

The City University of New York

CUNY SCHOOL OF LAW

Law in the Service of Human Needs

MADRE



**Communication to the ICC Prosecutor Pursuant to Article 15 of
the Rome Statute Requesting a Preliminary Examination into the
Situation of:**

**Gender-Based Persecution and Torture as Crimes Against
Humanity and War Crimes Committed by the Islamic State of
Iraq and the Levant (ISIL) in Iraq**

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by

The Human Rights and Gender Justice (HRGJ) Clinic of the
City University of New York (CUNY) School of Law

MADRE

The Organization of Women's Freedom in Iraq (OWFI)

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I. EXECUTIVE SUMMARY

1. The Human Rights and Gender Justice Clinic of the City University of New York (CUNY) School of Law (“HRGJ Clinic” or “HRGJ”), MADRE, and the Organization of Women’s Freedom in Iraq (“OWFI”)—jointly file this communication pursuant to Article 15 of the Rome Statute.¹ On the basis of the information set forth in this communication, we urge the Office of the Prosecutor (“OTP”) of the International Criminal Court (“ICC”) to launch an investigation into gender-based crimes committed by foreign fighters in the Islamic State of Iraq and al-Sham/Greater Syria (“ISIS,” also known as “ISIL,” “Daesh,” or “IS”) against civilians in Iraq.
2. In 2014, ISIS took control of large swaths of territory in Iraq. Since then, ISIS forces have imposed a reign of terror, perpetrating heinous gender-based crimes against civilians on a staggering scale. Human rights bodies and advocates have extensive documentation of ISIS’s practice of persecuting individuals because their gender or gender expression does not conform with the militia’s strict gender norms.² ISIS assaults against women based on their gender may be the most notorious of such crimes, involving the systematic subjugation of thousands of women, including young girls, to “sexual slavery, rape and other forms of sexual and gender-based violence.”³ ISIS fighters have beaten women doctors and nurses for removing their *niqab* and gloves in order to perform their medical duties.⁴ They have executed women as punishment for serving as politicians or in other professional roles.⁵ They issue death warrants against men and women alike on the basis

¹ Two additional organizations, one local and one international, also join this petition but have chosen to remain anonymous for safety reasons.

² See, e.g. Luisa Dietrich & Simone E. Carter, Oxfam, *Gender and Conflict Analysis in ISIS Affected Communities of Iraq*, at 5 (May 30, 2017) (“Under the ISIS occupation, study participants experienced the imposition of a set of radicalised gender norms, which included the strict separation of women from unrelated men in public spaces, as well as rules about attire and daily practices that were enforced by brutal means.”); Lisa Davis, *Women Confronting ISIL: Protecting Women’s Rights in the Context of Conflict*, 22 Sw. J. Int’l L. 27 (2016).

³ Office of The Prosecutor, *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Alleged crimes committed by ISIS*, (April 8, 2015).

⁴ See e.g., Nawzat Shamdeen, *Veils, Gloves and Violence New Extremist Rules See Women Disappear from Mosul’s Streets*, NIQASH (Aug. 24, 2014).

⁵ UN News Centre, *ISIL Unlawful Shari’a Courts’ Meting Out Monstrous Punishments, UN Warns* (January 20, 2015) (“Educated, professional women, particularly women who had run as candidates in elections for public office seem to be particularly at risk.”); U.N. Office of the High Commissioner for Human Rights (OHCHR) & U.N. Mission Assistance Mission for Iraq (UNAMI), *Report on the Protection of Civilians in Armed Conflict in Iraq: 6 July–10 September 2014*, (2014) (documenting cases of targeted assassinations of female professionals); MADRE, *The Wrong Kind of Woman: A Timeline of ISIS Killings Due to Gender Expression*, (May 3, 2017),

of gender behavior including their real or perceived sexual orientation.⁶ These atrocities have garnered condemnation the world over,⁷ and have been well-documented by individual victims and the perpetrators themselves on social media,⁸ by civil society actors,⁹ in news reporting and documentaries,¹⁰ and by international efforts including the Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic (“the Mechanism”).¹¹

3. By early 2015, a chorus of voices across the international community had implored the OTP to act. In March of that year, Prosecutor Bensouda recognized that the atrocities allegedly committed by ISIS “undoubtedly constitute serious crimes of concern to the international community and threaten the peace, security and well-being of the region, and the world.”¹² However, she observed that ISIS is “primarily led by nationals of Iraq and Syria.” Because neither Syria nor Iraq is party to the Rome Statute, she further

<https://www.madre.org/press-publications/human-rights-report/wrong-kind-woman-timeline-isis-killings-due-gender-expression>.

⁶ Jessica Stern, OutRight International, *Remarks to the U.N. Security Council* (Aug. 24, 2015) (“In addition to men perceived as gay, trans-identified people and lesbians are among those who have been raped and killed.”), available at <https://www.outrightinternational.org/content/jessica-sterns-remarks-historic-un-briefing-lgbt-people-focuses-persecution-and-killings>; MADRE: The Wrong Kind of Woman, *supra*, note 5; Human Rights Watch (HRW), *World Report 2016: Iraq* (2016) (“ISIS repeatedly executed men accused of homosexual conduct, although Iraqi law does not criminalize homosexual conduct.”).

⁷ See, e.g., United Nations, *Fight against Sexual Violence in Conflict Reaches ‘New Juncture’*, *Security Council Told*, U.N. Doc SC/11862 (April 15, 2015); HRW, *Iraq: Women Suffer Under ISIS* (April 5, 2016); U.N. Human Rights Council, *Annual Report*, 53, U.N. Doc. A/72/53, at 4, 228 (June 23, 2017). Human Rights Committee, *Concluding Observations on the fifth periodic report of Iraq*, U.N. Doc. CCPR/C/IRQ/C/5; CEDAW, *Concluding Observations on the combined fourth to sixth periodic reports of Iraq*, U.N. Doc. CEDAW/C/IRQ/4-6 (March 10, 2014); U.N. Security Council, *Security Council Res. 2299*, U.N. Doc. S/Res/2299 (July 25, 2016); Security Council, *Security Council Res. 2367*, U.N. Doc. S/Res/2367 (July 14, 2017); U.N. Security Council, *Security Council Res. 2368*, U.N. Doc. S/Res/2368 (July 20, 2017).

⁸ See e.g. Office of The Prosecutor (OTP), *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Alleged Crimes Committed by ISIS*, (April 8, 2015). (“Some of these individuals may have been involved in the commission of crimes against humanity and war crimes. A few have publicised their heinous acts through social media.”).

⁹ See e.g., Human Rights Watch: *World Report Iraq*, *supra*, note 6; Minority Rights Group International, *No Place to Turn: Violence Against Women in the Iraq Conflict*, February 2015.

¹⁰ Frontline, *Escaping ISIS* (May 15, 2015); Ahlulbayt: *Documentaries, ISIS: Sex Slaves*, (June 14, 2016).

¹¹ See, U.N. General Assembly, *International, Impartial and Independent Mechanisms to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011*, U.N. General Assembly Res. A/71/L.48, at 4 (Dec. 19, 2016) (establishing the independent mechanism (“the Mechanism”) “to collect, consolidate, preserve and analyse evidence of violations of international humanitarian law and human rights violations and abuses and to prepare files in order to facilitate and expedite fair and independent criminal proceedings”). While the Mechanism is focused on crimes occurring in the Syrian Arab Republic, given ISIS’s cross-border structure and the fluid nature of its operations across the border between Iraq and Syria, the Mechanism’s work will necessarily encompass evidence relevant to this investigation.

¹² OTP, *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Alleged Crimes Committed by ISIS*, (April 8, 2015).

concluded that “the jurisdictional basis for opening a preliminary examination into this situation is too narrow at this stage.”¹³ Nevertheless, Prosecutor Bensouda invited further communications, underscoring that the OTP remained “open to receive additional information which could provide further clarity on the positions occupied by State Party nationals within the ISIS organisational hierarchy.”

4. Prosecutor Bensouda also underscored the responsibility of the entire international community in the face of such contempt for human life and dignity, stating, “I remain profoundly concerned by this situation and I want to emphasise our collective duty as a global community to respond to the plight of victims whose rights and dignity have been violated.”¹⁴ The global community has failed, however, to honor its “collective duty” to the thousands of civilian victims of ISIS’s systematic gender-based crimes. As the information set forth in this communication makes clear, the States with jurisdiction to prosecute ISIS members for these crimes have neither the will nor the capacity to do so. Not one ISIS member has faced prosecution for the commission of gender-based crimes. Meanwhile, ISIS continued and expanded its horrific campaign of gender-based persecution, unfettered by any fear of penal consequences.
5. This impunity cannot stand. The complete lack of criminal accountability sends a clear message to ISIS forces that there will be no repercussions for the widespread, directed, and documented commission of barbarous acts of gender-based violence. It perpetuates a vicious cycle of persecution as ISIS uses these very atrocities as a recruiting tool.¹⁵ Impunity threatens the international prohibition on gender-based persecution and calls into question the efficacy of international criminal justice as a universal enterprise.
6. The ICC as an international body is best positioned to address the criminal responsibility of ISIS members. This communication responds to the express invitation in Prosecutor Bensouda’s March 2015 invitation to receive additional information. As set forth below, there is a reasonable basis to conclude that ISIS members who are nationals of State Parties to the Rome Statute are committing gender-based atrocities in Iraq.
7. *First*, there can be no dispute as to whether ISIS is committing gender-based crimes that constitute gender-based persecution, torture and other international crimes under the

¹³ *Id.*

¹⁴ Rukmini Callimachi, *ISIS Enshrines a Theology of Rape*, N.Y. TIMES (Aug. 13, 2015).

¹⁵ *Id.*

Rome Statute. The reported crimes are far from mere rumors. ISIS members commit them openly and notoriously. As a self-styled sovereign State, ISIS's formal, written statements and policies reflect its systematic approach to gender-based persecution.

8. *Second*, the available evidence shows there is a reasonable basis to conclude these crimes are being committed by State Party nationals in senior positions in ISIS's hierarchy. ISIS has always maintained a policy of recruiting State Party nationals in droves,¹⁶ including nationals of Tunisia, Jordan, Libya, the United Kingdom, France, Germany, Belgium, the Netherlands, and Australia. ISIS currently has over 5,000 foreign fighters from Tunisia alone. As this communication demonstrates, State Party nationals occupy critical roles in ISIS's organization, including high-level positions that necessarily involve the [direction and] implementation of ISIS's official policies of gender-based persecution. These foreign fighters are liable for ISIS's gender-based crimes.
9. Article 7(1)(h) of the Rome Statute reflects the affirmative obligation of the international community to end impunity for gender-based persecution. With no successful gender-based persecution prosecutions to date, that duty remains unfulfilled.¹⁷ While international justice is stalled or absent, ISIS is institutionalizing a malicious legacy of gender-based persecution that will set a dangerous precedent of impunity its victims and the international community for generations to come. The time has come for the OTP to act.
10. Article 8 of the Rome Statute gives the ICC jurisdiction over war crimes that are committed as a large-scale plan or policy. War crimes include the crime of torture committed for the purpose of discrimination based on gender, including sexual orientation and gender identity.¹⁸ To date, there have been no successful international prosecutions for the war crime of torture committed on the basis of gender discrimination.¹⁹
11. When evidence in this communication is cited to "Documentation," as opposed to a published article or report, this refers to human rights documentation gathered by Iraqi

¹⁶ U.N. Security Council, *Letter dated 13 November 2014 from the Chair of the Security Council Committee pursuant to resolutions 1267 (1999) and 1989 (2011) concerning Al-Qaida and associated individuals and entities addressed to the President of the Security Council*, U.N. Doc. S/2014/815, ¶ 11 (November 14, 2014).

¹⁷ Emily Chertoff, *Prosecuting Gender Based Persecution: The Islamic State at the ICC*, 126 YALE L. J. 1050, 1053, 1054 (2017).

¹⁸ See *infra.*, Section IV(B)(1)(b), regarding elements of torture under Article 8(2)(c)(i)-4 of the Rome Statute.

¹⁹ Lisa Davis, *Reimagining Justice for Gender Crimes at the Margins: New Legal Strategies for Prosecuting ISIS Crimes Against Women and LGBTI Persons*, 24 WM. & MARY J. WOMEN & L. 175 (forthcoming, 2018).

human rights defenders operating inside and outside of ISIS-controlled territories. These defenders, at great personal risk, document human rights violations including gender-based crimes committed by ISIS and other armed actors. They help unveil key information about perpetrators and larger criminal networks. In concert with this work, many documenters in Iraq also provide safe passage and shelter to those at imminent risk of sexual slavery or death, including those living under ISIS-controlled or contested areas. For safety reasons, the identification of these defenders and their organizations has been omitted from this communication. Documentation is available through CUNY Law School.

II. EXPERTISE AND INTEREST

12. MADRE is an international women's human rights organization that partners with community-based women's groups worldwide facing war and disaster.²⁰ MADRE was founded in 1983 and supports community-based organizations in more than 25 countries, directly impacting approximately 450,000 lives across the globe.²¹
13. In the mid-1990s, during the formation of the Rome Statute, MADRE provided fiscal sponsorship to the Women's Initiative on Gender Justice (formerly known as the Women's Caucus on Gender Justice), and hosted some of the earliest meetings of the Women's Initiative at its headquarters in New York. As part of the Women's Initiative, MADRE advocated for the codification of rape as a form of torture punishable under the crimes against humanity, genocide and war crimes, and worked to address the gender-related gaps in the draft of the Rome Statute. MADRE helped to provide delegations with in-depth analysis and practical recommendations on gender-sensitive language for the draft Statute on the basis of international law. As a result, the Women's Initiative successfully called on the drafters to abandon the "outrages to personal dignity" language, and to broaden the category for sexual violence to not only include rape but also sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and other undefined forms of sexual violence, including substituting the word "sex" for "gender."

²⁰ See MADRE's homepage for more information, available at <https://www.madre.org>.

²¹ Yanar Mohammed, Testimony to United States Congress, "Human Rights Violations Committed by the Islamic State" (2015).

14. MADRE advocates for human rights, calling on the international community to confront violations of women's rights by ISIS and other extremists. In August 2014, for example, MADRE and the Women's International League for Peace and Freedom (WILPF), submitted a joint written statement to the UN Human Rights Council describing the atrocities befalling women in Iraq at the hands of ISIS, and urged the UN General Assembly to take action.²² From 2015 to 2017, MADRE, often in partnership with OWFI, WILPF, and the HRGJ Clinic & Sorensen Center for International Peace and Justice at CUNY Law School have organized four international women's rights conferences known as "Strategies for Change" convenings²³ in Erbil, Iraq, Istanbul, Turkey, and Beirut Lebanon, bringing together dozens of Syrian and/or Iraqi women's rights advocates working in the context of the current conflict to protect survivors and document human rights abuses.²⁴
15. The HRGJ Clinic (formerly the International Women's Human Rights Clinic (IWHR)) of CUNY Law School was founded in 1992 by Professors Rhonda Copelon and Celina Romany as one of the first law school human rights clinics in the United States.²⁵ Over the last twenty years, the HRGJ Clinic has worked to integrate a gender perspective into international human rights law and mechanisms. In particular, the HRGJ Clinic (then the IWHR Clinic) played a significant role in the Women's Caucus for Gender Justice at the 1997 Preparatory Committee for the Establishment of an International Criminal Court, which worked to ensure that the Rome Statute codified sexual and gender crimes as within its jurisdiction. The HRGJ Clinic served as Legal Secretariat to the Women's Caucus, which convened international delegation of attorneys and advocates to bring a gender perspective into the United Nations negotiations of the Rome Statute. During the International Criminal Tribunal for Rwanda, HRGJ in collaboration with the Working Group on Engendering the Rwanda Tribunal, the Center for Constitutional Rights, and volunteers, also filed an amicus curiae brief appealing to the court Akayesu Case to call

²² U.N. General Assembly, *Joint written statement submitted by MADRE, Women's International League for Peace and Freedom (WILPF)*, U.N. Doc. A/HRC/S-22/NGO/13 (August 29, 2014).

²³ MADRE, *Strategies for Change*, (2015), <https://www.madre.org/press-publications/statement/strategies-change>; Women's International League for Peace and Freedom, *Strategies for change Conference*, (2015) <http://wilpf.org/wp-content/uploads/2016/06/Strategies-for-Change-2015.pdf>.

²⁴ NGO Working Group on Women Peace and Security, Statement by Yanar Mohammed at the U.N. Security Council open debate on Women, Peace and Security, (October 13, 2015) <http://www.womenpeacesecurity.org/resource/statement-unsc-wps-open-debate-october-2015/>.

²⁵ See CUNY Law School, HRGJ Clinic's homepage for more information, available at <http://www.law.cuny.edu/academics/clinics/hrgj.html>.

upon the prosecutor to ensure the inclusion of rape in charges of genocide, as well as war crimes and crimes against humanity.

16. In Iraq, the HRGJ Clinic promotes the rights, protection, and physical security of marginalized Iraqis who are at risk of violence committed on the basis of gender. Clinic students engage in litigation through the UN human rights mechanisms, collaborate with UN Human Rights Experts, develop and submit expert testimony, train partner groups on how to best identify and document cases of marginalized and at-risk Iraqis, and conduct investigations on gender-based human rights abuses in Iraq.
17. OWFI is a pioneering Iraqi women's organization dedicated to rebuilding Iraq on the basis of secular democracy and human rights for all. OWFI has developed innovative anti-violence and political empowerment strategies for women across Iraq. OWFI advocates on behalf of women who are most marginalized, including those who are incarcerated, widowed, displaced or battered. OWFI offers shelter and protection for Iraqi women, investigates and reports on the status of women's rights in Iraq, and promotes a comprehensive campaign of advocating for Iraqi women's rights.²⁶
18. In Iraq, OWFI partners with MADRE to provide humanitarian aid, shelter and safe passage to vulnerable individuals fleeing conflict-related gender-based violence, including women survivors of ISIS sexual slavery.²⁷ Together, MADRE, HRGJ, and OWFI have documented a range of gender crimes committed by ISIS.²⁸

III. UNDERLYING FACTS

A. The Rise of ISIS

19. ISIS is a militant organization which has conquered territory in western Iraq, eastern Syria, and Libya with the self-proclaimed goal of establishing and expanding a modern caliphate.²⁹ ISIS has intentionally developed many of the characteristics of a *de facto*

²⁶ See OWFI's homepage for more information, <http://www.owfi.info/EN/>.

²⁷ See e.g. Vanessa Thevathasan, *First Responders: Women's Organizations Fighting Against Gender-Based Violence in Iraq*, The World Post (2014).

²⁸ Lisa Davis, *Women Confronting ISIL: Protecting Women's Rights in the Context of Conflict*, 22 Sw. J. Int'l L. 27 (2016).

²⁹ See e.g. Zachary Laub, *The Islamic State*, Council on Foreign Relations, (Last updated August 10, 2016), <https://www.cfr.org/background/islamic-state>; Stanford University, Mapping Militant Organizations: The Islamic State, (April 14, 2017), <http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/1>.

governmental authority: establishing administrative control through a complex bureaucracy, creating and enforcing a strict legal and religious code, taxing the local population, exerting control over the education system, and providing basic social services.³⁰ ISIS leverages that authority to impose strict gender regulations on social behavior—torturing, killing and persecuting those who do not conform.

1. From Al-Qaida of Iraq to ISIS

20. ISIS has its origins in the early 2000s, when Abu Musab al-Zarqawi began training extremist militants, first under the name Jama'at al-Tawhid wa'al-Jihad (“JTJ”) and then, after swearing fealty to Al Qaida, as Al Qaida in Iraq (“AQI”).³¹ During the 2003 Iraq War, AQI orchestrated Al-Qaida-sponsored terrorist attacks and supported Al-Qaida’s primary mission to expel foreign influence and establish a theocratic state.³² According to the United Nations, this goal is “based on a widely repudiated misinterpretation of religion.”³³ Under pressure from U.S. and Iraqi forces, the group declined until 2011, when it became involved in the Syrian Civil War.³⁴
21. In 2013, the group changed its name to the Islamic State in Iraq and Syria (ISIS). Al-Qaida’s core leadership and several AQI officers disagreed over Al-Qaida’s principal leader.³⁵ AQI repudiated Al-Qaida’s governing paradigms, limited aspirational scope, and its self-imposed tactical restraints in pursuing Al-Qaida’s mission.³⁶ Otherwise, the underlying political ideology held by the two groups remained largely indistinguishable.³⁷ Nevertheless, when AQI selected Ibrahim Awad Ibrahim al-Badri (now Abū Bakr al-Baghdadi) as its unrivaled leader in February 2014 and reorganized under the ISIS banner, Al-Qaida formally disassociated itself from AQI.³⁸
22. In June 2014, al-Baghdadi declared himself “caliph” of ISIS, which then included an amalgam of AQI veterans and Afghan terrorists active since the 1990s, and he renamed

³⁰ See e.g. Christoph Günther and Tom Kaden, *The Authority of the Islamic State*, Max Planck Institute for Social Anthropology Working Paper No. 169 (2016); Tim Arango, *ISIS Transforming into Functioning State that Uses Terror as Tool*, N.Y. TIMES, (July 21, 2015).

³¹ Stanford University, *supra*, note 29.

³² U.N. Security Council: *Letter, supra*, note 16, (“ISIS is the direct descendent of AQI.”).

³³ *Id.*

³⁴ Stanford University, *supra*, note 29.

³⁵ U.N. Security Council: *Letter, supra*, note 16, ¶ 11.

³⁶ *Id.*

³⁷ *Id.* ¶ 11.

³⁸ *Id.* ¶¶ 11-12.

this entity the “Islamic State”.³⁹ Al-Baghdadi simultaneously claimed authority over the entire Muslim world,⁴⁰ seeking “a broader regional agenda” for the Islamic State than did either Al-Qaida or its other spins-offs, and declared a caliphate.⁴¹ Al-Baghdadi’s caliphate declaration encouraged Al-Qaida followers from around the world, particularly in regions outside the Middle East, to rally around al-Baghdadi, and travel to ISIS-controlled areas of Iraq and Syria.⁴²

2. Foreign Fighters and ISIS’s Growth

23. Foreign fighters have played a significant role throughout ISIS’s development. When Abu Musab al-Zarqawi, himself a Jordanian, formed JTJ in Iraq, he brought with him foreign fighters from Jordan, Syria, Afghanistan, Pakistan, and Kurdish regions.⁴³ As the group transitioned to become AQI, it continued that tradition, relying on smuggling networks in Syria to coordinate the arrival of foreign fighters in Iraq. The Sinjar records, captured Al-Qaida documents, reveal that AQI relied on a large group of foreign fighters, primarily coming from the Arabian Gulf and North Africa.⁴⁴ Indeed, between August 2006 and 2007, foreign fighters were responsible for three-quarters of suicide bombings in Iraq.⁴⁵

24. In ISIS under Al-Baghdadi’s leadership, foreign fighters remain crucial to the group’s leadership structure and its continued unprecedented growth.⁴⁶ After ISIS captured Mosul in June 2014, the military victory “made movement between [the] Syrian Arab Republic and Iraq easier,” and “facilitated the flow of foreign terrorist fighters.”⁴⁷ ISIS actively recruits foreign fighters, and increased those efforts in June 2014.⁴⁸ To encourage immigration, ISIS issued Internet guidelines that “clearly indicate ISIS’s awareness of the techniques commonly used by [UN] Member States to identify foreign terrorist fighters,

³⁹ *Id.* ¶ 12.

⁴⁰ *Id.* ¶ 13.

⁴¹ *Id.* ¶ 7.

⁴² *Id.* ¶ 12.

⁴³ Stanford University, *supra*, note 29.

⁴⁴ Joseph Felter and Brian Fishman, *Al Qaeda's Foreign Fighters in Iraq: A First Look at the Sinjar Records*, Combating Terrorism Center at West Point, at 8 (December 19, 2007).

⁴⁵ Peter Bergen, Joseph Felter, Wahid Brown, and Jacob Shapiro (Edited by; Rep. Brian Fishman) *Bombers, Bank Accounts, & Bleedout: Al-Qa'ida's Road In and Out of Iraq*. Combating Terrorism Center at West Point (July 2008).

⁴⁶ U.N. Security Council: *Letter, supra*, note 16, ¶¶ 1, 11 (“Their funding and networks of foreign terrorist fighters strengthen the transnational threat from the Al-Qaida movement.”); *Id.* ¶ 13 (“The third group consists of foreign terrorist fighters drawn from 80 countries around the world, whose presence enabled ISIS to move from an organization of a few hundred to the force of thousands it is today.”).

⁴⁷ *Id.* ¶ 14

⁴⁸ Karadshesh, Jomana, Jim Sciutto, and Laura Smith-Spark, *How Foreign Fighters Are Swelling ISIS Ranks in Startling Numbers*, CNN, (September 14, 2014).

as well as systemic shortfalls in existing measures to track their travel patterns” before arriving in Iraq.⁴⁹ In June 2014, The Soufan Group (“TSG”) identified approximately 12,000 ISIS foreign fighters from 81 countries.⁵⁰ By December 2015, TSG calculated that between 27,000 and 31,000 foreign fighters had traveled to Syria and Iraq from at least 86 countries.⁵¹

B. ISIS Bureaucracy and Command Structure

25. After killing ISIS strategic commander Samir Abd Muhammad al-Khlifawi in early 2014, Iraqi authorities recovered information detailing the group’s calculated plans for controlling territory, as well as its precise organizational structure.⁵² ISIS structure includes a military hierarchy, as well as an administrative bureaucracy that allowed it to gain and maintain control over a vast expanse of territory. Since June 2014, under al-Baghdadi’s leadership, ISIS acted swiftly to establish governmental control of areas it seized from Iraq and Syria, declaring these regions part of a “caliphate.” ISIS’ implementation of a state-like bureaucracy has involved establishment of schools, court systems, social services and local governance. Many of its top administrative posts are occupied by foreign fighters.⁵³

1. ISIS’s Leadership Structure

26. ISIS is comprised of three primary groups.⁵⁴ The first is its core leadership, predominantly Iraqi, and headed by al-Baghdadi.⁵⁵ The second group includes an amalgam of Iraqi and Syrian fighters who pledged loyalty to al-Baghdadi and “engage in military or administrative duties.”⁵⁶ Foreign terrorist fighters from over 80 countries make up al-Baghdadi’s third core group and were most influential in ISIS’s unprecedented

⁴⁹ U.N. Security Council, *Report of the Secretary-General on the threat posed by ISIS (Da’esh) to international peace and security and the range of United Nations efforts in support of Member States in countering the threat*, U.N. Doc. S/2016/92, at 26 (January 29, 2016) (“The ISIS guidelines also include detailed information about the most easily penetrable travel routes, those to avoid because of stepped-up controls and the best modes of travel to be used to reach territories under its control.”).

⁵⁰ The Soufan Group, *Foreign Fighters: An Updated Assessment of the Flow of Foreign Fighters into Syria and Iraq*, (December 8, 2015).

⁵¹ *Id.*

⁵² *Id.* at 16; Christoph Reuter, *Secret Files Reveal the Structure of Islamic State*, Spiegel Online, (April 18, 2015).

⁵³ Cameron Glenn, *Al-Qaeda v ISIS: Leaders & Structure*, Wilson Center, (September 28, 2015).

⁵⁴ U.N. Security Council: *Letter, supra*, note 16, ¶ 13.

