THE YALE LAW JOURNAL

EMILY CHERTOFF

Prosecuting Gender-Based Persecution: The Islamic State at the ICC

ABSTRACT. Reports suggest that Islamic State, the terrorist "caliphate," has enslaved and brutalized thousands of women from the Yazidi ethnic minority of Syria and Northern Iraq. International criminal law has a name for what Islamic State has done to these women: gender-based persecution. This crime, which appears in the Rome Statute of the International Criminal Court (ICC), has only been charged once, and unsuccessfully, in the Court's two decades of existence. The case of the Yazidi women presents a promising opportunity to charge it again – and, potentially, to shift the lately unpromising trajectory of the Court, which has been weakened in recent months by a wave of defections by former member states.

This Note uses heretofore unexamined jurisprudence of the ICC's Pre-Trial Chamber to elaborate – element by element – how the Prosecutor of the Court could charge gender-based persecution against members of Islamic State. I argue that the prosecution of Islamic State would not just vindicate the rights of Yazidi survivors of Islamic State violence. It would help to consolidate an international norm against gender-based persecution in armed conflict – a norm that, until now, international law has only incompletely realized. This Note argues that only by prosecuting the crime of gender-based persecution can international criminal law cognize violence, like the attacks on Yazidi women, that is motivated not just by race, ethnicity, or gender, but by the victims' intersecting gender and ethnic or racial identities. I conclude by reflecting on the role that a series of prosecutions against perpetrators of gender-based persecution might have in restoring the legitimacy of the ailing ICC.

AUTHOR. Yale Law School, J.D. expected 2017. The author would like to thank Harold Koh for his thoughtful suggestions and support throughout the drafting process, and Oona Hathaway and Ali Miller for formative insights and conversations. Megan McGlynn provided extremely helpful and professional editorial feedback, and I thank her as well as Hilary Ledwell, Urja Mittal, and the editors of the *Yale Law Journal*. I am grateful to friends and colleagues who read early drafts of this piece and offered their comments and encouragement, among them Zak Manfredi, Hava Mirell, and Noah Rosenblum, and to my parents for their support. This Note is dedicated to Yazidi survivors of violence, especially the estimated 2,000 Yazidi women who remained in Islamic State captivity as of this August.

NOTE CONTENTS

INTRODUCTION 1052

I. EVIDENCE OF GENDER-BASED CRIMES AGAINST YAZIDI WOMEN 1056

II. GENDER-BASED PERSECUTION AND THE EXPRESSIVE VALUE OF INTERNATIONAL LAW 1063

A. International Criminal Accountability 1065

B. Creating an International Norm 1069

C. The Insufficiency of Current Charges at the ICC 1075

1. Current Theoretical Insufficiencies 1075

2. The Need for a Composite Crime 1081

III. CHARGING GENDER-BASED PERSECUTION UNDER THE ROME STATUTE: THE ELEMENTS OF A CASE 1085

A. Threshold Questions: Procedural Matters and Individual Criminal Liability 1085

1. Jurisdiction 1086

2. Admissibility 1090

3. Individual Criminal Responsibility 1091

B. Charging Islamic State with Gender-Based Persecution Under Article 7(1)(h) of the Rome Statute 1095

1. The Widespread or Systematic Element 1099

2. The Mens Rea Element 1102

3. The Severe Deprivation of Fundamental Rights Element 1104

4. The Nexus with Group Element 1107

5. The Other Criminal Acts Element 1109

IV. GENDER-BASED PERSECUTION AND THE EVOLUTION OF THE ICC 1111

CONCLUSION 1116

INTRODUCTION

Over the past two years, media reports from Syria and Iraq have documented how the terrorist group Islamic State has systematically enslaved and raped women and girls from the Yazidi ethnic minority group.[1] One emblematic *New York Times* report details how Islamic State fighters have forced Yazidi women to take birth control in order to avoid violating a supposed religious mandate to abstain from sex with pregnant women slaves.[2] Women who have escaped this torture are fighting back. Some have spoken out against their captors in the press, to human rights observers, and at the United Nations (UN).[3] A group of them has even taken up arms against their former tormenters: a unit of women fighters based in Iraqi Kurdistan is training to take on members of Islamic State alongside the Kurdish *peshmerga*.[4] "We want justice," the commander of this battalion told a reporter.[5] "We want the men who did this to go to court."[6] Yet despite the public outcry and sustained advocacy efforts, justice has remained out of reach.

Of particular concern to many outside observers is the apparently premeditated nature of the Yazidi women's enslavement and the sexist ideology—evident in Islamic State pamphlets and articles—that underlies it.[7] France's Minister for Family, Children, and Women's Rights echoed other commentators when she delivered a speech to the United Nations proposing a new international crime—"femicide"[8]—and insisting that countries take steps to prose-

1. Rukmini Callimachi, *To Maintain Supply of Sex Slaves, ISIS Pushes Birth Control*, N.Y. TIMES (Mar. 12, 2016) [hereinafter Callimachi, *Birth Control*], http://www.nytimes.com/2016/03/13/world/middleeast/to-maintain-supply-of-sex-slaves-isis-pushes-birth-control.html [http://perma.cc/XS8A-QBTZ]; *see also* Rukmini Callimachi, *ISIS Enshrines a Theology of Rape*, N.Y. TIMES (Aug. 13, 2015) [hereinafter Callimachi, *Theology of Rape*], http://www.nytimes.com/2015/08/14/world/middleeast/isis-enshrines-a-theology-of-rape.html [http://perma.cc/K36L-4PXT] (reporting Islamic State's development of a radical theological position that purports to justify the systemic rape of captured women).

2. Callimachi, *Birth Control*, *supra* note 1.

3. *See, e.g.*, *infra* notes 191, 252 and accompanying text.

4. Janine di Giovanni, *How Yazidi Women Are Fighting Back Against ISIS*, VOGUE (Oct. 26, 2016, 11:32 AM), http://www.vogue.com/13495865/sun-ladies-yazidi-women-isis-genocide-sexual-enslavement [http://perma.cc/74SJ-A7EU].

5. *Id.*

6. *Id.*

7. *See infra* Part I.

8. Adam Taylor, *As Kerry Condemns ISIS Genocide, Calls To Recognize Something Else: Femicide*, WASH. POST (Mar. 17, 2016), http://www.washingtonpost.com/news/worldviews/wp/2016/03/17/as-kerry-condemns-isis-genocide-calls-to-recognize-something-else-femicide

cute Islamic State at the International Criminal Court (ICC).[9] Unfortunately, there has never been a successful international trial for gender-based persecution, despite the long and tragic history of gender-based targeting in conflict. Indeed, persecutors in several recent conflicts have singled out women and girls,[10] and sometimes men and boys,[11] for vicious, differential treatment.

[http://perma.cc/KR34-QM6L]; *see also* V.G. Julie Rajan, *Women, Violence, and the Islamic State: Resurrecting the Caliphate Through Femicide in Iraq and Syria*, *in* VIOLENCE AND GENDER IN THE GLOBALIZED WORLD: THE INTIMATE AND THE EXTIMATE 45 (Sanja Bahun & V.G. Julie Rajan eds., 2d ed. 2015). The term "femicide," which the French Minister for Family, Children and Women's Rights used in her speech to the UN, emerged not from feminist legal advocacy, but from radical feminist discourse. *See, e.g.*, TERRORIZING WOMEN: FEMINICIDE IN THE AMÉRICAS (Rosa Linda Fregoso & Cynthia Bejarano eds., 2010); Steven S. Volk & Marian E. Schlotterbeck, *Gender, Order, and Femicide: Reading the Popular Culture of Murder in Ciudad Juárez*, 32 AZTLÁN: J. CHICANO STUD. 53 (2007).

9. *See* Taylor, *supra* note 8.

10. Beyond the case of Islamic State, there appear to have been patterns of gender-based targeting of women for brutal rape during the genocides in Rwanda and Yugoslavia and the ongoing conflict in the Democratic Republic of the Congo (DRC). *See, e.g.*, *infra* notes 13, 315-316 and accompanying text (discussing the mass rape of women in Rwanda, Yugoslavia, and DRC, respectively).

I use the categories of "women" and "men" throughout this Note to mirror the language of the Rome Statute, which was drafted in the early 1990s by a broad coalition of states and nonstate stakeholders. Although Article 7(1)(h) talks about persecution on the basis of "gender," Article 7(3) of the Rome Statute clarifies that "[f]or 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." Rome Statute of the International Criminal Court arts. 7(1)(h), 7(3), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. Valerie Oosterveld attributes this language to the concerns of conservative elements ("[t]he Holy See, certain Arab states, and conservative nongovernmental organizations") that worried the statute might provide a hook for the recognition of the persecution of gays and lesbians or the classification of laws discriminating against women as crimes against humanity. *See* 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, 58 & n.37 (2006). Ironically, the Statute nonetheless could be interpreted—though in practice, this is perhaps unlikely—to provide a basis for claims of persecution by lesbian, gay, bisexual, and transgender individuals, since persecution "by reason of" gender as it is socially constructed can be read to permit claims on behalf of individuals who do *not* fit socially constructed gender norms and are persecuted on that basis. It is important to remember when working with international materials that to have broad effect, international law, whether customary or treaty-based, must be the product of broad international consensus (though not unanimity), and that rights and recognitions only beginning to emerge in relatively socially tolerant countries may be a long way off in other countries. Working in international institutional contexts with partners from diverse cultural backgrounds may require advocates to accept conceptual categories to which they otherwise would not revert.

This Note argues that Islamic State can be charged under the "gender-based persecution" provision of Article 7(1)(h) of the Rome Statute, the multilateral treaty that codifies the ICC's jurisdiction, substantive crimes, and major procedures.[12] The provision—a triumph, at the time, for feminist advocacy groups[13]—has unfortunately failed to realize its full potential. Since the enactment of the Rome Statute, gender-based persecution has been charged only once, in a case that failed to move forward for evidentiary reasons.[14]

---

11. *See infra* note 78 (discussing the sex-selective targeting of men and boys during the Rwandan genocide).

12. Rome Statute, *supra* note 10.

13. In the 1990s, particularly in response to mass rapes of women during the Rwandan and Bosnian genocides, feminist lawyers and legal scholars mobilized to ensure that sexual violence would receive adequate attention in international legal proceedings against the genocides' perpetrators. *See, e.g.*, Barbara Bedont & Katherine Hall-Martinez, *Ending Impunity for Gender Crimes Under the International Criminal Court*, 6 BROWN J. WORLD AFF. 65 (1999) (providing an extensive account of advocacy that ensured that "gender-based persecution" was recognized in the Rome Statute and by the ICC more broadly). As a number of scholars have documented, prior to the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR), sexual crimes in war were treated as lesser crimes in international war crimes proceedings. *See, e.g.*, David Cohen, *Prosecuting Sexual Violence from Tokyo to the ICC*, *in* UNDERSTANDING AND PROVING INTERNATIONAL SEX CRIMES 13, 24-38 (Morten Bergsmo, Alf Butenschøn Skre & Elisabeth J. Wood eds., 2012) (providing a historical account of the development of jurisprudence on gender-based crimes in the ICTR and ICTY); Kathleen M. Pratt & Laurel E. Fletcher, *Time for Justice: The Case for International Prosecutions of Rape and Gender-Based Violence in the Former Yugoslavia*, 9 BERKELEY WOMEN'S L.J. 77, 80-82 (1994) (describing the "historical invisibility" of gender-based crimes in international law and advocating for stronger recognition of such crimes at the ICTY).

    Several scholars, including the activists themselves, have documented how the Women's Caucus for Gender Justice urged the inclusion of rape and other sexual crimes in the Rome Statute during its development in the mid-1990s. *See, e.g.*, LOUISE CHAPPELL, THE POLITICS OF GENDER JUSTICE AT THE INTERNATIONAL CRIMINAL COURT: LEGACIES AND LEGITIMACY (2016); Cate Steains, *Gender Issues*, *in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 357 (Roy S. Lee ed., 1999); Janet Halley, *Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law*, 30 MICH. J. INT'L L. 1 (2008). The advocacy of the Women's Caucus led to the incorporation of several key provisions into the Rome Statute, including rape, sexual slavery, enforced prostitution, forced pregnancy, and enforced sterilization in Article 7 (crimes against humanity) and Article 8 (war crimes). *See* Rome Statute arts. 7, 8; *see also* Barbara Bedont, *Gender-Specific Provisions in the Statute of the International Criminal Court*, *in* 1 ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT *supra* note 10, at 183-84 (Flavia Lattanzi & William A. Schabas eds., 1999).

14. Prosecutor v. Mbarushimana, Case No. ICC-01/04-01/10-465-Red, Decision on the Confirmation of Charges (Dec. 16, 2011), http://www.icc-cpi.int/CourtRecords/CR2011_22538.pdf [http://perma.cc/P9FX-BCLS].

This Note fills a gap both in the literature on potential prosecutions of members of Islamic State and in the broader body of scholarship on gender-based crimes. I make two descriptive contributions and one normative contribution to the existing literature. On the descriptive front, this is the first piece to address the possibility of a gender-crimes prosecution against Islamic State. In addition, this Note is the first to analyze the persecution-related jurisprudence of the Pre-Trial Chamber of the ICC and to use this jurisprudence to assess the feasibility of bringing a charge of gender-based persecution in a particular case. Other scholars have tried to give Article 7(1)(h) meaning by examining the statute's drafting history,[15] analyzing the events of its drafting conference from the perspective of advocates,[16] and analogizing to refugee law.[17] But thus far, none has examined the Pre-Trial Chamber's jurisprudence in this context. On the normative front, this Note makes novel use of the concept of intersectionality[18] to analyze why international courts have failed to charge and develop the crime of gender-based persecution, a lapse that may be partly responsible for the failure to create an international norm against such persecution.

The Note proceeds in four Parts. Part I details what is known about Islamic State's crimes against Yazidi women by drawing on evidence unearthed by

---

15. *See, e.g.*, Brook Sari Moshan, Comment, *Women, War, and Words: The Gender Component in the Permanent International Criminal Court's Definition of Crimes Against Humanity*, 22 FORDHAM INT'L L.J. 154 (1998); Jessie Chella, Persecution: A Crime Against Humanity in the Rome Statute of the International Criminal Court (Aug. 2004) (unpublished Master of Laws thesis, Bond University), http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1056&context=theses [http://perma.cc/GTA8-5633].

16. *See, e.g.*, CHAPPELL, *supra* note 13; Halley, *supra* note 13.

