Tadic, Judgment, Case No. IT-94-1-T, 7 May 1997 in which the Court held that cruel treatment constitutes a war crime
[9] Art. 1 Council common position 2003/444/CFSP of 16 June 2003 on the International Criminal Court; General Secretariat of the Council, p. 5.
[10] General Secretariat of the Council, p. 17.
[11] General Secretariat of the Council, p. 12.
[12] Human Rights Watch, Q&A 2013.
[13] UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, art. 12 – 14 on jurisdiction.
[14] M. Lattimer, S. Mojtahedi, L. Tucker, p. 12.

out investigations and prosecutions regarding crimes committed by their nationals abroad – thereby precluding the exercise of ICC jurisdiction.

Theoretically, the situation in Syria, or at least the crimes committed by IS, could be referred to the ICC by the United Nations Security Council.[15] This has already been done for Sudan (2005) and Libya (2011).[16] Given the current political situation, however, it is likely that Russia or China, as permanent members of the council, may exercise their veto over such a Security Council referral.[17]

Given these legal constraints, it comes as no surprise that, responding to calls for the ICC to exercise its jurisdiction, the prosecutor of the ICC has issued a statement confirming that the ICC (currently) has no jurisdiction over the crimes committed in Syria.[18]

b. Ad hoc tribunals

Ad hoc international criminal tribunals are set up for specific situations and usually have jurisdiction that is limited in time.[19] Well-known examples are the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The United Nations created these courts because the international community had a lack of faith in the domestic judicial systems of the states on whose territory the crimes had been committed.[20] Investigations of ad hoc tribunals may have the same impact on a conflict and post-conflict situation as the ICC.[21]

An advantage of establishing an ad hoc tribunal is that can have broad jurisdiction, which is not limited to core international crimes. Previous ad hoc tribunals have also heard more cases, e.g., the ICTY has heard more than 120 cases, while the ICC has only dealt with 34 cases so far (of which five have been closed, and five are currently in the trial phase). An ad hoc tribunal for IS (or Syria in the wider sense) could also be based in the region, in order to have good access to witnesses and documentation.[22] This tribunal could have jurisdiction over crimes committed by IS in both Syria and Iraq.

[15] UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, art. 13b. A referral to a group, rather than to the situation of a specific territory has been done by Uganda concerning the Lord's Resistance Army. See: https://www.icc-cpi.int/uganda. It could therefore be argued that the UNSC could refer the crimes committed by IS.
[16] For example: Referral by the UNSC for Sudan: S/RES/1593 (2005) on 31 March 2015.
[17] Meetings Coverage Security Council, 'Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution', SC/11407, 22 May 2014: http://www.un.org/press/en/2014/sc11407.doc.htm (consulted: 25 October 2016).
[18] Statement by Fatou Bensouda, April 2015.
[19] B. Van Schaak, p. 37.
[20] A. Solis, p. 75.
[21] A. Solis, p. 75.
[22] A. Solis, p. 84

The ICTY and the ICTR have been set up by the Security Council. It remains to be seen now whether Russia and China will agree to the establishment of an ad hoc tribunal for Syria and IS.[23] According to Del Ponte, this is not necessarily excluded provided that an ad hoc tribunal concentrates on the more extremist elements of the opposition rather than on members of the regime.[24] The Syrian regime, in return for cooperation with the tribunal, is at any rate likely to ask for guarantees that its members will not be prosecuted.[25] Finally, it is of note that ad hoc tribunals are usually created after the conflict is over, as it is difficult to investigate and prosecute criminals during the conflict. The effective functioning of a tribunal for Syria/IS may thus depend on the cessation of the conflict.[26]

c. Hybrid courts

Hybrid courts tend to combine international and domestic law, procedure, and staff.[27] They can be said to have the legitimacy of a domestic court and the objectivity of an international court.[28] They may even be established within the existing domestic court structure of a state, thereby obviating the need for the establishment of a completely new court. Iraq is already familiar with a hybrid court: the Iraqi High Tribunal convicted Saddam Hussein and other individuals for committing, among other crimes, genocide and some domestic crimes.[29]

In spite of the benefits of hybrid courts, their establishment requires the consent of the territorial state (Syria/Iraq) or of the Security Council.[30] As signalled earlier, such consent may not be forthcoming. At most, consent may be limited to jurisdiction over crimes committed by the opposition, including IS. From a legitimacy perspective, however, such one-sided justice is not desirable.[31]