⁵⁵ *Id.*

⁵⁶ *Id.*

expansion.⁵⁷ To integrate nonnative fighters into the Islamic State, “[a] so-called ‘ministry’ is reportedly in charge of hosting, arming, training and ensuring the welfare of foreign terrorist fighters.”⁵⁸

2. ISIS’s Administrative Bureaucracy

27. While ISIS is relatively decentralized, al-Baghdadi maintains a structured organization.⁵⁹ ISIS leadership sets the aims and purpose of the group, which are implemented through a hierarchical bureaucracy, but local commanders and other authorities retain discretion over the manner in which these goals are carried out.⁶⁰ Local “*hisbah*” forces, or morality police, patrol on behalf of ISIS to enforce its radical ideology.⁶¹

a. Executive Authority

28. Al-Baghdadi is the ultimate authority in ISIS, and has also named himself “caliph,” claiming authority over Muslims worldwide.⁶² He has two chief deputies, generally former senior Iraqi Army officers, who supervise Iraqi and Syrian operations respectively.⁶³ The deputy in charge of Iraq is reportedly Abu Fatima al-Jaheishi (also known as Ni’ma Abd Nayef al-Jabouri), who succeeded Abu Muslim al-Turkmani after the latter was killed in a U.S. airstrike in August 2015.⁶⁴ The deputy of Iraq serves as the governor general of ISIS’s territories in Iraq, overseeing the local governors and councils and acting as a political envoy.⁶⁵ Though al-Baghdadi and his deputies set general operating guidelines, ISIS commanders “have significant autonomy to run their own operations in Iraq and Syria.”⁶⁶

29. Under al-Baghdadi and his two deputies are various councils and committees, the leaders of which form a cabinet. One of these bodies is the Shura Council, which oversees affairs

⁵⁷ *Id.*

⁵⁸ *Id.* ¶ 17.

⁵⁹ *Id.* ¶ 15.

⁶⁰ *Id.*

⁶¹ *Id.* ¶ 17.

⁶² *Id.* ¶ 13.

⁶³ *Id.* ¶ 16.

⁶⁴ Abu Fatima al-Jaheishi, Counter Extremism Project, <https://www.counterextremism.com/extremists/abu-fatima-al-jaheishi>.

⁶⁵ Glenn, *supra*, note 53.

⁶⁶ Eric Schmitt and Ben Hubbard, *ISIS Leader Takes Steps to Ensure Group’s Survival*, N.Y. TIMES, (July 20, 2015).

of state and includes ministers of war, finance and religious affairs among others.⁶⁷ The Shura Council is responsible for relaying al-Baghdadi's orders and has the authority to depose al-Baghdadi for deviating from ISIS doctrine.⁶⁸

30. A parallel legislative body, the "Sharia Council", is charged with ensuring compliance with an extremist interpretation of Islam.⁶⁹ This Council ensures party discipline, establishes rules and penalties for their infringement, and supervises ISIS' police and self-appointed courts.⁷⁰ Al-Baghdadi supervises and gives orders to both councils.⁷¹

Sub-councils

31. Ministry-like sub-councils implement the councils' directives. The Islamic State "mimic[s] a civil administration by appointing judicial, internal security and communications officers" and coordinates its Iraqi territory through wilayas, or "Iraqi governorates under ISI[S] control."⁷² This structure facilitates al-Baghdadi's delegation of military authority to ISIS fighters who control local towns and cities within each wilaya. Such councils include the following:
32. Military Council: The Military Council manages its vast military operations in Iraq and elsewhere, overseeing an expansion and defending conquered territory.⁷³
33. Financial Council: The Financial Council "oversees oil and weapons sales and other revenue."⁷⁴
34. Medical Personnel: ISIS trains foreign terrorist fighters in medicine. The Islamic State wants "to ensure a steady supply of qualified medical personnel in the future as well as expand[] and enhance[] the current medical services from a professional as well as Islamic point of view."⁷⁵ To achieve this, ISIS has "opened the Medical College in ar-Raqqah as well as the College for Medical Studies in Mosul."⁷⁶ The Medical College in

⁶⁷ *Id.*

⁶⁸ Counter Extremism Project, Overview: ISIS, <https://www.counterextremism.com/threat/isis>.

⁶⁹ Richard Bennet, *The Islamic State*, Soufan Group, at 30 (November 2014).

⁷⁰ *Id.*

⁷¹ *Id.* at 29-30.

⁷² U.N. Security Council: *Letter, supra*, note 16, ¶¶ 15-17.

⁷³ Bennet, *supra*, note 69, at 31.

⁷⁴ Counter Extremism Project, *supra*, note 68.

⁷⁵ Sha'ban, *They Plot and Allah Plots*, 9 Dabiq 1436, CARION PROJECT, at 25 (May 2015).

⁷⁶ *Id.* at 26.

ar-Raqqah “attracted more than 300 applicants, of which 100 were accepted, half of whom were muhājirīn”, or a foreign religious migrant to the region.⁷⁷

35. Legal Council: The Legal Council is “responsible for decisions on executions and recruitment” and “also handles family disputes and religious transgressions.”
36. Fighters Assistance Council: The Fighters Assistance Council is “responsible for providing aid and housing to foreign fighters who come to ISIS’s territory, including moving them into and out of the territory.”⁷⁸
37. Security and Intelligence Councils: The Security Council oversees ISIS’s territory and manages ISIS’s police and security units.⁷⁹ The Intelligence Council operates “ISIS’s intelligence-gathering wing.”⁸⁰ ISIS has an intelligence network throughout its conquered territory and acts quickly to eliminate any suspected dissidents.
38. Media Council: The Media Council “manages ISIS’s media strategy, including social media.”⁸¹

b. Local Authorities

39. ISIS divides territory under its control into *wilayat*, or states, with each headed by a *Wali*, or governor, that oversees a governance structure mirroring ISIS’ central hierarchy, but with a focus on civilian administration. The leadership of the *wilayat* comprise ISIS’ Provincial Council. ISIS provinces are divided into local districts. Central ISIS governance organs maintain representatives in provinces and districts, and these entities have greater power than their local counterparts.⁸²

⁷⁷ *Id.* Muhājirīn means “those who left their homes and estates, emigrating to give support to Allah and His Messenger to establish His religion.”; Quran Tafsir Ibn Kathir, *The Muhajirin and Al-Ansar are the Supporters of One Another*, http://www.qtafsir.com/index.php?option=com_content&task=view&id=1377, (accessed on June 29, 2017).

⁷⁸ Counter Extremism Project, *supra*, note 68.

⁷⁹ *Id.*

⁸⁰ *Id.*; Stanford University, *supra*, note 29.

⁸¹ Counter Extremism Project, *supra*, note 68; Hassan Abu Haniyeh, *Daesh’s Organisational Structure*, Al Jazeera Centre for Studies, (December 4, 2014).

⁸² Bennet, *supra*, note 69, at 33-34.

C. ISIS Forces in Iraq Commit Acts of Gender-Based Persecution, including Torture, Killing and Sexual Violence

40. ISIS brutally enforces strict gender regulations in areas of Iraq under its control, and systematically targets women and girls with sexual violence. Its fighters subject those deemed not to conform to ISIS' conception of gender roles and behaviors, to harassment, torture, murder, and sexual violence. These crimes are evidence of systematic persecution of persons based on their gender including real or perceived sexual orientation or gender identity.

1. ISIS Publicly Defends and Promotes Gender-Based Persecution

41. ISIS has devoted significant amounts of written policies and propaganda to defending and promoting gender-based persecution and discrimination, including violent repression of women and of anyone falling outside of its prescribed gender norms dictating among other things, behaviors, activities, and attributes assigned to women and men, and to girls and boys.

42. ISIS' rules for women and girls, which require them to adhere to the organization's prescribed gender roles include the following:

- Women must serve their husbands and families.⁸³
- Women are not allowed to manage money.⁸⁴
- Women are prohibited from moving in public without a male guardian. Documented punishment: beating.⁸⁵
- A woman may leave the home only: 1) to study theology 2) if she is a women's doctor or women's teacher or 3) to engage in Jihad (if ruled by Fatwa only).⁸⁶
- Women must be dressed in a cloak with their head, face and feet fully covered. Documented punishment: 50 lashes, biting exposed extremities.⁸⁷

⁸³ *Women of the Islamic State: A Manifesto on Women by the Al-Khanssaa Brigade*, at 17, (Charlie Winter, trans. February 2015).

⁸⁴ *Id.*

⁸⁵ UNAMI, *UN Human Rights Chief Zeid Condemns ISIL Killings Of Women Politicians And Activists in Iraq*, (September 25, 2014).

⁸⁶ *Women of the Islamic State*, *supra*, note 83, at 22.

⁸⁷ *ISIS Publicly Flogging Woman on Charges of Violating Sharia Dress Code*, ARA News, (May 16, 2016); *Mosul Terror Survivor: ISIS Judges Bit Exposed Women's Hands as Punishment*, THE WASHINGTON TIMES (November 1, 2016). In the town of Mosul women were reported to be beaten with sticks in markets for not wearing a veil. Documentation #13-16 (2014).

- Girls may be forced into marriage as early as 9 years old. Girls should be married by the age of 16 or 17. Stoning to death for resisting forced marriage.⁸⁸
- ISIS fighters may rape and enslave women. The enslavement is subject to ISIS's rules on proper "rape" relations between the fighters and the enslaved women.⁸⁹
- Real or perceived homosexuality is forbidden. Documented punishment: execution.⁹⁰

43. ISIS' rules for men and boys, which require them to adhere to the organization's prescribed gender roles, include the following:

- Real or perceived homosexuality is forbidden. Documented punishment: execution.⁹¹
- Men are prohibited from having western haircuts or giving someone else a western haircut. Documented punishment: 80 lashes.⁹²
- Men are responsible for, and will be punished for, any non-abiding actions of the girls or women in their family. Documented punishment: flogging.⁹³
- It is forbidden for men to wear skinny jeans or tight clothing. Documented punishment: Jailed for 10 days.⁹⁴
- Men must be bearded. Documented punishment: Three months in jail for first offense. Second offense: beheading.⁹⁵

44. ISIS' *Women of the Islamic State: Manifesto and Case study*, a manifesto on the role of women, explicitly states that men and women are not equal and have distinctly different roles from each other.⁹⁶ The Manifesto declares that "[i]t is the fundamental function of a woman to become a mother and serve her husband and children. Women can only leave the house in exceptional circumstances—to wage Jihad, when there are no men available, or to study religion."⁹⁷ Women doctors and teachers are permitted to leave their homes to travel to and from work but must adhere to all other rigid gender rules prescribed by the

⁸⁸ *Women of the Islamic State*, *supra*, note 83, at 24; *Iraqi Woman Stoned to Death for Refusing to Marry ISIS Jihadist* ARA NEWS (October 8, 2016).

⁸⁹ *Rape Regulations: ISIS Laws on Proper Sex Slavery Revealed*, RUSSIAN TIMES (December 30, 2015).

⁹⁰ Documentation #168.

⁹¹ *Report: Islamic State Executes Teenager for "Homosexuality"*, WASHINGTON BLADE (January 3, 2016).

⁹² *Life Under ISIS: 80 Lashes for Cutting His Cousin's Hair*, NEWS WEEK (May 1, 2016).

⁹³ One resident of the formerly ISIS-controlled town of Tikrit explained how ISIS fighters knocked on the doors of homes to monitor dress code compliance, proclaiming they would flog any man who accompanied a woman not wearing a veil. Documentation ## 13-16 (Nov. 7, 2014).

⁹⁴ Morgan Winsor, *ISIS Bans Skinny Jeans: Islamic State Arrests Men Caught Wearing Tight Pants in Raqqa*, INTERNATIONAL BUSINESS TIMES, (April 3, 2014).

⁹⁵ *ISIS Beard Police to Enforce Shaving Ban in Mosul*, INTERNATIONAL BUSINESS TIMES (June 1, 2015).

⁹⁶ Mah-Rukh Ali, *ISIS and Propaganda: How ISIS Exploits Women*, Reuters Institute, 2015, at 13.

⁹⁷ *Id.*

militia. The manifesto also permits girl as young as nine to be married and cautions that all girls must be married by the age of 17 while they are still “young and active.”⁹⁸

45. Under ISIS’ doctrine, women must demonstrate their complete social, political, economic and sexual submission to men in their daily lives.⁹⁹ The Manifesto, written by the Al-Khansa’a Brigade, a woman’s policing brigade within ISIS, opposes feminist advances, stating that contemporary women have stepped out of their religiously mandated role and, in doing so, have emasculated men. It calls for women to retrain themselves and step into their “rightful place” as subordinate to men.¹⁰⁰ Women’s secondary role may involve serving the community, but only in exceptional circumstances, according to The Manifesto. Female doctors or teachers may only enter the public sphere in keeping with ISIS’s interpretation of *Shari’a* guidelines.¹⁰¹ In 2014, ISIS launched the Zora Foundation, an Arabic language media outlet directed at women. With crude clip art videos, the website reinforces its stance that women’s place is the private sphere, as wives performing domestic duties for male ISIS fighters.¹⁰²
46. ISIS’ written dogma positions women as enslaved chattel or sub-human; or as wives, mothers or daughters, relegated to the domestic sphere to be used to build the caliphate.¹⁰³ The organization focuses on controlling and containing women’s and girls’ bodies, and promotes and justifies some of the most severe and heinous forms of gender-based violence, including rape, sexual enslavement, forced marriage, trafficking, and extreme social control. For example, in a protocol on slavery, ISIS encourages further gender-based violence against the women and girls that it captures and enslaves. According to the protocol, “[i]t is permissible to have sexual intercourse with the female captive,” and “it is permissible to beat the female slave...”¹⁰⁴ According to ISIS’ contorted religious interpretation, its fighters perform virtuous religious acts when they commit rape and sexual assaults.¹⁰⁵

⁹⁸ *Id.* at 14.

⁹⁹ *Women of the Islamic State, supra*, note 83; Callimachi: *ISIS Enshrines, supra*, note 14; Documentation #168.

¹⁰⁰ *Women of the Islamic State, supra*, note 83, at 17-18; Documentation #17.

¹⁰¹ *Women of the Islamic State, supra*, note 83, at 22; Documentation #20.

¹⁰² Homa Khaleeli, *Domestic Terrorism: Housewives Told How to Prepare Battle Snacks*, The Guardian, (November 5, 2014).

¹⁰³ See, for example, MEMRI, *Islamic State (ISIS) releases pamphlet on female slaves* (2014), available at <http://www.memrijtm.org/islamic-state-isis-releases-pamphlet-on-female-slaves.html>; *Women of the Islamic State, supra*, note 83; Documentation #13-16, report 2.

¹⁰⁴ MEMRI, *supra*, note 103; Documentation #66.

¹⁰⁵ Callimachi: *ISIS Enshrines, supra*, note 14; Documentation #13-16.

47. ISIS strictly regulates visible forms of gender expression. Its “Research and Fatwa Department” regulates all aspects of dress and appearance for men and women, bans behaviors such as women sitting on chairs, and prohibits gender mixing in public places.¹⁰⁶ According to the UN Office of the High Commissioner, ISIS “has imposed strict codes of behavior, including regulations concerning dress and freedom of movement. Women must be fully covered while in public and are only allowed to move in public in the company of an appropriately related male chaperone.”¹⁰⁷ After seizing Mosul, for example, ISIS distributed a “Bill of the City” house-to-house, ordering women to stay home and only leave in cases of necessity.¹⁰⁸ ISIS punishes violations of these norms through “fines, lashings and even execution.”¹⁰⁹
48. ISIS also strictly regulates Men’s appearance. ISIS prescribes rigid definitions for masculine and effeminate characteristics, often conflating certain traits with heterosexual and homosexual behaviors. Men that do not display masculine characteristics as defined by ISIS risk being labeled as effeminate, and thus accused of homosexuality regardless of their actual sexual orientation. The militia deems those who do not adhere to its strict dress code and appearance requirements as transgressing gender norms. In Mosul, ISIS distributed a leaflet forbidding men from shaving their beards because “no one does this except men who are effeminate.”¹¹⁰ Male youth who do not (or cannot)¹¹¹ conform to ISIS’s appearance norms have been targets for violence and killing, having been labeled as gay or “less masculine” based on their appearance alone.¹¹²
49. ISIS promotes a militarized, violent form of masculinity and condones exerting patriarchal power in the public and private spheres, thus justifying the abuse of men and

¹⁰⁶ *12 Rules for Living Under ISIS: Follow or Be Killed*, CLARION PROJECT (January 28, 2015); Documentation #130, 134.

¹⁰⁷ OHCHR, *Technical Assistance Provided to Assist in the Promotion and Protection of Human Rights in Iraq*, U.N. Doc. A/HRC/30/66, at 31 (July 27, 2015); Documentation #93.

¹⁰⁸ Rukmini Callimachi, *For Women Under ISIS, a Tyranny of Dress Code and Punishment*, N.Y. TIMES, (December 12, 2016); *Syria: Extremists Restricting Women’s Rights*, Human Rights Watch (Jan. 13, 2014); Mona Mahmood, *Double-Layered Veils and Despair... Women Describe Life Under ISIS*, THE GUARDIAN, (February 17, 2015); Documentation #99.

¹⁰⁹ OHCHR: *Technical Assistance*, *supra*, note 107, at 31; Documentation #107.

¹¹⁰ Johnlee Varghese, *ISIS Bans Men from Shaving, Says Those Without Beard Are Effeminate*, INTERNATIONAL BUSINESS TIMES, (April 30, 2015).

¹¹¹ *Id.*; Oliver Wheaton, *Isis Has a New ‘Beard Police’ to Enforce Shaving Ban*, METRO, (June 1, 2015); INTERNATIONAL BUSINESS TIMES: *ISIS Beard Police*, *supra*, note 95 (noting that ISIS handed out leaflets in the Iraqi city of Mosul ordering all men to grow full beards or face punishment. ISIS states that shaving facial hair is *Haram* (forbidden) under their extremist interpretation of Islamic Law).

¹¹² OHCHR and UNAMI, *Report on the protection of civilians in armed conflict in Iraq: 1 May – 31 October 2015*, at 19 (2016); Documentation #56, 168.

women, boys and girls, including those real or perceived as lesbian, gay, bisexual, transgender, or intersex (LGBTI). By joining ISIS' militia, according to its online magazine, *Dabiq*, men are refusing "a life of humiliation."¹¹³ The group bans access to internet, cell phones and satellite dishes in areas it controls, claiming that "satellite channels normalize men being effeminate and sissies."¹¹⁴ Its magazine urges male fighters to strictly obey their military commanders,¹¹⁵ while telling them to expect obedience from women. "To Our Sisters" advises that "if the weapon of the men is the assault rifle and the explosive belt, then ... the weapon of the women is good behavior."¹¹⁶

50. ISIS recruitment material claims the caliphate provides men the opportunity to be "true" men, and positions those not part of the so-called Islamic State as not fulfilling their proper gender roles. "True" masculinity depends on women also adhering to ISIS' rigid gender roles.¹¹⁷ As Al Khansaa Brigade puts it, "If women were real women then men would be real men."¹¹⁸ This construction of masculinity undergirds ISIS' violent opposition to same-sex intimacy between men or between women. ISIS' frames its notion of masculinity in opposition to "America and Western Europe" which it uses as a stand-in for "bestiality, transgenderism, sodomy, pornography, feminism, and other evils."¹¹⁹ *Dabiq* readers are told that *fitrah*, or proper predisposition to religiosity under Islam, is manifest in "the attraction of man to woman and woman to man," while "sodomites" represent the worst of sexual perversion, and are worthy of death.¹²⁰ In an explicit linking of ISIS' misogyny and homophobia, the magazine warns that "as the *fitrah* continues to be desecrated day by day in the West and more and more women abandon motherhood,

¹¹³ Sha'ban, *Just Terror*, 12 *Dabiq* 1737, CLARION PROJECT, at 10, available at <https://clarionproject.org/docs/islamic-state-isis-isil-dabiq-magazine-issue-12-just-terror.pdf>; Documentation #168.

¹¹⁴ Babak Dehghanpisheh, and Michael Georgy, *Documents Show Islamic State Obsessions: Beards and Concubines*, REUTERS, (November 1, 2016); Documentation #168.

¹¹⁵ Sha'ban: *Just Terror*, *supra*, note 113, at 9-10; Documentation #168.

¹¹⁶ Sha'ban, *From the Battle of Al-Ahzab to the War of Coalitions*, 11 *Dabiq* 1436, CLARION PROJECT, at 44, available at: <https://clarionproject.org/docs/Issue%2011%20-%20From%20the%20battle%20of%20Al-Ahzab%20to%20the%20war%20of%20coalitions.pdf>.

¹¹⁷ Dyan Mazurana, Dallin Van Leuven, and Rachel Gordon, *Gender Under a Black Flag: ISIL Recruitment*. (August 19, 2015).

¹¹⁸ *Id.*

¹¹⁹ Sha'ban, *The Fitrah of Mankind and the Near-Extinction of the Western Woman*, 15 *Dabiq* 1437, CLARION PROJECT, at 20, available at: <http://clarionproject.org/wp-content/uploads/islamic-state-magazine-dabiq-fifteen-breaking-the-cross.pdf>.

¹²⁰ *Id.* at 21-23; Documentation #93.

wifhood, chastity, femininity, and heterosexuality, the true woman in the West has become an endangered creature.”¹²¹

2. ISIS Commits Torture and Murder as a Form of Gender-Based Persecution

a. Targeting women and girls for noncompliance with ISIS’ prescribed gender norms

51. Women and girls under ISIS are subject to harsh restrictions that impact nearly all aspects of their lives, and constrain their ability to move, to work, and to determine their own behavior or appearance including clothing. ISIS brutally punishes women and girls it deems out of compliance with its prescribed gender norms, subjecting them to physical and sexual violence, torture and murder. As stated above, ISIS’ manifesto declares that: “[i]t is the fundamental function of a woman to become a mother and serve her husband and children. Women can only leave the house in exceptional circumstances—to wage Jihad, when there are no men available, or to study religion.”¹²² Through its propaganda and its targeted violence, ISIS makes clear that the acts that place women and girls out of compliance include their failing to adhere to dress and movement restrictions. In addition, being a lesbian or perceived as such, or serving as a public professional, such as a politician or lawyer carries the punishment of death.

i. Targeting women and girls for failure to adhere to dress and movement restrictions

52. In August 2014, ISIS ordered all women to veil their faces and to only go out in the company of an appropriate male “guardian,” or face severe punishment. That month, the United Nations received reports of ISIS beating women who resisted the restrictions.¹²³ Late that month, media outlets reported that ISIS members beat women with sticks for not wearing veils in Mosul’s markets.¹²⁴ In October 2015, in Mosul, an informant told human rights documentors that members of Al-Khansa’a Brigade killed a 20-year-old pregnant woman from the Al Sarjaghanah area because she lifted her *niqab* to drink some water.¹²⁵

¹²¹ Sha’ban: *The Fitrah of Mankind*, *supra*, note 119, at 25; Documentation #108.

¹²² Mah-Rukh Ali, *supra*, note 96, at 13.

¹²³ UNAMI, *supra*, note 85.

¹²⁴ OHCHR and UNAMI: *Protection Report July-September 2014*, *supra*, note 5, at 11; Documentation #161

¹²⁵ Documentation #65, 56.

An hour after the Brigade members beat her unconscious, she passed away. Iraqi media reported that ISIS murdered three women in December 2015 in Mosul for not wearing the *hijab*.¹²⁶ The instrument they used to kill the women is known as the “biter.” ISIS members have attacked and killed other women and girls in Mosul with the biter, a metal device with teeth that cuts into flesh.¹²⁷ A 22-year-old woman who fled to a refugee camp in Syria, reported that ISIS members assaulted her sister with the device for forgetting to wear her gloves in public.¹²⁸ She recounted that her sister described the weapon as “more painful than labor pains,” and that a month after the assault the bruises and scars were still visible.

53. Women who venture into public without a close male relative “guardian” also risk abuse. For example, in June 2015, a married woman and her widowed sister-in-law stood in line to receive a gas canister when an ISIS member detained them, warning them not to leave the house without a *mahram*.¹²⁹ According to Iraqi human rights documenters, the married woman said that there was no one but her husband to escort her and he was working. Shortly after returning home, ISIS raided the women’s house and kidnapped them both. A day later, they returned home bruised and beaten. Shortly thereafter, they reportedly self-immolated. One woman survived a short period and stated that ISIS raped them. After their passing, the husband was seized and never seen from again. Documenters also described how ISIS statement declared that the women were traitors and that their suicides confirmed their guilt.

ii. *Targeting women for engaging in professional occupations*

54. ISIS has prohibited women from most public occupations, only allowing them to work outside of the home in a limited capacity, such as in medical professional roles of doctors and nurses (largely because ISIS has a critical need for medical personnel) or as teachers, and some positions as civil service administrator positions.¹³⁰

¹²⁶ Abdelhak Mamoun, *ISIS Executes 3 women by “biter” in Central Mosul*, Iraqi News, (December 18, 2015); I Documentation #72.

¹²⁷ Henry Holloway, *ISIS Unleash Lady Jihadi Biting Brigade Armed With ‘Metal Jaws’ to Tear Women To Death*, DAILY STAR, (February 8, 2017); Documentation #57.

¹²⁸ Patrick Cockburn, *ISIS in Mosul: Brutal Metal Instrument Used to Clip Women's Flesh Shows Increasing Barbarity Within 'Caliphate's' Own Walls*. THE INDEPENDENT, (February 24, 2015); Documentation #116, 140.

¹²⁹ Documentation #55, 70, 88.

¹³⁰ Louisa Tarras-Wahlberg, *Promise of Paradise? A Study of Official ISIS-Propaganda Targeting Women*, at 36 (May 2016); *Women of the Islamic State*, *supra*, note 83, at 25; OHCHR and UNAMI, *Report on the protection of civilians in armed conflict in Iraq: 11 September – 10 December 2014*, at 12-14. (2014).

55. UN Assistance Mission in Iraq (UNAMI) has reported that numerous executions of women in Mosul and other ISIL-controlled areas have taken place, some after perfunctory “trials.”¹³¹ ISIS has abducted and killed numerous female public professionals, including doctors, lawyers, and politicians, often trying them in self-appointed ISIS courts before publicly executing them. For example, in July 2014, ISIS killed a female parliamentary candidate in her home in the Ninewa governorate.¹³² While a number of professional women, including community activists and human rights defenders, have been targeted both for their occupation as well as for standing up against ISIS’s narrow gender ideology concerning women’s activities in public life, the Office of the High Commissioner for Human Rights (OHCHR) has noted that educated, professional women are particularly at risk.¹³³
56. Early on in its emergence in Iraq, ISIS targeted female doctors for execution, some under the false pretext of adultery.¹³⁴ After gaining control over significant parts of Iraq, including Mosul, ISIS faced a dearth of trained medical professionals and started to reduce the punishment for non-gender compliance of female medical professionals from execution to torture or other cruel inhuman or degrading treatment.
57. Women members of the medical field spoke to human rights observers about the clothing restrictions they faced under ISIS. Women and girls are prohibited from wearing any color other than black, and are required to cover every inch of their bodies, including gloves to cover their hands.¹³⁵ One documented exception is for women doctors, who have been assigned color-coded dress requirements in order to identify their marital status. ISIS has required married women doctors to wear black and unmarried women other colors.¹³⁶ Female medical professionals are also required to wear gloves and *niqabs* that cover their faces. They have been punished for removing them in order to perform their medical duties such as examining patients.¹³⁷ Women doctors also reported that ISIS

¹³¹ UNAMI, *supra*, note 85.

¹³² Minority Rights Group: *No Place to Turn*, *supra*, note 9, at 17; Documentation #13-16, (reporting the killing of Iman Mohammad Younis al Salman, a local politician in Nineva).