17. Oosterveld, *supra* note 10.

18. In the field of legal scholarship, this concept originated in Kimberlé Crenshaw's article describing the erasure that African American women faced in taking their employment discrimination claims to court. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139. For more on the history of the concept, see *infra* Section II.B. In her Note *Intersectionality and International Law: Recognizing Complex Identities on the Global Stage*, 28 HARV. HUM. RTS. J. 205 (2015), Aisha Nicole Davis makes a related argument, suggesting that concepts of intersectionality have influenced the jurisprudence of the ICTY and the ICTR, and previewing the potential for intersectional analysis at the ICC. However, Davis's argument focuses on rape as an intersectional charge, and does not examine the gender-based persecution section of the Rome Statute. Her central suggestion, that the ICC "recognize sexual violence as a tool of genocide," *id.* at 232, extends the reasoning these courts have previously used. I argue that this extended reasoning reduces gender-based persecution to sexual assault, subsumes its distinct harm within a broader genocidal purpose, and fails to recognize the discrete harm of persecution based on gender. *See infra* Section II.C.

journalists, advocacy groups, and others. Part II addresses why only a charge of gender-based persecution can address the harm in crimes of this type—not just in response to the atrocities against Yazidis, but in all cases of gender-based targeting of civilians. While aspects of gender-based persecution could be prosecuted as other crimes, gender-based persecution should constitute a separate international crime for the same reasons that genocide does: where evidence indicates that a group has committed widespread criminal acts with a specific intent to target a distinct social group, we consider those crimes distinctly blameworthy. Part II develops this intuition and its doctrinal implications. Pursuing members of Islamic State for violence against Yazidi women—or members of any other group engaged in gender-based persecution—would express an overall international commitment to prevent or respond to gender-based atrocities.

Part III elaborates how a prosecution of Islamic State members for gender-based persecution could proceed. I assess the elements of the crime of gender-based persecution. To help illustrate how the ICC might apply the gender-based persecution statute, this Note makes use of the jurisprudence of the ICC's Pre-Trial Chamber, a judicial panel that decides the viability of indictments for the crimes of ethnic and political persecution. This Part subsequently explains how the alleged crimes against Yazidi women would satisfy the definition of gender-based persecution. In Part IV, I suggest that a series of prosecutions for gender-based persecution, in this case and in others, could help to bolster the legitimacy of the ICC at a critical moment in the institution's troubled history. Undertaking a broadly popular and clearly justified prosecution against a nonstate actor rather than a state could give the ICC an opportunity to pivot from recent unpopular prosecutions to a legitimate new course.

I. EVIDENCE OF GENDER-BASED CRIMES AGAINST YAZIDI WOMEN

Islamic State is a nonstate militant group that started as a little-known offshoot of the terrorist group al-Qaeda.[19] Over the past five years, Islamic State has taken control of broad swathes of territory in Syria and Iraq as well as smaller areas in Libya and Afghanistan.[20] It gained widespread notoriety in the

19. *See* Fawaz A. Gerges, *ISIS and the Third Wave of Jihadism*, 113 CURRENT HIST. 339, 339 (2014).

20. *See, e.g.*, Steve Bernard et al., *ISIS's Advance in Iraq*, FIN. TIMES (Mar. 18, 2016, 7:38 PM), http://ig.ft.com/sites/2014/isis-map [http://perma.cc/RD2J-WQRY]; Eric Schmitt, *U.S. Scrambles To Contain Growing ISIS Threat in Libya*, N.Y. TIMES (Feb. 21, 2016), http://www.nytimes.com/2016/02/22/world/africa/us-scrambles-to-contain-growing-isis-threat-in-libya.html [http://perma.cc/FME8-RDQH]; Hamid Shalizi, *Exclusive: In Turf War with*

West in 2014 for executing captured journalists and disseminating graphic videos of their murders.[21] Since 2014, Islamic State has also taken responsibility for and inspired a number of terror attacks in North Africa, Europe, and the United States.[22]

As a matter of internal structure, evidence suggests that Islamic State has all of the characteristics of a de facto governmental authority: it provides services, collects taxes, manages local resources, and engages in extensive recordkeeping to fulfill its governance responsibilities and combat objectives.[23] Under the ultimate control of Abu Bakr al-Baghdadi, the self-declared "caliph" of Islamic State,[24] Islamic State's bureaucracy consists of several governmental units, including a cabinet in charge of a number of ministries and regional commands.[25] A "governor" who reports to Al-Baghdadi directs each of the regional

---

Afghan Taliban, Islamic State Loyalists Gain Ground, REUTERS (June 29, 2015, 10:26 AM), http://www.reuters.com/article/us-afghanistan-islamic-state-idUSKCN0P91EN20150629 [http://perma.cc/W3YV-U6AV].

21. *See, e.g.*, Rukmini Callimachi, *Militant Group Says It Killed American Journalist in Syria*, N.Y. TIMES (Aug. 19, 2014), http://www.nytimes.com/2014/08/20/world/middleeast/isis-james-foley-syria-execution.html [http://perma.cc/5C46-8ED9]; Michael Winter & Kevin Johnson, *Video Appears To Show Islamic State Beheading U.S. Journalist*, USA TODAY (Aug. 19, 2014, 11:12 PM), http://www.usatoday.com/story/news/world/2014/08/19/syria-isis-kidnapped-journalist-beheaded/14306021 [http://perma.cc/5BCF-LHY2].

22. *See, e.g.*, Rukmini Callimachi, *Islamic State Says 'Soldiers of Caliphate' Attacked in San Bernardino*, N.Y. TIMES (Dec. 5, 2015), http://www.nytimes.com/2015/12/06/world/middleeast/islamic-state-san-bernardino-massacre.html [http://perma.cc/FBS9-7T6Q]; Jihen Laghmari et al., *Islamic State Spreads in North Africa in Attacks Ignored by West*, BLOOMBERG (Mar. 16, 2016, 7:00 PM), http://www.bloomberg.com/news/articles/2016-03-16/islamic-state-spreads-in-north-africa-in-attacks-ignored-by-west [http://perma.cc/CEV8-K85P]; Swati Sharma, *Islamic State Claims Responsibility for Paris Attacks*, WASH. POST (Nov. 14, 2015), http://www.washingtonpost.com/news/worldviews/wp/2015/11/14/islamic-state-claims-responsibility-for-paris-attacks [http://perma.cc/WQW5-EMDF].

23. *See, e.g.*, Jonathan Landay, Warren Strobel & Phil Stewart, *Exclusive: Seized Documents Reveal Islamic State's Department of "War Spoils,"* REUTERS (Dec. 28, 2015, 12:19 PM) http://www.reuters.com/article/us-usa-islamic-state-documents-group-exc-idUSKBN0UB0AW20151228 [http://perma.cc/AY36-D392] (describing seized documents that show Islamic State "has developed a complex bureaucracy to manage revenue streams—from pillaged oil to stolen antiquities—and oversee subjugated populations").

24. Gregor Aisch et al., *How ISIS Works*, N.Y. TIMES (Sept. 16, 2014), http://www.nytimes.com/interactive/2014/09/16/world/middleeast/how-isis-works.html [http://perma.cc/3U52-GLTL]; Charles Lister, *Profiling the Islamic State* 21 (Brookings Doha Ctr. Analysis, Paper No. 13, 2014), http://www.brookings.edu/wp-content/uploads/2014/12/en_web_lister.pdf [http://perma.cc/N8D4-8G7A] (describing the organizational structure for governing the areas seized by IS).

25. *See, e.g.*, *The Islamic State's Organizational Structure One Year In*, AL-MONITOR (Egypt) (July 2, 2015), http://www.al-monitor.com/pulse/security/2015/07/islamic-state-caliphate

commands.[26] Centralized under the supervision of the cabinet members in Raqqa are Islamic State's *diwan*, or departments.[27] Those bureaucracies coordinate Islamic State's affairs in areas such as education, health, public security, tribal outreach, and public relations.[28] A cache of Islamic State documents translated by the terrorism researcher Aymenn al-Tamimi reveals administrative documents regulating matters from maternity care pricing and the proper format for Islamic State birth certificates to the examination schedule at Mosul's pharmacology college.[29] This same collection contains documents threatening Christians and a *fatwa* (or religious edict) introducing the death penalty for blasphemy.[30]

Islamic State operates "war spoils" departments to handle captured resources and slaves. One war spoils department coordinates the use of natural resources like oil; another coordinates the sale and movement of slaves.[31] This department of slaves is the organ of Islamic State known to be directly responsible for the treatment of women captives,[32] along with Islamic State's Research and Fatwa Department, the body responsible for issuing religious edicts, including those that deal with women slaves.[33]

The Islamic State campaign has appeared to focus particularly on persecuting Yazidis, a religious minority of 300,000 to 700,000 people centered primarily in Northern Iraq.[34] Islamic State's particular brutality toward Yazidis is

---

-ministries-armies-syria-iraq.html [http://perma.cc/6HCJ-XEHY] (naming Islamic State governors); Ruth Sherlock, *Inside the Leadership of Islamic State: How the New 'Caliphate' Is Run*, TELEGRAPH (July 9, 2015, 2:28 PM), http://www.telegraph.co.uk/news/worldnews/middleeast/iraq/10956280/Inside-the-leadership-of-Islamic-State-how-the-new-caliphate-is-run.html [http://perma.cc/D7VL-QVWE] (explaining the highly organized command structure of Islamic State including cabinets and military commands).

26. MALCOLM W. NANCE, THE TERRORISTS OF IRAQ: INSIDE THE STRATEGY AND TACTICS OF THE IRAQ INSURGENCY 2003-2014, at 317-19 (2015); Sherlock, *supra* note 25.

27. Lister, *supra* note 24, at 21; Aymenn al-Tamimi, *The Evolution in Islamic State Administration: The Documentary Evidence*, 9 PERSP. ON TERRORISM 117 (2015), http://www.terrorismanalysts.com/pt/index.php/pot/article/view/447/878 [http://perma.cc/AWA5-DLUS].

28. al-Tamimi, *supra* note 27.

29. Aymenn Jawad al-Tamimi, *Archive of Islamic State Administrative Documents*, AYMENNJAWAD (Jan. 27, 2015, 12:25 PM), http://www.aymennjawad.org/2015/01/archive-of-islamic-state-administrative-documents [http://perma.cc/QG6Y-NSMB].

30. *Id.*

31. *See* Landay et al., *supra* note 23.

32. *Id.*

33. *See infra* notes 52-55 and accompanying text.

34. Peter Henne & Conrad Hackett, *Iraqi Yazidis: Hazy Population Numbers and a History of Persecution*, PEW RES. CTR. (Aug. 12, 2014), http://www.pewresearch.org/fact-tank/2014/08

based in part on its view of their religion. While Islamic State ideology affords minimal protections to members of monotheistic religions, the Yazidis' Zoroastrian-derived form of polytheism affords them no such defense against Islamic State violence. Thousands of Yazidi civilians have been driven from their villages, killed, or enslaved by Islamic State.[35] Most infamously, in 2014, tens of thousands of Yazidis were trapped for weeks by Islamic State fighters on Mount Sinjar,[36] a traditional home of Yazidis and the location of many of their holy sites.[37] Islamic State persecution of Yazidis comes in the context of a systematic military campaign in which the group has captured Mosul, the second-largest city in Iraq, as well as dozens of other towns and cities.[38] The Office of the UN High Commissioner for Human Rights estimates that Islamic State-related violence in Iraq alone killed 3,855 people in a six-month period in 2015.[39] And on March 17, 2016, U.S. Secretary of State John Kerry declared that

---

/12/iraqi-yazidis-hazy-population-numbers-and-a-history-of-persecution [http://perma.cc/9BUS-CFEV]; *Persecuted Yazidis Again Caught in Larger Struggle*, N.Y. TIMES (Aug. 11, 2014), http://www.nytimes.com/2014/08/12/world/middleeast/persecuted-yazidis-again-caught-in-larger-struggle.html [http://perma.cc/6KJ7-TZ56].

35. *See* Mara Revkin, *ISIS' Social Contract: What the Islamic State Offers Civilians*, FOREIGN AFF. (Jan. 10, 2016), http://www.foreignaffairs.com/articles/syria/2016-01-10/isis-social-contract [http://perma.cc/3B44-TTM6] ("Unlike Christians, adherents of certain non-Abrahamic faiths such as the Yazidis (which ISIS regards as 'original' unbelievers as opposed to those who were initially Muslim and only later apostasized) may be enslaved or killed unless they convert to Islam.").

36. *See* Helene Cooper & Michael D. Shear, *Militants' Siege on Mountain in Iraq Is Over, Pentagon Says*, N.Y. TIMES (Aug. 13, 2014), http://www.nytimes.com/2014/08/14/world/middleeast/iraq-yazidi-refugees.html [http://perma.cc/6PFY-GRF3].

37. *See* Avi Asher-Schapiro, *Who Are the Yazidis, the Ancient, Persecuted Religious Minority Struggling To Survive in Iraq*, NAT'L GEOGRAPHIC (Aug. 11, 2014), http://news.nationalgeographic.com/news/2014/08/140809-iraq-yazidis-minority-isil-religion-history [http://perma.cc/23CH-ATZ9]. Many Yazidis who were trapped on Mount Sinjar, in turn, arrived there after fleeing villages destroyed by Islamic State elsewhere. Alissa J. Rubin, *For Refugees on Mountain, 'No Water, Nothing,'* N.Y. TIMES (Aug. 9, 2014), http://www.nytimes.com/2014/08/10/world/middleeast/chased-onto-iraqi-mountain-there-is-no-water-nothing.html [http://perma.cc/7PNE-NJX2].

38. At the time of publication, Iraqi security forces and their allies were in the middle of an offensive to retake Mosul. *See* Tim Arango & Falih Hassan, *Mosul Is Breached by Iraqi Forces, Heralding a New, Complex Phase*, N.Y. TIMES (Nov. 1, 2016), http://www.nytimes.com/2016/11/02/world/middleeast/iraq-mosul-isis.html [http://perma.cc/824F-QLJX]; Eliott C. McLaughlin & Hamdi Alkhshali, *Eastern Mosul Liberated from ISIS, Iraqi PM Says*, CNN (Jan. 25, 2017), http://www.cnn.com/2017/01/24/middleeast/eastern-mosul-liberated-iraq-prime-minister-says [http://perma.cc/TZ3T-BGBG].

39. *Report on the Protection of Civilians in the Armed Conflict in Iraq: 1 May – 31 October 2015*, OFF. UNITED NATIONS HIGH COMMISSIONER FOR HUM. RTS. & UNITED NATIONS ASSISTANCE MIS-

Islamic State attacks on the Yazidi people and other ethnic minorities constituted genocide.[40]

The most horrifying aspect of Islamic State's treatment of Yazidis is its systematic sexual and domestic enslavement of thousands of Yazidi women. Survivors, many of whom were captured during the attack on Mount Sinjar, have told journalists that they were bussed to the Islamic State-held city of Mosul and other Iraqi towns and then held in large buildings, including a wedding hall and a prison, with hundreds of other captives.[41] "It was 100 percent preplanned," one Yazidi activist told the *New York Times*. "I spoke by telephone to the first family who arrived at the Directory of Youth [one of the holding sites] in Mosul, and the hall was already prepared for them. They had mattresses, plates and utensils, food and water for hundreds of people."[42] Islamic State fighters took some Yazidi women directly from these holding sites; others were moved repeatedly from town to town until they had been auctioned off or sold.[43]

Journalists and other observers have reported on the treatment of Yazidi women captives. These captives have been raped repeatedly, subjected to sexual torture, forced to perform household labor in their capacity as "slaves" or "captives," bought and sold like chattel,[44] denied access to medical care, and gruesomely and publicly executed for failing to comply with their captors' sexual demands.[45] In an interview with the *Middle East Eye*, UN Special Representative on Sexual Violence in Conflict Zainab Bangura told a reporter:

> After attacking a village, [Islamic State] splits women from men and executes boys and men aged 14 and over. The women and mothers are

---

SION FOR IRAQ—HUM. RTS. OFF. 5 (Jan. 19, 2016), http://www.ohchr.org/Documents/Countries/IQ/UNAMIReport1May31October2015.pdf [http://perma.cc/AJL2-3Z55].