Alternatively, in the absence of consent given by the territorial state, the UN General Assembly could sign a treaty with a neighbouring state willing to exercise its universal jurisdiction over crimes committed in Syria (see Section 4 on universal jurisdiction).[32] International community support could then make such jurisdiction 'hybrid'. However, such a treaty has its drawbacks too: it may have enormous political consequences, its implementation may be very expensive, and concerns may exist

[23] G. Waltman III, p. 22.
[24] J. Borger in the Guardian, March 2015.
[25] A. Solis, p. 85. On the other hand, resolutions of the UNSC are binding (chapter VII UN Charter), Syria and Iraq have to cooperate.
[26] A. Solis, p. 85.
[27] Public International Law & Policy Group, p. 1; M. Lattimer, S. Mojtahedi, L. Tucker, p. 13.
[28] A. Solis, p. 79, 88.
[29] Resolution No. (10) 2005 Statute of the Iraqi High Criminal Court Law, available at: https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/0/62dfa419b75d039cc12576a1005fd6c1/$FILE/IST_statute_official_english.pdf; Case No. 1/C1/2005 Dujail Case, available at: http://www.asser.nl/upload/documents/3272012_3403305-11-2006%20-%C2%A0Iraqi%20High%20Tribunal%20Judgement%C2%A0Saddam%20Hussein.pdf.
[30] M. Lattimer, S. Mojtahedi, L. Tucker,, p. 13.
[31] J. Trahan, p. 2.
[32] M. Lattimer, S. Mojtahedi, L. Tucker,, p. 13.

over the impartiality and independence of courts in neighbouring states.[33] Also, if such a treaty is signed, it would be a 'ground-breaking precedent'. It is not entirely clear whether the UNGA has a mandate to conclude it.[34] Finally, at the moment, there is no nationally accepted criminal code in Syria, which renders the application of national law by a hybrid court problematic.

d. International fact-finding

For an international criminal tribunal to be established, the international community needs first to be convinced of the urgent need for such a tribunal. This will normally be a function of international awareness as to the extent of the atrocities committed (combined, of course, with political willingness). The extent of the atrocities can be brought to the international community's attention via the media, but more appropriately and objectively by an independent international fact-finding commission. Fact-finding commissions often have a UN mandate, map and investigate the commission of core international crimes, and recommend corrective measures.[35] Through their investigations, fact-finding commissions may advance compliance with human rights, assist in ensuring accountability by gathering evidence, and provide possibilities of justice for victims.[36] In the past, such commissions have been established to investigate atrocities committed in the former Yugoslavia, Darfur, and Libya. Reports of these commissions have informed the establishment of an international criminal tribunal, respectively facilitated referrals to the ICC.

For Syria, the UN Human Rights Council has established an Independent Commission of Inquiry on the Syrian Arab Republic.[37] Unfortunately, the Commission is not allowed to enter Syria. Still, it has conducted over 1400 interviews with witnesses outside Syria or through Skype, on which the Commission has based four reports.[38] By uploading photos and videos on social media, the Commission has given an insight into the horrible atrocities committed, so as to create public awareness and present prosecutors with interesting leads.[39] In its June 2016 report, the Commission explicitly addressed crimes sexual violence committed by IS.[40] It recommended, inter alia, that the Security Council refer the matter to the ICC or an ad hoc tribunal, and that Syria must do everything in its powers to rescue the Yezidi people.[41]

4. Universal criminal jurisdiction by bystander states

[33] HRC Report, February 2013, p. 125. Neighbouring states may have their own national and security interests, and on that basis influence their courts.
[34] M. Lattimer, S. Mojtahedi, L. Tucker,, p. 13-14.
[35] Guidance and practice, p. 7.
[36] Guidance and practice, p. 7.
[37] Human Rights Council S/17-1, 22 August 2011.
[38] Website of the Independent Commission of Inquiry on the Syrian Arab Republic.
[39] Guidance and practice, p. 44.
[40] HRC Report, June 2016.
[41] HRC Report, June 2016, p. 37.