¹³³ Press Release, U.N. Office of the High Commissioner on Human Rights, *Press Briefing Notes on ISIL/Iraq and Death Penalty in SE Asia*, (January 20, 2015). The UN’s Office of the High Commissioner noted that, “[e]ducated, professional women, particularly women who have run as candidates in elections for public office seem to be particularly at risk” of execution by ISIS.

¹³⁴ Documentation #5, 57

¹³⁵ Mah-Rukh Ali, *supra*, note 96, at 13 (citing, The Daily Mail, 4th December 2014, How 'up to 60' women rule ISIS's capital by fear).

¹³⁶ OHCHR and UNAMI: *Protection Report July-September 2014*, *supra*, note 5, at 10.

¹³⁷ Shamdeen, *supra*, note 4.

members monitored them when they entered hospitals; stopping and insulting them, apparently for not appearing observant enough.¹³⁸

58. About two months into ISIS' occupation of Mosul, women doctors went on strike and faced violent retaliation and threats.¹³⁹ An open letter on the strike explains, "Female doctors have continued to work in order to aid the sick and injured of Mosul, a city that is in a critical condition because of the IS' control over the city, aerial bombardment and the fact that no salaries have been paid for weeks."¹⁴⁰ Even still, the letter noted that women doctors, who might have tried to flee with their families, continued doing their work. Yet for their efforts, "the IS group has imposed the *niqab* on female doctors in hospitals, with fighters at hospital entrances in order to stop any female doctors coming or going unless they're wearing the *niqab* and gloves. When women doctors tried to convince them that they couldn't do their jobs and treat patients dressed like this, the IS men abused the doctors verbally and began threatening them."¹⁴¹
59. Two days after the letter was posted, the apparent author, Dr. Ghada Shafiq, a gynecologist who worked at Mosul's General Hospital, was attacked and stabbed to death by militia members attempting to drag her from her home in the Tayaran area of south Mosul.¹⁴² Her colleagues believe she was targeted because of the open letter. The letter had warned female doctors against compliance, arguing that obedience could result in escalated human rights violations against women.¹⁴³ Women doctors who participated in the strike reported that ISIS threatened to destroy or seize their property.¹⁴⁴ Some felt ultimately they had to return to work and abide by ISIS' restrictions. Hospital sources, however, told human rights observers that staff numbers in health care facilities in Mosul declined by late 2014,¹⁴⁵ which may have been partly attributable to ISIS' restrictions and threats. On September 5, 2014, ISIS executed three Sunni women medical professionals in Mosul for allegedly refusing to treat ISIS fighters.¹⁴⁶ Roughly a year later, ISIS

¹³⁸ OHCHR and UNAMI: *Protection Report July-September 2014*, *supra*, note 5, at 10.

¹³⁹ *Id.*

¹⁴⁰ Shamdeen, *supra*, note 4.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Shamdeen, *supra*, note 4 (citing *The Last Message of Dr. Ghada Shafiq*, ALL-IRAQ, (August 18, 2014)).

¹⁴⁴ *Id.*; OHCHR and UNAMI: *Protection Report July-September 2014*, *supra*, note 5, at 10.

¹⁴⁵ OHCHR and UNAMI: *Protection Report September-December 2014*, *supra*, note 130, at 10.

¹⁴⁶ OHCHR and UNAMI: *Protection Report July-September 2014*, *supra*, note 5, at 6, (documenting cases of targeted assassinations of female professionals).

members executed a doctor because she refused to wear the *niqab*, which ISIS had imposed on all female hospital employees.¹⁴⁷

60. In addition to attacks on female medical professionals, ISIS has also targeted women in public roles. Women working in government positions or as lawyers have faced harsh punishments and death for practicing their professions. A few examples include:

- In September 2015, ISIS executed two female lawyers for violating its ban on women practicing law in the criminal court.¹⁴⁸
- In November 2014, ISIS abducted and then publicly executed two former female parliamentary candidates, Ibtisam Ali Jarjis from the Watanya List and Miran Ghazi, from the Arab List in Mosul. ISIS reportedly forced the women to “repent”, but then did not accept their repentance.¹⁴⁹
- In October 2014, after holding her prisoner for over a month, ISIS executed a Turkmen former parliamentarian of Ninewa, Iman Mohammed Salman Younis. Instead of handing over her body to her family, ISIS fighters threw it down a well. Salman became a member of the House of Representatives in 2004 and was the first woman to enter the Iraqi parliament for the Tal Afar district. She was also reportedly the first woman journalist from Tal Afar.¹⁵⁰
- In October 2014, ISIS shot the female Deputy Attorney General of the Mosul Court of Appeal in the head in a public execution.
- In September 2014 ISIS killed Deputy Attorney General and former candidate in the prior elections Ibtihal Al-Hayali. ISIS militants ordered her family not to hold a funeral for her when they returned her corpse to them.¹⁵¹
- In September 2014, ISIS abducted Sameera Salih Al-Nuaimy, a lawyer and human rights activist, and publically executed her by masked firing squad five days later outside a former governorate building in Mosul. An ISIS court had accused her of apostasy because she denounced its bombing of mosques and historic shrines on

¹⁴⁷ MADRE: The Wrong Kind of Woman, *supra*, note 5 (citing Shamdeen, *supra*, note 4 (“women have been banned from working outside their homes – the only exceptions are obstetricians and nurses.”)).

¹⁴⁸ OHCHR and UNAMI: *Protection Report May-October 2015*, *supra*, note 112, at 10.

¹⁴⁹ OHCHR and UNAMI: *Protection Report September-December 2014*, *supra*, note 130, at 10; Ludovica Laccino, *ISIS Iraq News: Militants Execute Two Female Parliamentary Candidates in Mosul*, INTERNATIONAL BUSINESS TIMES, (November 26, 2014); Documentation #168.

¹⁵⁰ *Iraqi Women Targeted for Execution by IS*, AL-MONITOR, (October 10, 2014); Documentation #13-16, 106.

¹⁵¹ Minority Rights Group: *No Place to Turn*, *supra*, note 9, at 17.

Facebook. According to witnesses, her body showed signs of torture when ISIL delivered it to her relatives.¹⁵²

- In July 2014, ISIS fighters killed a female candidate from the State of Law party list after breaking into her home in the Ninewa province.¹⁵³ A day later, ISIS fighters broke into the house of another female candidate for Ninewa Provincial Council from the prior election, killed her, and abducted her husband.¹⁵⁴
- In July 2014 ISIS abducted another candidate from the previous general election after storming into her house in eastern Mosul.¹⁵⁵

iii. Targeting women on the basis of real or perceived sexual orientation

61. ISIS militia members have killed and tortured women and girls on the basis of real or perceived sexual orientation. In June 2014, ISIS gained access to the academic and police records of two female Mosul University students who had been caught kissing on the premises and expelled from the University for behavior deemed as inappropriate.¹⁵⁶ ISIS then issued a death warrant against the two women on charges of engaging in homosexual acts. Fearing torture and execution, the women went into hiding, constantly moving from one abandoned house or building to another in Mosul and its outskirts. In 2015, the two women reached out to Iraqi human rights defenders for help, who in response mobilized their underground railroad to provide the women with safe passage and relocation assistance through ISIS-controlled territories.

62. In November 2015, the two women embarked on the perilous journey on foot through the Hamrain Mountains – a mountain ridge south of Mosul—risking landmines and ISIS snipers to reach the designated meeting point at the foot of the mountains. The women walked for days, traveling by night and hiding by day, so as to avoid ISIS patrols and snipers. Upon arriving at the meeting point, Iraqi human rights defenders facilitated the women’s crossing through the security checkpoint, and took them to a safe house to receive urgent care. Two weeks later, Iraqi human rights defenders arranged for the women’s safe transfer to Kurdistan, where they were reunited with their relatives.

¹⁵² OHCHR and UNAMI: *Protection Report September-December 2014*, *supra*, note 130, at 10; UNAMI, *supra*, note 85.

¹⁵³ OHCHR and UNAMI: *Protection Report July-September 2014*, *supra*, note 5, at 10.

¹⁵⁴ I Documentation #168

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

63. As discussed in Section III(C)(1), ISIS regularly conflates gender transgressions with homosexuality, and women who do not conform to the gender norms prescribed by ISIS are accused of being homosexual. In August 2015, ISIS decapitated three women, alleging that they were homosexual.¹⁵⁷ Witnesses reported that the women had argued with ISIS fighters after being told they were not allowed to leave their homes without a male relative, and that prior to their execution, ISIS militants arrested them for disobeying their orders.¹⁵⁸ In June 2015, ISIS executed two women by shooting them in the head, claiming that messages on their phones proved they were lesbians.¹⁵⁹ After the executions, ISIS militants reportedly announced that the women were “abominations.”¹⁶⁰

b. *Targeting men and boys for non-compliance with ISIS’ prescribed gender norms*

i. *Targeting men and boys for failure to adhere to dress and appearance requirements*

64. ISIS has beaten, jailed, and killed men and boys whom it deems to have transgressed gender norms by failing to adhere to its strict dress and appearance code, often alleging that they are homosexual or insufficiently masculine.¹⁶¹

65. Included among victims are males who wear fashionable or “Western” clothing, such as “skinny” jeans.¹⁶² According to UNAMI, on September 24, 2015, during the Eid al-Adha holiday, ISIS abducted 36 young men in Mosul for wearing fashionable jeans.¹⁶³ The members of Al Hisbah (ISIS’s morality task force) punished the men by shaving their heads and flogging them publicly in the street.

66. Another key indicator of masculinity under ISIS is the ability to grow a robust beard. In May of 2015, in Mosul, ISIS banned males from shaving their beards, threatening those without beards with two months’ jail time, beatings or death.¹⁶⁴ Mosul Eye, a media

¹⁵⁷ Documentation #140.

¹⁵⁸ MADRE: *The Wrong Kind of Woman*, *supra*, note 5.

¹⁵⁹ Documentation #110.

¹⁶⁰ *Id.*

¹⁶¹ For example, a number of males ISIS executed on the accusation of homosexuality were considered handsome young men who happened to cut their hair in a “modern way” or who dressed “elegantly.” Documentation #56.

¹⁶² Winsor, *supra*, note 94.

¹⁶³ OHCHR and UNAMI: *Protection Report May-October 2015*, *supra*, note 112, at 19.

¹⁶⁴ *Id.* Johnlee Varghese, *Mosul: ISIS Imprisons Men for 3 Months, Threatens to Behead Them for Shaving Beard*, INTERNATIONAL BUSINESS TIMES, (May 15, 2015).

activist group, reported the arrest of a group of young men for shaving their beards.¹⁶⁵ ISIS jailed the men for three months, and threatened them with beheading if they removed their beards again. Militia members also circulated leaflets claiming that barbers and hairdressers are an “accessory to sin” if they shave or trim men’s beards and will be detained if they do so. Young men unable to grow substantial beards who once lived under ISIS-control feared punishment from militia members. One 18-year-old from Mosul told a news agency, “My facial hair is just slow to come out for my age [...]. I’m scared because they deal ruthlessly with anyone who opposes or ignores their instructions.”¹⁶⁶

ii. *Targeting men and boys on the basis of real or perceived sexual orientation*

67. The Islamic State has outlawed homosexuality, and has issued edicts against what is defined as “homosexual” behaviors or appearances, including trendy hairstyles for men and fashionable clothing.¹⁶⁷ On December 15, 2014, ISIS released a penal code entitled, “Clarification [regarding] the Hudud [Koranic punishments],” which declares that the punishment for same-sex sex is “death for the person committing the act, as well as for the one receiving it.”¹⁶⁸ ISIS-appointed courts have sentenced men to death based on their real or perceived non-conforming sexual orientation and gender behavior, and then executed them, often by throwing the victims off buildings, and then stoning to death any who survive the fall.¹⁶⁹ In some instances, they place a bag filled with weights over the victim’s head so that the body falls on the head upon impact.¹⁷⁰ Individuals labeled as homosexual by ISIS may also endure rape and other forms of torture before executions.¹⁷¹ Other common forms of execution for the accusation for appearing homosexual include death by firing squad, immolation or beheading. ISIS has attacked or disappeared family members who try to intervene.¹⁷² To further perpetuate stigma and isolate the victim’s

¹⁶⁵ Johnlee Varghese, *supra* note, 164.

¹⁶⁶ Wheaton, *supra*, note 111.

¹⁶⁷ Ishaan Tharoor, *The Islamic State’s Shocking War on Gays*, WASHINGTON POST, (June 13, 2016).

¹⁶⁸ *Id.* (citing Jihad and Terrorism Threat Monitor, *Islamic state (Isis) publishes penal code, says it will be vigilantly enforced* (December 17, 2014)).

¹⁶⁹ *Id.*; OHCHR and UNAMI: *Protection Report May-October 2015*, *supra*, note 112, at 17, (documenting cases of civilian in armed conflict).

¹⁷⁰ Documentation #56.

¹⁷¹ Mark Levine, *Killing Emos, and the Future, in Iraq*, AL JAZEERA, (March 20, 2012).

¹⁷² Documentation #55; August 27, 2015; Documentation #140.

family, ISIS may emblazon the phrase: “One of the houses of the Lot tribe,” on the victim’s family’s domicile, threatening the family with death if they remove the label.¹⁷³

68. ISIS grounds its persecution in extremist interpretations of Islamic sources, referring to homosexuals as belonging to the tribe of Lot, and telling the story of a prophet whose people were destroyed for transgressing moral norms.¹⁷⁴ According to ISIS’s online magazine, *Dabiq*, ISIS seeks to regulate gender conformity and implement “the rulings of Allah on those who practice any form of sexual deviancy or transgression,” in order to avoid the “same rotten course” as the “West”.¹⁷⁵
69. Escaped victims describe a systematic effort by ISIS to track and punish perceived homosexuals. A gay Iraqi man who fled an area of Iraq overrun by the Islamic State, told a reporter, “[ISIS] are also professional when it comes to tracking gay people. They hunt them down one by one. When they capture people, they go through his phone and his contacts and Facebook friends. They are trying to track down every gay man. And it's like dominoes. If one goes, the others will be taken down too.”¹⁷⁶
70. Numerous reports of executions of men and boys based on their real or perceived sexual orientation have emerged from ISIS-controlled areas in Iraq. For example, according to an October 2015 UNAMI report, “[o]n 4 June, ISIS killed three civilians for alleged homosexual acts. Two young males and a 60-year-old man were thrown from the National Insurance Company building in the Dawasa area of central Mosul, Ninewa. Militants read a condemnation of the men that was issued by an ISIS self-appointed court before killing them. Pictures of the killings were posted on social media.”¹⁷⁷ UNAMI also reported that on October 8, 2015 “ISIL publically murdered two men aged 21 and 26, by throwing them from the top of an eight-story building, in the Palestine area of western Mosul, for allegedly being homosexual.”¹⁷⁸ The victims were killed following the decision

¹⁷³ Documentation #55.

¹⁷⁴ OutRight Action International, *Timeline of Publicized Executions for Alleged Sodomy by the Islamic State Militias*, (June 30, 2016).

¹⁷⁵ Rabi’ Al-Akhar, *From Hypocrisy to Apostasy: The Extinction of the Grayzone*, 7 *Dabiq* 1436, CLARION PROJECT, at 43 (February 2015), available at <https://clarionproject.org/docs/islamic-state-dabiq-magazine-issue-7-from-hypocrisy-to-apostasy.pdf>.

¹⁷⁶ See, e.g., *Why my own father would have let IS kill me*, BBC, (July 23, 2015).

¹⁷⁷ U.N. Office of the United Nations High Commissioner for Human Rights and United Nations Assistance Mission for Iraq—Human Rights Office, *Report on the Protection of Civilians in the Armed Conflict in Iraq: 1 May – 31 October 2015*, at 17 (2015) (documenting cases of civilian in armed conflict).

¹⁷⁸ *Id.*

of an ISIS self-appointed court.”¹⁷⁹ In at least one instance, potential victims who were not yet detained managed to flee an ISIS-controlled area, prior to execution of an ISIS-issued death warrant.

71. On September 12, 2015, two gay men from Mosul reached out to Iraqi human rights defenders for assistance.¹⁸⁰ They had been hiding for three months in a house on the outskirts of Mosul, fearing a death sentence that ISIS had issued against them. The young men eventually passed through the Homrain Mountains on foot. They entered Samarra, where they were assisted by Iraqi human rights defenders, and were able to escape to Kirkuk six days later.
72. ISIS publishes photos of the executions as propaganda. Since 2014, OutRight Action International (OutRight) has tracked photo reports issued by ISIS fighters purporting to show the execution of men who had engaged in sodomy.¹⁸¹ OutRight lists 11 incidents in Iraq, resulting in 23 executions. On April 19, 2016, for example, the Islamic State’s Information Office in Aljazirah Province (an administrative division of the area controlled by the Islamic State), in the city of Tel-Afar, Iraq, issued a photo report depicting “the imposition of Sharia punishment on a person who committed the acts of the people of [Prophet] Lot in the city of Tel-Afar” by throwing the blindfolded victim off a building.¹⁸²
73. Iraqi human rights defenders have also documented the following torture, abductions, and murders of people on the basis of gender identity or sexual orientation in and around the Mosul area, all allegedly perpetrated by ISIS. It is likely that many others go unreported:
 - October 2016: ISIS executed two men via shots to the head in the Al-Rifaq Al-Thani area on charges of homosexuality. They were 21 and 29 years old. ISIS moved their bodies to an unknown location.¹⁸³
 - August 2016: ISIS militants threw four young men off of a building in Bab Al Tob after accusing them of homosexuality.¹⁸⁴

¹⁷⁹ *Id.*

¹⁸⁰ Documentation # 58.

¹⁸¹ OutRight Action International, *supra*, note 174. Human Rights & Gender Justice Clinic at CUNY School of Law, *Dying to be Free: LGBT Human Rights Violations in Iraq*, (November 2015).

¹⁸² OutRight Action International, *supra*, note 174.

¹⁸³ Documentation #148; Oct 18, 2016

¹⁸⁴ Documentation #136; Aug 7, 2016

- August 2016: ISIS raped three young men in Hawija after accusing them of sodomy. ISIS then executed them and left their bodies in the Kbaiba area, at the entrance to Hawija. ISIS militants took five hundred dollars from the victims' community for the men's "dishonor."¹⁸⁵
- July 2016: ISIS executed eight men on charges of homosexuality. Its fighters closed nearby roads and forced members of the public to watch them shoot the men in the head.¹⁸⁶
- June 2016: ISIS arrested, raped, and then two days later, executed three young men from Mosul, on charges of homosexuality. All were under 16 years old. After stoning and burning them to death, ISIS abandoned their bodies were abandoned near Al Nifayat Park.¹⁸⁷
- June 2016: ISIS executed two young women by shots to the head in Al Sukkar neighborhood on charges of being lesbians. ISIS seized them on 12 June and by Al Hisbah (ISIS morality task force). ISIS members claimed they found messages, photos, and conversations on the young women's phones that indicated their sexuality.¹⁸⁸
- May 2016: ISIS immolated two young men in Al Ghazlani area on charges of homosexuality.¹⁸⁹
- April 2016: ISIS immolated seven young men in Mosul on charges of homosexuality. ISIS did not return their remains to their families.¹⁹⁰
- January 2016: ISIS executed three young men in Al Rashad Stadium in southern Kirkuk, on charges of homosexuality. Their families were not allowed to take the bodies afterward.¹⁹¹
- December 2015: After two months of detaining them, ISIS executed three young men by shots to the head in a soccer field behind the public hospital in Hawija on charges of homosexuality.¹⁹²
- November 2015: ISIS beheaded four young men at Al Ghazlani Camp Intersection on charges of homosexuality.¹⁹³

¹⁸⁵ Documentation #132.

¹⁸⁶ Documentation #127.

¹⁸⁷ Documentation #107.

¹⁸⁸ Documentation #110.

¹⁸⁹ Documentation #99.

¹⁹⁰ Documentation #88.

¹⁹¹ Documentation #77.

¹⁹² Documentation #80.

- October 2015: ISIS beheaded six young men on charges of homosexuality.¹⁹⁴
- September 2015: ISIS executed four men between ages 20-27 years old by immolation on charges of homosexuality. An eyewitness said that ISIS put the victims in a rectangular hole about two meters deep and one meter and a half wide, and tied the victims to each other with metal chains. They then put benzene on them and burned them. Afterward, they buried them in the same hole.¹⁹⁵
- September 2015: ISIS executed three males in the Karama district of Mosul on charges of “practicing the actions of sodomites.” ISIS placed them in a large container, tied them up in metal chains and then immolated them.¹⁹⁶
- August 2015: ISIS executed eleven young men in Mosul throughout the month on charges of homosexuality.¹⁹⁷

3. ISIS Commits Rape, Sexual Slavery and other forms of Sexual Violence as a Form of Gender-Based Persecution

74. ISIS employs sexual violence as a strategic weapon and “as a tactic of terror, a core element of their ideology and *modus operandi*.”¹⁹⁸ While ISIS’ sexual violence against Yazidi women is well-documented, ISIS has also subjected Muslim, Christian and Turkmen women in Iraq to human rights violations, including sexual and gender-based violence.¹⁹⁹ Its fighters have also committed acts of rape and other forms of sexual violence against boys and men.²⁰⁰

75. Sexual enslavement of women and girls is a hallmark policy of ISIS’s control in Iraq,²⁰¹ and is used as a propaganda tool for recruiting and maintaining ISIS fighters.²⁰² ISIS

¹⁹³ Documentation #72.

¹⁹⁴ Documentation #59.

¹⁹⁵ Documentation #69.

¹⁹⁶ Documentation #57.

¹⁹⁷ Documentation #55.

¹⁹⁸ European Parliament Members’ Research Service, *Fighting conflict-related sexual violence*. Briefing, at 4, 9 (December 2016).

¹⁹⁹ Kristie McCrum, *Captured ISIS Fighter Claims Fellow Jihadis Were Rewarded with Slave Girls for Their Loyalty to Their Cause*, MIRROR, (September 29, 2016); Human Rights Watch: World Report Iraq, *supra*, note 6; HRW, *Iraq: Sunni Women Tell of ISIS Detention, Torture, Describe Forced Marriage, Rape* (February 20, 2017).

²⁰⁰ Human Rights Watch *Iraq: Forced marriage, conversion for Yezidis*, (November 11, 2014); OHCHR and UNAMI: *Protection Report July-September 2014*, *supra*, note 5, at 15.

²⁰¹ Callimachi: *ISIS Enshrines*, *supra*, note 14.

²⁰² McCrum, *supra*, note 199.

created an extensive system to profit off the sale of captured women and girls.²⁰³

According to human rights and media reports, such sexual exploitation is a major source of income for ISIS, and is a means to attract fighters.²⁰⁴ Women are bought, sold and traded within an organized system that includes sales contracts notarized by ISIS-run courts.²⁰⁵ ISIS published rules on the trade and sale of women and girl sexual slaves. The average sale for girls 9 years old or younger is about \$170 US dollars each; girls and young women ages 10-20 year old cost about \$130 and those between 20-30 years old are sold for about \$90.²⁰⁶

76. The pages of its flagship magazine, *Dabiq* openly espouses sexual slavery, trafficking, forced marriage, rape and other forms of sexual violence committed against women and girls, making clear that these forms of gender-based violence are fully acceptable within ISIS dogma.²⁰⁷ *Dabiq* featured an article entitled “The Revival of Slavery,” which justified and embraced the practice of sexual slavery and trafficking as a means to eradicate “pagan” Yazidi women and girls from the Muslim world.²⁰⁸ The Research and Fatwa Department of ISIS also published a pamphlet not only justifying enslavement of women and girls, but also detailing the conditions under which females can be bought, sold, beaten and raped.²⁰⁹
77. ISIS “rewards” its fighters with the widows of executed men, as motivation to continue fighting.²¹⁰ Yazidi women and girls who have managed to escape ISIS report that fighters forced them into “weddings” including “temporary marriages,” sold them multiple times, and gave them as “gifts” to fighters.²¹¹

²⁰³ Human Rights & Gender Justice (HRGJ) Clinic at CUNY School of Law, *Seeking Accountability and Demanding Change: A Report on Women’s Rights Violations in Iraq*, at 28-29 (October 2015).

²⁰⁴ Minority Rights Group: *No Place to Turn*, *supra*, note 9, at 32.

²⁰⁵ U.S. Department of State, *Iraq: 2016 trafficking in persons report* (2016).

²⁰⁶ Mah-Rukh Ali, *supra*, note 96, at 13, (citing: Jamal Abdul-Alim, *ISIS ‘manifesto’ Spells Out Role for Women*, THE ATLANTIC, (March 8, 2015))

²⁰⁷ Sha’ban, *They Plot*, *supra*, note 75, at 45, 48 (“As for the slave-girl that was taken by the swords of men following the cheerful warrior (Muhammad – sallall(a)hu ‘alayhi wa sallam), then her enslavement is in opposition to human rights and copulation with her is rape?! What is wrong with you? How do you make such a judgment? What is your religion? What is your law? Rather, tell me who is your lord?”). *Id.*

²⁰⁸ Human Rights & Gender Justice Clinic, *Seeking Accountability and Demanding Change*, *supra*, note 203, at 29; 5 Robert Mackey, *Islamic State Propagandists Boast of Sexual Enslavement of Women and Girls*, N.Y. TIMES (October 14, 2014).

²⁰⁹ MEMRI, *supra*, note 103.

²¹⁰ OHCHR and UNAMI: *Protection Report May-October 2015*, *supra*, note 112, at 28.

²¹¹ Human Rights Watch *Iraq: Forced marriage*, *supra*, note 200; UNICEF *Horrifying accounts of child rights violations emerge from survivors of violence in north-western Iraq*. (August 20, 2014); U.S. Department of State *Iraq 2015 human rights report*, at 58, (2015).

78. Women from other religious and ethnic communities have also been subjected to forced marriage and sexual enslavement.²¹² Survivors of sexual slavery told Human Rights Watch that ISIS detained at least several dozen people from other ethnic and religious communities during its 2014 offensive, among them Christians, Shia Shabaks, and Turkmen.²¹³ In August 2014, OHCHR and UNAMI reported that ISIS transported 150 of the approximately 450–500 Yezidi and Christian women and girls it imprisoned in the citadel of Tal Afar in Ninewa to Syria to be “given” to ISIS fighters or sold as sex slaves.²¹⁴ A Sunni woman told Human Rights Watch that in 2016 she attempted to flee Hawija with 50 other families, but ISIS caught and detained the group.²¹⁵ During her detention, militia members beat her, suspended her from cables and raped her repeatedly in front of her children, after she said she would not agree to marry one of the fighters.
79. Iraqi human rights advocates report that in addition to the direct seizure of women as occurred on Mt. Sinjar in 2014, ISIS forcibly acquires women and girls by threatening their family members with arrest or death. For example, according to human rights defenders in Iraq, in February 2016, a woman sought the release of her husband from an ISIS prison.²¹⁶ After multiple appeals, she went to ISIS headquarters in Hawija without results. Afterwards, ISIS members went to her home to bargain the release of her husband for the marriage of her two daughters, a 16 year-old and a 14 year-old. She ultimately took her children on the dangerous trip through the Homrain Mountains and escaped to Rubaida.²¹⁷ In 2015, a man told a reporter that he fled from Fallujah to Baghdad and ultimately to Kurdistan to prevent his daughters from being forcibly married to ISIS fighters, after one knocked on his door, demanding to marry one of them and claiming it was his legal right.²¹⁸
80. In a similar situation, ISIS arrested a woman and her two daughters, one 19 years old, the other 17 years old, for attempting to flee an ISIS-controlled area following her husband’s

²¹² McCrum, *supra*, note 199; HRW: World Report Iraq, *supra*, note 6; HRW, *Iraq: Sunni Women Tell of ISIS Detention, Torture*, *supra*, note 199.