40. Matthew Rosenberg, *Citing Atrocities, John Kerry Calls ISIS Actions Genocide*, N.Y. TIMES (Mar. 17, 2016), http://www.nytimes.com/2016/03/18/world/middleeast/citing-atrocities-john-kerry-calls-isis-actions-genocide.html [http://perma.cc/836V-YGAE].

41. *See* Callimachi, *Theology of Rape*, *supra* note 1; Kirk Semple, *Yazidi Girls Seized by ISIS Speak Out After Escape*, N.Y. TIMES (Nov. 14, 2014), http://www.nytimes.com/2014/11/15/world/middleeast/yazidi-girls-seized-by-isis-speak-out-after-escape.html [http://perma.cc/D5LA-9YKL].

42. Callimachi, *Theology of Rape*, *supra* note 1.

43. *See id.*; Semple, *supra* note 41.

44. Callimachi, *Theology of Rape*, *supra* note 1; James Reinl, *Q&A: Probing Islamic State's Sex Atrocities with the United Nations*, MIDDLE EAST EYE (May 27, 2015, 11:29 AM), http://www.middleeasteye.net/news/qa-probing-islamic-state-s-sex-atrocities-united-nations-1064004421 [http://perma.cc/ZK8X-SUSZ].

45. *See* Callimachi, *Theology of Rape*, *supra* note 1.

> separated; girls are stripped naked, tested for virginity and examined for breast size and prettiness. The youngest, and those considered the prettiest virgins fetch higher prices and are sent to Raqqa, the IS stronghold . . . . At slave auctions, buyers haggle fiercely, driving down prices by disparaging girls as flat-chested or unattractive . . . . We heard about one girl who was traded 22 times, and another, who had escaped, told us that the sheikh who had captured her wrote his name on the back of her hand to show that she was his "property."[46]

There is written evidence that Islamic State not only condones, but also actively encourages, the rape, torture, and enslavement of Yazidi women captives. Indeed, the central Islamic State bureaucracy has issued multiple fatwas dealing with the treatment of women slaves.[47] A manual on women captives issued at

---

46. Reinl, *supra* note 44. Former ICC Prosecutor Luis Moreno-Ocampo also visited northern Iraq and met with Yazidi victims of the attack on Mount Sinjar. His description of the attacks on Yazidis parallels Bangura's. Rosenberg, *supra* note 40.

47. On December 3, 2014, a Twitter account linked to the group posted a manual on women captives titled, in English, "Questions and Answers on Taking Captives and Slaves," attributed to the Research and Fatwa Department. *Islamic State (ISIS) Releases Pamphlet on Female Slaves*, MEMRI JIHAD & TERRORISM THREAT MONITOR (Dec. 4, 2014), http://www.memrijttm.org/islamic-state-isis-releases-pamphlet-on-female-slaves.html [http://perma.cc/8N9H-ZER7]. A think tank monitoring Muslim fundamentalist terrorism translated the document, and numerous news outlets quoted this translation. *See, e.g.*, *ISIS Sex Slaves Guide Mars International Human Rights Day*, AL-ARABIYA NEWS (Dec. 10, 2014), http://english.alarabiya.net/en/perspective/features/2014/12/10/ISIS-sex-slaves-guide-mars-international-Human-Rights-Day.html [http://perma.cc/6TBK-PAN5]; Adam Withnall, *Isis Releases 'Abhorrent' Sex Slaves Pamphlet with 27 Tips for Militants on Taking, Punishing and Raping Female Captives*, INDEPENDENT (U.K.) (Dec. 10, 2014), http://www.independent.co.uk/news/world/middle-east/isis-releases-abhorrent-sex-slaves-pamphlet-with-27-tips-for-militants-on-taking-punishing-and-9915913.html [http://perma.cc/6J95-VVWT]. In December 2015, Reuters, which had gained exclusive access to a trove of Islamic State documents seized by U.S. Special Operations forces, released a translation of a fatwa with similar content from the "ISIL Committee of Research and Fatwas" dated January 29, 2015. *See Fatwa No. 64*, ISIL COMMITTEE RES. & FATWAS (Jan. 29, 2015) [hereinafter *Fatwa 64*], http://graphics.thomsonreuters.com/doc/slaves_fatwa.pdf [http://perma.cc/BU9L-BWW3]; *see also* Jonathan Landay et al., *Exclusive: Islamic State Ruling Aims To Settle Who Can Have Sex with Female Slaves*, REUTERS (Dec. 29, 2015, 7:32 PM), http://www.reuters.com/article/us-usa-islamic-state-sexslaves-exclusive-idUSKBN0UC0AO20151230 [http://perma.cc/TPR8-NTWQ] (noting the release of the fatwa). The fatwa opens by noting that "[s]ome of the brothers have committed violations in the matter of the treatment of the female slaves," suggesting that some of the activities prohibited in the manual have occurred. *Fatwa 64*, *supra*. It goes on to prohibit, among other things, anal sex with a "female captive," or sex "during her menstrual cycle," also noting that "it is not possible to cause [the woman] to abort if she is pregnant." *Id.* The manual also instructs Islamic State members:

the end of 2014 answers a number of questions about relations between Islamic State members and women slaves. It states that sex with a woman slave is permissible (quoting as support a passage from the Qu'ran[48]), but if the slave is not a virgin, "her uterus must be purified" beforehand to ensure that she is not pregnant.[49] Sale of women captives, too, is permitted, "for they are merely property."[50] The manual also lays out various rules governing, among other things, whose slaves a fighter may have sex with (only one's own, with co-owned slaves off-limits), and the appropriate forms of beating ("disciplinary beatings" are acceptable, but "breaking beatings," "beating[s] for the purpose of achieving gratification," and "torture beating[s]" are not).[51]

The Research and Fatwa Department, and the Islamic State bureaucracy more generally, purport to ground their rulings on the treatment of women slaves in dictates of Islamic law.[52] An article published in Islamic State's magazine *Dabiq* states, after citing various religious texts, that "enslaving the families of the kuffār [infidels] and taking their women as concubines is a firmly established aspect of the [Shariah] that if one were to deny or mock, he would be . . . apostatizing from Islam."[53] A *New York Times* journalist who interviewed escaped Yazidi survivors reported that fighters prayed before and after raping the women,[54] and that the fighters referred to the assaults as "*ibadah*," a term from Islamic scripture meaning worship.[55]

"The owner of a female captive should show compassion towards her, be kind to her, not humiliate her, and not assign her work she is unable to perform." *Id.*

48. MEMRI JIHAD & TERRORISM THREAT MONITOR, *supra* note 47 ("It is permissible to have sexual intercourse with the female captive. Allah the almighty said: '[Successful are the believers] who guard their chastity, except from their wives or (the captives and slaves) that their right hands possess, for then they are free from blame [Koran 23:5-6]'.").

49. *Id.*

50. *Id.*

51. *Id.*

52. In an assessment of a cache of Islamic State documents obtained by the United States military, Jonathan Landay, Warren Strobel, and Phil Stewart describe an October 2014 fatwa titled "From Creator's Rulings on Capturing Prisoners and Enslavement" that "lays out rules on enslaving women seized from vanquished 'infidels'" while "attempt[ing] to ground the rules in Islamic law." *See* Landay et al., *supra* note 23.

53. *The Revival of Slavery Before the Hour*, 4 DABIQ 14, 17 (2014); *see also* Dallin Van Leuven, Dyan Mazurana & Rachel Gordon, *Analysing the Recruitment and Use of Foreign Men and Women in ISIL Through a Gender Perspective*, *in* FOREIGN FIGHTERS UNDER INTERNATIONAL LAW AND BEYOND 97, 115-16 (Andrea de Guttry, Francesca Capone & Christophe Paulussen eds., 2016) (describing the article in *Dabiq* and providing further background on the religious theories underpinning Islamic State's practice of sexual enslavement).

54. *See* Callimachi, *Theology of Rape*, *supra* note 1 ("Because the preteen girl practiced a religion other than Islam, the Quran not only gave [the Islamic State fighter] the right to rape her —

The shocking treatment of Yazidi women under Islamic State has drawn international condemnation and has naturally led some commentators to examine the prospect of criminal accountability.[56] But thus far, no commentator has offered a comprehensive analysis of how a prosecution would grapple with the gendered nature of the atrocities. I argue that an appropriate accounting for these crimes is possible only if the international legal regime recognizes the gendered nature of these acts of violence – an argument I take up in the following Part.

II. GENDER-BASED PERSECUTION AND THE EXPRESSIVE VALUE OF INTERNATIONAL LAW

Not only has Islamic State targeted the Yazidis as a group in general; it has also singled out Yazidi women for a particularly prolonged and brutal form of persecution. As this Part explains, we would expect members of Islamic State to experience legal condemnation at the international level given the scope and gravity of their crimes against Yazidis. We would also expect criminally punished Islamic State members to face a regime of justice that recognizes the motivations behind their targeted treatment of Yazidi women. That is, to the extent criminal law takes into account biased intent – as it does in hate-crime proceedings at the national level, and in genocide and persecution proceedings at the international level – we would expect it to recognize the maltreatment directed at the Yazidi women as *women*. Yet, while international criminal law theoretically recognizes a charge of gender-based persecution, in practice this crime has almost never been charged, and never once successfully.

This Part contends that charging the international crime of gender-based persecution against members of Islamic State should be a top priority. The moral harm that results from targeting on the basis of gender is akin to the moral harm that stems from targeting on the basis of ethnicity and ought to be recognized as an atrocity of comparable severity. While infrequent, where gen-

---

it condoned and encouraged it, he insisted. . . . [H]e knelt beside the bed and prostrated himself in prayer before getting on top of her. When it was over, he knelt to pray again . . . .").

55. *See, e.g.*, *id.* ("'Every time that he came to rape me, he would pray,' said F, a 15-year-old girl who was captured on the shoulder of Mount Sinjar one year ago and was sold to an Iraqi fighter in his 20s. . . . 'He kept telling me this is ibadah,' she said, using a term from Islamic scripture meaning worship.").

56. *See, e.g.*, John B. Bellinger III, *Make ISIS' Leaders Face Justice*, N.Y. TIMES (Apr. 2, 2015), http://www.nytimes.com/2015/04/03/opinion/make-isis-leaders-face-justice.html [http://perma.cc/F6FA-W27C] (noting that "the Security Council should ask the [ICC] to investigate the numerous offenses committed by the Islamic State").

der-based persecution does take place, it is particularly shocking. The bureaucratized slavery of Yazidi women is only the most recent example of gender-based persecution. It was the sex-selective execution of men and boys at Srebrenica in 1995, for instance, that finally galvanized members of the North Atlantic Treaty Organization (NATO) to intervene in the Bosnian Genocide.[57]

First, I argue that Islamic State's persecution of Yazidi women should be prosecuted in an international criminal trial both because of the magnitude and gravity of the crimes alleged and because developing a strong international norm against gender-based persecution is critically important. The especially serious harms at the intersection of ethnicity and gender deserve increased recognition in international criminal law, a recognition that should begin with the Yazidi victims and survivors of Islamic State.

Next, I argue that gender-based persecution is a composite crime structurally akin to genocide and that it deserves recognition for the same expressive reasons that genocide itself was first recognized as a crime. Like genocide, gender-based persecution is composed of a series of acts—in this case, torture, rape, and slavery—that could each be charged as separate domestic or international crimes. The reason prosecutors should be allowed to charge these acts as a single composite crime is that the whole—the intent to terrorize a particular group—is more morally blameworthy and damaging than the sum of its parts.[58] Moreover, recognizing gender-based persecution as a crime would serve similar purposes as recognizing the crime of genocide: it would allow international criminal law to fulfill its expressive function, and, in turn, to help crystallize a new international human rights norm against gender-based atrocities.[59]

57. *See* Ivo H. Daalder, *Decision To Intervene: How the War in Bosnia Ended*, BROOKINGS INST. (Dec. 1, 1998), http://www.brookings.edu/research/articles/1998/12/balkans-daalder [http://perma.cc/66FY-WLSV].

58. Or, in the case of genocide, the intent to destroy a group. What makes these composite crimes particularly heinous is that there is an intent to single out a particular group for atrocities—this is the *dolus specialis* or specific intent of genocide. *See* Kai Ambos, *What Does 'Intent To Destroy' in Genocide Mean?*, 91 INT'L REV. RED CROSS 833, 834-39 (2009). A similar logic underlies domestic hate crime enhancements. *See* Paul H. Robinson, *Hate Crimes: Crimes of Motive, Character, or Group Terror?*, 1992/1993 ANN. SURV. AM. L. 605, 606 (1993) ("[T]he offense punishes or enhances punishment for the actor's motivation *in selecting the victim* . . . .").

59. *See* discussion *infra* Section II.B.

A. *International Criminal Accountability*

The ICC, the world's permanent criminal court, was established in 1998 through the ratification of the Rome Statute.[60] Though atrocities in Rwanda and Yugoslavia in the early 1990s most immediately spurred its creation, the idea of such a court has existed in the international arena since the aftermath of World War II and the Holocaust, when the Allied powers tried and, in some cases, executed Nazi and Imperial Japanese war criminals in trials at Nuremberg and Tokyo.[61] International policymakers and lawyers recognized after the Nuremberg trials that certain acts – because of their scale, their severity, and, in

60. The Rome Statute, which created the ICC, is a treaty. The 124 countries that have ratified it, called State Parties, have agreed to submit to the Court's jurisdiction. *See Ratification of the Rome Statute*, COALITION FOR INT'L CRIM. CT., http://www.iccnow.org/?mod=romeratification [http://perma.cc/X7Q2-ZBTG]. The ICC does not have jurisdiction over countries that have not signed the Rome Statute (including the United States), except by special procedures. *See infra* Section III.A.1. The ICC is technically independent of the UN. *See* U.N. General Assembly, *Relationship Agreement Between the United Nations and the International Criminal Court*, art. 2, U.N. Doc. A/58/874 (Aug. 20, 2004). However, its processes are closely linked to the United Nations and international diplomacy. For instance, the Security Council may override a country's decision not to submit to ICC jurisdiction by referring that country to the ICC. *See id.* art. 17; *see also* Michael C. Wood, *The Interpretation of Security Council Resolutions*, 2 MAX PLANCK Y.B. U.N. L. 73, 75 (1998) (noting ICJ recognition of power of security council to pass resolutions binding on UN member states). In many ways the ICC is like a domestic criminal court. Before filing charges, the Prosecutor must gather at least some evidence to support the allegations made, but the standard of proof to allow an indictment to proceed is lower than the standard to convict. *See infra* note 203. Cases are conducted in a similar fashion, with witnesses, evidence, cross-examination, and procedural safeguards for both victims and the accused. *See* INT'L CRIM. CT. R.P. & EVID. 63, 65, 68(2)(a), 87-88. ICC judges may impose prison time or a fine as punishment and may also require the forfeiture of assets. *See* Rome Statute, *supra* note 10, art. 77. That said, there are some substantial differences between processes at the ICC and U.S. state and federal criminal law. One major difference is the enormous volume of evidence cases at the ICC must bring to bear, given the extraordinary complexity of proving international crimes, which often involve dozens of violations and complicated forms of mens rea. *See Measures Available to the International Criminal Court To Reduce the Length of Proceedings*, INT'L CRIM. CT. para. 8 (2003) [hereinafter *Length of Proceedings*], http://www.icc-cpi.int/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281982/length_of_proceedings.pdf [http://perma.cc/29ZE-BYCP] (noting that "[d]ue to the fact that international crimes typically involve atrocities committed on a massive scale, international criminal justice has to cope with cases which are more extensive and complex than most national cases"). And the judges to some extent constrain prosecutorial discretion, a notion almost unheard of in the United States. *See, e.g.*, Rome Statute, *supra* note 10, art. 15(3)-(5) (setting out Pre-Trial Chamber power to deny the Prosecutor's request to begin an investigation).