Having discussed the options for the establishment of international criminal tribunals, we now turn to the possibilities for national courts to exercise jurisdiction over the crimes committed by IS. In fact, such courts might be the natural venues to provide criminal accountability for IS crimes. Also the ICC defers to (genuine) national criminal proceedings.[42] As courts in the region are unlikely to function properly, we focus on the role of domestic courts of bystander states exercising 'universal jurisdiction', i.e., jurisdiction without a territorial or personal link. The Syria Justice and Accountability Centre considers universal jurisdiction, at least in the short run, to be the most viable option to demonstrate the international community's commitment to bring justice for the grave crimes committed in Syria.[43] So do we. We call on EU member states to do more to investigate and prosecute IS atrocities committed against women and girls. Improved cooperation between immigration authorities and prosecutors could be particularly helpful in this respect.

a. Universal jurisdiction

Bystander (third) states may exercise nationality-based and universal jurisdiction over crimes committed by IS members. Thus, EU member state nationals who fight for IS in Syria and Iraq (so-called foreign fighters), may be prosecuted in their home state. Many, if not most acts of sexual violence may however have been committed by non-nationals. Such persons could be prosecuted by bystander states under the universality principle, which operates on the basis of the gravity of the crime rather than a personal or territorial link. Universal jurisdiction could be exercised over crimes against humanity, genocide, war crimes, and torture.[44] As argued above, sexual violence may, under the circumstances, constitute a war crime or a crime against humanity.

That said, almost all states require that the presumed offender be present on the bystander state's territory before a prosecution under the universality principle could actually be started.[45] Most offenders will be present in Syria and Iraq. This severely limits the potential of universal jurisdiction. Nonetheless, some offenders may have fled abroad and on that basis fulfil the presence requirement. National immigration authorities could then have a role to play in identifying them. We address this role in subsection iii. In subsection ii, we first give a brief overview of actual national prosecutions brought concerning crimes committed in Syria.

b. National prosecutions

[42] UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, preamble and art. 17 (1) (a).
[43] M. Lattimer, S. Mojtahedi, L. Tucker, p. 6.
[44] C. Staker, p. 322.
[45] Dutch International Crimes Act, 19 June 2003 (Wet Internationale Misdrijven), art 2.

National prosecutors have proved quite willing to prosecute their own nationals or residents joining IS. Such prosecutions have ordinarily been based on the fact that these persons joined a foreign terrorist war or supported a terrorist group, rather than for committing the war crime of sexual violence. In the US, for instance, IS-linked US-based individuals are typically prosecuted for providing material support to IS.[46] Germany, however, has convicted a returned foreign fighter for the war crime of treating a person in an inhumane manner (the case did not concern sexual violence committed by IS). [47] Another returned fighter has been arrested and prosecuted in Germany for the war crime of torture.[48] Also in Sweden and France, returned fighters have been charged with committing war crimes.[49]

Prosecutions need not be limited to returned foreign fighters, however. They could also extend to non-national or non-resident IS fighters who have committed atrocities in Syria and Iraq and have joined the refugee stream to Europe. It appears that some states are willing to exercise universal jurisdiction over such individuals. For instance, as of February 2016, the Germany Federal Prosecutor of Germany was investigating 15 cases of international crimes committed in Syria (no information available as to nationality of the perpetrator, or crimes accused of). This number can rise when immigration authorities hand over more files to prosecutors. The next section addresses this issue.

c. Cooperation with immigration authorities

The civil war in Syria has led many Syrians to flee to Europe and apply for asylum there. Also war criminals, including perpetrators of sexual violence, may join the refugee stream and apply for asylum. It is incumbent on EU member state immigration authorities to identify such persons and to withhold recognition as refugee if there are serious reasons for considering that they have committed war crimes, in keeping with art. 1F of the 1951 Refugee Convention. Pursuant to this provision, individuals who are suspected of having committed grave crimes, including war crimes and crimes against humanity, are to be refused asylum. The Netherlands refuses asylum on the basis of article 1F in about 30-40 cases each year.[50] In Sweden, such refusals total about 20 each year. Belgium refused recognition in 118 cases between 2007–2014.[51] Such persons are not necessarily deported, sometimes
on the ground that the European Convention on Human Rights prohibits deportation on the basis of