²¹³ HRW, *Iraq: Sunni Women Tell of ISIS Detention, Torture*, *supra*, note 199.

²¹⁴ OHCHR and UNAMI: *Protection Report July-September 2014*, *supra*, note 5, at 15.

²¹⁵ HRW, *Iraq: Sunni Women Tell of ISIS Detention, Torture*, *supra*, note 199.

²¹⁶ Documentation #97.

²¹⁷ *Id*

²¹⁸ Patrick Cockburn, *War with ISIS: The grim reality of life under the Islamist group in Iraq*, INDEPENDENT (16 May, 2015, 20:54 BST), available at <http://www.independent.co.uk/news/world/middle-east/war-with-isis-the-grim-reality-of-life-under-the-islamist-group-in-iraq-10255422.html>

death.²¹⁹ Upon their capture, she refused to allow her daughters to be married to ISIS members. ISIS kidnapped her daughters and publically executed her in May 2016.²²⁰ Shortly before July 2016, ISIS executed a family of seven after the family refused to allow an ISIS member to wed their 11-year-old daughter. Subsequently, an ISIS member raped and immolated the young girl.²²¹ In June 2016, ISIS imprisoned a man for refusing to allow an ISIS member, aged 50, to marry his 12-year-old daughter. According to a witness, ISIS militants told the father: “Either wed her to one of them or she will be executed.” The daughter was forced to marry an ISIS member.²²²

81. In addition to creating organized systems of sexual exploitation of women and girls, ISIS fighters also rape and sexually assault people they capture, stop, or detain. Within a week of seizing Mosul, women’s rights advocates reported that fighters raped eighteen women, four of whom then committed suicide. The numbers of ISIS rapes and sexual assaults in Mosul were likely far higher, but shame and stigma prevented reporting.²²³ For example, in the Turkmen village of Bashir, ISIS captured nine women and a twelve year-old girl, raped them, killed them, and then hung their bodies out in public.²²⁴ A Yezidi girl who had been captured by ISIS in August 2014, contacted UN monitors and told them several ISIS fighters raped her multiple times before selling her in a market. The OHCHR received reports from two families that ISIS fighters raped two boys seized in Sinjar in August 2014.²²⁵ Men and women who managed to contact the monitors while detained by ISIS in 2014 reported that ISIS fighters regularly sexually assaulted detained teenagers, both male and female.²²⁶

D. ISIS Forces in Iraq Committed the War Crime of Torture Motivated by Discrimination Based on Gender including Non-Conforming Sexual Orientation and Gender Identity

82. To enforce strict gender regulations and norms, ISIS forces in Iraq have systematically subject civilians to acts of violence that cause severe physical and mental pain and suffering. These crimes are evidence of systematic torture based on gender

²¹⁹ Documentation #99.

²²⁰ *Id.*

²²¹ Documentation #116.

²²² Documentation #99.

²²³ Minority Rights Group: *No Place to Turn*, *supra*, note 9, at 24.

²²⁴ *Id.*

²²⁵ HRW *Iraq: Forced marriage*, *supra*, note 200.

²²⁶ OHCHR and UNAMI: *Protection Report July-September 2014*, *supra*, note 5, at 15.

discrimination, including real or perceived sexual orientation or gender identity. The first two parts of this section briefly review ISIS' professed ideology of gender discrimination, and the crimes of torture that it has committed on this basis. The third part of this section provides the legal foundation for a finding that the element "discrimination of any kind" within the war crime of torture includes discrimination based on gender, including sexual orientation and gender identity. The specific ways in which ISIS' gender-based crimes meet each of the required elements such that they constitute the war crime of torture are treated separately, in Section IV(B)(1)(b).

1. ISIS Publicly Defends and Promotes Gender-Based Persecution

83. As described in Section III(C)(1), ISIS publicizes detailed explanations and justifications of its discriminatory views on gender in its magazine, recruitment materials, widely distributed leaflets, and other online publications. It promotes violent repression of women and girls, and of anyone it deems as noncompliant with its prescribed gender norms and regulations, including people it deems to be non-conforming in their sexual orientation or gender identity. In handbills and in its other print media, ISIS has issued detailed rules, regulating the dress, behavior and movements of men and women. Women in ISIS-controlled territory in Iraq must be fully covered, for example, and only leave the house with a related male guardian. ISIS requires women's full subservience to men, relegating them to the domestic sphere to serve ISIS militants either as wives and mothers, or as sex slaves. Men and boys are required to adhere to ISIS' violent notion of masculinity, which defines "real men" as "heterosexual", as dutiful ISIS fighters, and as husbands and fathers who should expect women's obedience. They must grow and maintain robust beards and avoid any clothing ISIS deems "effeminate," including stylish jeans. ISIS often publicly tortures and executes people its militants deem out of compliance with prescribed gender norms. It sometimes distributes photographs of its crimes, as it has, for example, with photographs of its militants torturing and executing men and boys accused of homosexuality (see Section III(C)(2)(b)(ii)).

2. ISIS Tortures People on the Basis of Gender, Sexual Orientation, and Gender Identity

84. ISIS brutally punishes people it deems out of compliance with its prescribed gender norms, while also subjecting women and girls, as a policy, to among the most severe and heinous forms of gender based violence. Section III(C) describes these crimes in greater detail. They include beatings, unlawful detentions, rape, sexual slavery, and painful execution measures involving, for example, immolation, and throwing people from high buildings with bricks attached to their heads. ISIS carries out these violent crimes against women and girls who fail to adhere to its dress and movement restrictions, who work as professionals, or who it accuses of being lesbian. It tortures and executes men and boys for not adhering to its dress and appearance requirements, or on accusations of homosexuality. ISIS also commits widespread, systematic sexual violence against women and girls. Its militants espouse and carry out rape, forced marriage, trafficking and sexual enslavement of women and girls, and have raped male and female detainees.

3. Element of “Discrimination of Any Kind” for the War Crime of Torture Includes Discrimination Based on Gender, Including Sexual Orientation and Gender Identity²²⁷

85. In order to establish that the war crime of torture under Article 8(2)(c)(i)-4 of the Rome Statute has been committed, it must be demonstrated that the victims were civilians or other actors not taking part in active hostilities, that the perpetrator was aware of factual circumstances establishing this status, that the conduct was in the context of and associated with an internal armed conflict of which the perpetrator was aware, that the “perpetrator inflicted physical or mental pain or suffering upon one or more persons,” and that the perpetrator did so “for such purposes as obtaining information or a confession, punishment, intimidation or coercion or for any reason based on *discrimination of any kind*.”²²⁸

²²⁷ This section contains excerpts from: Lisa Davis, *Reimagining Justice for Gender Crimes at the Margins: New Legal Strategies for Prosecuting ISIS Crimes Against Women and LGBTI Persons*, 24 WM. & MARY J. WOMEN & L. 175 (forthcoming, 2018).

²²⁸ Rome Statute Elements 8 (2) (c) (i)-4. War crime of torture. Elements. *Italics added*.

86. The historical record on the Rome Statute’s drafting, and developments under customary international law make plain that the element “discrimination of any kind” includes discrimination based on gender, including sexual orientation and gender identity.
87. Drafters of the Rome Statute based the definition of torture on existing international human rights law, which recognizes “discrimination of any kind” to include gender, including sexual orientation and gender identity
88. Delegates to the Preparatory Committee (PrepCom) that was established in 1996 to create what would become the Rome Statute, utilized existing international human rights law to define torture under international criminal law.²²⁹ Specifically, PrepCom delegates turned to the definition of torture under Article 1 of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT), which they considered to reflect customary international law and found operative within international humanitarian law.²³⁰ The drafters used verbatim the first three elements of the CAT definition,²³¹ and added the Rome Statute’s fourth and fifth elements, distinguishing the perpetrator as an armed actor as opposed to a state actor. Several delegation members noted that many judgements of the ad hoc tribunals also adopted language from the CAT.²³²
89. The CAT is the only legally binding instrument at the international level that exclusively addresses the prevention and elimination of the practice of torture for states. Today, 162 states have ratified it.²³³ Like the Rome Statute, for a finding of torture, the CAT requires intentional infliction of severe physical or mental pain or suffering, for specified purposes such as interrogation, punishment or intimidation or coercion of the victim or a third person, or, “for any reason based on discrimination of any kind.” Again, the primary

²²⁹ Knut Dormann, War Crimes under the Rome Statute of the International Criminal Court with a Special Focus on the Negotiations on the Elements of Crimes, Max Planck Yearbook of the United Nations Law, Vol. 7, 2003, 350-351 (2003); Patricia Viseur Sellers, Sexual Torture as a Crime Under International Criminal and Humanitarian Law, 11 N.Y. City L. Rev. 339, 342 (2008). (citing See Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998), Prosecutor v. Furundzija (Furundzija), Case No. IT-95-17/1 (July 21, 2000).; see also, Prosecutor v. Delalic (Delalic), Case No. IT-96-21-T, Judgment, 452-469 (Nov. 16, 1998).

²³⁰ Dormann, *supra*, note 229, at 366-367; Sellers, *supra*, note 229.

²³¹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85., Art. 1. (“the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”)

²³² Knut Dormann, *supra*, note 229, at 367-369.

²³³ OHCHR, *Status of Ratification Interactive Dashboard*, <http://indicators.ohchr.org/> (accessed June 1, 2017).

difference between the two definitions is that while the Rome Statute requires the perpetrator be an armed actor in a conflict, the perpetrator or instigator under CAT must be a state official or person acting in official capacity.²³⁴

90. “Discrimination of any kind” should be interpreted by its plain meaning. The CAT does not qualify or limit the purpose of “discrimination of any kind” to specific categories or protected classes.²³⁵ While on its face, this definition includes gender discrimination including sexual orientation and gender identity (SOGI) discrimination, SOGI is also explicitly recognized as a category of discrimination that takes shelter under the CAT Convention.
91. In 2007, the Committee Against Torture adopted General Comment No. 2 (the Comment),²³⁶ consolidating decades of international developments on the understanding of gender-based torture as a human rights violation. CAT Comment No. 2 affirms that gender is a social construction and highlights the often-observed roles of gendered discrimination in facilitating the practice of torture.²³⁷ It clarifies that both men and women, and more specifically, persons who deviate from their culturally assigned heteronormative gender roles, are at risk of gender discrimination.²³⁸ It prohibits such discrimination, finding that states have the responsibility to protect against gender-motivated crimes of torture, explicitly including when directed against LGBTI people and other gender transgressors.²³⁹
92. The Rome Statute’s list of prohibited purposes in the Elements of Crimes is not exhaustive and does not preclude the Court from providing further clarification. In the International Criminal Tribunal for the former Yugoslavia (ICTY) case *Prosecutor v. Kronjelic*, the Trial Chamber clarified that the purposes element of torture sets it apart

²³⁴ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85., Art. 1. (or with the consent or acquiescence of a public official or other person acting in an official capacity.); Rome Statute, 2187 U.N.T.S. 90, Article 7(1)(f), Article 8 (2) (a) (ii)-1.

²³⁵ Some treaties have limited the scope of “discrimination of any kind” relative to the respective rights they uphold. For example, the International Covenant on Economic, Social and Cultural Rights under Article 2 calls on states to guarantee that the rights of the Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. It should also be noted that the Economic, Social and Cultural Rights Committee has found “other status” to include sexual orientation.

²³⁶ CAT, Gen. Cmt. No. 2.

²³⁷ *Id.* ¶ 22.

²³⁸ *Id.*

²³⁹ *Id.* ¶¶ 21-22.

from other criminal offenses. “Torture as a criminal offence is not a gratuitous act of violence; it aims, through the infliction of severe mental or physical pain, to attain a certain result or purpose.”²⁴⁰ Building on this, the Trial Chamber also emphasized that such conduct need not be perpetrated solely for the prohibited purpose.²⁴¹ Instead, “the prohibited purpose must simply be part of the motivation behind the conduct and need not be the predominant or sole purpose.”²⁴²

a. *Customary International Law Recognizes Sexual Orientation and Gender Identity as Protected Classes*

93. Article 21(3) of the Rome Statute requires the Court to apply and interpret law in accordance with existing internationally recognized human rights.²⁴³ Customary international law (CIL) is one key source of international human rights law with regard to discrimination and establishment of protected classes. Developing international law spanning the last three decades has established sexual orientation and gender identity as protected classes, which compels the Court to apply this recognition in its definition of torture under the Rome Statute.

94. In 1981, in the breakthrough case of *Dudgeon v. United Kingdom*, the European Court of Human Rights found that a nineteenth century law still in force in Northern Ireland criminalizing male homosexual acts violated the right to privacy under Article 8 of the *European Convention on Human Rights*.²⁴⁴ By 1999, as international law began codifying

²⁴⁰ *Prosecutor v. Kronjelic*, op. cit., §180. The ICTY has also found that the various purposes identified by the CAT treaty or tribunals do not necessarily imply an exhaustive list, although likely the purpose may need to be closely related to one of the already established prohibitions. See, e.g., *Prosecutor v. Brđanin* (2004), op. cit., §487 (holding that “[t]he prohibited purposes... do not constitute an exhaustive list”); *Prosecutor v. Musema* (2000), op. cit., § 285 (using the phrase “for such purposes as” indicating the list is not exhaustive). See, e.g., *Prosecutor v. Furundžija* (1998), op. cit., §162. But See, *Prosecutor v. Kunarac, Kovač and Vuković* (finding for definition of torture under customary international law there must be a purpose of “obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person” and no other purpose. *Prosecutor v. Kunarac, Kovač and Vuković* (2001), op. cit., §497; *Prosecutor v. Delalić and Others* (the Čelebići case) (1998), op. cit., §494; *Prosecutor v. Furundžija* (2000), op. cit., §111. *Prosecutor v. Furundžija* (2000), ibid. §111.

²⁴¹ ICTY Judgment, *The Prosecutor v. Zejnil Delalic and others* IT-96-21-T, 470.

²⁴² *Delalic* IT-96-21-T, 470; see also, *Kunarac* IT-96-23/1-A, 155.

²⁴³ “The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights....” Rome Statute, Article 21(3).

²⁴⁴ *Dudgeon v. United Kingdom*, App. No. 7525/76, Eur. Ct. H.R. (1981) (finding the decision 15 to 4). Although the law was not being enforced, *Dudgeon* challenged that as a homosexual he ran the risk of prosecution. Interestingly, the same law had been repealed in England and Wales. The Court has gone on to consistently hold LGBT persons are afforded rights under the European Convention. See e.g., *X. v. Turkey*, October 9 2012, no. 24626/09 (solitary confinement in prison motivated by prisoner’s sexual orientation is discriminatory inhuman or degrading treatment); *Case of Identoba and Others v. Georgia*, 12 May 2015, no. 73235/12 (failure of the police to adequately protect LGBT march from violent counter-protestors and

SOGI rights more broadly, the European Court followed suit, expanding its scope of liability from violations of the right to privacy to the inclusion of SOGI as a protected class against discrimination.²⁴⁵

95. Many of the references to sexual orientation or gender identity throughout the UN human rights system stem from the Human Rights Committee's landmark 1994 decision, *Toonen v. Australia*.²⁴⁶ The Committee held that sexual orientation was included in the International Covenant on Civil and Political Rights' antidiscrimination provisions as a protected status. The *Toonen* decision, like the *Dudgeon* decision for Europe, marked a turning point in the recognition of gay and lesbian rights within the UN human rights system.²⁴⁷

96. Aside from the CAT and the Human Rights Committees, other UN treaty bodies have recognized SOGI as a protected class in their General Comments and Recommendations. Beginning in 2000, the Committee on Economic, Social, and Cultural Rights (CESCR) has listed sexual orientation as protected grounds from discrimination numerous times.²⁴⁸ By 2009, the CESCR Committee crystalized its jurisprudence through its General Comment No. 20, recognizing sexual orientation and gender identity as protected classes

subsequent failure to conduct a proper investigation into those crimes violates prohibition on inhuman or degrading treatment).

²⁴⁵ See *Lustig-Prean & Beckett v. United Kingdom* App. No. 31417/96 and 32377/96 Eur. Ct. H.R. (1999); *Smith & Grady v. United Kingdom* App. No. 33985/96, Eur. Ct. H.R. (1999) (holding that such discriminatory policies "were founded solely upon the negative attitudes of heterosexual personnel towards those of homosexual orientation" and cannot justify discrimination "any more than similar negative attitudes towards those of a different race, origin or colour.").

²⁴⁶ *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (1994) (holding that a Tasmanian law criminalizing consensual sexual contact between men was not "essential to the protection of morals in Tasmania" and arbitrarily interfered with the petitioner's rights under Article 17 of the ICCPR (right to privacy)).

²⁴⁷ The Human Rights Committee has continued to recognize and uphold SOGI rights, stating in 2014 that LGBT persons are part of the "everyone" guaranteed the rights of liberty and security of person, encompassing "freedom from injury to the body and the mind." Human Rights Committee, General Comment No. 35 (2014): Article 9 (Liberty and security of person), ¶ 3, U.N. Doc. CCPR/C/GC/35 (December 16, 2014).

²⁴⁸ See CESCR, Gen. Comm. No. 23 (2016) on the right to just and favorable conditions of work (Article 7 of the International Covenant on Economic, Social and Cultural Rights), 65(a), U.N. Doc. E/C.12/GC/23 (Apr. 27, 2016); CESCR, Gen. Comm. No. 22 (2016) on the right to sexual and reproductive health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), 23, U.N. Doc. E/C.12/GC/22 (May 2, 2016); CESCR, Gen. Comm. No. 20: Non-discrimination in economic, social and cultural rights, U.N. Doc. E/C.12/GC/20 (July 2, 2009); Gen. Comm. No. 18: The Right to Work (art. 6) ¶ 12(b)(i), U.N. Doc. E/C.12/GC/18 (Feb. 6, 2006); CESCR, Gen. Comm. No. 15 (2002): The Right to Water, 13 U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003); CESCR, Gen. Comm. No. 14 (2000): The right to the highest attainable standard of health, 18 U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000).

under “other status.”²⁴⁹ Similarly, the Committee on the Elimination of Discrimination Against Women has found that states parties “must legally recognize and prohibit such intersecting forms of discrimination” including where sex and gender intersect with sexual orientation.²⁵⁰ The Convention on the Rights of the Child,²⁵¹ the International Convention on the Elimination of All Forms of Racial Discrimination (CERD),²⁵² and the Convention on the Rights of Persons with Disabilities²⁵³ all find sexual orientation and gender identity among the prohibited grounds of discrimination under their respective treaties. All seven of these treaties have been widely ratified—ranging from 83% to 99% of all UN Member States²⁵⁴—evidencing states’ behavior.

²⁴⁹ CESCR, Gen. Comm. No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), 32, U.N. Doc. E/C.12/GC/20 (July 2, 2009).

²⁵⁰ CEDAW, Gen. Rec. No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women, CEDAW/C/2010/47/GC.2. Gen. Rec. 28 states:

The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste, and sexual orientation and gender identity . . . States parties must legally recognize and prohibit such intersecting forms of discrimination and their compounded negative impact on the women concerned.

See also e.g., CEDAW, General Recommendation No. 19: Violence against women, Addendum, Draft General Recommendation No. 19 (1992): accelerating elimination of gender-based violence against women, CEDAW/C/GC/19/Add.1 (July 28, 2016); CEDAW, General recommendation No. 33 on women’s access to justice, CEDAW/C/GC/33 (Aug. 3, 2015); CEDAW; CEDAW, General Recommendation No. 27 on Older Women and Protection of Their Human Rights, CEDAW/C/2010/47/GC.1.

²⁵¹ *See* Comm. on the Rights of the Child, Gen. Comm. No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), U.N. Doc. CRC/C/GC/15 (Apr. 17, 2013); Comm. on the Rights of the Child, Gen. Comm. No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3) ¶ 55 U.N. Doc. CRC/C/GC/14 (May 29, 2013); Comm. on the Rights of the Child, Gen. Comm. No. 13 (2011): The right of the child to freedom from all forms of violence, ¶ 72 (g) U.N. Doc. CRC/C/GC/13 (Apr. 18, 2011); Comm. on the Rights of the Child, Gen. Comm. No. 4 (2003): Adolescent health and development in the context of the Convention on the Rights of the Child, ¶ 6 U.N. Doc. CRC/GC/2003/4 (July 1, 2003); Comm. on the Rights of the Child, Gen. Comm. No. 3 (2003): HIV/AIDS and the Rights of the Child, ¶ 8 U.N. Doc. CRC/GC/2003/3 (Mar. 17, 2003).

²⁵² While the Committee on the Elimination of Racial Discrimination has not enshrined sexual orientation or gender identity (SOGI) as protected classes through its general comments as of yet, it has SOGI protected classes under the Convention through its Concluding Observations to member states. *E.g.*, Comm. on the Elimination of Racial Discrimination, Concl. Obs. on the combined nineteenth to twenty-second periodic reports of Germany, ¶ 16, U.N. Doc. CERD/C/DEU/CO/19-22 (June, 30, 2015); Comm. on the Elimination of Racial Discrimination, Concl. Obs. on the combined nineteenth to twenty-first periodic reports of the Netherlands, ¶ 26 & 34 U.N. Doc. CERD/C/NLD/CO/19-21 (Sept. 24, 2015).

²⁵³ Comm. on the Rights of Persons with Disabilities, General comment No. 3 (2016) on women and girls with disabilities, ¶ 4(c), U.N. Doc. CRPD/C/GC/3 (Nov. 25, 2016); *See also* Concluding Observations, *e.g.*, Comm. on the Rights of Persons with Disabilities, Conc. Obs. on the initial report of the Islamic Republic of Iran * ¶ 12(b), 13(c), 19(c), 35(c), U.N. Doc. CRPD/C/IRN/CO/1 (Apr. 12, 2017).

²⁵⁴ *See Generally*, United Nations Human Rights Office of the High Commissioner. Status of Ratification Interactive Dashboard. (Last Updated 8 June 2017) <http://indicators.ohchr.org/>.

97. In the late 1990s, reports on violence and discrimination committed against LGBTI individuals began to gain visibility in UN Special Rapporteur reports.²⁵⁵ By 2003, the UN General Assembly officially recognized sexual orientation as a protected class against extrajudicial, summary or arbitrary executions through its resolutions.²⁵⁶ Since then, the Special Rapporteur for this mandate has gone on to call attention to killings committed on the basis of gender identity and gender expression explicitly, including LGBTI individuals, as violations of international human rights law.²⁵⁷
98. For the last twenty years numerous UN Resolutions have condemned discrimination based on sexual orientation or gender identity.²⁵⁸ UN General Assembly resolutions have also recognized that killing based sexual orientation or gender identity “may under certain circumstances amount to genocide, crimes against humanity or war crimes, as defined in international law, including in the Rome Statute of the International Criminal Court.”²⁵⁹ Consequently the General Assembly specifically calls on states “to bring those responsible to justice before a competent, independent and impartial judiciary at the national or, where appropriate, international level.”²⁶⁰
99. Like the General Assembly, joint statements and resolutions on LGBTI rights have also been delivered at the former UN Commission on Human Rights, and at its replacement, the UN Human Rights Council. On June 17, 2011, the Human Rights Council passed a resolution on human rights, sexual orientation and gender identity.²⁶¹ Supported by 85

²⁵⁵ See, e.g., Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on a gender-sensitive approach to arbitrary killings, U.N. Doc. A/HRC/35/23 (June 6, 2017).

²⁵⁶ U.N. Doc. A/Res/57/214 (Feb. 25, 2003).

²⁵⁷ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on a gender-sensitive approach to arbitrary killings, U.N. Doc. A/HRC/35/23 (June 6, 2017).

²⁵⁸ G.A. Res. 67/168, ¶ 6(b), (Mar. 15, 2013). The U.N. General Assembly urges States to “ensure the effective protection of the right to life of all persons under their jurisdiction, to investigate promptly and thoroughly all killings, including . . . killings of persons . . . because of their sexual orientation or gender identity.” See also e.g., G.A. Res. 69/182, ¶ 6(b) (December 18, 2014), GAOR, U.N. Doc. A/Res/69/182 (Jan. 30, 2015); G.A. Res. 67/168, ¶ 6(b) (December 20, 2012), GAOR, U.N. Doc. A/Res/67/168 (Mar. 15, 2013); G.A. Res. 65/208, ¶ 6(b) (December 21, 2012); GAOR, U.N. Doc. A/Res/65/208 (Mar. 30, 2011); G.A. Res. 63/182, ¶ 6(b) (December 20, 2012); GAOR, U.N. Doc. A/Res/63/182 (Mar. 16, 2009); G.A. Res. 61/173, ¶ 5(b) (December 20, 2012), GAOR, U.N. Doc. A/Res/61/173 (Mar. 1, 2007); G.A. Res. 59/197, ¶ 8(c), GAOR, U.N. Doc. A/Res/59/197 (Mar. 10, 2005); G.A. Res. 57/214, ¶ 6, GAOR (December 18, 2002).

²⁵⁹ U.N. Doc. A/Res/69/182 at 2, (Jan. 30, 2015).

²⁶⁰ *Id.* ¶6(b).

²⁶¹ U.N. Doc. A/HRC/17/L.9/Rev.1; See Press Release, Int’l Gay & Lesbian H.R. Comm., Historic Decision at the United Nations: Human Rights Council Passes First-Ever Resolution on Sexual Orientation and Gender Identity (June 17, 2011).

states from all regions of the world, the resolution demonstrates the significant trend in state support for prohibiting discrimination based on sexual orientation.²⁶²

100. That same year, the Organization of American States (OAS) General Assembly passed a resolution in the Americas condemning violence and discrimination committed on the basis on sexual orientation or gender identity.²⁶³ The OAS also created an LGBTI Unit, later succeeded by a Special Rapporteurship position on the rights of LGBTI persons, dedicated to monitoring the human rights situation of LGBTI individuals.²⁶⁴ The Inter-American Commission on Human Rights has issued eleven precautionary measures for LGBTI persons, related almost exclusively to violence and death threats perpetrated against LGBTI activists.²⁶⁵ In 2012, the Inter-American Court of Human Rights followed suit when it established sexual orientation and gender identity as protected categories under the American Convention in the case of *Atala Riffo and Daughters v. Chile*.²⁶⁶

101. The European Union has also been a longstanding champion of LGBTI rights. The Charter of Fundamental Rights expressly lists sexual orientation as a ground protected against discrimination.²⁶⁷ It became binding European Union law in 2009. Following the European Union's lead, the Council of Europe Parliamentary Assembly adopted a

²⁶² See *U.N. Human Rights Council: A Stunning Development Against Violence*, INT'L GAY & LESBIAN H.R. COMM., (Mar. 23, 2011), This was an increase from 54 states that issued a joint statement in 2006 proclaiming that existing human rights standards apply to LGBT persons and calling upon the Council to take action. *HRC 3rd session. Joint statement on Human Rights violations based on sexual orientation and gender identity*, NORWAY: THE PERMANENT DELEGATIONS IN GENEVA, (December 1, 2006)

²⁶³ OAS General Assembly Resolution, AG/RES. 2653 (XLI-O/11), Human Rights, Sexual Orientation and Gender Identity, HUMAN, (Adopted at the fourth plenary session, held on June 7, 2011). More broadly, the Resolution condemns violence, harassment, discrimination, exclusion, stigmatization, and prejudice based on sexual orientation and gender identity.