61. *See, e.g.*, WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 5-8, 10-13 (2004).

some cases, their motivation—were so heinous that they aptly could be called crimes against the whole of mankind and the international order.[62] Nazi Germany's unprovoked and unjustified acts of war against other countries were one such crime;[63] its large-scale ethnic cleansing of Jews, Roma, and other minority groups was another.[64]

The 160 states[65] that participated in drafting the Rome Statute had this same idea in mind: to prosecute the worst war criminals, persecutors, and tyrants on the reasoning that some acts are so heinous that they damage us all;[66] they cross-cut national boundaries, giving multiple societies claims to see justice done. The severity of the crimes makes a mockery of basic principles of humane treatment. Moreover, the perpetrators, often governments, are in many cases effectively above national law and, without intervention, might never face justice.[67]

Though commentators continue to debate the issue, Islamic State's abuses of Yazidi women are appropriate subjects for international criminal accountability, and thus for trial before the ICC.[68] To be sure, trying these crimes in a national court would offer some advantages over international proceedings, assuming the existence of a functioning judiciary in the state conducting the trial. Most obviously, international justice can be slow and its processes less well established. Certainly the United States, Britain, or another Western country could more quickly prosecute the accused. Moreover, a domestic prosecution would likely face fewer jurisdictional challenges than an ICC trial would.[69]

On balance, however, the advantages of an international trial over a domestic one in the case of Islamic State outweigh the disadvantages. Because Islamic State operates across multiple states[70] and claims a membership of diverse na-

---

62. *See id.* at 26-27.

63. *See, e.g.*, Christian Tomuschat, *The Legacy of Nuremberg*, 4 J. INT'L CRIM. JUST. 830, 832-33 (2006).

64. The concept of the crime of genocide did not exist at that time, and so at Nuremberg prosecutors charged atrocities against Jews as crimes against humanity. SCHABAS, *supra* note 61, at 7-8, 27.

65. U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an Int'l Criminal Court, *Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, ¶ 14, U.N. Doc. A/CONF.183/10 (July 17, 1998).

66. *See* WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES 14 (2009); SCHABAS, *supra* note 61, at 26-27.

67. *See* SCHABAS, CRIME OF CRIMES, *supra* note 66, at 14-15.

68. *See* Bellinger, *supra* note 56.

69. *See infra* Section III.A.1.

70. *See infra* Section III.A.1.

tionalities,[71] it is difficult to pinpoint a single appropriate national forum. One country might have trouble establishing jurisdiction over a substantial number of Islamic State members. Thus, while there may be dozens of countries with jurisdiction to prosecute their own nationals, fragmenting the prosecutions across many countries would impede the gathering and airing of a single body of evidence on Islamic State crimes. The ICC, on the other hand, is well suited to this task. Moreover, even if jurisdiction in a single national forum were legally feasible, a prosecution in the United States, United Kingdom, or other Western court would seem inappropriate given the relatively tenuous connection of Western states to events on the ground in Iraq and Syria.[72] Although these countries have highly developed legal systems, this fact alone may not entitle them to prosecute international crimes with a highly attenuated domestic connection when there is an appropriate international forum.

But most importantly, international criminal liability is not only justified but critical in light of the severity and magnitude of Islamic State's crimes.[73] The United States recently acknowledged that Islamic State's treatment of Yazidis amounts to genocide, a paradigmatic and extremely severe international crime.[74] It requires no stretch of the imagination to recognize that Islamic State's gendered crimes against Yazidi women are equally appropriate candidates for international prosecution. Indeed, an international trial would in many ways be more legitimate than a national one. It would not only avoid the pitfalls of a Western or regional trial, but would also recognize, consistent with the policies underlying the establishment of the ICC, that dozens of countries' nationals have fought for Islamic State and that the gravity and magnitude of their alleged crimes demand worldwide condemnation.

The gendered nature of Islamic State's crimes provides further incentive to bring the case in an international court: a well-structured prosecution of Islamic State for gender-based persecution would help to solidify an international

---

71. Louisa Loveluck, *Islamic State: Where Do Its Fighters Come From?*, TELEGRAPH (U.K.) (June 8, 2015), http://www.telegraph.co.uk/news/worldnews/islamic-state/11660487/Islamic-State-one-year-on-Where-do-its-fighters-come-from.html [http://perma.cc/U44N-WKX7].

72. *See id.*

73. Commentators frequently argue that international criminal liability attaches to particularly heinous crimes that target a large number of victims. *See, e.g.*, SCHABAS, *supra* note 61, at 26 ("The crimes over which the International Criminal Court has jurisdiction are 'international' not so much because international cooperation is needed for their repression, although this is also true, but because their heinous nature elevates them to a level where they are of 'concern' to the international community.").

74. *See* Bellinger, *supra* note 56; Rosenberg, *supra* note 40.

norm against gender-based violence. While Article 7 of the Rome Statute criminalizes persecution on the basis of gender as a crime against humanity,[75] the gender-based persecution provision has never been successfully charged. The Statute defines the crime as a "severe deprivation of [the] fundamental rights" of the targeted individuals, by reason of their gender, in the context of a "widespread or systematic attack directed against any civilian population," and it requires that the perpetrator know of the attack.[76] As other scholars have noted, the statute is not necessarily confined to sex crimes; it condemns all crimes that involve targeting on the basis of gender.[77] For instance, sex-selective murder of all males of fighting age could be a form of gender-based violence.[78] Similarly,

---

75. *See* Rome Statute, *supra* note 10, art. 7(1)(h). Article 7 applies even outside the context of armed conflict (whether international or not). *See* Darryl Robinson, *Defining "Crimes Against Humanity" at the Rome Conference*, 93 AM. J. INT'L L. 1, 43, 45-46 (1999). This feature is potentially useful in the context of gender-based persecution, since some gender-based atrocities take place outside of armed conflict.

76. Rome Statute, *supra* note 10, arts. 7(1), 7(1)(h), 7(2)(g). The perpetrator also must deprive the victim of rights "in connection with" (that is, via) one or more other Rome Statute crimes; the Statute covers many crimes that would be serious felonies in the United States, like murder, rape, and torture. *See id.*

77. *See* Dianne Luping, *Investigation and Prosecution of Sexual and Gender-Based Crimes Before the International Criminal Court*, 17 AM. U. J. GENDER SOC. POL'Y & L. 431, 465-66 (2009).

78. *See, e.g.*, R. Charli Carpenter, *Recognizing Gender-Based Violence Against Civilian Men and Boys in Conflict Situations*, 37 SECURITY DIALOGUE 83 (2006). It is important to note that Islamic State has persecuted Yazidi men, too—interviews with victims suggest Islamic State has conducted sex-selective executions of men and boys. *See* Reinl, *supra* note 44. Sex-selective execution targeting men occurred during the Rwandan genocide, the Bosnian Genocide, the Colombian Civil War, and the East Pakistani movement for independence, among other conflicts. *See* Carpenter, *supra*, at 89-90. The rationale for sex-selective execution of men generally rests on the notion that every man and boy might be a combatant, or could grow up to be one. *See id.* at 90. As more information emerges about these practices, we may hope there is a sufficient body of evidence to support a charge of gender-based persecution against members of Islamic State for persecution of men. Recent scholarship on gender and conflict has productively complicated long-held stereotypes about the harms women, men, girls, and boys suffer in conflict as civilians and as combatants. *See id.* at 83 (noting that men may suffer sex-selective killing, forced conscription, and sexual violence in conflict); Megan MacKenzie, *Securitization and Desecuritization: Female Soldiers and the Reconstruction of Women in Post-Conflict Sierra Leone*, 18 SECURITY STUD. 241, 248-49 (2009) (noting several women former soldiers who admitted to having voluntarily joined particular military units in interviews); Augustine S.J. Park, *'Other Inhumane Acts': Forced Marriage, Girl Soldiers and the Special Court for Sierra Leone*, 15 SOC. & LEGAL STUD. 315, 324 (2006) ("Disrupting the stereotype of the 'damsel in distress' . . . research with former girl soldiers reveal[s] that girls often felt empowered through their experiences fighting, bearing arms and killing."); Sandesh Sivakumaran, *Sexual Violence Against Men in Armed Conflict*, 18 EUR. J. INT'L L. 253, 257-58 (2007) (citing evidence of sexual violence against men in recent conflicts in El Salvador, Chechnya, Turkey, Sri Lanka, Sierra Leone, Kenya, and more than a dozen other conflicts).

slavery could be a form of gender-based persecution even without its sexual characteristics if only women were being enslaved.[79]

But the promise of the gender-based persecution charge has, until now, remained only a theoretical possibility. While the inclusion of the charge in the Rome Statute shows some progress toward recognizing how gendered harms and other forms of bias are interwoven in international crimes, successfully charging gender-based persecution is a crucial next step in the evolution toward recognizing and combatting intersectional crimes.

B. Creating an International Norm

The experience of Yazidi women illustrates that gender-based persecution is often intersectional—indeed, its intersectionality may be one reason legal discourse often overlooks it. Intersectionality refers to the effects of overlapping identities on individuals' lived experiences, particularly of discrimination. In legal scholarship, Kimberlé Crenshaw introduced the idea in her analysis of the difficulty faced by African American women seeking to bring employment discrimination claims to court. These women were told that their claims were not cognizable on the ground that they were denied employment because they were both African American *and* women; as a result, they sometimes received no relief at all from the courts.[80] Similarly, the available evidence suggests that Islamic State targets Yazidi women because they are both Yazidi *and* women. Just as domestic judges' understanding of the nature of discrimination had to change in order to make African American women's claims cognizable, so, too, does the international community's understanding of persecution based on identity need to change in order to recognize the harm in targeting based on both gender and ethnicity. Only once the international system recognizes gen-

A key goal of any effort to charge gender-based persecution at the ICC should be to frame it in a gender-sensitive but not gender-biased way, so that in the future prosecutors can charge it against violators of men's rights.

79. *See* Luping, *supra* note 77, at 465-67.

80. Crenshaw, *supra* note 18, at 141. In the first of three cases that form the centerpiece of her argument, *DeGraffenreid v. General Motors Assembly Division*, a district court found that African American women who had been denied employment had no cognizable claim of discrimination at all: while Title VII explicitly protected both African Americans and women at the time the cases came to court, there was no statute or Supreme Court decision entitling African American women in particular to employment discrimination protection. 413 F. Supp. 142, 143 (E.D. Mo. 1976). This in effect meant that African American women could bring a case saying they were discriminated against as African Americans or as women, but not both. Intersectionality is the perspective that recognizes the effects of overlapping identities on individuals' lived experiences and experiences of discrimination.

der-based targeting as a distinctive harm will it begin to develop a robust norm against gender-based persecution.

The idea that some victims of international crimes may be targeted based on the intersection of their gender and ethnic identities (rather than their ethnic identity alone), as well as the belief that an intersectional perspective is required to fully comprehend the implications of those crimes, is not itself new.[81] However, despite the progress made by including gender-based persecution in the Rome Statute, international criminal law is, in Crenshaw's words, still fundamentally a "discourse[] shaped to respond"[82] to only one aspect of the Yazidi victims' (and other genocide victims') identities: their race or their ethnicity. The skewing of the discourse is obvious. Consider the failure to charge gender-based persecution in all but one of the twenty-three cases that have come before the ICC, when ethnic and political persecution has been charged nine times,[83] including in cases where there is strong evidence of mass rape of women (and no comparable evidence of rape of men).[84]

---

81. Catharine MacKinnon was perhaps the first to make this observation in some detail. In a 2013 article considering intersectionality as a dynamic approach to legal problems, she discusses the Second Circuit case *Kadic v. Karadžić*, 70 F.3d 232 (2d Cir. 1995), a civil suit based on the same facts as the Bosnian Genocide cases at the ICTY, as an example of intersectional thinking for its recognition that the rape of women could be a tool of genocide. Catharine A. MacKinnon, *Intersectionality as Method: A Note*, 38 SIGNS: 1019, 1026-27 (2013). This Note is, however, the first to connect this point about intersectionality to another strand of feminist literature that argues generally that persecution based on gender is underrecognized in international law. Its particular contribution is to argue that until now gender-based crimes have been subsumed within the crimes of genocide or political and ethnic persecution because of a lack of intersectional perspective on the part of international jurists, and to contend that a full accounting for the experiences of many conflict victims would require charging persecutors with gender-based persecution alongside these other crimes. In this way, it makes an argument that partly (but not completely) parallels Crenshaw's in *Demarginalizing the Intersection*, *supra* note 18: whereas the plaintiffs that Crenshaw discusses had their case completely barred by Title VII's supposed lack of recognition of African American women as a protected class – and, simultaneously, as paradigmatic members of two separate protected classes – the persecution of Yazidis is only incompletely recognized, filtered through the prism of only one of the two identities on the basis of which they experience persecution.

82. Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244 (1991). Of course, there are obvious historical reasons for this skew, chief among them the fact that the endeavor of international criminal law came out of the Holocaust.

83. *See Situations and Cases*, INT'L CRIM. CT., http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx [http://perma.cc/6FF7-PPS6].