[46] Center on National Security, p. 2 (stating that 101 cases have been brought against IS individuals before federal courts, 26 pct. of which concern the act of joining IS in Syria). For the material support provision see 18 U.S.C. par. 2339B.
[47] OLG Frankfurt Am Main Urt. V. 12.07.2016, Az.: 5-3 StE 2/16 – 4 – 1/16.
[48] Statement by the Federal Prosecutor in April 2016. Available in German at:
http://www.generalbundesanwalt.de/de/showpress.php?themenid=17&newsid=602.
[49] R. Dicker, G Mattioli-Zeltner 2016 (Sweden has exercised universal jurisdiction in this respect).
[50] Kamerstukken 19637/2152, 29 February 2016 (Parliamentary Documents).
[51] M. Bolhuis, J. van Wijk, p. 13 – 22. They discuss each of the focus studies.

art. 3 of the European Convention of Human Rights to a state where the individual might be subject to inhumane treatment.[52] This means that presumed IS war criminals, including perpetrators of sexual violence, may continue to reside on the territory. In order to dispense justice in such cases, it is crucial that information on these persons is shared with prosecutors so that a criminal investigation could be started.[53] Some best practices can be cited here. The Dutch immigration authorities regularly inform the public prosecutor, who in turn may decide to initiate investigations.[54] In Germany the immigration authorities handed over more than 2000 cases to federal prosecutors.[55] Immigration authorities are not only essential in identifying criminals, but also in providing witness statements that could be used in a criminal prosecution.[56] The authorities may thus want refugees to speak out. The Netherlands and Germany, for example, hand out pamphlets to refugees asking them to issue statements and to identify war criminals.

Not only could the exchange of information on a national level be better organised in some states, also international exchange of information between immigration authorities and between such authorities and foreign prosecutors could be enhanced (even if information-sharing between law-enforcement agencies in Europe has, in general, greatly improved).[57] Enhanced information-sharing between immigration authorities and between the latter and law-enforcement agencies may prevent criminals from exploiting legal loopholes by travelling across Europe, and may increase the chances of prosecuting them.[58]

Concluding this part on universal criminal jurisdiction exercised by domestic courts, the European Parliament could call on prosecutors in EU member states to make sexual violence prosecutions a priority and to strengthen cooperation between immigration authorities and public prosecutors.

5. Civil jurisdiction

Having discussed the accountability options under the criminal law, we now turn to possibilities under the civil law. In civil or tort cases, the victim asks for compensation for damages suffered, by filing a direct suit with a court, thus bypassing a prosecutor. These cases may obviously be brought before Syrian and Iraqi courts, but as noted before, the chances of success there are slim. Therefore, we examine options in bystander courts, in particular in EU member states.

[52] Landmark case: Soering v United Kingdom (1989), 11 EHRR 439, Judgment of 7 July 1989. See for example: Rechtbank Den Haag, 19 May 2016, Nr. 16_7864VK, 16_7872VK, 16_7869VK, ECLI:NL:RBDHA:2016:5463.
[53] L. Haskell 2014.
[54] M, Bolhuis, J. van Wijk, p. 26.
[55] B. Knight 2016.
[56] R. Dicker, G Mattioli-Zeltner 2016.
[57] M. Bolhuis, J. van Wijk, p. 68-69.
[58] Idem, p. 49.

While universal criminal jurisdiction over international crimes is well-established, this does not hold for universal civil jurisdiction. Jurisdiction in civil cases is governed by private rather than public international law, and normally operates on the basis of a connection with the forum state. Therefore, it is uncertain whether national courts will be willing to establish their civil jurisdiction over the crimes committed by IS members in Syria, i.e., crimes ordinarily committed by nationals of other states, against victims of other states, and on foreign territory. It is of note, however, that, in order to avert a denial of justice, a number of EU member states have inserted a 'forum of necessity' clause into their legal codes or adopted it through case law. This clause allows courts to establish jurisdiction in civil matters absent a strong nexus to the forum.[59] One study has even concluded that forum of necessity is a general principle of public international law.[60] By nuancing the nexus requirement, forum of necessity resembles universal jurisdiction. Still, many states continue to require some connection with the forum state for forum of necessity-based jurisdiction to be exercised.[61] A Dutch court, for example, established its jurisdiction in a civil case brought by a Palestinian nurse, who had been tortured and had suffered sexual violence by the Libyan Kadhafi regime, on the ground that he had eventually fled to the Netherlands.[62] He was awarded 1 million euro in compensatory damages (which went uncollected).