²⁶⁴ Press Release, Inter-American Commission on Human Rights (IACHR), *The IACHR creates Rapporteurship to address issues of Sexual Orientation, Gender Identity, Gender Expression, and Body Diversity*, No. 94/13 (November 25, 2013).

²⁶⁵ See, e.g., MC 457/13 (precautionary measures granted for the members of the "Asociación para una Vida Mejor de Honduras" who were at risk because of their activities in defense of LGBTI persons in Honduras), PM 155/13 (precautionary measures granted for Caleb Orozco, an LGBTI human rights defender in Belize, subjected to death threats, harassment and attacks), PM 153/11 (precautionary measures for two unnamed individuals in Jamaica victimized on account of their sexual orientation).

²⁶⁶ *Atala Riffo v. Chile*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, (Feb. 24, 2012).

²⁶⁷ Charter of Fundamental Rights of the European Union art. 21(1) 2010 O.J. C 83/02, at 396. In addition to the protections against sexual orientation discrimination explicit in these treaties, the Court of Justice of the European Union ("Court of Justice") has established that discrimination against transgender persons is "sex" discrimination.²⁶⁷ Moreover, the Court of Justice has held that sexual orientation can be a particular social group for the purposes of asylum in part because "it is common ground that a person's sexual orientation is a characteristic so fundamental to his identity that he should not be forced to renounce it." Joined Cases C-199/12, C-200/12 and C-201/12 *X, Y and Z v Minister voor Immigratie en Asiel* [2013] I-0000.

resolution in 2010 condemning violence and discrimination committed on the basis of sexual orientation and gender identity. It echoed the European Court’s view that “negative attitudes on the part of a heterosexual majority against a homosexual minority cannot amount to sufficient justification for discrimination, any more than similar negative attitudes towards those of a different sex, origin or colour.”²⁶⁸

102. In 2014, the African Commission on Human and Peoples’ Rights (“African Commission”) adopted a resolution urging parties to the African Charter on Human and Peoples Rights to take the necessary measures to prevent and prosecute violence committed on the basis of real or perceived sexual orientation or gender identity.²⁶⁹ The Resolution came on the heels of a 2011 decision when a coalition of local and international organizations led by OutRight Action International, (then known as IGLHRC)²⁷⁰ successfully lobbied the African Commission to recognize gender and sexual orientation as prohibited grounds of discrimination in guidelines issued to assist States Parties in complying with their obligations to protect economic, social and cultural rights.²⁷¹

103. The UN High Commission for Refugees (the “UNHCR”) has also recognized the role of socially constructed gender roles in the persecution of LGBTI refugees. In 2012, it released guidelines addressing refugee claims based on sexual orientation and gender identity, recognizing that LGBTI individuals are often persecuted because of “non-compliance with expected cultural, gender and/or social norms and values.”²⁷² The guidelines further explain that LGBTI individuals are protected as a particular social group, as well as under the religion and political opinion grounds, under the 1951 Refugee Convention.²⁷³ Recently the UNHCR released a report putting forth best

²⁶⁸ Council of Europe Parliamentary Assembly, Resolution 1728 (2010), Discrimination on the basis of sexual orientation and gender identity ¶ 2 (April 29, 2010) (citing the European Court of Human Right’s 1999 judgment in *Lustig-Prean and Beckett v. the United Kingdom*).

²⁶⁹ African Commission on Human and Peoples’ Rights (ACHPR), *Resolution on the Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation of Gender Identity*, Resolution 275, (2014).

²⁷⁰ The International Gay and Lesbian Human Rights Commission (IGLHRC), now known as OutRight Action International.

²⁷¹ ACHPR, Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights, ¶ 1(d), (Oct. 24, 2011)

²⁷² U.N. High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 23 October 2012, ¶ 14 UN Doc. HCR/GIP/12/09.

²⁷³ *Id.* ¶ 40.

practices for helping LGBTI refugees in which it attributed “social hostility toward LGBTI persons . . . to broader contextual factors, such as “patriarchy,” “conservatism,” “cultural taboos,” “religion,” and/or traditional practices.”²⁷⁴

IV. ALLEGED OFFENSES

A. The Standard for Initiating a Preliminary Examination into the Gender-Based Crimes Committed by ISIS Has Been Met

104. Based on the existing facts, the OTP should initiate a preliminary examination into ISIS’ gender-based crimes in Iraq. The OTP “will conduct, on the basis of its *proprio motu* powers under Article 15 of the Statute, a preliminary examination of all situations that are not manifestly outside the jurisdiction of the Court” to determine “whether there is a reasonable basis to proceed with an investigation.”²⁷⁵ The present situation is within the jurisdiction of the Court, and there is also a reasonable basis for the OTP to continue to an investigation.

105. In deciding whether to initiate an investigation, the OTP considers whether:

First, there is a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;

Second, the case is or would be admissible under Article 17; and

Third, taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.²⁷⁶

106. On the facts presented here, there is reasonable basis to believe that foreign fighters in ISIS have committed gender-based crimes within the jurisdiction (temporal, material, and personal) of the Court, that the case would be admissible under Article 17 requirements (complementarity and gravity), and that an investigation would serve the interests of justice.

²⁷⁴ U.N. High Commissioner for Refugees (UNHCR), *Protecting Persons with Diverse Sexual Orientations and Gender Identities: A Global Report on UNHCR's Efforts to Protect Lesbian, Gay, Bisexual, Transgender, and Intersex Asylum-Seekers and Refugees*, December 2015, at 15.

²⁷⁵ OTP, *Policy Paper on Prelim Examinations*, ¶ 2. (November 2013).

²⁷⁶ Rome Statute, Article 53(1)(a)-(c).

B. There Is a Reasonable Basis to Believe that Foreign Fighters in ISIS Have Committed Crimes within the Jurisdiction of the Court

107. The legal standard of a “reasonable basis to believe” is the lowest evidentiary standard available under the Rome Statute.²⁷⁷ Pre-Trial Chamber II found that “[t]his is logical given that the nature of this early stage of the proceedings is confined to a preliminary examination. Thus, the information available to the Prosecutor is neither expected to be ‘comprehensive’ nor ‘conclusive,’ if compared to evidence gathered during the investigation.”²⁷⁸ Therefore, an ICC Pre-Trial Chamber, “in evaluating the available information provided by the Prosecutor, [...] must be satisfied that there exists a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court ‘has been or is being committed’.”²⁷⁹ The OTP’s standard in determining whether to open a preliminary examination should be no higher than the burden the OTP must meet in seeking authorization for an investigation based on the results of the preliminary examination.

108. For crimes to fall within the jurisdiction of the Court, the following conditions must be satisfied: 1. Subject matter jurisdiction, meaning that the crimes are referred to in Article 5, as defined in Articles 6, 7, and 8 of the Rome Statute, 2. Temporal jurisdiction under Article 11 of the Statute, and 3. Under Article 12, either territorial or personal jurisdiction.²⁸⁰ Temporal jurisdiction under Article 12 is satisfied here, because the states with fighters who would be prosecutable by the Court under its personal jurisdiction requirements ratified the Rome Statute prior to the events in question. As described herein, ISIS’s crimes of gender-based persecution in Iraq constitute crimes against humanity under Article 7. Its crimes of torture motivated by gender, sexual orientation and gender identity discrimination constitute war crimes under Article 8 of the Rome Statute. These crimes therefore satisfy the Court’s subject matter requirements. While

²⁷⁷ *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, ICC-01/09-19, Pre-Trial Chamber II, 31 March 2010, ¶ 27.

²⁷⁸ *Id.*

²⁷⁹ *Id.* ¶ 35.

²⁸⁰ *Id.* ¶ 39.

Iraq is not a party to the Rome Statute,²⁸¹ making the Court’s territorial jurisdiction irrelevant, the crimes committed by foreign ISIS fighters in Iraq from states that ratified the Rome Statute do meet the Court’s Article 12 personal jurisdiction requirements, as described below.²⁸²

**1. The Court has Subject Matter Jurisdiction over Gender-Based Crimes
ISIS Has Committed in Iraq**

a. Crimes against humanity

109. ISIS has committed well-documented acts of persecution against civilians on the basis that they did not conform to its prescribed gender roles. These acts meet all of the constituent elements to establish persecution under Article 7(1)(h), which requires that: (i) the conduct was part of a widespread or systematic attack directed against a civilian population; (ii) the perpetrator was aware the persecutory conduct was part of that attack; (iii) the persecution led to a severe deprivation of fundamental rights; (iv) the victims were deprived of their rights based on their membership in a group; (v) the group must be based on certain defined grounds, which include gender; and (vi) the persecutory conduct was committed in connection with a crime under Article 7 (1) or any other crime prosecutable by the Court.²⁸³

*i. ISIS’s gender-based crimes in Iraq are part of ISIS’s
widespread and systematic attack on the civilian population*

110. ISIS’s attack against the civilian population in Iraq is more “widespread,” in terms of the large-scale nature of the attack and the number of targeted persons²⁸⁴ than others that Pre-Trial Chamber has accepted as meeting these criteria. In *Prosecutor v. Laurent Gbagbo*, for example, the Pre-Trial Chamber found that an attack that left 316 members of the Ivorian opposition dead or injured was “widespread” because it “involved a large number

²⁸¹ ICC, State Parties to the Rome Statute, available at: https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx. (Accessed on October 31, 2017).

²⁸² Rome Statute, Art. 12(2)(b). *See also, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, ICC-01/09-19, Pre-Trial Chamber II, 31 March 2010, ¶ 39.

²⁸³ *See* Rome Statute, Articles 7(1)(h), 7(2)(g); Elements of Crimes, Article 7(1)(h).

²⁸⁴ *Prosecutor v. Gbagbo*, Case No. ICC-02/11-01/11, Decision on the Confirmation of Charges Against Laurent Gbagbo, ¶ 222 (June 12, 2014); *see Prosecutor v. Bemba*, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶ 83 (June 15, 2009).

of acts; . . . targeted and victimized a significant number of individuals; . . . extended over a time period of more than four months; and . . . affected the entire city of Abidjan, a metropolis of more than three million inhabitants.”²⁸⁵

111. ISIS’s attack on civilians has exceeded this standard. ISIS has overrun large swathes of territory in northern and western Iraq, which, at its peak, included nearly 10 million people living under ISIS rule.²⁸⁶ ISIS has killed thousands of civilians, and persecuted many more.²⁸⁷ Its campaign of terror has lasted for years. Whether the Court looks to Al-Zarqawi’s attacks against civilians under the banner of Jama’at al-Tawhis wal Jiha (JJI) in the early 2000s, Al-Qaida in Iraq (AQI)’s terrorist attacks during the 2003 Iraq War, the reformulation of the group as ISIS in 2013, or al-Baghdadi’s rise to power in 2014, ISIS has been a formidable force targeting civilians in the region for anywhere from three years to over a decade.²⁸⁸

112. ISIS’s attack is also part of a systematic policy to attack civilians.²⁸⁹ The policy need not be formal or explicitly defined.²⁹⁰ “an attack which is planned, directed, or organized—as opposed to spontaneous or isolated acts of violence—will satisfy this criterion.”²⁹¹ In *Gaddafi*, the Pre-Trial Chamber found that there were reasonable grounds to believe that there was a “State policy” to quell demonstrations based on a series of coordinated actions, including acts of the Libyan security forces, speeches of Saif and Muammar Gaddafi denouncing the opposition, and a threatening mass text message sent via the state-owned telecommunications system.²⁹² Here, ISIS has again gone one step further – rather than inferring a policy based on a series of coordinated actions, the Court could

²⁸⁵ *Prosecutor v. Gbagbo*, Case No. ICC-02/11-01/11, Decision on the Confirmation of Charges Against Laurent Gbagbo, ¶¶ 204, 224 (June 12, 2014).

²⁸⁶ See e.g. BBC News, *Islamic State and the crisis in Iraq and Syria in maps*, (July 20, 2017).

²⁸⁷ OHCHR and UNAMI: *Protection Report May-October 2015*, *supra*, note 112, at 10.

²⁸⁸ See *Prosecutor v. Bemba*, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶ 77 (June 15, 2009) (“[T]he Prosecutor need not prove that the *entire* population of the geographical area, when the attack is taking place, was being targeted.”).

²⁸⁹ “‘Attack directed against any civilian population’ means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.” Rome Statute, Articles 7(2)(a). Elements of Crimes, Article 7, Introduction, para. 3 (“It is understood that ‘policy to commit such attack’ requires that the State or organization actively promote or encourage such an attack against a civilian population.”).

²⁹⁰ *Prosecutor v. Katanga and Ngudjolo*, Case No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges, ¶ 396 (Sept. 30, 2008).

²⁹¹ *Prosecutor v. Bemba*, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶ 81 (June 15, 2009).

²⁹² See *Gaddafi*, Case No. ICC-01/11-12, Decision on the “Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi”, ¶¶ 14-31 (June 27, 2011).

look directly to ISIS statements detailing and justifying its attack on civilians. For example, ISIS has published detailed policies concerning sexual slavery,²⁹³ its court system orders horrific punishments based on real or perceived sexual orientation,²⁹⁴ and it publishes photos of its victims as propaganda.²⁹⁵ The Pre-Trial Chamber has accepted such overt statements as evidence of an official policy to attack civilians.²⁹⁶ While the concepts of “policy” and “systematic” nature of the attack should not be conflated, they “both refer to a certain level of planning of the attack . . . [and] evidence of planning, organisation or direction by a State or organisation may be relevant to prove both the policy and the systematic nature of the attack.”²⁹⁷ Thus, given their organized nature, ISIS’s acts of violence satisfy the alternative requirement under Article 7(1) of the Statute that the attack be systematic.

ii. ISIS fighters have the requisite mens rea

113. ISIS fighters are necessarily aware that their persecutory conduct is part of ISIS’s widespread and systematic attack on the civilian population in Iraq. The Elements of Crimes states that this element “should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization.”²⁹⁸ The perpetrators’ awareness that their conduct is part of an attack may be inferred from circumstantial evidence.²⁹⁹ Given that ISIS publicizes its policy of attacking civilians as a recruiting tool, it would be highly unlikely that even low-level perpetrators would not aware of ISIS’s widespread and systematic attack on civilians.

²⁹³ See Kenneth Roth, *Slavery: The ISIS Rules*, Human Rights Watch, (September 5, 2015),

<https://www.hrw.org/news/2015/09/05/slavery-isis-rules>.

²⁹⁴ OutRight Action International, *supra*, note 174.

²⁹⁵ *Id.*

²⁹⁶ See *Ruto*, Case No. ICC-01/09-01/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶¶ 273-74 (finding that speeches by officials and orders by midlevel organizers urging members of a political party to attack the opposition constituted evidence of an official policy to attack civilians).

²⁹⁷ *Prosecutor v. Gbagbo*, Case No. ICC-02/11-01/11, Decision on the Confirmation of Charges Against Laurent Gbagbo, ¶ 216.

²⁹⁸ Elements of Crimes, Article 7, Introduction, para. 2. See also *Prosecutor v. Gbagbo*, Case No. ICC-02/11-01/11, Decision on the Confirmation of Charges Against Laurent Gbagbo, ¶ 214 (June 12, 2014). (“[I]t is only necessary to establish that the person had knowledge of the attack in general terms.”)

²⁹⁹ *Prosecutor v. Katanga and Ngudjolo*, Case No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges, ¶ 402 (Sept. 30, 2008) (such evidence may be “the accused’s position in the military hierarchy; his assuming an important role in the broader criminal campaign; his presence at the scene of the crimes; his references to the superiority of his group over the enemy group; and the general historical and political environment in which the acts occurred.”)

iii. *ISIS's persecutory conduct has caused severe deprivations of fundamental rights*

114. ISIS's persecutory conduct has resulted in the "intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity."³⁰⁰ For instance, in *Prosecutor v. Kenyatta*, the Pre-Trial Chamber found that a series of "killings, displacement[s], rape[s], serious physical injuries, and acts causing serious mental suffering . . . constitute[d] severe deprivations of fundamental rights."³⁰¹ There, the OTP had alleged acts of violence that "resulted in more than 1,100 people dead, 3,500 injured, approximately 600,000 victims of forcible displacement, [and] at least hundreds of victims of rape and sexual violence."³⁰² ISIS has committed atrocities on a similar scale. ISIS fighters have blatantly and intentionally violated fundamental rights of thousands of civilians, including the rights to life, liberty, and security of person, as well as the rights to be free from slavery and torture.³⁰³ Indeed, Ján Kubiš, the Special Representative of the United Nations Secretary-General for Iraq, reported in August 2016 that, among the Yazidi community, "[t]housands of men, women and children have been killed or are missing, or remain in captivity where they are subjected to unspeakable sexual and physical abuse."³⁰⁴

iv. *ISIS fighters persecute their victims based on their membership in a group defined by their gender, targeting those who do not conform with ISIS's strict gender regulations on social behavior*

115. ISIS deprived its victims of their fundamental rights based on their membership in a group defined by their gender. The Pre-Trial Chamber has found a nexus between the deprivation of rights and the group's identity from a pattern of acts committed against a covered group. In *Prosecutor v. Harun*, the Pre-Trial Chamber found "reasonable grounds to believe" that the Sudanese government had persecuted the ethnic Fur people of Darfur on the basis of evidence "that the Sudanese Armed Forces and the

³⁰⁰ Rome Statute, Art. 7(2)(g).

³⁰¹ *Prosecutor v. Kenyatta*, Case No. ICC-01/09-02/11, Decision on Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶ 283 (January 23, 2012).

³⁰² *Prosecutor v. Kenyatta*, Case No. ICC-01/09-31-Red, Prosecutor's Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta & Mohammed Hussein Ali, ¶ 9 (Dec. 15, 2010).

³⁰³ G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

³⁰⁴ UNAMI & OHCHR, *A Call for Accountability and Protection: Yazidi Survivors of Atrocities Committed by ISIL*, at 3, (August 2016).

Militia/Janjaweed launched attacks against specific localities believing that they were predominantly inhabited by the Fur population.”³⁰⁵ ISIS has committed a pattern of atrocities against women and girls, including torture and sexual slavery. In addition to these targeted attacks, ISIS has explicitly incorporated sexual and gender-based violence into its ideology to further its policy of gendered persecution.

116. ISIS’s persecution of based on membership in a group defined by gender includes acts targeting individuals who do not conform with ISIS’s strict gender-based regulations on social behavior. The Rome Statute is unique among the frameworks of the international criminal tribunals in expressly prohibiting gender-based persecution.³⁰⁶ The definition of “gender” under Article 7(3) applies to individuals persecuted for defying their prescribed gender roles. Article 7(3) states: “For the purpose of this Statute, it is understood that the term ‘gender’ refers to the two sexes, male and female, within the context of society. The term ‘gender’ does not indicate any meaning different from the above.” As the OTP has recognized, “this definition acknowledges the social construction of gender, and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and to girls and boys.”³⁰⁷ Accordingly, the OTP has defined gender-based crimes as “those committed against persons, whether male or female, because of their sex and/or socially constructed gender roles. Gender-based crimes are not always manifested as a form of sexual violence. They may include non-sexual attacks on women and girls, and men and boys, because of their gender.”³⁰⁸

³⁰⁵ *Prosecutor v. Harun*, Case No. ICC-02/05-01/07, Decision on the Prosecution Application Under Article 58(7) of the Statute, ¶¶ 74-75 (Apr. 27, 2007). See also *Prosecutor v. Simone Gbagbo*, Case No. ICC-02/11-01/12, Decision on the Prosecutor’s Application Pursuant to Article 58 for a Warrant of Arrest Against Simone Gbagbo ¶ 204 (2 Mar. 2012) (finding “substantial grounds to believe” that at least 316 victims of killings, rapes, and injuries by pro-government forces had been targeted because the victims were members of the opposition); *Prosecutor v. Blé Goudé*, Case No. ICC-02/11-02/11, Decision on the Confirmation of Charges Against Charles Blé Goudé ¶ 122 (11 Dec. 2014)] (finding “substantial grounds to believe that at least 348 victims of the killings, rapes and injuries committed by the pro-Gbagbo forces . . . were targeted by reason of their [political] identity” on the basis of “the facts . . . that during the five events under consideration, the pro-Gbagbo forces targeted participants at pro-[opposition] demonstrations, or inhabitants of areas perceived as supporting [the opposition]”).

³⁰⁶ Compare Rome Statute, art. 7(1)(h) with Charter of the International Military Tribunal art. 6, *The Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, Aug. 8, 1945, 82 U.N.T.S. 279; Charter of the International Military Tribunal for the Far East art. 5, Apr. 26, 1946, 4 Bevans 27 (replacing the original Charter, Jan. 19, 1946, 4 Bevans 20); Statute of the International Criminal Tribunal art. 5(h), May 25, 1993, 32 I.L.M. 1192 (1993) (“ICTY Statute”); Statute of the International Criminal Tribunal for Rwanda art. 3 Nov. 8, 1994, 22 I.L.M. 1602 (1994) (“ICTR Statute”).

³⁰⁷ OTP, *Policy Paper on Sexual and Gender-Based Crimes*, ¶ 12 (June 2014).

³⁰⁸ *Id.* ¶ 16.

117. Legal commentators support this view, noting that “[i]t is significant that both biological sex and social gender constructs are identified as relevant motivations, as it means that the concept of ‘gender violence’ is broad enough to include both violence which targets women and men in different ways on the basis of their sex and violence which targets women or men as punishment for not complying with their assumed or assigned social gender roles. The definition used by the Office of the Prosecutor also emphasizes that gender violence is not synonymous with sexual violence, and may manifest itself in other, non-sexual forms against both women and girls and men and boys.”³⁰⁹
118. The ad hoc tribunals have also taken gender roles into account in persecution cases, even without express provision for gender-based persecution in their charters. In *Akayesu*, for example, the ICTR Trial Chamber drew a clear link to the physical and psychological targeting of women within “their families and their communities” as “contributing to their destruction and to the destruction of the Tutsi group as a whole.”³¹⁰ In *Nahimana*, the portrayal of Tutsi women as “femmes fatales . . . seductive agents of the enemy” in local media was considered an act of “targeted . . . persecution” because it “made the sexual attack and killing of Tutsi women a foreseeable consequence of the role attributed to them”—demonstrating that even without the express legal basis to consider gender as a basis of persecution, gender roles within society have been considered in the persecution context.³¹¹ Finally, in *Kvočka*, the Trial Court held that holding women “in detention, guarded by men with weapons who were often drunk, violent, and physically and mentally abusive and who were allowed to act with virtual impunity,” made rape and sexual violence “natural or foreseeable consequences” of putting those women in “circumstances rendering them especially vulnerable.”³¹² While defendant Kvočka’s sentence was ultimately overturned on evidentiary grounds, the Appeals Chamber took the opportunity to clarify that a finding of discriminatory intent is not voided by personal

³⁰⁹ Otto Triffterer, COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, 293 (2d. ed. 2008); See also Valerie Oosterveld, *Gender, Persecution, and the International Criminal Court: Refugee Law’s Relevance to the Crime Against Humanity of Gender-Based Persecution*, 17 DUKE J. COMP. & INT’L L. 49, 78-79 (2006-2007) (“If crimes against men who are targeted because of their gender are not charged as gender-based persecutions. . . this results in the creation of a ‘male experience’ of persecution and a ‘female model,’ with the female model overemphasizing sexual violence at the expense of other forms of repression.”) (hereinafter “Oosterveld, *Gender, Persecution and the ICC*”).

³¹⁰ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment ¶ 731 (Sept. 2, 1998) (targeting Tutsi women for sexual violence was an act of genocide against the Tutsi group as a whole).

³¹¹ *Prosecutor v. Nahimana*, Case No. ICTR-99-52-T, Judgment ¶ 1079 (Dec. 3, 2003).

³¹² *Prosecutor v. Kvočka*, Case No. IT-98-30/1-T, Judgment ¶ 327 (Nov. 2, 2001).

motivations to commit sexual crimes.³¹³ The ad hoc tribunal jurisprudence illustrates the role and definition of gender in the context of persecution as a crime against humanity, and further supports the OTP’s conclusion that gender as defined in Article 7(3) encompasses socially constructed roles and norms.

119. ISIS’s persecutory conduct towards Yazidi women and girls should also be charged as gender-based persecution in connection with other forms of persecution. While Yazidi women and girls may have been targeted based on the intersection of their gender and ethnic identities, rather than their gender or ethnic identification alone, they constitute gender-based persecution and should be considered as such. Indeed, “an intersectional perspective is required to fully comprehend the implications of those crimes[.]”³¹⁴ Gender-based persecution is currently underrepresented in the OTP’s charging decisions; thus far, the OTP has charged gender-based persecution in only one of the twenty-three cases that have come before the Court, whereas “ethnic and political persecution has been charged nine times, including in cases where there is strong evidence of mass rape” targeting only women.³¹⁵

120. The definition of “gender” under Article 7(3) may also apply to individuals persecuted on the basis of their real or perceived sexual orientation or gender identity where associated behavior or acts are seen to violate traditional gender roles. While the ICC has not yet addressed this issue, pursuant to Article 21(3), the OTP will look to internationally recognized human rights in interpreting and applying the definition of gender under Article 7(3). The OTP has recognized that sexual orientation is a factor that it will consider in this context: stating that it will seek to “[u]nderstand the intersection of factors such as gender, age, race, disability, religion or belief, political or other opinion, national, ethnic, or social origin, birth, sex, *sexual orientation*, and other status or identities which may give rise to multiple forms of discrimination and social inequalities.”³¹⁶ Similarly, as an example of “internationally recognised human rights, including those relating to women’s human rights and gender equality,” the OTP highlighted “the efforts of the UN Human Rights Council and the Office of the High Commissioner for Human Rights

³¹³ *Prosecutor v. Kvočka*, Case No. IT-98-30/1-A, Judgment on Appeal, ¶¶ 369-370 (Feb. 28, 2005).

³¹⁴ Emily Chertoff, *Prosecuting Gender-Based Persecution: The Islamic State at the ICC*, 126 Yale L.J. 1050, 1070 (2017).

³¹⁵ *Id.* See, e.g., Thomas Escritt, *Sex Crimes in Focus at Hague Trial of Ugandan Rebel Commander*, REUTERS (December 2, 2016) (reporting strong evidence of mass rape of women in conflicts in the DRC, Uganda, and the Darfur region of Sudan).

³¹⁶ OTP, *Sexual and Gender-Based Crimes*, *supra*, note 307, ¶ 27 (emphasis added).

(OHCHR) to put an end to violence and discrimination on the basis of sexual orientation or gender identity.”³¹⁷ The OTP also noted that “[i]t is important to view different types of discrimination as a totality, and not in isolation, as they can overlap with one another”, citing the Committee on the Elimination of Discrimination against Women (“CEDAW”) General Recommendation No. 28, which notes that, “[t]he discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste, and *sexual orientation and gender identity*.”³¹⁸

121. The Court has also indicated that sexual orientation is a factor that it will consider pursuant to Article 21(3). Trial Chamber I determined that, consistent with international human rights law and international humanitarian law, the non-discrimination principle applied so that “reparations shall be granted to victims without adverse distinction on the grounds of gender, age, race, colour, language, religion or belief, political or other opinion, *sexual orientation*, national, ethnic or social origin, wealth, birth or other status.”³¹⁹

122. Moreover, international refugee law, which the Court may consider pursuant to Article 21(3), has recognized that gender-based persecution includes discrimination based on sexual orientation.³²⁰ While refugee law cannot serve as the basis of a criminal conviction without violating the principles of legality,³²¹ it can shed light on the definition of gender within the ICC framework. As no other international criminal tribunal has expressly included gender-based persecution within its framework, turning to international refugee

³¹⁷ *Id.* ¶¶ 26 n.3, 27. Specifically, the OTP cited the Free & Equal Initiative of the OHCHR at <https://www.unfe.org/> and statement of 26 September 2013 by the High Commissioner for Human Rights, Navanethem Pillay, and several world leaders to end violence and discrimination against lesbian, gay, bisexual, and transgender (LGBT) persons at <https://www.unfe.org/en/actions/ministerial-meeting>.” *Id.* ¶ 26 n.23.