84. For instance, there is strong evidence of mass rape of women in conflicts in the DRC, Uganda, and the Darfur region of Sudan. *See, e.g.*, Thomas Escritt, *Sex Crimes in Focus at Hague Trial of Ugandan Rebel Commander*, REUTERS (Dec. 2, 2016, 6:38 AM), http://www.reuters.com/article/us-warcrimes-uganda-idUSKBN13R15M [http://perma.cc/N48S

As a result, the discourse of international criminal law, to borrow Crenshaw's language again,[85] ignores the intersectional identity of victims. In so doing, the law marginalizes those victims by failing to recognize their experiences both as ethnic minorities *and* as women or men. Including the crime of gender-based persecution in the Rome Statute is a step forward, but failing to ever successfully charge it limits its value, both practically and symbolically. Turning a blind eye in this way to the totality of victims' experiences would be a failure in domestic criminal law. Expressive theories of punishment recognize criminal law as a device for conveying social disapproval;[86] failing to charge a crime once it is codified compromises its expressive value and fails to strengthen the related social norm.[87] This failure is particularly acute when it comes to international criminal law since expressive condemnation is one of its paramount functions.[88] International criminal law signals to both state and nonstate actors that the overwhelming weight of international opinion vilifies the criminalized practices and that there is a norm against them. It signals that engaging in those practices may carry not just criminal, but also diplomatic, economic, and military consequences.[89]

-E5WX]; *Mass Rape in North Darfur: Sudanese Army Attacks Against Civilians in Tabit*, HUM. RTS. WATCH (Feb. 11, 2015), http://www.hrw.org/report/2015/02/11/mass-rape-north-darfur/sudanese-army-attacks-against-civilians-tabit [http://perma.cc/U7R2-JLVF] (noting evidence that the Sudanese army had raped more than 200 women and girls in 36 hours and relaying claims by two soldiers that their commanders had told them to "rape women"); *see also infra* notes 314-316 and accompanying text.

85. *See* Crenshaw, *supra* note 82, at 1244.

86. Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 STAN. J. INT'L L. 39, 42 (2007) ("[P]unishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, on the part either of the punishing authority himself or of those 'in whose name' the punishment is inflicted." (quoting JOEL FEINBERG, *The Expressive Function of Punishment*, *in* DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 95, 98 (1970))).

87. *See* Avlana Eisenberg, *Expressive Enforcement*, 61 UCLA L. REV. 858, 860 (2014) (noting that in the analogous context of domestic hate crimes law, "[t]he enactment of legislation itself sends a signal that society endorses a certain message. But much of a law's communicative impact . . . is bound up with whether and how the legislation is enforced").

88. *See* Margaret M. deGuzman, *Choosing To Prosecute: Expressive Selection at the International Criminal Court*, 33 MICH. J. INT'L L. 265, 312-19 (2012); Sloane, *supra* note 86, at 42, 69-88; *cf.* Mirjan Damaška, *What Is the Point of International Criminal Justice?*, 83 CHI.-KENT L. REV. 329, 343-47 (2008) (positing a similar theory of international criminal law's didactic purpose).

89. *See* SCOTT STRAUS, FUNDAMENTALS OF GENOCIDE AND MASS ATROCITY PREVENTION 142-47 (2016) (discussing modes of genocide response).

Indeed, norm creation through its expressive value lies at the heart of international criminal law. Since the earliest days of its existence, international criminal law has helped to spur the formation of new international law norms and to crystallize existing norms.[90] By articulating an international consensus that certain acts are morally wrong, the law can make clear that such acts are broadly unacceptable and can lead to increased awareness of their harms in the realms of diplomacy, international policy, and even national-level politics.[91]

The history of the international crime of genocide demonstrates the truth of this story. Mass atrocities that we would today call genocide, such as the extermination and deportation of ethnic Armenians living in Turkey,[92] occurred before the Holocaust. The concept of genocide as a distinctive and morally blameworthy act did not begin to take shape until after World War II. After the world realized the scale of ethnic cleansing of Jews and Roma in German-occupied Europe, and thanks to the lobbying of international lawyers, the UN General Assembly voted to pass the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.[93] The Genocide Convention criminalized its namesake act[94] and provided that responsibility for enforcing the treaty would lie with "a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have juris-

90. As William Schabas's telling of the prehistory of the ICC indicates, sometimes international consensus on the immorality of an act is just beginning to develop at the moment international criminal prosecution becomes possible. This was true at the end of World War I, where the Allied Powers included in the Treaty of Versailles the right to try the Kaiser of Germany for an embryonic version of what has since become known as the crime of aggression. *See* SCHABAS, *supra* note 61, at 3. At other times, inscription in international criminal law caps a process of evolution whereby certain acts have come to seem morally wrong. For example, the 1948 Convention on the Prevention and Punishment of Genocide followed both post-war international moral outrage over the Holocaust and the trial of Nazi officials at Nuremberg for crimes against humanity (but not genocide, which did not yet exist). *See id.* at 5-8.

91. *See* Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397, 1406 (1999) (discussing the operation of "vertical process," by which developments in international law and the discourses surrounding them at the supranational, national, and subnational levels influence obedience of human rights norms at the national level, alongside "horizontal" process, whereby states debate one another at a supranational level).

92. *See* VAHAKN N. DADRIAN, THE HISTORY OF THE ARMENIAN GENOCIDE: ETHNIC CONFLICT FROM THE BALKANS TO ANATOLIA TO THE CAUCASUS, at xix (2003) (noting recognition of the Armenian Genocide by the UN Commission on Human Rights and the European Parliament in 1986 and 1987, respectively).

93. *See* Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, 89 U.N.T.S. 277 [hereinafter Genocide Convention].

94. *Id.* art. I.

diction . . . ."[95] International criminal law in this case helped to cap an initial process of norm formation that began with recognition of a morally outrageous act after an international incident, and progressed with a broad international consensus against that act.

International criminal law again crystallized the norm against genocide in the 1990s, after the genocides in Yugoslavia and Rwanda, which the Genocide Convention notably failed to prevent. Horrified by both conflicts, the UN Security Council passed resolutions establishing the International Criminal Tribunals for Yugoslavia (ICTY) and Rwanda (ICTR) in 1993 and 1994, respectively.[96] Critically, the international criminal norm against genocide in these cases had effects beyond punishment for the perpetrators. The debates over the response to the genocides led to the international policy of "Responsibility to Protect," which, flying in the face of international law's conventional respect for sovereignty,[97] expressly endorses military intervention in a sovereign state as a last resort for preventing or responding to mass atrocities.[98] Embarrassment over the failure to intervene in Yugoslavia and Rwanda also led NATO to intervene in Kosovo—potentially preventing genocide—and led to a temporary increase in humanitarian support in Somalia[99] before U.S. forces withdrew following the notorious Black Hawk Down incident.[100] In those years, international criminal justice served not just as an expression of international support for an existing norm against committing an atrocity. Awareness of the genocides in Rwanda and Yugoslavia and of the ongoing trials at the ICTR and ICTY helped create, along with other forces, a new norm in favor of interven-

95. *Id.* art. VI; *see also* SCHABAS, *supra* note 61, at 8.

96. S.C. Res. 955 (Nov. 8, 1994) (establishing the ICTR); S.C. Res. 827 (May 25, 1993) (establishing the ICTY).

97. This solicitude finds one strong expression in the UN Charter, which outlaws the use of force by one state against another state, subject to certain exceptions. U.N. Charter art. 2(4). While interstate war no doubt can lead to severe atrocities, this principle of nonintervention primarily redounds to the benefit of states—helping to maintain their political and territorial integrity—"with the individual an incidental, indirect beneficiary, and often not a beneficiary at all." Louis Henkin, *Human Rights and State "Sovereignty,"* 25 GA. J. INT'L & COMP. L. 31, 33 (1996).

98. *See* STRAUS, *supra* note 89, at 121-22.

99. Office of the Historian, *Somalia, 1992-1993*, U.S. DEP'T ST., http://history.state.gov/milestones/1993-2000/somalia [http://perma.cc/6MRC-TQ2Z].

100. *See generally* MARK BOWDEN, BLACK HAWK DOWN: A STORY OF MODERN WAR (1999) (recounting U.S. involvement in Somalia and the crash of a Black Hawk helicopter leading to the death of seventeen Marines during the Battle of Mogadishu on October 3, 1993).

tion in cases of mass atrocities, and led to concrete policy decisions in Kosovo and Somalia.[101]

The failure to make use of the prohibition on gender-based persecution, then, is not just a failure to hold perpetrators accountable on a retributive theory of justice, which suggests that we punish because a bad actor deserves it.[102] It is also tantamount to a failure of the international system to signal its disapproval of gender-based persecution. Of course, there may be other ways of demonstrating disapprobation, such as Security Council declarations or diplomatic conferences. But talk is cheap. International prosecutions can require coming to a difficult consensus. Indeed, the very challenges that impede international prosecution can amplify their signaling effect. Because of these signaling costs, international prosecution sends a stronger message about shared human values and priorities. As a result, international criminal prosecution can play a stronger role in the norm evolution and crystallization process.[103]

---

101. Responsibility to Protect, also known as R2P, can be viewed as the ex ante side of the norm against genocide and other mass atrocities (ideally, it prevents bad things from getting worse), whereas international criminal law operates ex post (it can only punish things that already have happened). Of course, punishment may have a deterrent effect and intervention may come too late. *See* STRAUS, *supra* note 89, at 118-19 (noting that international criminal case law, among other sources of international humanitarian law, "create[s] the foundation for the theory and practice of atrocity prevention," including the policy of R2P, and mentioning Yugoslavia and Rwanda as motivations for the development of R2P). Of course, as one might expect of a new norm of international law contravening centuries of historical deference to state sovereignty, both R2P itself and its stability as a norm have been the subject of some debate. *See, e.g.*, Cristina G. Badescu & Linnea Bergholm, *The Responsibility To Protect and the Conflict in Darfur: The Big Let-Down*, 40 SECURITY DIALOGUE 287, 289-90 (2009) (discussing the failure to intervene in the genocide in Darfur as indicative of "challenges" to implementing the norm of R2P); Mark Kersten, *The Responsibility To Protect Doctrine Is Faltering. Here's Why.*, WASH. POST. (Dec. 8, 2015), http://www.washingtonpost.com/news/monkey-cage/wp/2015/12/08/the-responsibility-to-protect-doctrine-is-failing-heres-why [http://perma.cc/VB5A-4DQC] (noting inconsistencies between the initial elaboration and the subsequent application of R2P). *But see* Alex J. Bellamy, *The Responsibility To Protect Turns Ten*, 29 ETHICS & INT'L AFF. 161, 161 n.2 (2015) ("[E]vidence of [state] practice suggests that [R2P] itself has become significantly less controversial. The 'growing controversy' view rests almost entirely on the conflation of [R2P] with the debate over intervention in Libya."); Philipp Rotmann et al., *Major Powers and the Contested Evolution of a Responsibility To Protect*, 14 CONFLICT SECURITY & DEV. 355 (2014) (noting both the growing sympathy of non-Western powers to R2P and the role of the highly contested Libya debate in reopening questions about the norm).

102. *See generally* Alexander K.A. Greenawalt, *International Criminal Law for Retributivists*, 35 U. PA. J. INT'L L. 969 (2014).

103. This notion is consistent with Harold Koh's theory of norm internalization in international law, in which states absorb international norms and incorporate them into domestic law and policy under pressure from a mix of actors at both the supranational and subnational levels,

C. *The Insufficiency of Current Charges at the ICC*

As the previous Section details, there is a strong positive case for charging gender-based persecution against Islamic State members for atrocities committed against Yazidi women. International criminal law can help solidify a norm against gender-based persecution and signal international willingness to mobilize against it. This Section deals with the negative case: the reasons that the current protocol for charging crimes at international courts cannot adequately deal with cases that show potential patterns of gender-based persecution in general, or with the atrocities against Yazidi women in particular. Where ethnic violence also displays patterns of gender-based targeting, international criminal tribunals have tended to subsume potential acts of gender-based persecution under genocide, charging these acts as simply components of the overall crime of genocide.[104] Unfortunately, the failure to recognize the particular bias at work in a pattern of gender-based targeting that, in turn, accompanies patterns of political or ethnic targeting is tantamount to a failure to fully recognize the harm that intersectional persecution does to its victims.

1. *Current Theoretical Insufficiencies*

In the domestic context it seems obvious: victims of hate crimes can be victimized for multiple reasons. Say a gay man of color were mugged by a group of assailants, and bystanders heard the man's attackers yell slurs about both his race and sexual orientation. In evaluating whether the act was a hate crime, would we only take into account evidence that the perpetrators attacked the man because of his race? On the contrary, in a jurisdiction where LGBTQ people are a protected class,[105] and in the presence of appropriate evidence to make out the intent requirement, a prosecutor likely would present evidence that the victim had been subject to a hate crime on the basis of his intersecting identities—not just because of his race, and not just because of his sexuality. The

including NGOs, civil society organizations, international institutions, and other states. *See* Koh, *supra* note 91, at 1413-14. Presumably, the stronger a signal the international community sends that a certain act is unacceptable, the greater the pressure on states not to commit that act.

104. *See infra* Section II.C.1.

105. *See* JAMES B. JACOBS & KIMBERLY POTTER, HATE CRIMES: CRIMINAL LAW AND IDENTITY POLITICS 29-44 (2000).

perpetrators chose him because he was gay, because he was a person of color, and because he was gay *and* a person of color.[106]

Unfortunately, the two dominant working theories regarding the role gender-based targeting plays in conflict appear to erase the important intuition that the criminal law ought to recognize intersectionality. Indeed, neither of the two theories, which stem from previous international prosecutions and radical feminist[107] legal scholarship, provides a strong rationale for devoting resources to prosecuting gender-based persecution in international criminal law. As to the first theory, in previous cases of genocide that also showed evidence of gender-based targeting (such as the genocide in Rwanda), courts and prosecutors explained the differential treatment of women and men as a component of the overall crime of genocide—a tactic in service of a strategic plan to harm a particular ethnic group.[108] The crime of "genocidal rape" is paradigmatic[109]: women are raped as part of an overall plan to exterminate an ethnic group by forcing them to bear the children of their persecutors rather than children of their

106. *See generally* Crenshaw, *supra* note 18 (conceptualizing intersectional discrimination as biased behavior against each of the constituent groups plus biased behavior against the group at the intersection of both identities).

107. I use the term "radical feminist" here not as a pejorative—perhaps the most common way it is currently used—but to refer specifically to the radical feminist movement in gender theory, which had its major flowering roughly from the 1960s to the 1970s. Radical feminism consciously defined itself in opposition to the dominant reformist feminism that advocated around issues like equal work for equal pay. Different strands of radical feminism tackled issues as diverse as liberating women from the work of bearing children through the use of cybernetic technology and emphasizing the perspectives of lesbians and women of color who had been shut out of the dominant feminist movement. For one history of the movement, see ALICE ECHOLS, DARING TO BE BAD: RADICAL FEMINISM IN AMERICA, 1967-1975 (1989). Though obviously many of the developments in international criminal law that this Note discusses date to after the radical feminist movement per se, the analytic framework used by many feminists with respect to wartime atrocities closely parallels a Marxian-inflected strain within radical feminism that positions women as an underclass that is systematically subjugated by a dominant class of men via pervasive and therefore invisible techniques of social control. *See, e.g.*, SHULAMITH FIRESTONE, THE DIALECTIC OF SEX: THE CASE FOR FEMINIST REVOLUTION 81-85 (1970) (positing that reproduction via female impregnation is systematically used to subjugate women).