In the United States, civil cases concerning international crimes have often been brought, at least in the past, under the Alien Tort Statute,[63] which on its face provides a cause of action in US federal courts for foreign victims of violations of international law. Thus, in Kadic v Karadzic, a US court ordered the leader of the Republika Sprska to pay compensation to victims of, inter alia, sexual violence (an award which went uncollected). In the Kiobel case, the US Supreme Court limited civil actions to cases that 'touch and concern' the United States.[64] Wider options continue to exist, however, under the Torture Victim Protection Act.[65]

Concluding, civil cases concerning sexual violence committed by IS, brought in bystander states' courts, are only likely to succeed if the victim can establish some connection to the forum. However, even when the court awards compensatory damages to the victim, this money judgment is likely to remain uncollected, as the perpetrators will normally be indigent or have no assets on the territory of the forum state against which the judgment can be executed. Nevertheless, these judgments signal the international community's commitment to ending impunity for international crimes.

[59] L. Roorda, C. Ryngaert, p. 3.
[60] A. Nuyts 2007.
[61] L. Roorda, C. Ryngaert, p. 10.
[62] EL Hojouj vs Unnamed Libyan Officials, Arrondissementsrechtbank Den Haag, 21 March 2012, number: ECLI:NL RBSGR:2012:BV 9748.
[63] 28 USC §1350 (1988).
[64] Kadić v. Karadzić, 70 F 3d 232, C.A. 2 (1995); Kiobel v. Royal Dutch Petroleum Company, 133 S.Ct. 1659 (2013).
[65] Torture Victims Protection Act Pub L 102-256, 106 Stat 73 .

6. Administrative sanctions

Apart from criminal and civil litigation, a modicum of accountability, or at least crime prevention and mitigation, could also be provided by taking administrative sanctions against IS-affiliated perpetrators of sexual violence. Such sanctions consist of travel bans, assets freezes, or arms embargoes. Sanctions against terrorists or terrorist supporters have gained ascendancy after 9/11.

Currently, both the UN and the EU maintain anti-IS sanctions lists. Through resolution 2253 (2015), the UN Security Council has imposed a travel ban, assets freeze, and arms embargo on IS and associated individuals. The listing criteria of the relevant UN Security Council Resolution 2253 (2015) do not include violence against women, but mainly pertain to participation in financing or planning terrorist activities. In September 2016, the EU, for its part, introduced an autonomous sanctions against IS members.[66] The EU Regulation does list abduction, rape, sexual violence, forced marriage, and enslavement of persons as abuses falling within its remit.

The challenge with these sanctions laws is to ensure that sanctions are also effectively taken against IS members and supporters with respect to violence committed against women and girls. There is a danger indeed that the sanctions committees will almost exclusively focus on more general assistance to terrorism. Currently no sanctions have specifically addressed sexual violence committed by IS. The Secretary-General of the UN has therefore called on the sanctions committee regarding IS to fully integrate the issue of sexual violence in its decision-making.[67] Sanctions committees should obviously also make sure that they safeguard the human rights of listed individuals, and they should remove them from the list as soon as it is clear that they have nothing to do with the violations.

7. Enhancing compliance of IS with norms prohibiting sexual violence

Legal retribution, litigation, or sanctioning may provide accountability, but they may not necessarily have a compliance-enhancing effect. Engaging with armed groups on questions of compliance with prohibitions of sexual violence may better prevent violations from occurring in the first place.

As noted earlier, non-state armed groups (NSAGs) cannot formally consent to IHL treaties as they are not states.[68] Still, such groups might want to be seen to be complying with IHL, in order to gain international legitimacy and to be more broadly accepted.[69] International actors, such as

[66] Council Regulation (EU) 2016/1686 of 20 September 2016 Imposing additional restrictive measures directed against ISIL (Da'esh) and Al-Qaeda and natural and legal persons, entities or bodies associated with them.
[67] United Nations Security Council, Report of the Secretary-General on conflict-related sexual violence, S/2016/261, 20 April 2016.
[68] C. Ryngaert, A. van de Meulebroucke, p. 443.
[69] Idem, p. 444.