³¹⁸ *Id.* ¶ 27 n.25 (citing CEDAW, General recommendation No. 28 on the core obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women ¶ 18) (emphasis added).

³¹⁹ *Prosecutor v. Thomas Lubanga Dyilo, Decision Establishing The Principles And Procedures To Be Applied To Reparations*, ICC-01/04-01/06-2904, para. 191 (citing United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, U.N. General Assembly, Resolution A/RES/60/147, 21 March 2006, principle 25 (“The application and interpretation of these Basic Principles and Guidelines must be consistent with international human rights law and international humanitarian law and be without any discrimination of any kind or on any ground, without exception.”)) (emphasis added).

³²⁰ GUIDELINES ON INTERNATIONAL PROTECTION: Gender-Related Persecution Within the Context of Article IA(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, U.N. High Comm’r for Refugees, ¶¶ 14-17, U.N. Doc. HCR/GIP/02/01 (“UNHCR Gender Guidelines”); *see also* James D. Wilets, *Conceptualizing Private Violence Against Sexual Minorities as Gendered Violence: An International and Comparative Law Perspective*, 60 ALB. L. REV. 989, 1046 n.237 (1997).

³²¹ *Prosecutor v. Kupreškić*, Case No. IT-95-16-T, Judgment, ¶ 589 (14 Jan. 14 2000).

law is consistent within the guidance of Article 21. By July 17, 1998, when the Rome Statute was adopted by 120 states, international refugee law had “acknowledged gender-related forms of persecution,” which “influenced the drafters of the Rome Statute to include gender within the list of persecutory grounds in the crimes against humanity provision.”³²² The UNHCR 2002 Guidelines on International Protection: Gender-Related Persecution includes a similar definition of gender as does Article 7(3).³²³ The UNHCR Guidelines specify that discrimination on the grounds of sexual orientation can amount to persecution because “the claimant has refused to adhere to socially or culturally defined roles or expectation of behavior attributed to his or her sex.”³²⁴

123. Additionally, as discussed in further detail in Section (IV)(E) the persecution of victims based on their real or perceived sexual orientation or gender identity may be taken into consideration by the Court in assessing gravity.

v. *ISIS’s persecutory conduct was committed in connection with other international crimes recognized under the Rome Statute*

124. ISIS’s gender-based crimes easily satisfy the requirement that they be committed in connection with other international crimes recognized under the Rome Statute. In persecuting civilians based on their gender, including targeting individuals who do not conform with ISIS’s strict gender regulations on social behavior, including their real or perceived sexual orientation or gender identity, ISIS has committed war crimes and crimes against humanity,³²⁵ including, but not limited to: murder,³²⁶ forcible displacement,³²⁷ torture,³²⁸ sexual slavery,³²⁹ imprisonment,³³⁰ rape,³³¹ forced

³²² Oosterveld, *Gender, Persecution, and the International Criminal Court*, *supra*, note 309, at 50-51.

³²³ UNHCR Gender Guidelines, *supra*, note 320, at ¶ 3 (defining gender as “the relationship between women and men based on socially or culturally constructed and defined identities, status, roles and responsibilities that are assigned to one sex or another, while sex is a biological determination. Gender is not static or innate but acquires socially and culturally constructed meaning over time.”).

³²⁴ UNHCR Gender Guidelines, *supra*, note 320, at ¶ 16.

³²⁵ The conflict in Iraq is generally considered an armed conflict of a non-international character between the Iraqi Government, supported by international forces on the one hand, and non-state armed groups, particularly ISIS, on the other. The participation of international forces does not change the non-international character of the conflict since these forces became involved in support of the Iraqi Government. As such, war crimes, as well as crimes against humanity, are discussed jointly.

³²⁶ Rome Statute arts. 7(1)(a) and 8(2)(c)(i).

³²⁷ *Id.* art. 7(1)(d).

³²⁸ *Id.* arts. 7(1)(f) and 8(2)(c)(i).

³²⁹ *Id.* arts. 7(1)(g) and 8(2)(e)(vi).

³³⁰ *Id.* art. 7(1)(e).

pregnancy,³³² sexual violence,³³³ and cruel, inhuman & degrading treatment.³³⁴ This does not preclude other charges not listed here, such as genocide, which may have a number of gender-based underlying offenses and which the facts would also support, but which have been the subject of other submissions to the Court.³³⁵

125. To the extent that ISIS's gender-based persecutory conduct constitutes other international crimes under the Rome Statute, the OTP should bring cumulative charges. The OTP has indicated its willingness to bring cumulative "charges for sexual and gender-based crimes explicitly as crimes *per se*, in addition to charging these acts as forms of other violence within the Court's subject-matter jurisdiction, where the material elements are met . . . in order to reflect the severity and multi-faceted character of these crimes fairly, and to enunciate their range supported by the evidence in each case."³³⁶ The OTP "will also charge acts of sexual and gender-based crimes as different categories of crimes . . . in order to properly describe, *inter alia*, the nature, manner of commission, intent, impact, and context."³³⁷ As Professor Rhonda Copelon has explained, cumulative charges are particularly important in the context of gender-based offenses because "[i]t makes a difference, to the elements that must be proved, to the penalty imposed, and to the larger cultural understanding of violence against women, to treat rape as torture rather than humiliation."³³⁸ She emphasized that those engaged in the process of drafting the Rome Statute found it critical to insist "as a matter of the principle of non-discrimination, that sexual violence be treated as constituting any of the recognized crimes so long as it met their elements, at the same time as it was necessary to name the sexual violence crimes specifically."³³⁹

b. War crimes

126. To find that an individual has committed the war crime of torture under Article 8(2)(c)(i)-4 of the Rome Statute, the Court must find 1. that the victims were civilians or other

³³¹ *Id.* arts. 7(1)(g) and 8(2)(e)(vi).

³³² *Id.* art. 7(1)(g).

³³³ *Id.* arts. 7(1)(g) and 8(2)(e)(vi).

³³⁴ *Id.* art. 8(c)(i)

³³⁵ *See, e.g.*, Yazda, Mass Graves of Yazidis Killed by the Islamic State Organization or Local Affiliates on or After August 3, 2014, January 28, 2016; U.N. General Assembly, *Joint written statement, supra*, note 22.

³³⁶ OTP, *Sexual and Gender-Based Crimes, supra*, note 307, ¶ 72.

³³⁷ *Id.* ¶ 73.

³³⁸ Rhonda Copelon, *Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law*, 46 MCGILL L.J. 217, 234 (2000).

³³⁹ *Id.*

actors not taking part in active hostilities, 2. that the perpetrator was aware of factual circumstances establishing this status, 3. that the conduct was in the context of and associated with an internal armed conflict of which the perpetrator was aware, 4. that the “perpetrator inflicted physical or mental pain or suffering upon one or more persons,” and 5. that they did so “for such purposes as obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind.”³⁴⁰ As described above in Section III(D)(3), the historical record on the Rome Statute’s drafting, and developments under customary international law make plain that the element “discrimination of any kind” includes discrimination based on gender, including sexual orientation and gender identity. ISIS’ crimes of torture motivated by gender discrimination in Iraq meet these five standards.

127. *First*, it is well documented that ISIS targeted civilians not participating in active hostilities. UN experts have found that ISIS forces have killed thousands of civilians, and persecuted many more.³⁴¹ As detailed in Sections III(C) and III(D), ISIS’ victims of gender-motivated crimes included women professionals kidnapped from their homes, civilian women and girls captured as the group seized territory, as well as male and female civilians living under ISIS control who did not conform to the group’s gendered restrictions on appearance and movement, or whom ISIS militants presumed were LGBTI.³⁴²

128. *Second*, ISIS militants possessed the requisite *mens rea* with regard to the civilian status of victims. Again, the evidence in Sections III(C) and III(D) make plain that ISIS perpetrators were aware that the victims of their gender-based crimes were civilians or otherwise not engaged in active hostilities. Fighters and militants seized victims from their homes, attacked and tortured unarmed individuals on the street, and tortured detainees. They also searched civilians’ phone communications and civilian government records in order to find and target civilians its fighters presumed to be LGBTIQ,³⁴³ indicating an intentional pattern and practice of seeking out civilians to target for violence on the basis of sexual orientation or gender identity.

³⁴⁰ ICC, Elements of the Crime, *War Crime of torture*, art. 8 (2) (c) (i)-4.

³⁴¹ OHCHR and UNAMI: *Protection Report May-October 2015*, *supra*, note 112.

³⁴² *Supra*, Sections III(C)(2) and III(D)(2).

³⁴³ *Supra*, Sections III(C)(2) and III(D)(2).

129. *Third*, ISIS militants committed war crimes in the context of and associated with an internal armed conflict of which they were aware. An armed conflict is internal, or not of an international character, when it “take[s] place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.”³⁴⁴ The Court has found that “the involvement of armed groups with some degree of organisation and the ability to plan and carry out sustained military operations would allow for the conflict to be characterised as an armed conflict not of an international character.”³⁴⁵ It provides a non-exhaustive, flexible list of factors potentially relevant to determining if a body is an organized arm group, including “the force or group’s internal hierarchy; the command structure and rules; the extent to which military equipment, including firearms, are available; the force or group’s ability to plan military operations and put them into effect; and the extent, seriousness, and intensity of any military involvement.”³⁴⁶ Intensity, which is relevant for distinguishing an armed conflict from, for example, banditry or short-lived, disorganized insurrections, can be established by “the seriousness of attacks and potential increase in armed clashes, their spread over territory and over a period of time, the increase in the number of government forces, the mobilisation and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the UN Security Council, and, if so, whether any resolutions on the matter have been passed.”³⁴⁷

130. The nature of ISIS’ presence in Iraq clearly meets these standards. ISIS is an organized armed group, with an internal hierarchy and command structure as detailed in Section II(B), and it has carried out sustained, protracted military operations within Iraq. As described in Section III(A), ISIS rapidly swept territory in western Iraq throughout 2013 and 2014, establishing a state-like bureaucracy that included control of the education system, strict legal and religious codes, taxes on residents, and provision of some basic services.³⁴⁸ It ultimately overran large swathes of territory in northern and western Iraq,

³⁴⁴ Rome Statute Art. 8(2)(f).

³⁴⁵ *Prosecutor v. Lubanga*, ICC-01/04-01/06 ¶ 535, (citing ICC-01/04-01/06-803-tEN, para. 233.)

³⁴⁶ *Prosecutor v. Lubanga*, ICC-01/04-01/06 ¶ 537.

³⁴⁷ *Prosecutor v. Lubanga*, ICC-01/04-01/06 ¶ 538, (citing ICTY, *Prosecutor v. Ćorić*, Case No. IT-05-87/1-T, Trial Chamber, Public Judgment with Confidential Annex – Volume I of II, 23 February 2011, para. 1522.)

³⁴⁸ While it is clear that ISIS controlled significant territory in Iraq and that it operated with an explicit military hierarchy, the Court does not require that a group establish territorial control or be “under responsible command” in order to find it constitutes an armed group within the meaning of this element. *Prosecutor v. Lubanga*, ICC-01/04-01/06 ¶ 536.

which, at its peak, included nearly 10 million people living under ISIS rule.³⁴⁹ Only in October of 2017 did Iraqi forces report that they may be witnessing “the beginning of the end” of ISIS control of significant parts of Iraq, after a nine month-long battle to route the group from Mosul, followed by significant military action to eliminate it from Hawija.³⁵⁰ The UN Security Council has provided sustained attention to ISIS presence in Iraq, including multiple resolutions,³⁵¹ and a recent resolution establishing an investigative team to collect evidence of ISIS’ potential war crimes and crimes against humanity in Iraq.³⁵² Its contribution to the regional refugee crisis also makes clear the intensity and seriousness of military engagement with ISIS in Iraq. As of 2015, it was estimated that ISIS is responsible for displacing over 3.3 million people in Iraq.³⁵³

131. Regarding *mens rea* within this element, it is highly unlikely that any ISIS militants in Iraq were unaware of ISIS’ engagement in an ongoing internal armed conflict. ISIS’ 2014 battlefield successes attracted thousands of foreign fighters to join its military campaign to establish a “caliphate” under its military leader.³⁵⁴ ISIS perpetrators’ *mens rea* is further cemented by the nexus between their gender-motivated crimes and the ongoing armed conflict. ISIS’ written policies promoted acts of gender-based violence, in a manner explicitly linking these acts to armed violence and territorial control. For example, as described in Section III(C)(1), fighters received explicit instructions on how to commit further acts of gender-based violence against women and girls its fighters captured and enslaved. ISIS’ written policy also prescribes acts of physical violence, including beatings and lashings, against anyone not adhering to its gendered dress, movement and behavior restrictions in areas under its control, which were acquired through armed action.³⁵⁵

132. *Fourth*, ISIS inflicted severe mental and physical suffering and pain on multiple persons in its commission of gender-based crimes, as detailed in Sections III(C) and III(D).

³⁴⁹ See e.g. BBC News, *supra*, note 286.

³⁵⁰ Dave Zucchino, ‘Game Over.’ *Iraqi Forces See Beginning of the End for ISIS*, N.Y. TIMES (October 6, 2017).

³⁵¹ U.N. Security Council, *Res. 2249*, U.N. Doc. S/RES/2249 (2015); U.N. Security Council, *Res. 2299*, U.N. Doc. S/RES/2299 (2016); See also, Jessica Stern, *The U.N. Security Council’s Arria-Formula Meeting on Vulnerable Groups in Conflict: ISIL’s Targeting of LGBTI Individuals*, 48 Int’l Law and Politics 1191(2016).

³⁵² U.N., Press Release, *Security Council Requests Creation of Independent Team to Help in Holding ISIS (Da’esh) Accountable for its Actions in Iraq*, SC/12998 (September 21, 2017)

³⁵³ Orlando Crowcroft, *ISIS: Worst Refugee Crisis in a Generation as Millions Flee Islamic State in Iraq and Syria*, INTERNATIONAL BUSINESS TIMES (June 17, 2015).

³⁵⁴ Laub, *supra*, note 29; Stanford University, *supra*, note 29.

³⁵⁵ *Supra*, Section III(C)(1).

133. *Fifth*, Sections III(C) and III(D) also make plain that ISIS committed these acts on the basis of gender discrimination.

2. The Court has Personal Jurisdiction over Foreign Fighters in ISIS Operating in Iraq

134. Article 12(2)(b) of the Rome Statute establishes that the Court has personal jurisdiction over alleged crimes committed by nationals of State Parties to the Statute who are natural persons (commander or subordinate) and at least 18 years old at the time of the alleged conduct.

a. ISIS has a policy of recruiting foreign fighters

135. ISIS recruits foreign fighters to implement and execute acts that have terrorized individuals around the globe in recent years. In a speech in 2014, Abu Bakr al-Baghdadi called on Muslims to travel from around the globe to “the land of Islam,” claiming it was a religious obligation.³⁵⁶ He called particularly for “scholars, [Islamic legal experts] and callers, especially the judges, as well as people with military, administrative, and service expertise, and medical doctors and engineers of all different specializations and fields.”³⁵⁷

136. As of December 2015, researchers estimated that “between 27,000 and 31,000 people have traveled to Syria and Iraq to join the Islamic State and other violent extremist groups from at least 86 countries.”³⁵⁸

137. By 2015, these foreign fighters were documented as coming in the hundreds and thousands, primarily from the following countries³⁵⁹:

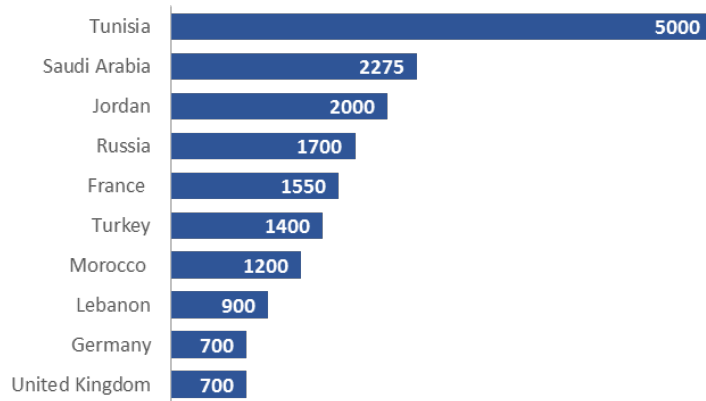
³⁵⁶ Jessica Stern & J.M. Berger, *ISIS and the Foreign-Fighter Phenomenon: Why Do People Travel Abroad to Take Part in Somebody Else’s Violent Conflict?*, THE ATLANTIC (March 8, 2015).

³⁵⁷ *Id.*

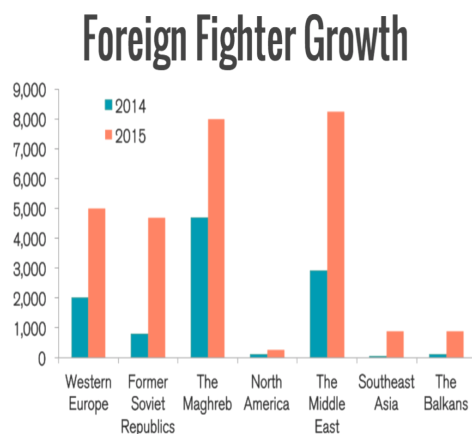
³⁵⁸ The Soufan Group: *Foreign Fighters Update*, *supra*, note 50; See also Cameron Glenn, *ISIS Losses by the Numbers*, WILSON CENTER: THE ISLAMISTS (March 25, 2016) (estimating that as of early 2016, ISIS had an estimated 25,000 foreign fighters).

³⁵⁹ Glenn, *ISIS Losses*, *supra*, note 358.

ISIS Foreign Fighters



138. ISIS recruits foreign fighters through the use of social media, family and friends,³⁶⁰ and its efforts became better organized and more effective with the passage of time.³⁶¹ “ISIS propaganda and messaging is disproportionately slanted toward foreign fighters, both in its content and its target audience[,]” according to investigative journalists writing for *The Atlantic* in 2015. They added, “[i]mportant ISIS messages are commonly released simultaneously in English, French, and German, then later translated into other languages, such as Russian, Indonesian, and Urdu.”³⁶² Within the first year of ISIS’s control of Iraqi territories, the number of foreign fighters grew rapidly, as reflected in the chart below:³⁶³



³⁶⁰ The Soufan Group: *Foreign Fighters Update*, *supra*, note 50.

³⁶¹ *Id.* at 13

³⁶² Stern & Berger, *supra*, note 355.

³⁶³ The Soufan Group: *Foreign Fighters Update*, *supra*, note 50, at 20.

139. The investigative journalists found that ISIS specifically sought foreigners who were already radicalized, as opposed to “the al-Qaeda model of attracting fighters first and radicalizing them later.” They added, “[w]ith its heady media mix of graphic violence and utopian idylls, ISIS sought recruits and supporters who were further down the path toward ideological radicalization or more inclined by personal disposition toward violence.”³⁶⁴
140. Many foreign fighters join ISIS in search for “belonging, purpose, adventure, and friendship.”³⁶⁵ At times, foreign fighters are lured to join ISIS based on false promises or expectations.³⁶⁶
141. Researchers have found that for most foreign fighters, the decision to join ISIS is driven by emotions instead of rationale, with familial and societal influences playing an important role in the radicalization process.³⁶⁷ This means that clusters of susceptible youth are likely to be influenced by closer personal contacts who decide to join.³⁶⁸

b. Foreign fighters occupy leadership roles in ISIS

142. Many foreign fighters do not inform their families of their decision to join ISIS, and sometimes these families learn of such involvement only when that individual dies.³⁶⁹ This has contributed to uncertainty in calculating the number of foreign fighters that have joined ISIS and, of equal importance, the leadership roles that these foreign fighters play.
143. Foreign fighters are costly, yet essential to ISIS and primarily fall into three groups: leaders, fighters, and support personnel.³⁷⁰ Foreign fighters typically “draw higher

³⁶⁴ Stern & Berger, *supra*, note 356 (“ISIS has crafted a novel formula for mixing brutal violence with the illusion of stability and dignity, and it has moved the bar for recruits. Its combination of successful ground strategy, aggressive messaging, and an appeal to strength over weakness has proven uniquely powerful and energized at least tens of thousands of ardent supporters.”).

³⁶⁵ The Soufan Group: *Foreign Fighters Update*, *supra*, note 50, at 6. *See also* Stern & Berger, *supra*, note 356 (“Internal motives stem from what an individual wants or needs for himself, in terms of the perceived benefits of membership in an extremist group, such as a feeling of belonging, escape into a new identity, adventure, or money. Foreign fighters have personal needs that are met by joining an organization, and those personal needs may become more important over time.”).

³⁶⁶ For example, Mohammad Ahmad Al Achrini, a Jordanian fighter who confessed he was fooled by ISIS Iraqi leader Abu Mariam Al-Iraqi in February 2014 into thinking he was fighting against PKK (the Kurdish party) in Syria while he was actually fighting against soldiers of the Free Syrian Army. Muqātl Urdunni Yrwi *Tajribatuhu ma’ “Dā’sh” (fydiyu)*[*Jordanian Fighter Tells of His Experience With ISIS (Video)*], AL-BAWṢLA (Feb. 1, 2014).

³⁶⁷ The Soufan Group: *Foreign Fighters Update*, *supra*, note 50, at 10.

³⁶⁸ *Id.*

³⁶⁹ Richard Barrett, *Foreign Fighters in Syria*, at 12, SOUFAN GROUP (2014).

³⁷⁰ Arie Perliger & Daniel Milton, *From Cradle to Grave: The Life Cycle of Foreign Fighters in Iraq and Syria*, at 37-38 COMBATING TERRORISM CENTER AT WEST POINT (2016).

salaries and live in nicer homes than local fighters.”³⁷¹ When foreign fighters join ISIS, they undergo tailored military training to prepare for battle, learn ISIS’ command structure, and adopt principles of “Islamic State” law.³⁷²

144. ISIS relies heavily on foreign fighters to maintain and expand its operations, particularly in key leadership positions. For example, Tarkhan Taumurazovich Batirashvili, (“Umar Shishani”), a Georgian national and “Syrian-based senior military commander” for ISIL, served on ISIS’ Shura Council³⁷³ from mid-2014 until his death in May 2016³⁷⁴ where he “[l]ed approximately 1,000 foreign fighters” and “committed a number of attacks in northern Syria.”³⁷⁵ Other Georgian-born ISIS fighters, particularly Chechen fighters from the Pankisi Gorge region, are particularly prominent in ISIS’ leadership structure, as they are able to utilize their military experience to further ISIS’ aims.³⁷⁶
145. German nationals have also advanced to leadership positions in ISIS. Reda Seyam joined ISIS and soon became “an important facilitator, financier, and recruiter for foreign fighters in Bosnia and Chechnya.”³⁷⁷ He also recruited other German nationals and helped them get to Syria.³⁷⁸ Most notably however, Seyam served as a high-ranking deputy to ISIS’ governor in Aleppo and currently “serves as IS’s minister of education in Mosul.”³⁷⁹
146. Abedlhamid Abaaoud, the orchestrator of the November 2016 Paris attacks, “was a Belgian citizen who had fought with IS in Syria.” He also “served as a link ‘between IS’s operations in Syria and its pool of would-be recruits and returnee fighters in Europe.’” Abaaoud led the Islamic State’s local cell in Paris and directly supervised IS soldiers.³⁸⁰

³⁷¹ *Id.* at 34.

³⁷² *Id.* at 37 (“Based on interviews with both current and former members of the Islamic State, such training camps can last from two weeks to over a year and include religious courses, weapons training, and other preparation for participation in the caliphate.”).

³⁷³ Press Release, U.N. Security Council, *Security Council Al-Qaida Sanctions Committee Adds Four Names to Its Sanctions List*, U.N. Press Release SC/11750 (January 23, 2015).

³⁷⁴ Luke Coffey, *Abu Omar al-Shishani: Death of an ISIL Commander*, AL JAZEERA (March 10 2016).

³⁷⁵ U.N. Security Council: Press Release, *supra*, note 373.

³⁷⁶ Joanna Paraszczuk, *Georgian Ex-President Says ‘Hundreds of Georgians Fighting With IS in Syria’* (January 13, 2015).

³⁷⁷ Hardin Lang & Muath Al Wari, *The Flow of Foreign Fighters to the Islamic State: Assessing the Challenge and the Response*, at 8 CENTER FOR AMERICAN PROGRESS (2016).

³⁷⁸ *Id.*

³⁷⁹ *Id.*

³⁸⁰ *Id.* at 10.

147. Australian authorities believe Australian-national Neil Prakash “may have been linked to [ISIL’s] drone programme”, although he “denied playing a broader role within the group.”³⁸¹ After entering Syria in 2013, Prakash was “the public face of a number of Islamic State’s propaganda videos” and played a prominent role in Islamic State operations.³⁸²

c. *There is a reasonable basis to believe that foreign fighters in ISIS leadership roles are responsible for gender-based crimes in Iraq, on the basis of command or superior responsibility under Rome Statute Article 28*

148. There is compelling evidence that foreign fighters in ISIS are liable for gender-based crimes on the basis of command or superior responsibility under Article 28. Article 28 establishes criminal responsibility for military commanders or persons effectively acting as military commanders,³⁸³ as well as non-military superiors.³⁸⁴ Article 28 requires: (i) the existence of effective control; (ii) the subjective element or *mens rea*; (iii) the failure to take necessary and reasonable measures; and (iv) causality.³⁸⁵

149. *First*, ISIS foreign fighters in command positions exhibit effective control. Under Article 28, a commander or superior must have effective “command and control”³⁸⁶ or “authority and control”³⁸⁷ over forces or subordinates who committed crimes within the jurisdiction of the Court.³⁸⁸ Effective control refers to the “material ability ‘to prevent or repress the

³⁸¹ Martin Chulov, Jamie Grierson, & Jon Swaine, *ISIS Faces Exodus of Foreign Fighters As Its ‘Caliphate’ Crumbles*, THE GUARDIAN (April 26, 2017).

³⁸² *Id.*

³⁸³ Rome Statute, Article 28(a) (referring to “[a] military commander or person effectively acting as a military commander”). See also *Prosecutor v. Bemba*, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶ 410 (June 15, 2009) (“[T]his category of military-like commanders may generally encompass superiors who have authority and control over regular government forces such as armed police units or irregular forces (non-government forces) such as rebel groups, paramilitary units including, *inter alia*, armed resistance movements and militias that follow a structure of military hierarchy or a chain of command.”).

³⁸⁴ Rome Statute, Article 28(b).

³⁸⁵ *Id.* Articles 28(a), 28(b).

³⁸⁶ *Id.* Article 28(a).

³⁸⁷ *Id.* Articles 28(a), 28(b).