108. *See, e.g.*, Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment ¶ 507 (Sept. 2, 1998) ("In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group . . . ."); Sherrie L. Russell-Brown, *Rape as an Act of Genocide*, 21 BERKELEY J. INT'L L. 350, 352 (2003) ("[T]he Rwandan Tribunal acknowledged that it viewed rape not as sexual in nature but as a tool of war, as a violent act perpetrated against a member of a group with the intent of destroying that group.").

109. *See* MacKinnon, *supra* note 81, at 1026-28.

own ethnicity.[110] The intent in the end has nothing to do with gender, but with ethnicity. For some international courts and commentators, then, gender is invisible, so that apparent patterns of singling out one gender for persecution must purely be in service of a broader goal to, for instance, prevent an ethnic group from reproducing.[111]

On the other hand, the radical feminist position implies that patriarchal structures are so pervasive, in every culture and at every time, that extreme forms of violence against women (and only women) during periods of instability are no aberration. Such acts are merely the logical outgrowth of pervasive misogyny in a context of violent ethnic conflict.[112] Abuses in wartime may be

---

110. *See, e.g.*, Siobhán K. Fisher, Note, *Occupation of the Womb: Forced Impregnation as Genocide*, 46 DUKE L.J. 91, 92-94 (1996).

111. *See, e.g.*, BEVERLY ALLEN, RAPE WARFARE: THE HIDDEN GENOCIDE IN BOSNIA-HERZEGOVINA AND CROATIA (1996); Katherine M. Franke, *Putting Sex To Work*, 75 DENV. U. L. REV. 1139, 1170-77 (1998) (detailing recent international criminal adjudications that have treated rape as a variant or component of other crimes, like torture and genocide). I do not argue that such rapes have no genocidal intent, but rather that they should be understood as motivated not just by ethnic hatred but also by gender bias. Moreover, this literature, with its narrow focus on rape as a means of forced impregnation or on sterilization, ignores the other forms of aggression to which both women and men may be subject on a gender-differentiated basis in armed conflict, including domestic slavery and sex-selective execution. It thus cannot be a comprehensive explanation for the ways that gender and ethnicity or other group identities intersect in conflict.

112. For variations on the view that violence against women during conflict or protracted crises exists on a continuum also including domestic and intimate violence, see, for example, Rhonda Copelon, *Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law*, 5 HASTINGS WOMEN'S L.J. 243, 247 (1994), which states that "[w]e must critically examine the claim that rape as a tool of 'ethnic cleansing' is unique, worse than or not comparable to other forms of rape in war or in peace." As Copelon explains, "This combination of the particular and the general is critical if the horrors experienced by women in Bosnia are to be fully understood and if that experience is to have meaning for women brutalized in less-known theaters of war or in the byways of daily life." *Id. See also* Catharine A. MacKinnon, *Rape, Genocide, and Women's Human Rights*, 17 HARV. WOMEN'S L.J. 5, 5-9 (1994) (discussing how together mass rape during the Bosnian Genocide and domestic and intimate violence against women in peacetime contexts violate women's human rights and notes that "the fact of Serbian aggression is beyond question, just as the fact of male aggression against women is beyond question, both here and in everyday life . . . . These rapes are to everyday rape what the Holocaust was to everyday anti-Semitism"). Such perspectives tend to emphasize the supposed universality of rape in conflict, presenting it as a necessary concomitant of war. *See, e.g.*, *Making Female Bodies the Battlefield*, NEWSWEEK (Jan. 4, 1993, 7:00 PM), http://www.newsweek.com/making-female-bodies-battlefield-192076 [http://perma.cc/6LWR-FFVT] ("Women are raped in war by ordinary youths as casually, or as frenetically, as a village is looted or gratuitously destroyed. Sexual trespass on the enemy's women is one of the satisfactions of conquest, like a boot in the face, for once he is handed a rifle and told to kill, the soldier becomes an adrenaline-rushed young man with permission

different in magnitude from those in peacetime, but not in kind.[113] This radical feminist tradition bears Marxism's imprimatur: it equates different forms of violence against women by analyzing them as products of the same patriarchal social structures, which, the argument goes, are designed to keep women in line by arbitrarily inflicting violence or other physical restraints on them.[114] This analysis intuitively leads to the conclusion that a legal remedy, international or otherwise, cannot solve the underlying problem. If pervasive and universal social structures are responsible for wartime persecution of women as well as peacetime domestic violence, then only wholesale subversion or overthrow of those structures can deal with the issue. Specifically singling out the treatment of women in a handful of armed conflicts not only loses meaning, but may be counterproductive.

Whichever of these perspectives one adopts, a charge of gender-based persecution is stripped of its significance. From both points of view, we lose any sense that gender-based targeting in a conflict is distinctly morally blameworthy, or that pursuing international prosecutions of gendered crimes has much value. Placed within the framework of a more totalizing evil—in the first view, genocide, and in the second, pervasive misogyny—the crime loses its significance as a discrete harm that international criminal law should directly and effectively address. Gender-based targeting of civilians is either a means to the end of genocide, or morally and causally no different than peacetime violence against women. In the context of an international legal order that *does* recognize other forms of identity-based persecution as distinctly morally blameworthy, however, failing to recognize gender-based persecution as such has the effect of making it seem somehow *lesser*.

Both perspectives, if adopted, also lead to a legal response that neglects the motivations behind the differential treatment that people of different genders receive in some (but not all) armed conflicts, and the magnitude of the moral horror of such treatment. This is not only counterintuitive, but empirically unfounded. Researchers have found that perpetrators of gender-based violence in some conflicts treat victims differentially because of their intersecting identi-

to kick in the door, to grab, to steal, to give vent to his submerged rage against all women who belong to other men. Sexual sadism arises with astonishing rapidity in ground warfare, when the penis becomes justified as a weapon in a logistical reality of unarmed noncombatants, encircled and trapped."). Scholars including Elisabeth Wood have debunked this idea with powerful evidence. *See* Elisabeth Jean Wood, *Armed Groups and Sexual Violence: When Is Wartime Rape Rare?*, 37 POL. & SOC'Y 131 (2009).

113. *See* MacKinnon, *supra* note 112, at 6.

114. For a sense of the interplay between Marxism and this variation of radical feminist theory, in the context of an attempt to synthesize Marxism and feminism, see CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 1-80 (1989).

ties. Beyond the case of Islamic State, for instance, the Interahamwe in Rwanda systematically executed Tutsi men, boys, and even male infants during the genocide, but did not systematically execute women and girls.[115] Differential treatment here resulted from the victims' intersecting identities as Tutsis and as males, as well as the perception, based in gender stereotypes about male tendencies toward violence and score-settling, that any Tutsi male left alive could grow up to avenge his relatives' deaths.[116] The perceived threat was firmly rooted in gender roles, not in individual behavior: the *génocidaires* removed diapers from babies so that they could determine "which were boys to be killed."[117] A gender-neutral perspective, the one that most international courts have taken, presents only half the story: taking such a perspective, it is difficult to see how killing all Tutsi men, but not all Tutsi women, more effectively accomplished the goals of the *génocidaires* than killing all Tutsis regardless of gender. Neglecting the role that gender bias plays as it intersects with ethnic, political, or religious bias compromises the explanatory power of the gender-neutral perspective.

The same analysis applies to crimes against the Yazidi people. Ethnicity alone cannot explain why Yazidi men are driven out of Islamic State-controlled areas or summarily killed, while women are kept in protracted situations of torture and enslavement, in some cases before suffering a violent death.[118] One Yazidi victim reported that her male relatives were taken away while she was held for seven months.[119] Reflecting on the disparate treatment, she told a reporter, "It's better that they are dead and not in prisons with these people. Even

---

115. *See* Carpenter, *supra* note 78, at 89; *see also* Adam Jones, *Gender and Genocide in Rwanda*, 4 J. GENOCIDE RES. 65, 65 (2002).

116. *See* Carpenter, *supra* note 78, at 88 ("The singling out of men for execution has now been documented in dozens of ongoing conflicts worldwide . . . . [M]ilitary-age men and adolescent boys are assumed to be 'potential' combatants . . . . [T]hese patterns of sex-selective violence are gender-based, because they are rooted in assumptions about male wartime roles . . . ."); Jones, *supra* note 115, at 73 ("[The] opening blast of the [Rwandan] genocide was accompanied by an injunction not to repeat the 'mistake' of the 1959 revolution, when male children had been spared only to return as guerilla fighters.").

117. Carpenter, *supra* note 78, at 90.

118. *See, e.g.*, Reinl, *supra* note 44 (interviewing the UN Envoy on Sexual Violence in Conflict on Islamic State crimes, including reports that members burned a woman alive "because she refused to perform an extreme sex act").

119. Kayleigh Lewis, *Yazidi Woman Held as Isis Sex Slave 'Abused Every Day' for Seven Months*, INDEPENDENT (Mar. 14, 2016), http://www.independent.co.uk/news/world/middle-east/yazidi-woman-isis-sex-slave-islamic-state-jihadist-a6930251.html [http://perma.cc/SN5U-7AYY].

us, we were just wishing to die rather than stay with such people."[120] The groups *share* an ethnicity but are treated differently. It is notable that Islamic State does not appear to enslave Yazidi men[121] and that the "bureaucracy of rape"[122] that news reports describe does not include non-Yazidi women.[123] In other words, the treatment that Yazidi women suffer appears to be a product of the intersection of their ethnicity and their gender. Chalking up this differential treatment purely to an effort to produce, for instance, Sunni Muslim children (besides the fact that this may not be true[124]) ignores the possibility that an atrocity can have more than one motivation.

That said, the same empirical evidence that undermines the gender-neutral approach to international atrocities also undermines the radical feminist approach: armed groups do not always treat different genders differently in ethnic, political, or religious conflicts. According to the radical feminist approach, we should expect misogynistic violence in all cases of ethnic conflict, just as it is supposedly universal in peacetime contexts. But this is far from the case. For instance, there is little evidence that members of the Liberation Tigers of Tamil Eelam have committed gender-based violence during their protracted conflict with the government of Sri Lanka.[125] Similarly, the ongoing conflict between Israelis and Palestinians centers on ethnicity alone. Little evidence of gender-based violence has emerged.[126] Thus, because gender-based violence does not appear to be as pervasive as some radical feminist scholars suggest, there appears to be a morally significant distinction between contexts where gendered brutality does appear and contexts where it does not. Radical feminists, in insisting that violence against women (and only women) is universal and perva-

---

120. *Id.*

121. *See, e.g.*, Reinl, *supra* note 44 (mentioning the systematic execution of Yazidi men and boys).

122. *See, e.g.*, Nussaibah Younis, *How Isis Has Established a Bureaucracy of Rape*, GUARDIAN (Aug. 15, 2015, 7:03 PM), http://www.theguardian.com/commentisfree/2015/aug/16/isis-systematic-rape-sharia-justification-sex-slavery [http://perma.cc/V43J-7YZN].

123. Islamic State's article about slavery in *Dabiq* focuses particularly on the justification for enslaving Yazidi women and notes that women from certain other religious groups may not be enslaved under Shariah, but only "given an ultimatum to repent or face the sword." *The Revival of Slavery Before the Hour*, *supra* note 53, at 15 & n.1.

124. *Cf.* Lynda E. Boose, *Crossing the River Drina: Bosnian Rape Camps, Turkish Impalement, and Serb Cultural Memory*, 28 SIGNS 71, 74 (2002) ("[A]lthough increasing the numbers of a putatively threatened Serb population . . . may likewise have played some role in the mass rape of Bosniak women, there were far too many women killed immediately after being raped . . . for the production of Serb babies to work as a likely rationale.").

125. *See* Wood, *supra* note 112, at 134.

126. *See id.* at 133.

sive, fail to cognize this distinction, just as they fail to cognize potential instances of gender-based persecution of men.

2. *The Need for a Composite Crime*

For the reasons stated above, the crimes of genocide and ethnic persecution could not, charged by themselves, fully encompass the crimes committed against Yazidi women in this case—or against Bosnian women in the former Yugoslavia or Tutsi men in Rwanda. Widely differential treatment of individuals of the same ethnicity suggests that an additional gender animus gives rise to the treatment suffered by particular groups, while the inconsistent appearance of gender-based targeting across conflicts suggests that this gender animus is present in some contexts but not in others. This evidence suggests that the gender-specific persecution that appears in these historical examples cannot be attributed just to ethnic hatred or to pervasive misogyny. Instead, it is the intersection of ethnic background with gender that produces particularly grievous harms.

Nonetheless, one might ask why crimes that display a pattern of gender targeting should be charged under the rubric of gender-based persecution when all of the crimes alleged against Islamic State in this situation could alternately be charged as individual crimes under the Rome Statute. Would it really be inadequate to recognize the issues at stake here by charging one individual with, for instance, several dozen rapes or acts of enslavement? Why should we charge gender-based persecution?

To understand the inadequacy of charging individual crimes, consider again the crime of genocide. Genocide—in some ways the paradigmatic international crime, given the historical development of international criminal justice[127]—is itself a composite crime, the individual elements of which could be charged separately as war crimes or crimes against humanity under the Rome Statute.[128] Article 6 of the Rome Statute says that the following individual crimes constitute elements of genocide: killing members of a national, ethnic, racial, or religious group;[129] inflicting on them "serious bodily or mental harm";[130] impeding the group's fertility;[131] "transferring children of the group

127. *See generally* SCHABAS, *supra* note 66, at 17-58 (detailing the parallel development of international criminal law in general and the crime of genocide in particular).

128. *See* Rome Statute, *supra* note 10, arts. 7, 8.

129. *Id.* art. 6(a).

130. *Id.* art. 6(b).

131. *Id.* art. 6(d).

to another group";[132] and "[d]eliberately inflicting on the group conditions of life calculated to bring about [the group's] physical destruction in whole or in part."[133]

All of these acts can also be charged as individual crimes under the Rome Statute's crimes against humanity and war crimes provisions. Both statutory provisions prohibit murder (or, in the case of the war crimes provision, "[w]ilful killing").[134] The crimes against humanity provision of the Rome Statute prohibits intentionally inflicting serious bodily or mental harm;[135] "enforced sterilization,"[136] which is comparable to the crime of impeding fertility; and "forcible transfer of population,"[137] which could be used to charge the transfer of children mentioned in Article 6.[138] The only element of the statute without a clear analog is the Article 6 "conditions of life" provision;[139] even so, many acts that could be characterized this way are covered by other elements of the statute, for instance the crimes against humanity provision covering "other inhumane acts . . . intentionally causing great suffering, or serious injury to body or to mental or physical health."[140]

Raphael Lemkin, the Jewish legal academic who lobbied furiously for the passage of the 1948 Genocide Convention,[141] best articulated the justification for maintaining genocide as an additional, composite charge. Acknowledging that genocide "consists of acts which are themselves punishable by most existing legislation," like killing or false imprisonment, "[t]he main task" in enabling national courts to prosecute genocide is "to redraft existing provisions . . . based upon the specific criminal intent to destroy entire human groups."[142] This "specific intent," or *dolus specialis*, characterizes not just geno-

132. *Id.* art. 6(e).