Geneva Call and the ICRC, have reached out to these groups for purposes of compliance-enhancement.[70]

Geneva Call is a non-governmental organisation "dedicated to promote respect by armed non-state actors for international humanitarian norms in armed conflicts".[71] Geneva Call frequently engages with NSAGs with the aim of letting them sign a 'Deed of Commitment'.[72] The Deed of Commitment provides them with the possibility of issuing a unilateral declaration in which they subscribe to the content of (some) humanitarian norms.[73] By April 2016, 16 NSAGs had signed the Deed of Commitment for the prohibition of sexual violence, 49 had signed the Deed for the ban of anti-personnel mines, and 18 had signed the Deed for the protection of children.[74] Next to the Deed of Commitment, Geneva Call also engages in training NSAGs to enable them to integrate international standards into their practice.[75] Geneva Call is active in Syria. Recently, supported by the EU Humanitarian Aid and Civil Protection Organization, it launched the 'Fighter not Killer' media campaign on the rules of war in Syria.[76] Geneva Call has obtained commitments from Kurdish Self-Defences Forces YPG-YPJ and is talking to other groups, e.g., the Free Syria Army. It is not engaging with IS. Ultimately, NSAGs themselves must be willing to engage with intermediaries to prevent sexual violence.[77]

Enhancing compliance by IS with basic IHL norms need not be a lost cause. It is recalled that, in 2010, the fundamentalist Taliban adopted its own Code of Conduct, through which it – at least in certain respects – pledged to comply with humanitarian rules.[78] The Taliban code does not make reference to international humanitarian law as such, however. Instead, it is based on the rules of Islamic Law.[79] For instance, it imposes limitations on suicide bombings (the killing of civilians should be limited as much as possible), but still allows the execution of prisoners of war or private contractors.[80] Munir eventually concludes that many of the Code's regulations are based on neither international humanitarian law, nor Islamic law.[81] Thus, while issuing a code of conduct might be applauded at first sight, on closer inspection, it may still be inconsistent with IHL norms and thus have only a limited compliance-enhancing effect. As far as IS is concerned, given the on-going atrocities, it is unlikely that IS would issue a code of conduct. Even if they were to issue one, it may

[70] To see a comprehensive list of other measures we refer to: C. Ryngaert, A. van de Meulebroucke or S. Ratner.
[71] Website Geneva Call.
[72] P. Bongard, J. Somer, p. 686.
[73] C. Ryngaert, A van de Meulebroucke, p. 448.
[74] Website Geneva Call.
[75] A. Lamazière 2011.
[76] Website Geneva Call.
[77] A. Lamazière 2011.
[78] The Code of Conduct is available at: http://www.afghanistan-analysts.org/wp-content/uploads/downloads/2012/10/Appendix_1_Code_in_English.pdf. The main aim of this code was to win the Afghan population over to the Taliban side. See Al Jazeera news publication.
[79] M. Munir, p. 5. Munir offers a comprehensive comparison of the Code of Conduct and Islamic law.
[80] M. Munir, p. 14 and 18.
[81] M. Munir, p. 22.

to a large extent be incompatible with IHL. To make engagement successful, interlocutors will have to employ non-legal arguments and convince IS of espousing IHL-friendly interpretations of Islamic law.

Finally, when engaging with NSAGs such as IS, a note of caution has to be sounded. In some states, engaging with NSAGs may be equated with providing material support to terrorist organizations, and on that basis be criminalized. In the United States, for instance, the US Supreme Court ruled in Holder v Humanitarian Law Project that training and supporting for peace building activities can be seen as providing material support to terrorist organizations.[82] Criminalizing engagement on IHL matters is undesirable, as it may cause NGOs to give up their interactions with armed groups, which may then continue to violate IHL.[83] At the same time, one should be aware that foreign fighters may use humanitarian aid organizations in disguise to enter Syria; such illegitimate ventures should obviously be repressed.[84]

8. Conclusion and recommendations

IS has committed, and continues to commit horrific crimes in Syria and Iraq. In particular, women and girls are subject to multiple forms of sexual violence. The EU and the UN may want to do more to prevent these crimes and to provide accountability after the fact. The establishment of an international criminal tribunal, preferably of the hybrid variant, should be the international community's long-term goal. Meanwhile, a more vigorous exercise of national jurisdiction – both criminal and civil – by bystander states in the EU is called for. Enhanced cooperation between immigration authorities and prosecutors, and the making available of sufficient resources to international crimes units within the police and the office of the prosecutor, are vital in this respect. EU administrative sanctions could also more specifically target those who support and facilitate the commission of sexual violence by IS. Finally, the EU may want to continue to invest in changing retrograde cultural views and practices that normalize sexual violence. It can do so by funding awareness-raising activities in the region and by supporting practices of engagement with armed groups on IHL matters.

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[83] A. Salinas de Frias, K. Samuel, N. White, p. 201.
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