³⁸⁸ See *Prosecutor v. Bemba*, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶¶ 412-413 (June 15, 2009) (“[A]lthough the degree of ‘control’ required under both expressions is the same . . . the term ‘effective authority’ may refer to the modality, manner or nature, according to which, a military or military-like commander exercise ‘control’ over his forces or subordinates.”).

commission of the crimes or to submit the matter to the competent authorities for investigation and prosecution.”³⁸⁹

150. As described above, ISIS operates a militarized bureaucracy in which foreign fighters occupy key leadership positions,³⁹⁰ including at least one in one of the highest ISIS governing bodies, the Shura Council.³⁹¹ The command structure of ISIS requires absolute compliance with orders and official policies and establishes strict disciplinary mechanisms to ensure compliance. For example, ISIS operates a “security apparatus . . . to identify, torture, and eliminate any suspected dissidents, spies, and defectors” and “takes [measures] to control the behavior of combatants in warfare [including] the regulation and censorship of their communications.”³⁹² ISIS has demonstrated the ability to “use[] its legal system to discipline its own members—both civilian officials as well as combatants.”³⁹³ Thus, there is a reasonable basis to believe that foreign fighters in leadership roles had the “material ability” to prevent, repress, or discipline and thereby exercised effective control over subordinates who committed gender-based crimes.

151. *Second*, ISIS foreign fighters have the requisite *mens rea*. In order to incur criminal responsibility under Article 28(a)(i) of the Rome Statute a “military commander or person effectively acting as a military commander” must have “either kn[own], or owing to the circumstances at that time, should have known that forces were committing or about to commit such crimes.” A higher standard applies for all other kinds of superior and subordinate relationships not involving a military commander or effective military commander. This higher standard requires that the superior “either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes.”

³⁸⁹ *Prosecutor v. Bemba*, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶ 415 (June 15, 2009); *cf. Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-A, Judgement, ¶ 50 (July 3, 2002); *Prosecutor v. Orić*, Case No. IT-03-68-A, Judgement, ¶ 311 (Int’l Crim. Trib. for the Former Yugoslavia, July 3, 2008) (“[W]hat matters [for effective control] is whether the superior has the material ability to prevent or punish the criminally responsible subordinate.”).

³⁹⁰ *See also*, Glenn, *supra*, note 53, (“Foreign fighters occupy many of the top administrative posts in the bureaucracy.”).

³⁹¹ *See, e.g.*, U.N. Security Council: Press Release Sanction List, *supra*, note 373 (identifying Georgian senior military commander as a member of the Shura Council).

³⁹² Mara Revkin, *The Legal Foundations of the Islamic State* 22, 36 (The Brookings Inst., Analysis Paper No. 23, 2016).

³⁹³ *Id.* at 14, 17, 26, 30.

152. Gender-based crimes are officially sanctioned by ISIS's leadership. For example, ISIS has an official policy promoting the perpetration of sexual slavery. ISIS has also published guidelines condoning gender-based crimes and "specifying the conditions under which enemy combatants may be targeted, tortured, mutilated, or killed, as well as rules governing the ransom of non-Muslim hostages."³⁹⁴
153. Even where no official fatwas, policies, orders, or public statements issued by ISIS leadership have been discovered, the circumstances provide a reasonable basis to believe that foreign fighters in leadership roles knew, should have known, or consciously disregarded information that clearly indicated the commission of gender-based crimes. As established in Section (IV)(B)(1)(a)(i) ISIS has committed gender-based crimes as part of widespread, large-scale, and systematic attacks. It is inconceivable that commanders and superiors within ISIS's hierarchy are unaware of attacks of such scale and notoriety that they have been the subject of reports by United Nations bodies and prominent NGOs, and have been covered extensively by the international press.
154. *Third*, ISIS foreign fighters have failed to take all necessary and reasonable measures within their power to prevent or repress the commission of gender-based crimes, or to submit transgressions to the competent authorities for investigation and prosecution. In this respect, there are three duties arising at different stages in the commission of crimes: the duty to prevent, the duty to repress the commission of the crime during or after, and the duty to submit the matter to competent authorities after the commission of the crime.³⁹⁵
155. ISIS uses its legal system to discipline members that violate its policies, even "execut[ing] its own judges when they deviate from its official position on legal questions."³⁹⁶ This demonstrates that ISIS leadership has the power to ensure compliance with its orders and official policies. However, there is no evidence that it uses that power to prevent or repress the commission of gender-based crimes, or to submit transgressions to competent authorities for investigation and prosecution. Evidence instead indicates that it uses that power to ensure that gender-based crimes are carried out.

³⁹⁴ Revkin, *supra*, note 392, at 22.

³⁹⁵ See *Prosecutor v. Bemba*, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶¶ 436, 442, 438-440 (June 15, 2009)

³⁹⁶ Revkin, *supra*, note 392, at 22, 26.

156. *Finally*, the causality element is satisfied. Under Article 28(a) and 28(b) no direct causal link is required and the Prosecutor need only demonstrate that the commander or superior's failure to exercise control properly increased the risk of the commission of the crimes charged.³⁹⁷ As the Court has found, failure to punish past crimes committed by the same group of subordinates can establish increased future risk.³⁹⁸

157. The gender-based crimes at issue are widespread, systematic, and officially sanctioned by ISIS leadership. There is a reasonable basis to conclude that the failure of ISIS's leadership to exercise proper control or to punish past gender-based crimes, at the very least, increased the risk that the commission of these crimes would be repeated.

d. There is a reasonable basis to believe that foreign fighters in leadership roles are individually liable for gender-based crimes under Article 25(3)(a) of the Rome Statute

158. *First*, ISIS foreign fighters are liable as direct perpetrators. There is a reasonable basis to believe that foreign fighters have committed gender-based crimes within the jurisdiction of the Court as direct perpetrators, such as the crime of rape or sexual slavery,³⁹⁹ given the widespread and systemic nature of these crimes.⁴⁰⁰

159. *Second*, ISIS foreign fighters in leadership roles are liable as co-perpetrators. Under Article 25(3)(a), a person is liable if that person commits a crime "jointly with another" as a co-perpetrator. Co-perpetration is based on the notion of joint control over the crime.⁴⁰¹ Liability under the concept of co-perpetration requires a common plan between two or

³⁹⁷ Rome Statute, Article 28(a) ("A military commander or person effectively acting as a military commander shall be criminally responsible for crimes . . . as a result of his or her failure to exercise control properly over such forces."); Rome Statute, Article 28(b) ("[A] superior shall be criminally responsible for crimes . . . as a result of his or her failure to exercise control properly over such subordinates."). *See also Prosecutor v. Bemba*, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶ 425 (June 15, 2009).

³⁹⁸ *Prosecutor v. Bemba*, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶ 434 (June 15, 2009).

³⁹⁹ *See, e.g.*, Elements of Crimes, Article 8(2)(e)(vi)-2 ("The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.").

⁴⁰⁰ *See, e.g.*, Human Rights & Gender Justice Clinic, *Seeking Accountability and Demanding Change*, *supra*, note 203, at 12, 29.

⁴⁰¹ *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, ¶ 342 (Jan. 29, 2007) ("The concept of co-perpetration based on joint control over the crime is rooted in the principle of division of essential tasks for the purpose of committing a crime between two or more persons acting in a concerted manner. Hence, although none of the participants has overall control over the offence because they all depend on one another for its commission, they all share control because each of them could frustrate the commission of the crime by not carrying out his or her task.").

more persons and the coordinated essential contribution by each co-perpetrator resulting in the fulfilment of the material elements of the crime.⁴⁰² The common plan need not be explicit and the existence of a common plan can be inferred from circumstantial evidence.⁴⁰³ Co-perpetrators must fulfill the subjective elements of intent and knowledge.⁴⁰⁴

160. The evidence provides a reasonable basis to conclude that foreign fighters in leadership roles have made essential contributions in the implementation of a common plan to carry out gender-based crimes.⁴⁰⁵ Foreign fighters in leadership roles occupy influential positions within ISIS's hierarchy. Many of them have the ability to shape the policies of ISIS and to direct the activities of their lower ranking co-perpetrators. ISIS's established reporting structures and lines of communication support the conclusion that foreign fighters in leadership roles issued instructions relating to the implementation of the common plan and were kept fully informed by their subordinates. Moreover, there is a reasonable basis to believe that foreign fighters in leadership roles have provided assistance in terms of planning military operations and have provided logistical support by ensuring that weapons and supplies are available for subordinates.⁴⁰⁶

161. *Third*, ISIS foreign fighters in leadership roles are liable as indirect perpetrators. Under Article 25(3)(a), a person is criminally responsible if that person commits a crime "through another person," as an indirect perpetrator. Indirect perpetration requires "control over the will of those who carry out the objective elements of the offence."⁴⁰⁷ Control over the direct actor can be exerted by means of an organization.⁴⁰⁸ Indirect

⁴⁰² *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute, ¶¶ 994, 1000-1001, 1003-1005 (Mar. 14, 2012) ("In the view of the Majority what is decisive is whether the co-perpetrator performs an essential role in accordance with the common plan, and it is in this sense that his contribution, as it relates to the exercise of the role and functions assigned to him, must be essential.").

⁴⁰³ *See Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, ¶ 345 (Jan. 29, 2007).

⁴⁰⁴ Rome Statute, Article 30. *See also Prosecutor v. Katanga and Ngudjolo*, Case No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges, ¶ 533 (Sept. 30, 2008) ("The Chamber finds that the co-perpetration of a crime requires that both suspects: (a) are mutually aware that implementing their common plan will result in the realisation of the objective elements of the crime; (b) undertake such activities with the specific intent to bring about the objective elements of the crime, or are aware that the realisation of the objective elements will be a consequence of their acts in the ordinary course of events.").

⁴⁰⁵ *See Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06 A 5, Judgment on the Appeal of Mr Thomas Lubanga Dyilo Against His Conviction, ¶¶ 488-489 (Dec. 1, 2014).

⁴⁰⁶ Glenn, *supra*, note 53; Coffey, *supra*, note 374.

⁴⁰⁷ *Prosecutor v. Katanga and Ngudjolo*, Case No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges, ¶ 488 (Sept. 30, 2008)

⁴⁰⁸ *See Prosecutor v. Katanga and Ngudjolo*, Case No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges, ¶ 512 (Sept. 30, 2008) (noting that the organization "must be based on hierarchical relations between

perpetration also requires an essential contribution which “may consist of activating the mechanisms which lead to the automatic compliance with their orders and, thus, the commission of the crimes.”⁴⁰⁹ Indirect perpetration features the same subjective elements of intent and knowledge as direct co-perpetration, with an additional requirement that “the suspects are aware of the factual circumstances enabling them to exercise control over the crime through another person.”⁴¹⁰

162. As explained above, ISIS command structure allows its leadership to control their subordinates through a strict hierarchy that features automatic compliance. Therefore, there are reasonable grounds to believe that foreign fighters in leadership roles are liable as indirect perpetrators because they possessed control over their subordinates and either ordered the commission of gender-based crimes or “activated the mechanisms” that led to their commission.

163. *Fourth*, ISIS foreign fighters are liable under the indirect co-perpetration principle. Indirect co-perpetration applies when some or all of the co-perpetrators carry out their respective essential contributions to the common plan through another person, and combines the elements of co-perpetration and indirect perpetration.⁴¹¹ As set forth above, there is a reasonable basis to believe that foreign fighters are liable as co-perpetrators and indirect perpetrators. Due to their essential roles in coordinating the design and implementation of a common plan to carry out gender-based crimes there is a reasonable basis to conclude that they are also liable as indirect co-perpetrators. For example, foreign fighters in leadership roles exercise control over the official slave market and the

superiors and subordinates. The organization must also be composed of sufficient subordinates to guarantee that superiors’ orders will be carried out, if not by one subordinate, then by another. These criteria ensure that orders given by the recognised leadership will generally be complied with by their subordinates.”)

⁴⁰⁹ *Prosecutor v. Katanga and Ngudjolo*, Case No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges, ¶¶ 520-526 (Sept. 30, 2008).

⁴¹⁰ *Prosecutor v. Katanga and Ngudjolo*, Case No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges, ¶¶ 533-534 (Sept. 30, 2008) (“Regarding this last [subjective] requirement, the suspects must be aware of the character of their organisations, their authority within the organisation, and the factual circumstances enabling near-automatic compliance with their orders.”).

⁴¹¹ See *Prosecutor v. Bashir*, Case No. ICC-02/05-01/09-3, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ¶ 213 (Mar. 4, 2009); *Prosecutor v. Katanga and Ngudjolo*, Case No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges, ¶¶ 492-539 (Sept. 30, 2008).

“war spoils” department through which military forces and administrative bodies engage in sexual slavery.⁴¹²

164. Finally, ISIS foreign fighters in leadership roles are individually liable for gender-based crimes under Articles 25(3)(b), 25(3)(c), 25(3)(d) of the Rome Statute. Articles 25(3)(b), 25(3)(c), 25(3)(d) of the Rome Statute address various forms liability, as accessory or secondary opposed to principal liability under Article 25(3)(a). For this reason and given the notions of indirect and co-perpetrator responsibility under Article 25(3)(a), “decisions of the International Criminal Court have preferred the doctrine of co-perpetration and applied article 25(3)(a). The consequence has been to diminish the significance of the complicity provisions . . . quite considerably.”⁴¹³ For example, the same commentator notes that “[A]rticle 25(3)(d) seems destined to play a rather minor role in the work of the International Criminal Court, given the robust approach to [A]rticle 25(3)(a).”⁴¹⁴ There has accordingly been limited discussion of these provisions in ICC decisions and arguments under these sections may be difficult in the abstract.

C. A Case Against ISIS for its Gender-Based Crimes in Iraq Would Be Admissible

165. A case against ISIS fighters for the commission of gender-based crimes would be admissible pursuant to Article 17 of the Rome Statute. Article 17 admissibility involves a consideration of both complementarity and gravity. Under the principle of complementarity, the Court will refrain from pursuing cases where States with jurisdiction are already investigating or prosecuting the same case in good faith.⁴¹⁵ Under the principle of gravity, the Court will only investigate cases of sufficient seriousness, based on an assessment of the scale, nature, and impact of the alleged crimes, as well as the manner of commission of the crimes.⁴¹⁶ In the present situation, both aspects of the admissibility test are satisfied.

⁴¹² Revkin, *supra*, note 392, at 23; Jonathan Landay et al., *Exclusive: Seized Documents Reveal Islamic State’s Department of “War Spoils,”* REUTERS, (December 28, 2015) (describing ISIS’s *diwan* or ministry for “war spoils,” including slaves).

⁴¹³ William A. Schabas, *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE* 431 (2010).

⁴¹⁴ *Id.* at 436.

⁴¹⁵ See Rome Statute, art. 17(1)(a)-(c). See also COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 384 (Otto Triffterer ed., 1999).

⁴¹⁶ See Rome Statute, art. 17(1)(d).

166. *First*, there are insufficient investigations and prosecutions of ISIS members for gender-based crimes in States that have jurisdiction. This alone is sufficient to justify the intervention of the OTP under the complementarity principle. Moreover, even if States with jurisdiction were to prosecute ISIS fighters for gender-based crimes, shortcomings in the judicial systems in certain key states—namely Iraq, Tunisia, Jordan, and Libya—render them unable [and unwilling] to genuinely investigate and prosecute. *Second*, ISIS’s gender-based crimes are of sufficient gravity to render the cases admissible.

D. The Court’s Prosecution of ISIS’s Gender-Based Crimes in Iraq Accords with the Complementarity Principle

167. Complementarity involves a two-part analysis. As an initial matter, the Chamber assesses whether a state with jurisdiction is currently investigating or prosecuting the same case, or has investigated or prosecuted the case in the past.⁴¹⁷ If national proceedings have not been initiated, the inquiry ends, as “inaction on the part of a State having jurisdiction . . . renders a case admissible before the Court.”⁴¹⁸

168. An OTP prosecution is justified under the complementarity principle when there are no past or ongoing proceedings by a State with jurisdiction.⁴¹⁹ To the extent past or ongoing proceedings exist, only those regarding “the same suspects . . . for substantially the same conduct” impact the complementarity analysis.⁴²⁰ In other words, it is only when “the

⁴¹⁷ See Rome Statute, art. 17(1)(a)-(c). See also *Prosecutor v. Katanga*, Judgment on the Appeal Against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497, Appeals Chamber, dated 25 September 2009 ¶ 78; Informal Expert Paper: The Principle of Complementarity in Practice, ICC-OTP (2003), ¶7.

⁴¹⁸ *Prosecutor v. Simone Gbagbo*, Decision on Côte d’Ivoire’s Challenge to the Admissibility of the Case against Simone Gbagbo, ICC-02/11-01/12, Pre-Trial Chamber I, dated 11 December 2014 ¶ 27 (quoting *Prosecutor v. Katanga*, Judgment on the Appeal Against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497, Appeals Chamber, dated 25 September 2009, ¶ 2) (internal quotation marks omitted).

⁴¹⁹ See Rome Statute, art. 17(1). See also *Prosecutor v. Muthaura, Kenyatta, and Ali*, Judgment on the Appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, ICC-01/09-02/11-274, Appeals Chamber, dated 30 August 2011 ¶ 43 (“If the suspect or conduct have not been investigated by the national jurisdiction, there is no legal basis for the Court to find the case inadmissible.”).

⁴²⁰ *Prosecutor v. Muthaura, Kenyatta, and Ali*, Judgment on the Appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, ICC-01/09-02/11-274, Appeals Chamber, dated 30 August 2011 ¶ 39; *Prosecutor v. Ruto, Kogsey, and Sang*, Judgment on the Appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, ICC-01/09-01/11-307, Appeals Chamber, dated 30 August 2011 ¶ 40.

case that the State is investigating sufficiently mirrors the one that the Prosecutor is investigating” that the Prosecutor’s case may become inadmissible.⁴²¹

169. If the Court determines that national proceedings in the same case exist, it will then consider the second prong of the complementarity analysis.⁴²² Under that prong, the Court must assess whether the states that are purportedly investigating or prosecuting the same case are unwilling or unable to do so “genuinely.”⁴²³

1. States that may have jurisdiction over the perpetrators have failed to act

170. The exercise of the ICC’s complementary jurisdiction is warranted in the present matter. Although investigations and prosecutions of ISIS members are ongoing in certain national jurisdictions, none of these investigations or prosecutions concern broader gender-based crimes. In these cases, the focus will likely be on terrorism charges instead.⁴²⁴

171. Other States with jurisdiction over ISIS fighters—including Tunisia, Jordan, Libya, the United Kingdom, France, Germany, Belgium, the Netherlands, and Australia—have similarly failed to investigate or prosecute ISIS members over which they have jurisdiction for gender-based crimes. While certain States Parties to the Rome Statute have subjected ISIS foreign fighters to arrest warrants,⁴²⁵ arrests,⁴²⁶ and trials in absentia

⁴²¹ *Prosecutor v. Saif Al-Islam Gaddafi*, Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled “Decision on the admissibility of the case against Saif Al-Islam Gaddafi,” ICC-01/11-01/11-547-Red, ¶ 2.

⁴²² *Prosecutor v. Katanga*, Judgment on the Appeal Against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497, Appeals Chamber, dated 25 September 2009, ¶ 78 (“It is only when [there are ongoing investigations or prosecutions, or there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned] that one has to ... examine the question of unwillingness and inability. To do otherwise would be to put the cart before the horse. It follows that in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court.”).

⁴²³ See Rome Statute, arts. 17(2) (Unwilling) and 17(3) (Unable). See *Prosecutor v. Katanga*, Judgment on the Appeal Against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497, Appeals Chamber, 25 September 2009. It is important to note that *either* of the two scenarios of unwillingness or inability is sufficient for ICC admissibility. Decision on the admissibility of the case against Abdullah Al-Senussi, Gaddafi and Al-Senussi, ICC-01/11-01/11-466-Red, October 11, 2013, ¶ 169.

⁴²⁴ For example, Britons extradited to the United Kingdom may face charges under the national Terrorism Act. Chulov et al., *supra*, note 381

⁴²⁵ See, e.g., U.N. Security Council ISIL (Da’esh) and Al-Qaida Sanctions List, <https://scsanctions.un.org/fop/fop?xml=htdocs/resources/xml/en/consolidated.xml&xslt=htdocs/resources/xsl/en/al-qaida.xsl> (French arrest warrant was issued on June 12, 2015 for the French national, Emilie Konig, for her participation in a terrorist criminal association); “Benghalem, Salim,” INTERPOL, <https://www.interpol.int/en/notice/search/un/5930707> (French national, Salim Benghalem, is subject to an European Arrest Warrant for his activities on behalf of ISIS).

for terrorism-related activities,⁴²⁷ gender-based crimes have not been the subject of any of these proceedings.

172. No national proceeding to date concerns the gender-based crimes that would be the subject of an OTP prosecution.⁴²⁸ As described in Sections III(C) and III(D), ongoing ISIS conduct giving rise to liability under the Rome Statute includes rape, murder and torture motivated by gender discrimination, and sexual slavery. This conduct is unique in its type, intent, and victims, and must be redressed as such. As no State with jurisdiction is redressing these crimes, an OTP investigation is justified under the complementarity standard.

173. It is not the duty of the OTP to disprove the existence of ongoing investigations or prosecutions of ISIS members for gender-based crimes.⁴²⁹ Once the OTP initiates a prosecution, the burden rests on the State with jurisdiction over the crimes to demonstrate that they have conducted or are conducting investigations or prosecutions for substantially the same conduct.⁴³⁰ In order to make this showing a State must satisfy a high evidentiary threshold.⁴³¹

⁴²⁶ See, e.g., *How will Tunisia deal with thousands of returning jihadis?* AL-MONITOR (January 17, 2017) (At least 92 foreign fighters were placed under house arrest upon their return to Tunisia; others have been imprisoned and are awaiting trial).

⁴²⁷ See, e.g., *Paris Attacks: Was Salim Benghalem the Real Ringleader?* BBC (January 26, 2016) (Salim Benghalem was sentenced in absentia by a Paris court to 15 years in prison in January 2016 for promoting terrorism).

⁴²⁸ A thorough review of publically available materials in English, Arabic, and French, including media sources, public databases, and organizational reports, has yielded no reference to ongoing gender-based prosecutions.

⁴²⁹ *Prosecutor v. Simone Gbagbo*, Decision on Côte d'Ivoire's Challenge to the Admissibility of the Case against Simone Gbagbo, ICC-02/11-01/12, Pre-Trial Chamber I, dated 11 December 2014, ¶ 28 (quoting Appeals Chamber, "Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute,'" 30 August 2011, ICC-01/09/02/11-274, ¶¶ 2, 61).

⁴³⁰ *Prosecutor v. Mutahura*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011, ICC-01/09-02/11 OA, ¶ 39.

⁴³¹ See *Prosecutor v. Saif Al-Islam Gaddafi*, Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled "Decision on the admissibility of the case against Saif Al-Islam Gaddafi," ICC-01/11-01/11-547-Red, ¶ 2. In *Gaddafi*, the Court found that Libya had insufficiently demonstrated that its ongoing prosecution rendered the ICC case inadmissible. *Id.* ¶ 34 ("[I]f it has only been established that 'discrete aspects' of the case before the Court are being investigated domestically, it will most likely not be possible for a Chamber to conclude that the same case is under investigation"). Whereas the ICC investigation focused on allegations of murder and persecution during the first two weeks of the Libyan civil war in 2011, the Libyan investigation focused on allegations of financial crimes and corruption. *Id.* ¶ 52. Even where Libya claimed to expand its investigations to cover "all crimes committed by Mr. Gaddafi during the revolution," *id.*, the Court determined that "the evidence . . . did not sufficiently demonstrate that Libya was investigating the same case," *id.* ¶ 75.

2. States that may have jurisdiction over the perpetrators are unable to genuinely conduct the proceedings

174. Even if a State with jurisdiction is able to demonstrate that it is conducting domestic proceedings related to the same case, the OTP may still intervene under the complementarity principle if the State is “unable” to genuinely conduct the proceedings. According to Article 17(3) of the Rome Statute, the inability assessment requires the Court to “consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.”⁴³² The Court must therefore make two determinations: *first*, whether the national judicial system has substantially collapsed or is otherwise unavailable; and *second*, whether due to such collapse or unavailability, the state is unable to obtain the accused, unable to obtain the necessary evidence and testimony, or otherwise unable to proceed.

175. The two prongs of the inability assessment permit broad and flexible interpretations. According to the 2003 Informal Expert Paper on the Principle of Complementarity in Practice,⁴³³ “the term ‘unavailability’ [in the first prong of the analysis] should be given a broad interpretation, so as to cover the various ‘inability’ scenarios in the latter part of Article 17(3) and to cover typical cases of inability.”⁴³⁴ Additionally, the subsequent “otherwise unable” wording in the second prong of the analysis creates flexibility for the Court to consider a variety of situations that may hamper the proper functioning of a State’s judicial system, regardless of the State’s ability to obtain the accused or the necessary evidence and testimony.⁴³⁵

176. The following factors, *inter alia*, may inform the Court’s assessment of “collapse or unavailability” under Article 17(3):

- lack of necessary personnel, judges, investigators, [or] prosecutor[s];
- lack of judicial infrastructure;

⁴³² Rome Statute, art. 17(3).

⁴³³ The Informal Expert Paper was drafted at the request of and in extensive consultation with the OTP. See Informal Expert Paper, *supra*, note 417, at 2.

⁴³⁴ Informal Expert Paper, *supra*, note 417, n.15.

⁴³⁵ J. Holmes, *Complementarity: National Courts versus the International Criminal Court*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 667-678 (A. Cassese, P. Gaeta & J.R.W.D. Jones eds., 2002).

- lack of substantive or procedural penal legislation rendering [the] system “unavailable”; [and]
- lack of access rendering [the] system “unavailable.”⁴³⁶

177. More broadly, the assessment of “inability” (and “unwillingness”) may involve consideration of “background context issues,” such as:

- [j]urisdictional territorial divisions [. . .];
- [i]ntegrity/corruptability of staff and institutions; [and]
- [r]esources invested and [the] ability of State institutions to cope with [the] scale of crime.⁴³⁷

178. These systemic considerations are probative not only of states’ ability to obtain the accused and necessary evidence, but their capacity and willingness to prosecute crimes more generally.

179. Application of these factors demonstrates that several of the States with jurisdiction are unable to genuinely investigate or prosecute ISIS foreign fighters for gender-based crimes. In particular, the national judicial systems of Iraq, Tunisia, Jordan, and Libya have substantially collapsed or are otherwise unavailable. Due to such collapse or unavailability, the States are unable to obtain the accused, unable to obtain the necessary evidence and testimony, or otherwise unable to proceed.

a. Inability of Iraq

180. The lack of judicial personnel and infrastructure render Iraq’s judicial system unavailable. As a general matter, Iraq’s judicial infrastructure is “weak”⁴³⁸ and “plagued with arbitrariness and opacity.”⁴³⁹ As OHCHR and UNAMI have reported, there is an insufficient supply of prosecutors in Iraq, resulting in lengthy delays.⁴⁴⁰ This may be due, in part, to the fact that lawyers, judges, and other court officers are under constant threat

⁴³⁶ The Informal Expert Paper on the Principle of Complementarity in Practice helpfully enumerated a list of potentially relevant indicators. See Informal Expert Paper, *supra*, note 417, at 2 & Annex 4, 28.

⁴³⁷ Informal Expert Paper, *supra*, note 417, at Annex 4, Sec. 1.

⁴³⁸ OHCHR & UNAMI, *Report on Human Rights in Iraq: July-December 2012*, at 17 (2012).

⁴³⁹ HRW, *Iraq: A Broken Justice System*, (January 31, 2013).