133. *Id.* art. 6(c).

134. *Id.* arts. 7(1)(a), 8(2)(a)(i).

135. *Id.* art. 7(1)(k).

136. *Id.* art. 7(1)(g).

137. *Id.* art. 7(1)(d).

138. *Id.* art. 6(e).

139. *Id.* art. 6(c).

140. *Id.* art. 7(1)(k). For more on the broad crime of "other inhumane acts" in the context of an international criminal tribunal, see Augustine S.J. Park, *'Other Inhumane Acts': Forced Marriage, Girl Soldiers and the Special Court for Sierra Leone*, 15 SOC. & LEG. STUD. 315, 327-30 (2006), which discusses the use of the "other inhumane acts" provision of the Statute of the Special Court of Sierra Leone to charge forced marriage.

141. *See* SCHABAS, *supra* note 66, at 28-29.

142. Raphael Lemkin, *Genocide as a Crime Under International Law*, 41 AM. J. INT'L L. 145, 150-51 (1947).

cide, but also the perhaps less totalizing crimes of political and ethnic persecution. It recognizes that there is a distinctive harm where bias against a particular social group spills over into violence aimed at destroying, degrading, or prostrating that group.[143]

Similarly, where a bias against one gender catalyzes a pattern of extreme violence against that gender, we may also say that this "special intent" exists. Gender is not fundamentally different from race, ethnicity, political belief, or religion. Like those other facets of identity, it creates distinct (and often publicly recognizable) groups of people within a single society. Moreover, unlike a favorite color or sports team preference, most people consider it to be a fundamental feature of identity, so that punishing people for having a particular gender would impose intolerable constraints on individuals and impoverish otherwise diverse societies. If gender or gender expression are fundamental characteristics of identity rather than peripheral ones, they should be treated like other fundamental characteristics of identity, such as ethnicity and religion.

Assuming this is the case, there is no coherent reason to ignore a specific intent to target individuals on the basis of gender—where there is evidence of this intent—and yet to take such intent into account with respect to ethnicity or political belief. Because women in many countries suffer violence and discrimination on the basis of their gender,[144] it may be tempting to argue that instances of gender-based persecution are merely cases of ordinary cultural bias that happen to manifest in violence. By that logic, punishing such acts under international criminal law may create a slippery slope toward prosecuting common differential social treatment.[145] Prosecuting such common differential social treatment in an international criminal forum, in turn, would violate principles of state sovereignty and likely be seen as an overreach for the ICC, which is designed to prosecute a handful of very grave and necessarily uncommon crimes.[146]

---

143. *See* SCHABAS, *supra* note 66, at 242 (discussing the Rome Statute's mens rea requirement for "serious international crimes, including genocide").

144. *See* Charlotte Watts & Cathy Zimmerman, *Violence Against Women: Global Scope and Magnitude*, 359 LANCET 1232 (2002); Lori L. Heise et al., *Violence Against Women: The Hidden Health Burden* (World Bank, Discussion Paper No. 255, 1994), http://documents.worldbank.org/curated/en/489381468740165817/pdf/multiopage.pdf [http://perma.cc/HY2T-QJ3D].

145. Similar arguments have surfaced in the context of refugee law. Proponents of granting asylum to individuals facing persecution on the basis of gender fought a perception that such a measure would open a "floodgate" of abused women coming to the United States. *See, e.g.*, Mattie L. Stevens, *Recognizing Gender-Specific Persecution: A Proposal To Add Gender as a Sixth Refugee Category*, 3 CORNELL J.L. & PUB. POL'Y 179, 215-16 (1993).

146. *See supra* notes 62-67 and accompanying text.

But in practice, the ICC is more than capable of drawing the required lines. In fact, the same argument could have been made against the ICC prosecuting crimes involving persecution of minority ethnic, religious, or political groups. Yet in all those cases, the ICC chose not to prosecute common differential social treatment precisely because of the court's focus on grave crimes. For instance, many (if not most) societies also engage in practices that suggest "ordinary" bias against minority ethnic, religious, or political groups, without spilling over into widespread, violent purging of these groups. For instance, Uighurs in China, Jews and African immigrants in Russia, and Muslim Americans in the United States have all faced recent hostility, discrimination, and sporadic violence that is deplorable but does not come close to the level of genocide.[147] None of these countries have been investigated by the ICC on the basis of bias against racial, ethnic, or religious minorities. Indeed, such an investigation would strain the institution's credibility.

Genocide and gender-based persecution both recognize that where bias intersects with and spurs widespread, systematic, and grave crimes on the order of murder and torture, the result is particularly destructive and morally blameworthy. Both genocide and gender-based persecution require us to draw lines between courses of tolerable and criminal conduct based on severity. Fortunately, the fact that the Prosecutor of the ICC has been able to successfully charge genocide shows that such line-drawing is possible.[148]

---

147. *See, e.g.*, Andrew Jacobs, *Uighurs in China Say Bias Is Growing*, N.Y. TIMES (Oct. 7, 2013), http://www.nytimes.com/2013/10/08/world/asia/uighurs-in-china-say-bias-is-growing.html [http://perma.cc/R8M4-BKDG]; Eric Lichtblau, *Hate Crimes Against Muslims Most Since Post-9/11 Era*, N.Y. TIMES (Sept. 17, 2016), http://www.nytimes.com/2016/09/18/us/politics/hate-crimes-american-muslims-rise.html [http://perma.cc/F9WZ-SPTN]; *Playing a Dangerous Game*, ECONOMIST (May 11, 2006), http://www.economist.com/node/6916041 [http://perma.cc/6V3K-N97Z].

148. The Prosecutor has charged President Omar al-Bashir of Sudan with genocide for his role in masterminding systematic attacks on the ethnic Fur people of Darfur. *See* Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Warrant of Arrest for Omar Hassan Ahmad Al Bashir (Mar. 4, 2009), http://www.icc-cpi.int/CourtRecords/CR2009_01514.pdf [http://perma.cc/NKX9-RCZG]. Unfortunately, Bashir so far has evaded arrest by mostly remaining in his own country or only traveling regionally to other African countries that are skeptical of the ICC, illustrating one problem with the Court's capabilities. *See* Norimitsu Onishi, *Bid by Omar al-Bashir of Sudan To Avoid Arrest Is Tested in South Africa*, N.Y. TIMES (June 14, 2015), http://www.nytimes.com/2015/06/15/world/africa/bashir-sudan-international-criminal-court-south-africa.html [http://perma.cc/58WF-PWT2]. Part of the problem in garnering recognition for gender-based persecution may be that, in many societies, regular physical violence against women is so entrenched (in the form of domestic violence) that we see it as ordinary. Extreme wartime violence against women might therefore appear to be a "mere" outgrowth of this peacetime conduct, rather than a manifestation of condemnable bias against a particular group.

III. CHARGING GENDER-BASED PERSECUTION UNDER THE ROME STATUTE: THE ELEMENTS OF A CASE

If successfully charging gender-based persecution is essential to forming a norm against it in international law, then finding the right case is critical. The case of the Yazidi women is not just a paradigmatic example of gender-based persecution but may also be the perfect test case to begin to recognize the crime. While the lack of an international norm against gender-based targeting may have allowed their treatment to continue despite an outcry, a successful prosecution of their case at the ICC could bring justice not only to them, but to future victims of gender-based persecution. This Part argues that Islamic State's treatment of Yazidi women presents a paradigmatic case of gender-based persecution. Moreover, because there appears to be a strong body of evidence supporting potential charges, it presents a unique opportunity to give content to the elements of the crime for use in future cases.

A. Threshold Questions: Procedural Matters and Individual Criminal Liability

While this Note primarily addresses the feasibility of charging gender-based persecution within an ongoing prosecution of Islamic State, one should nonetheless be aware of the procedural and other substantive criminal components of the broader case. Below, I sketch how the Prosecutor of the ICC could prove two important procedural elements of any criminal prosecution against Islamic State—jurisdiction and admissibility—as well as the challenges she would face in doing so. It also outlines how the Prosecutor might go about fulfilling the substantive requirement of individual criminal responsibility that applies in every ICC case. As the situation in Syria and Iraq stands today,[149] the Prosecutor would face serious jurisdictional hurdles to prosecuting the top leadership of Islamic State, including Baghdadi and his direct lieutenants, not just for this crime but also for other atrocities. However, with the cooperation of states that are friendly to the court, she has a reasonable chance of successfully charging certain midlevel figures with gender-based persecution, as well as other crimes.

149. Many commentators expect that at least a handful of the perpetrators of war crimes in Syria will eventually face some kind of trial. *See, e.g.*, Marlise Simmons, *Veteran International Prosecutor Foresees War Crimes Trials for ISIS*, N.Y. TIMES (Dec. 26, 2015), http://www.nytimes.com/2015/12/27/world/europe/veteran-international-prosecutor-foresees-war-crimes-trials-for-isis.html [http://perma.cc/95D9-CPFG]. As both the situation on the ground and geopolitical alignments shift, avenues to ICC jurisdiction that once seemed foreclosed may open up again.

1. *Jurisdiction*

An important but complex question at the start of this analysis is whether the ICC could obtain territorial jurisdiction over Islamic State, which operates primarily within the territory of Syria and Iraq. A thorough evaluation of the ways the ICC might or might not be able to obtain territorial jurisdiction over Islamic State would be a separate project. Commentators have already opined on both sides of the argument and the answer remains far from clear.[150] Nonetheless, I provide a brief overview of the paths by which the ICC might be able to secure jurisdiction. The ICC's jurisdiction depends heavily on diplomatic developments[151] and is thus quite fluid. There is therefore a reasonable chance that at some point, geopolitical alignments and interests will change and jurisdiction over major Islamic State figures will become easier to secure.

The ICC can obtain territorial jurisdiction over an individual or a situation in four ways: (1) where the acts occur on the territory of a country that has rat-

150. The consensus view seems to be that jurisdiction over some members of Islamic State is possible as things currently stand at the ICC with a piecemeal approach, but that jurisdiction over major figures like Baghdadi is more complicated. It is clear that the ICC has jurisdiction over some foreign fighters under Article 12(2)(b) of the Rome Statute. *See* Kai Ambos, *The New Enemy of Mankind: The Jurisdiction of the ICC over Members of the "Islamic State,"* EJIL (Nov. 26, 2015), http://www.ejiltalk.org/the-new-enemy-of-mankind-the-jurisdiction-of-the-icc-over-members-of-islamic-state [http://perma.cc/9GXH-6CUZ]. Jurisdiction over Islamic State's Syrian and Iraqi inner circle is a more fraught issue, since neither Syria nor Iraq is a member of the ICC. One possibility for jurisdiction over these figures is to use the ICC's open file on the situation in Libya—where Islamic State at one point controlled territory, and where some of its attacks on civilians have occurred—to exercise jurisdiction over top leaders not in that territory, based on the fact that some element of the crimes charged would have occurred on a territory where there is jurisdiction. *See id.* On the pessimistic end of the spectrum, Beth Van Schaack has suggested that an international criminal prosecution against Islamic State may not be possible without the establishment of an ad hoc tribunal. Beth van Schaack, *Mapping War Crimes in Syria*, 92 INT'L L. STUD. 282, 332-37 (2016). I discuss other views later in this Section.

151. Jurisdiction at the ICC works very differently than in a U.S. domestic court. To take just one example, the Security Council may vote to refer cases to the ICC. *See infra* notes 154, 161-164. Currently, Russia and China seem resolute in their intention to veto an inquiry into Syria. *See infra* note 161. However, a referral of the situation in Darfur emerged from the Security Council in 2005 after extensive negotiations and despite the initial hostility of the United States to the idea. *See generally* Matthias Neuner, *The Darfur Referral of the Security Council and the Scope of the Jurisdiction of the International Criminal Court*, 8 Y.B. INT'L HUMANITARIAN L. 320 (2005) (discussing negotiation processes). A consensus that may not exist now may become possible after negotiations and after conditions on the ground change in Syria.

ified the Rome Statute;[152] (2) where the perpetrators are citizens of Rome Statute countries;[153] (3) by resolution of the UN Security Council;[154] and (4) where a non-State Party accepts jurisdiction.[155] In this case, the first option is inapplicable because neither Syria nor Iraq, the locations of the Yazidi abuses, are members of the Court.[156]

This leaves three options for obtaining territorial jurisdiction. First, either Syria or Iraq could accept the jurisdiction of the ICC at some point in the future without ratifying the Rome Statute. Prosecution of the gender-based crimes detailed in this Note might then be possible if the countries were to choose to allow jurisdiction to apply retrospectively.[157] Unfortunately this is unlikely, if not impossible, as long as Bashar al-Assad is in power, since the consent of Syria would also subject Assad to possible investigation and prosecution. However, if Syria were partitioned, the ICC could gain jurisdiction to investigate crimes in at least part of the territory.[158] Gaining jurisdiction in Iraq is similarly complicated, since neither its government nor any other will necessarily be able to control the course of the investigation once opened. The leaders of Iraq may be uncooperative given recent violence stemming from sectari-

152. Rome Statute, *supra* note 10, arts. 13(a), 13(c); *see The States Parties to the Rome Statute*, INT'L CRIM. CT., http://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx [http://perma.cc/4N9R-J9TP].

153. Rome Statute, *supra* note 10, art. 12(2)(b).

154. *Id.* art. 13(b).

155. *Id.* art. 12(3); *see also How the Court Works*, INT'L CRIM. CT., http://www.icc-cpi.int/about/how-the-court-works [http://perma.cc/RJ2M-FJ4H]. Prosecutor Bensouda previously has stated that she cannot open an investigation without a Security Council referral because Syria and Iraq are not parties to the Rome Statute. *See* Thomas Escritt, *ICC Prosecutor: Slim Chance of IS Leaders Facing War Crimes Inquiry*, REUTERS (Apr. 8, 2015, 10:12 AM), http://www.reuters.com/article/us-mideast-crisis-icc-idUSKBN0MZ18120150408 [http://perma.cc/G6M3-JFM5]. However, the ICC can also exercise jurisdiction over nationals of countries that have ratified the Rome Statute.

156. *See The States Parties to the Rome Statute*, *supra* note 152.

157. *See* Rome Statute, *supra* note 10, art. 12(3); Kevin Jon Heller, *Yes, Palestine Could Accept the ICC's Jurisdiction Retroactively*, OPINIO JURIS (Nov. 29, 2012, 9:32 PM), http://opiniojuris.org/2012/11/29/yes-palestine-could-accept-the-iccs-jurisdiction-retroactively [http://perma.cc/JY9K-24LG].