⁴⁴⁰ OHCHR & UNAMI: *Report July-December 2012*, *supra*, note 438.

and subject to fatal attacks by armed groups.⁴⁴¹ Many lawyers fear taking on politically sensitive cases.⁴⁴² Judicial personnel are also vulnerable to corruption.⁴⁴³ Lastly, with respect to gender-based crimes in particular, judicial personnel lack the training and resources needed to engage in gender-sensitive investigations, including the identification of trafficking situations, handling of complaints, and management of survivors and witnesses.⁴⁴⁴

181. The lack of penal legislation concerning gender-based violence further renders Iraq's judicial system unavailable. For instance, the Iraqi Penal Code fails to criminalize domestic violence⁴⁴⁵ and female genital mutilation,⁴⁴⁶ and effectively condones honor killings.⁴⁴⁷

182. Even if more pertinent penal legislation were adopted, the deep-seated discrimination of Iraq's judicial system against women and LGBT persons renders it unavailable to the victims of the alleged crimes. Women and LGBT persons in Iraq generally lack equal access to justice.⁴⁴⁸ The Iraqi judicial system often punishes women for being victims of gender-based crimes. Victims of sex trafficking, for example, are punished for activities carried out as a result of having been subjected to trafficking.⁴⁴⁹ Iraqi law enforcement

⁴⁴¹ Amnesty International, *Iraq: Amnesty International submission for the UN Universal Periodic Review: 20th session of the UPR Working Group*, at 4 (2014).

⁴⁴² HRW, *No One Is Safe: Abuses of Women in Iraq's Criminal Justice System*, at 4 (2014).

⁴⁴³ Amnesty International, *Iraq*, *supra*, note 441, at 4; In many cases, judges and investigating officers have accepted bribes. HRW, *No One Is Safe*, *supra*, note 442, at 4.

⁴⁴⁴ Minority Rights Group: *No Place to Turn*, *supra*, note 9, at 33, ("Iraq's male-dominated police and security forces lack the gender-sensitivity training needed to deal effectively with allegations of trafficking or to recognize its signs. The judicial system is also unlikely to be sympathetic to victims of trafficking.");

⁴⁴⁵ A draft law on domestic violence has been awaiting approval since January 2012. Comm. on the Elimination of Discrimination against Women, CEDAW: Concluding Observations Iraq, *supra*, note 7, ¶ 9.

⁴⁴⁶ CCPR, State Party Reply to the List of Issues: Iraq, ¶ 24. Doc: CCPR/C/IRQ/Q/5/Add.1 (27 Aug. 2015). The Kurdistan Regional Parliament recently passed a bill to prohibit "female circumcision," but the Iraqi government has not yet followed suit.

⁴⁴⁷ Human Rights and Gender Justice (HRGJ) Clinic, *supra*, note 181, at 9; Human Rights & Gender Justice Clinic, *Seeking Accountability and Demanding Change*, *supra*, note 203, at 17-18; ("Several Iraqi Penal Code provisions, including Article 128, Article 130, and Article 409, allow for mitigated sentences for violent acts, including homicide, committed for so-called 'honourable motives.' These legal mechanisms allow 'honor' killings to continue with impunity. . . . [P]olice are unwilling to investigate cases due to their own social acceptance of 'honor' killings.").

⁴⁴⁸ Human Rights and Gender Justice (HRGJ) Clinic, *supra*, note 181, at 8. In this context, it is telling that Iraq failed to respond to queries from the CEDAW Committee asking for information on how the government will ensure women's effective access to justice.

⁴⁴⁹ Human Rights & Gender Justice Clinic, *Seeking Accountability and Demanding Change*, *supra*, note 203, at 16; ("[T]he Government of Iraq does not effectively investigate or punish Government officials who face allegations of complicity in trafficking-related offenses. Moreover, prosecutors and judges are still too often uneducated about the law and courts continue to prosecute trafficking victims under laws criminalizing prostitution."). The CEDAW Committee has also noted with concern the "harsh" and excessive sentences imposed on women for involvement in prostitution. CEDAW: Concluding Observations Iraq, *supra*, note 7, ¶

also routinely fails to investigate and punish crimes against LGBT persons. Some security personnel even participate in such abuse.⁴⁵⁰ These systemic shortcomings all contribute to the unavailability of Iraq's judicial system.

183. The same conditions that render Iraq's judicial system unavailable also render Iraq unable to genuinely investigate and prosecute ISIS for gender-based crimes. In particular, the lack of judicial infrastructure, personnel, and access to justice all contribute to the State's inability to obtain the accused or the necessary evidence and testimony to investigate and prosecute.

b. Inability of Tunisia

184. Tunisia's judicial system is similarly unavailable due to the lack of judicial infrastructure. As the UN Special Rapporteur on the independence of judges and lawyers observed on a recent mission to Tunisia, judgments are often hand-written, work flows lag, "there is no methodology for preparing cases for hearings," and "nobody administers court work."⁴⁵¹ The Rapporteur noted that "in one court, there had been no ink for a printer for an entire year because courts were not involved in the management of their budget and everything had to go through the Ministry of Justice."⁴⁵² Indeed, there is "a complete lack of efficiency in the administration of justice."⁴⁵³ All of these shortcomings contribute to the effective unavailability of Tunisia's judicial system.

185. The lack of substantive or procedural penal legislation also renders Tunisia's judicial system unavailable. The Penal Code fails to criminalize marital rape and allows men who rape women aged 15 to 20, or who abducted girls under the age of 18, to escape

32. Those detained face torture and ill-treatment. GENEVA INT'L CTR. FOR JUSTICE, IRAQ: TORTURE & ILL-TREATMENT 17 (2015) ("In the case of women who were detained, rape and other forms of sexual violence were often used to torture and humiliate in an attempt to garner confessions. Reports indicate that men were also raped with sticks and bottles in an attempt to emasculate.")

⁴⁵⁰ Human Rights and Gender Justice (HRGJ) Clinic, *supra*, note 181, at 6.

⁴⁵¹ UN Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers on her mission to Tunisia, 26 May 2015, A/HRC/29/26/Add.3, para.54.

⁴⁵² *Id.*

⁴⁵³ *Id.*

prosecution if they marry their victims.⁴⁵⁴ The Penal Code also punishes same-sex sexual relations by up to three years in prison.⁴⁵⁵

186. Notwithstanding the absence of penal legislation, the deep-seated discrimination of Tunisia's judicial system renders it unavailable to the victims of gender-based crimes.⁴⁵⁶ The Tunisian government often chooses not to investigate gender-based crimes.⁴⁵⁷ Many victims are punished and blamed when they file complaints.⁴⁵⁸ Men that engage in same-sex sexual relations, for example, may be subjected to forced anal examinations by the authorities, in violation of the prohibition of torture.⁴⁵⁹ These features of the justice system make it virtually impossible for women and LGBT persons to lodge complaints for gender-based crimes. In fact, they often pave the way for blackmail and further abuses by the police.⁴⁶⁰ For these reasons, the Tunisian judicial system is unavailable to victims of ISIS's gender-based crimes in Iraq.

187. For the same reasons that Tunisia's judicial system is unavailable, Tunisia is unable to carry out investigations and prosecutions. While Tunisia has been able to obtain custody of some foreign fighters,⁴⁶¹ it remains unable to obtain the necessary evidence and testimony for gender-based crimes and to otherwise carry out proceedings pursuant to Article 17(3) of the Rome Statute.

c. Inability of Jordan

188. As in Iraq and Tunisia, the lack of judicial personnel and infrastructure renders Jordan's judicial system unavailable. Jordan has "a slow judiciary that lacks administrative and financial independence" and is riddled with corruption.⁴⁶² In response to the question "[t]o what extent does the Judiciary have adequate levels of financial resources, helpers, and basic structure necessary to perform effectively," Transparency International gave

⁴⁵⁴ The Penal Code also criminalizes rape based on the use of violence but not on the absence of consent. *Id.*

⁴⁵⁵ HRW, *World Report 2017: Tunisia*, available at <https://www.hrw.org/world-report/2017/country-chapters/Tunisia>; Amnesty International, *Assaulted and Accused: Sexual and Gender-Based Violence in Tunisia*, at 34 (November 2015).

⁴⁵⁶ Amnesty International, *Assaulted and Accused*, *supra*, note 455, at 10.

⁴⁵⁷ *Id.* at 60.

⁴⁵⁸ Some police directly participate in violence, exploitation, and sexual and other abuse against LGBT individuals. *Id.* at 41.

⁴⁵⁹ Amnesty International, *Annual Country Report: Tunisia*, available at <https://www.amnesty.org/en/countries/middle-east-and-north-africa/tunisia/report-tunisia>.

⁴⁶⁰ Amnesty International, *Assaulted and Accused*, *supra*, note 455, at 42.

⁴⁶¹ See, e.g., AL-MONITOR: Tunisia, *supra*, note 426.

⁴⁶² USAID, *Jordan Country Development Cooperation Strategy: 2013-2017*, at 3 (March 2015); Democracy International, *Jordan Rule of Law and Anti-Corruption Assessment*, at 12, (June 2013).

Jordan a score of 50 out of 100.⁴⁶³ Democracy International found that “[t]he key actors in the justice system—regulatory office personnel, police, investigative staff, prosecutors and judges—do not have the skill sets necessary to deal with complex, contemporary legal issues and cases.”⁴⁶⁴ Prosecuting gender-based crimes undoubtedly invokes such issues and cases.

189. The lack of pertinent penal legislation renders Jordan’s judicial system unavailable to the victims of gender-based violence in particular. Jordan lacks substantive and procedural penal legislation concerning gender-based violence. Many of Jordan’s laws are discriminatory and “inadequately protect[] against so-called honour crimes and other forms of gender-based violence.”⁴⁶⁵ For instance, Article 340 of the Jordanian Penal Code allows mitigated sentences for men who attack their wives or female relatives for committing adultery or being in an “unlawful bed.”⁴⁶⁶
190. Moreover, in practice, the discriminatory nature of Jordan’s judicial system renders it unavailable to the victims of gender-based crimes. Women face “social and economic barriers to using the formal justice system.”⁴⁶⁷ Even when female victims do file complaints, they are often mistreated by judicial personnel and their claims may be “questioned inappropriately or are not recorded or investigated.”⁴⁶⁸ Women often face unsympathetic judges, particularly in cases of domestic violence.⁴⁶⁹
191. Due to the same conditions rendering its judicial system unavailable, Jordan is unable to obtain the accused and evidence and otherwise unable to conduct its proceedings. Additionally, Jordan’s lack of access to ISIS-controlled territory⁴⁷⁰ may exacerbate its inability to obtain perpetrators, evidence, and testimony in particular.

⁴⁶³ Rasheed, Transparency International Jordan, *The National Integrity System (NIS) Jordan Report*, (2016), at 10.

⁴⁶⁴ Democracy International, *supra*, note 462, at 46.

⁴⁶⁵ Amnesty International, *Annual Country Report: Jordan* (2016), available at <https://www.amnesty.org/en/countries/middle-east-and-north-africa/jordan/report-jordan/>.

⁴⁶⁶ HRW, *How to End ‘Honor’ Killings in Jordan*, (April 3, 2017). The sentence for honor killings can be as little as one year. *Id.*

⁴⁶⁷ Democracy International, *supra*, note 462, at 14.

⁴⁶⁸ *Id.*

⁴⁶⁹ *Id.* at 11-12.

⁴⁷⁰ While Jordan has contributed to the military coalition against ISIS, its contribution has been largely limited to aerial bombardment. See Kathleen J. McInnis, *Coalition Contributions to Countering the Islamic State*, at 9, UNITED STATES CONGRESSIONAL RESEARCH SERVICE, (August 24, 2016); see also Ali Younes, *Jordanians ‘won’t support ground intervention in Syria*, AL JAZEERA, (May 9, 2017).

d. *Inability of Libya*

192. Lack of territorial control and judicial infrastructure render Libya’s judicial system unavailable and are indicative of substantial collapse. To date, thousands of detainees have been held in “unofficial prisons run by armed groups”⁴⁷¹ and “paramilitaries and militias” impose “‘self-justice’ according to their own standards and beliefs.”⁴⁷² Three rival governments are competing to assert territorial authority⁴⁷³ and militias abduct politicians, journalists, and civilians for political gains.⁴⁷⁴ The Supreme Court has failed to issue judgments due to political divisions⁴⁷⁵ and the “domestic criminal justice system remain[s] dysfunctional, offering no prospects for accountability.”⁴⁷⁶ As a result of these shortcomings, most gender-based crimes go unreported and unchecked. For example, when asked why she failed to file a police complaint, one female victim responded, “Which police? The police can’t do anything for me. The militias are too strong.”⁴⁷⁷
193. The lack of substantive penal legislation also contributes to the unavailability of Libya’s justice system in the present case. According to Human Rights Watch, “Libyan law inadequately prohibits domestic violence and its personal status laws continue to discriminate against women, particularly with respect to marriage, divorce, and inheritance.”⁴⁷⁸ The Libyan Penal Code also permits mitigated sentences for honor killings.⁴⁷⁹
194. Due to the substantial collapse and / or unavailability of its judicial system, Libya is unable to conduct proceedings in the instant case. In this context, it is important to recognize this Court’s previous findings on the situation of Libya. While in *al-Senussi*, the Appeals Chamber did not find Libya unable to prosecute the accused,⁴⁸⁰ its ruling

⁴⁷¹ Amnesty International, *Annual Country Report: Libya*, (2016), available at <https://www.amnesty.org/en/countries/middle-east-and-north-africa/libya/report-libya/>.

⁴⁷² Hanan Salah, *The Law is Failing the Women of Libya*, LOS ANGELES TIMES, (June 18, 2014).

⁴⁷³ HRW, *World Report 2017: Libya*, <https://www.hrw.org/world-report/2017/country-chapters/libya> (“The United Nations-backed, internationally recognized Government of National Accord (GNA) struggled in 2016 to assert itself in the capital Tripoli, as two authorities—one also based in Tripoli and another in eastern Libya—continued to compete for legitimacy and control over resources and infrastructure.”).

⁴⁷⁴ *Id.*

⁴⁷⁵ *Id.*

⁴⁷⁶ *Id.* Indeed, the Libyan courts are “unable to process thousands of untried detainees’ cases, some dating from 2011.” HRW: *World Report Libya*, *supra*, note 473.

⁴⁷⁷ Salah, *supra*, note 472.

⁴⁷⁸ HRW: *World Report Libya*, *supra*, note 473.

⁴⁷⁹ *Id.*

⁴⁸⁰ Decision on the admissibility of the case against Abdullah Al-Senussi, Gaddafi and Al-Senussi, ICC-01/11-01/11-466-Red, October 11, 2013, ¶ 303.

rested on the “concrete circumstances of the present case,”⁴⁸¹ including the fact that proceedings against al-Senussi had advanced significantly.⁴⁸² In the instant case, no such national prosecutions have begun. Moreover, the security situation has materially worsened since 2013, with rival governments competing for power. In November 2016, the Prosecutor pledged a “commitment to make Libya a priority situation in 2017.”⁴⁸³ Indeed, the OTP has itself confirmed its view that Libya is in a state of lawlessness.⁴⁸⁴ Thus, an investigation of gender-based crimes committed by Libyan nationals affiliated with ISIS would be admissible.

E. ISIS’s Gender-Based Crimes Are of Sufficient Gravity To Render the Cases Admissible

195. Even if states with jurisdiction are inactive, unable, or unwilling, the Court may still find a case inadmissible if it “is not of sufficient gravity to justify further action.”⁴⁸⁵ In the instant case, however, there is sufficient gravity to warrant the Court’s investigation. An analysis of the relevant factors—scale, nature, impact, and manner of commission of the alleged crimes⁴⁸⁶—demonstrates sufficient gravity for the case to be admissible.

196. *First*, ISIS’s leadership is perpetrating gender-based crimes on a massive scale.⁴⁸⁷ Foreign fighters in ISIS’s leadership have killed, tortured, raped, assaulted, and abducted significant numbers of women and girls.⁴⁸⁸ There has been at least one mass execution of over 60 Yazidi women in Iraq.⁴⁸⁹ The geographical spread of the crimes committed is

⁴⁸¹ *Id.* ¶ 301.

⁴⁸² *Id.* ¶ 303 (discussing “the quantity and nature of the evidence gathered as part of the investigation in relation to Mr Al-Senussi’s case, the ultimate transfer of the case to the Accusation Chamber and the recent commencement of the accusation phase”).

⁴⁸³ *International Criminal Court Aims to Make Libya a Priority for Next Year, Says Prosecutor*, UN NEWS CENTRE, (November 9, 2016).

⁴⁸⁴ *Id.*

⁴⁸⁵ *Id.*, art. 17(1)(d).

⁴⁸⁶ *See* OTP, *Prelim Examinations*, *supra*, note 275, ¶ 9. *See also* Situation in the Republic of Kenya, “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya,” Mar. 31, 2010, ICC-01/09-19-Corr, ¶ 62.

⁴⁸⁷ According to the OTP, the scale of alleged crimes is assessed in light of, inter alia, the number of victims, extent of damage, and geographical or temporal spread of the crimes committed. OTP, *Prelim Examinations*, *supra*, note 275, ¶ 62.

⁴⁸⁸ *See, e.g.*, U.N. HRC, They Came to Destroy, A/HRC/32/CRP.2 ¶ 140 (referring to sexual violence on a massive scale).

⁴⁸⁹ *Id.*

discernible from recent evidence of mass graves across areas under ISIS control.⁴⁹⁰ In fact, the OTP has already characterized ISIS’s atrocities as “widespread.”⁴⁹¹

197. *Second*, the nature of the alleged crimes demonstrates sufficient gravity.⁴⁹² As the OTP previously recognized, ISIS is committing gender-based crimes of “unspeakable cruelty” including mass executions, sexual slavery, rape, torture, mutilation, and other forms of sexual and gender-based violence.⁴⁹³ The OTP’s nature assessment involves consideration of “persecution, or the imposition of conditions of life on a group calculated to bring about its destruction.”⁴⁹⁴ In the present case, ISIS has issued edicts, manifestos, maintaining its policy and practice of imposing oppressive gender regulations concerning social behavior, including sexual practices. As evidenced in Section III(C)(2)(a), (b), ISIS systematically persecutes people based on gender and gender expression. These policies are laid out in the 2015 42-page ISIS publication, *Women of the Islamic State: Manifesto and Case study*⁴⁹⁵ and the 2014 Pamphlet on Female Slaves.⁴⁹⁶ For instance, ISIS grounds its persecution of perceived homosexuals in the legal framework of the “caliphate,” referring to all gay people as the tribe of Lot, who, by ISIS’s interpretation of the Quran, caused the destruction of the biblical city of Sodom.⁴⁹⁷ The attempt to bring about their destruction is clear—as one gay Iraqi man explained, “[t]hey are trying to track down every gay man.”⁴⁹⁸

198. *Third*, ISIS’s crimes have caused an extreme, long-lasting impact. The impact of crimes, according to the OTP, may be assessed “in light of, *inter alia*, the sufferings endured by the victims and their increased vulnerability; the terror subsequently instilled, or the social, economic and environmental damage inflicted on the affected communities.”⁴⁹⁹ In the present case, the survivors of ISIS’s gender-based crimes have articulated long-lasting physical and psychological impact. Interviewees have “described feelings of abject

⁴⁹⁰ U.N. HRC, *supra*, note 488, ¶ 48. Yazda, *supra*, note 335.

⁴⁹¹ OTP Statement re ISIS, dated 8 April 2015, 1.

⁴⁹² According to the OTP, “The nature of the crimes refers to the specific elements of each offence such as killings, rapes and other crimes involving sexual or gender violence and crimes committed against children, persecution, or the imposition of conditions of life on a group calculated to bring about its destruction.” OTP Policy Paper on Prelim Examinations ¶ 63.

⁴⁹³ OTP Statement re ISIS, dated April 8, 2015 at 1.

⁴⁹⁴ OTP, *Prelim Examinations*, *supra*, note 275, ¶ 63

⁴⁹⁵ *Women of the Islamic State*, *supra*, note 83; Mah-Rukh Ali, *supra*, note 96.

⁴⁹⁶ MEMRI, *supra*, note 103; Jonathan Landay, Warren Strobel, Phil Stewart, *Exclusive – Islamic State ruling aims to settle who can have sex with female slaves*, REUTERS (Dec. 29, 2015).

⁴⁹⁷ OutRight Action International, *supra*, note 174.

⁴⁹⁸ BBC, *supra*, note 176.

⁴⁹⁹ OTP, *Prelim Examinations*, *supra*, note 275, ¶ 65.

terror”⁵⁰⁰ and female survivors of sexual slavery “have been shattered, with many experiencing suicidal thoughts, and intense feelings of rage interspersed with periods of deep depression and listlessness.”⁵⁰¹ Beyond this impact at the individual level, the alleged crimes have inflicted severe damage to victims’ families and communities. ISIS has perpetrated widespread infrastructural damage⁵⁰² and many homes belonging to Yazidi women in particular have been looted, destroyed, or severely damaged by ISIS fighters.⁵⁰³

199. *Finally*, the manner of commission of the alleged gender-based crimes is particularly heinous, targeting the most vulnerable populations.⁵⁰⁴ It is clear in the instant case that women and gender non-conforming persons suffer systematic violations sanctioned by ISIS’s ideological framework and official policies.⁵⁰⁵ The attacks have been planned, directed and organized by ISIS leadership and executed by ISIS fighters. In the determination of the manner of commission of crimes, the OTP may also consider “elements of particular cruelty, including the vulnerability of the victims, any motives involving discrimination, or the use of rape and sexual violence as a means of destroying groups.”⁵⁰⁶ The violent acts committed against individuals based on their gender target truly vulnerable individuals. The egregious method of torture goes beyond what is required to satisfy the elements of the crimes. Often crimes are committed publically, adding to the cruel, inhuman and degrading treatment experienced by the victim. Individuals are often lashed, up to 100 times in public for not disobeying orders such as not wearing veils,⁵⁰⁷ women are raped in front of their children,⁵⁰⁸ people are thrown off buildings after being tortured⁵⁰⁹ and people are beheaded in public settings.⁵¹⁰

⁵⁰⁰ U.N. HRC, *supra*, note 488, ¶ 52.

⁵⁰¹ *Id.* ¶ 177.

⁵⁰² See UNOSAT Live Map, Complex Emergency Iraq, CE20140613IRQ Damage Assessment, <https://unosat.maps.arcgis.com/apps/webappviewer/index.html?id=3356c7f1659a4282a08fa188208036d7>.

⁵⁰³ U.N. HRC, *supra*, note 488, ¶ 99.

⁵⁰⁴ The OTP assesses the manner of commission of crimes by looking to the “means employed to execute the crime, the degree of participation and intent of the perpetrator (if discernible at this stage), the extent to which the crimes were systematic or result from a plan or organised policy or otherwise resulted from the abuse of power or official capacity, and elements of particular cruelty, including the vulnerability of the victims, any motives involving discrimination, or the use of rape and sexual violence as a means of destroying groups.” *Id.* ¶ 64.

⁵⁰⁵ U.N. HRC, *supra*, note 488, ¶¶ 31, 114, 156, 167.

⁵⁰⁶ OTP, *Prelim Examinations*, *supra*, note 275, ¶ 64.

⁵⁰⁷ Documentation #47, 69, 95, 136, 166.

⁵⁰⁸ Documentation #93, 161, 164.

⁵⁰⁹ Documentation #55, 56, 136, 162.

⁵¹⁰ Documentation #59, 88, 148.

Afterwards, ISIS publicizes their crimes as victories.⁵¹¹ In the present case, it is clear that ISIS is targeting the most vulnerable of victims, and its motive forthrightly involves discrimination. ISIS is also using sexual violence as a “tactic of terror and a core element of their ideology and *modus operandi*.”⁵¹²

200. For the preceding reasons a case against ISIS’s leadership for the commission of gender-based crimes in Iraq is admissible pursuant to the principles of complementarity and gravity enshrined in Article 17 of the Rome Statute.

V. INTERESTS OF JUSTICE

201. The OTP should investigate and prosecute ISIS members for their gender-based crimes because doing so would not be contrary to the interests of justice under Article 53 of the Rome Statute.⁵¹³ Rather, it would manifestly *serve* the interests of justice.

202. According to the Rome Statute, the “interests of justice” inquiry involves consideration of the gravity of the alleged crimes and the interests of victims.⁵¹⁴ ISIS’s policy of gender-based persecution features institutionalized depravity with far reaching consequences for incredibly vulnerable and defenseless victims.

203. *First*, as set forth above in Section (IV)(E), the alleged crimes are of the utmost gravity.⁵¹⁵ In its 2007 and 2014 Policy Papers, the OTP affirms its commitment to redressing gender-based crimes.⁵¹⁶ As the OTP recognizes, “sexual and gender-based crimes are amongst the gravest under the Statute.”⁵¹⁷ ISIS is brazenly flouting the imperatives the OTP so cogently articulated in its Policy Papers in a manner that resembles pure and totalizing evil. ISIS has established State-like machinery for perpetrating heinous gender-based atrocities including mass execution, sexual slavery, torture, and mutilation. For example, ISIS’s “war spoils” sex slave departments and directives and online manuals for gender-based crimes demonstrate the elaborate infrastructure ISIS uses to commit gender-based crimes on a massive scale. It is difficult to imagine crimes of a graver nature.

⁵¹¹ Documentation #66, 76, 88.

⁵¹² European Parliament Members’ Research Service, *supra*, note 198.

⁵¹³ Rome Statute, Articles 53(1)-(2).

⁵¹⁴ *Id.* Article 53(2).

⁵¹⁵ OTP, *Policy Paper on the Interests of Justice*, at 5 (September 2007).

⁵¹⁶ *Id.* at 10.

⁵¹⁷ OTP, *Sexual and Gender-Based Crimes*, *supra*, note 307, ¶ 3.

204. *Second*, OTP action would help protect the “interests of victims,” including their interests in both “seeing justice done” and ensuring their own safety, well-being, dignity, and privacy.⁵¹⁸ ISIS continues to target female and LGBT victims because, as people facing widespread discrimination within Iraqi society⁵¹⁹, they are among the most vulnerable members of the population. As explained in Sections (IV)(C), and (D) no investigations or prosecutions have been initiated against ISIS members for gender-based crimes. Moreover, ISIS is not currently subject to any alternative justice mechanisms, such as truth seeking and reparations programs, for its gender-based crimes in Iraq.⁵²⁰ Impunity prevails, encouraging the recurrence of these crimes. The physical and psychological well-being of victims cannot be achieved while the perpetrators remain at large.

205. *Finally*, it is only in “exceptional circumstances” that a case otherwise qualified for selection by the OTP should not be pursued on the basis that it would not serve the interests of justice.⁵²¹ As the OTP itself stated in its 2007 Policy Paper on the Interests of Justice “bearing in mind the objectives of the Court to put an end to impunity and to ensure that the most serious crimes do not go unpunished, a decision not to proceed on the basis of the interests of justice should be understood as a course of last resort.”⁵²² There can be no basis for charting that course of last resort in the present case.

VI. CONCLUSION

206. On the facts presented here, there is reasonable basis to believe that foreign fighters in ISIS have committed gender-based crimes within the jurisdiction of the Court, that the case would be admissible under Article 17, and that an investigation would serve the interests of justice.

⁵¹⁸ OTP, *Interests of Justice*, *supra*, note 515.

⁵¹⁹ See, Lisa Davis, *Women Confronting ISIL: Protecting Women’s Rights in the Context of Conflict*, 22 Sw. J. Int’l L. 27 (2016).

⁵²⁰ OTP, Policy Paper on the Interests of Justice, September 2007, at 8–9.

⁵²¹ *Id.* at 1.

⁵²² *Id.* at 9. See also Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya of 31 March 2010, PTC II, ICC-01/09-19, ¶ 63, n. 35; OTP, *Interests of Justice*, *supra*, note 515, at 1 (noting the general presumption in favor of the Court exercising jurisdiction, so long as the affirmative, jurisdictional and admissibility requirements are met).