158. *See* Patrick Wintour, *John Kerry Says Partition of Syria Could Be Part of "Plan B" if Peace Talks Fail*, GUARDIAN (Feb. 23, 2016, 1:39 PM), http://www.theguardian.com/world/2016/feb/23/john-kerry-partition-syria-peace-talks [http://perma.cc/6PHC-Z629] (noting that parties to the conflict are considering partition as a potential solution to it).

an divisions,[159] while the United States is unlikely to support an investigation that might cover the Iraq War.[160]

Second, the Security Council could refer the case to the ICC. Like retrospective jurisdiction, this strategy, depending on how deployed, might capture much or all of Islamic State's conduct toward Yazidi women. The major hurdle here is Syrian and Chinese opposition, which stems in part from their desire to protect Assad from ICC investigation[161] as well as from their longstanding reluctance to weaken principles of state sovereignty.[162] Commentators have suggested two possible ways around this hurdle (besides lobbying to change attitudes): referring only the situation on Iraqi territory (where Islamic State captured many of the women)[163] and referring Islamic State as an organization.[164]

---

159. *See, e.g.*, Omar Al-Jawoshy & Tim Arango, *Premier Haider al-Abadi, Facing Protests, Proposes Iraqi Government Overhaul*, N.Y. TIMES (Aug. 9, 2015), http://www.nytimes.com/2015/08/10/world/middleeast/iraqs-premier-facing-protests-proposes-government-overhaul.html [http://perma.cc/N97Q-263R]; Rod Nordland & Suadad Al-Salhy, *In Iraq's Sectarian Violence, a Show of Each Side's Worst*, N.Y. TIMES (June 23, 2014), http://www.nytimes.com/2014/06/24/world/middleeast/in-iraqs-sectarian-violence-a-show-of-each-sides-worst.html [http://perma.cc/8JFN-VSZM]. The ICC has opened an investigation in Iraq, but it very narrowly covers the conduct of British forces in that country during the Iraq War from 2003 to 2008. *Preliminary Examination: Iraq/UK*, INT'L CRIM. CT., http://www.icc-cpi.int/iraq [http://perma.cc/J29B-CRCH].

160. Anna Marie Brennan, *Prosecuting ISIL Before the International Criminal Court: Challenges and Obstacles*, AM. SOC'Y INT'L L. (Sept. 17, 2015), http://www.asil.org/insights/volume/19/issue/21/prosecuting-isil-international-criminal-court-challenges-and-obstacles [http://perma.cc/6FRR-HWWF] ("In considering whether to acquiesce to a potential referral [of Iraq to the ICC] the United States may be concerned that a potential investigation by the ICC would also scrutinize its own military operation[s in Iraq].").

161. *See Russia, China Block Security Council Referral of Syria to International Criminal Court*, U.N. NEWS CTR. (May 22, 2014), http://www.un.org/apps/news/story.asp?NewsID=47860 [http://perma.cc/J4TF-W3UX].

162. *See* Ramesh Thakur, *Developing Countries and the Intervention-Sovereignty Debate*, *in* THE UNITED NATIONS AND GLOBAL SECURITY 193 (Richard M. Price & Mark W. Zacher eds., 2004).

163. *See* Bellinger, *supra* note 56; Marlise Simons, *International Criminal Court Says IS Is Out of Its Jurisdiction*, N.Y. TIMES (Apr. 8, 2015), http://www.nytimes.com/2015/04/09/world/middleeast/international-criminal-court-says-isis-is-out-of-its-jurisdiction.html [http://perma.cc/PX75-TWV8] (noting previous attempts to refer Syria to the ICC).

164. Alexandre Skander Galand, *The Situation Concerning the Islamic State: Carte Blanche for the ICC If Security Council Refers?*, EJIL (May 27, 2015), http://www.ejiltalk.org/the-situation-concerning-isis-carte-blanche-for-the-icc-if-the-security-council-refers [http://perma.cc/P8N7-RQN6]; Simons, *supra* note 163.

However, for our purposes, the best immediate hook for jurisdiction may be the ICC's jurisdiction over nationals of countries that have ratified the Rome Statute.[165] Islamic State has an extremely diverse membership by many accounts. Reports detail large numbers of Islamic State fighters hailing from, among other countries, Belgium, Tunisia, and Denmark, all of which are members of the ICC.[166]

This form of jurisdiction would not capture Baghdadi and his inner circle, who are Syrian and Iraqi, but it would at least capture some midlevel Islamic State commanders and allow the Court to establish the elements of the crime of gender-based persecution while winning a measure of justice for Islamic State's most brutalized victims. Chief Prosecutor Fatou Bensouda has previously expressed unwillingness to open a case against members of Islamic State using this jurisdictional principle because, according to her, the ICC is best suited to prosecute only the top leadership of governments or organizations.[167]

However, Bensouda's perspective does not recognize that those high-level individuals, whose roles are attenuated from operations on the ground, are not always more morally blameworthy or culpable than lower-ranking individuals in the same organization. While the leaders of an organization may make policies that permit or encourage crimes, it takes midlevel and lower-level officials to turn those policies into practice by ordering or directly committing crimes. This in itself makes them culpable. So, too, does their greater proximity to victims, with whom they may be more likely to interact than are high-level officials who set organizational policy. In practice, it seems that survivors sometimes blame lower-level perpetrators just as much as the high-level officials who oversaw their persecution. For example, victims' groups participating in the ICC case *Prosecutor v. Simone Gbagbo* recently withdrew from the proceeding, questioning the wisdom of prosecuting a former first lady who had a role in planning election violence without also prosecuting the individuals who actually carried out the crimes.[168]

---

165. *How the Court Works*, *supra* note 155.

166. *See* Peter R. Neumann, *Foreign Fighter Total in Syria/Iraq Now Exceeds 20,000; Surpasses Afghanistan Conflict in the 1980s*, INT'L CTR. FOR STUDY RADICALISATION & POL. VIOLENCE, KING'S C. LONDON (Jan. 26, 2015), http://icsr.info/2015/01/foreign-fighter-total-syria iraq-now-exceeds-20000-surpasses-afghanistan-conflict-1980s [http://perma.cc/4UHE -VKSF].

167. *See* Simons, *supra* note 163.

168. *Simone Gbagbo Goes on Trial Accused of Crimes Against Humanity*, GUARDIAN (May 31, 2015), http://www.theguardian.com/world/2016/may/31/simone-gbagbo-trial-crimes -against-humanity-ivory-coast [http://perma.cc/SHS8-NBYR] ("[One representative of an Ivorian human rights organization] said the trial lacked relevance. He said Gbagbo was 'ac-

Moreover, Bensouda has demonstrated a strong interest in pursuing sexual and gender-based crimes within the jurisdiction of the Court,[169] having recently issued a policy statement on prosecuting such crimes.[170] Given her demonstrated desire to correct for the historical underprosecution of these offenses, and the clear moral culpability of midlevel Islamic State leaders, she would do well to reconsider her stated aversion to prosecuting them. Proceeding against these midlevel officials would give her the opportunity to develop the elements of gender-based persecution with a strong case.[171]

2. *Admissibility*

Once the ICC has established jurisdiction over a given situation, the Prosecutor still faces the hurdle of admissibility. Whether a case will be admissible at the ICC hinges, in turn, on the application of the principle of complementarity.

---

cused of crimes against humanity, something she could have only done through an organized group – so why is only she being judged?'").

169. *See* Fatou Bensouda, *Gender and Sexual Violence Under the Rome Statute*, *in* FROM HUMAN RIGHTS TO INTERNATIONAL CRIMINAL LAW: STUDIES IN HONOUR OF AN AFRICAN JURIST, THE LATE JUDGE LAÏTY KAMA 401 (Emmanuel Decaux et al. eds., 2007).

170. Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*, INT'L CRIM. CT. (2014), http://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf [http://perma.cc/X3TJ-WC79]. Bensouda has stated in interviews that she would like to pursue defendants for such crimes. *Fatou Bensouda on the International Criminal Court and Gender-Based Crimes*, COUNCIL ON FOREIGN REL. (Dec. 10, 2014), http://www.cfr.org/international-law/fatou-bensouda-international-criminal-court-gender-based-crimes/p35829 [http://perma.cc/4WLA-2GFZ].

171. *See ICC Has No Jurisdiction To Prosecute ISIS Despite "Crimes of Unspeakable Cruelty,"* GUARDIAN (Apr. 8, 2015, 10:02 AM), http://www.theguardian.com/law/2015/apr/08/icc-no-jurisdiction-prosecute-isis-despite-crimes-unspeakable-cruelty [http://perma.cc/6M5G-UCET]. At any rate, Bensouda has not always pursued only top-level violators. For example, in August 2016, the Prosecutor secured the ICC's first ever guilty plea from Ahmad al-Faqi al-Mahdi, a Malian religious extremist, for ordering the destruction of cultural heritage during a military campaign by the Islamist militant group Ansar Dine. Al-Mahdi was not top leadership of Ansar Dine, but appears to have been a midlevel official whom Ansar Dine recruited from the local population in 2012 to run its vice squad in Timbuktu, which it had captured at the time. *See* Ruth Maclean, *"I Am Sorry": Islamist Apologises for Destroying Timbuktu Mausoleums*, GUARDIAN (Aug. 22, 2016, 8:32 AM), http://www.theguardian.com/world/2016/aug/22/islamic-extremist-pleads-guilty-at-icc-to-timbuktu-cultural-destruction [http://perma.cc/WTP6-M7K5]; Marlise Simons, *Extremist Pleads Guilty in Hague Court to Destroying Cultural Sites in Timbuktu*, N.Y. TIMES (Aug. 22, 2016), http://www.nytimes.com/2016/08/23/world/europe/ahmed-al-mahdi-hague-trial.html [http://perma.cc/QX5Z-JCAJ]; *see also* Aeyal Gross, *ICC Prosecutor: Low-Ranking Israeli Soldiers, as Well as Palestinians, Could Be Prosecuted for War Crimes*, HAARETZ (May 1, 2015, 3:23 PM), http://www.haaretz.com/israel-news/.premium-1.654516 [http://perma.cc/8FAT-M5RL].

According to this principle, codified at Article 17(1)(a) of the Rome Statute, the ICC may only take cases when the state where the alleged acts occurred, or the nationals of which perpetrated the acts, is "unwilling or unable" to handle the perpetrators through its own criminal justice system.[172]

The application of this principle depends on which theory the ICC uses to obtain jurisdiction. For the purposes of the theory of jurisdiction over nationals – the most immediate path to prosecuting at least some individuals involved in the Yazidi atrocities – the case would be admissible if an ICC-friendly state with Islamic State-member nationals agreed to cede its prosecution to the Court by claiming itself "unwilling or unable" to handle the case. This seems at least plausible in light of the policy arguments mentioned above for trying members of Islamic State at the ICC rather than in national courts. As former U.S. State Department Legal Adviser John Bellinger noted, "[T]he United States and other governments should not limit themselves to potential prosecutions of Islamic State members under domestic criminal laws. The group is engaging in widespread and systematic attacks against civilians in Iraq and Syria that constitute grave international crimes (including genocide)."[173] These "grave international crimes" are precisely the offenses that the ICC was established to handle.[174]

3. *Individual Criminal Responsibility*

As in U.S. federal and state criminal law, it is possible (indeed, common) to charge defendants at the ICC with crimes that they did not perpetrate directly. However, in order for any criminal charge to proceed, international criminal law, like domestic criminal law, requires that prosecutors prove individual criminal responsibility.[175] The prosecutors must show that the defendant was sufficiently connected to the commission of the crime at issue to bear moral and legal responsibility for it. Articles 25 and 28 of the Rome Statute articulate the theories of individual criminal responsibility that form a basis for conviction at the ICC.[176] Article 25 of the Rome Statute provides for liability on the basis of the same theories of individual criminal liability that appear in U.S. domestic

---

172. Rome Statute, *supra* note 10, art. 17(1)(a).

173. Bellinger, *supra* note 56.

174. *See supra* notes 60-67 and accompanying text.

175. *See* Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CALIF. L. REV. 75, 82-85 (2005).

176. Rome Statute, *supra* note 10, arts. 25, 28.

criminal law, including direct liability, solicitation, aiding and abetting, and conspiracy.[177] Additionally, Article 28 imposes a separate, more capacious form of individual criminal responsibility on military commanders based on a theory of command responsibility. Commanders who "knew or . . . should have known" their forces were committing or about to commit Rome Statute crimes and nonetheless failed to take "all necessary and reasonable measures" to avert those crimes may be individually criminally liable under this theory.[178]

The challenges of proving individual criminal responsibility were on full display in the only prior case at the ICC to charge gender-based persecution, *Prosecutor v. Mbarushimana*.[179] Luis Moreno Ocampo, the first Chief Prosecutor of the ICC,[180] brought the *Mbarushimana* case in 2010. It ended in 2011 when the Court declined to confirm the charges due to a lack of evidence.[181] The case stemmed from the activities of a paramilitary group in the Democratic Republic of Congo (DRC). The Prosecutor's Document Containing Charges[182] identified some evidence that the group had exhibited a pattern of acute violence targeting women civilians. However, as the Pre-Trial Chamber's Decision on

177. *See id.* art. 25(1)-(3). Article 25 of the Statute also provides for attempt liability, and creates liability without a criminal actus reus for individuals who "directly and publicly incite others to commit genocide." *See id.* art. 25(3)(e)-(f).

178. *See id.* art. 28(a). Article 28(b) provides for liability for military superiors for the Rome Statute crimes of subordinates where those superiors knew or "consciously disregarded" information about the crimes and failed to take "necessary and reasonable measures" that were within their "effective responsibility and control." *Id.* art. 28(b)(i). In the context of Islamic State, liability under Article 28 may attach to any responsible person within the Islamic State military command structure who willfully ignored evidence of gender-based persecution that was within his/her power to mitigate, as well as to any military commander (perhaps including top leadership of Islamic State) who was negligent of such gender-based persecution.

179. Prosecutor v. Mbarushimana, Case No. ICC-01/04-01/10-11-Red2, Prosecution's Application Under Article 58 (Aug. 20, 2010), http://www.icc-cpi.int/CourtRecords/CR2011_22538.pdf [http://perma.cc/P9FX-BCLS]. The Pre-Trial Chamber in that case dismissed the Prosecutor's application, apparently on the grounds that it did not link Mbarushimana in particular to the crimes perpetrated by his unit. *See* CHAPPELL, *supra* note 13, at 122.

180. Current Chief Prosecutor Fatou Bensouda is the second.

181. Prosecutor v. Mbarushimana, Case No. ICC-01/04-01/10-465-Red, Decision on the Confirmation of Charges (Dec. 16, 2011), http://www.icc-cpi.int/CourtRecords/CR2011_22538.pdf [http://perma.cc/P9FX-BCLS].

182. This is roughly equivalent to an indictment in domestic criminal law. *See Mbarushimana*, Case No. ICC-01/04-01/10-11-Red2, Prosecution's Application Under Article 58. In its application, the Office of the Prosecutor charged Mbarushimana, a Rwandan rebel, with war crimes and crimes against humanity for the alleged activities of his group in Congo during an attempt to seize power in 2009. *See id.* The application charged Mbarushimana with persecution based on gender among other war crimes and crimes against humanity. *Id.* at 13-17.

the Confirmation of Charges noted, there were deep flaws in the Prosecutor's case against the Defendant.[183] The Pre-Trial Chamber found, with consternation, that the Prosecution had utterly failed to substantiate many of the crimes charged including murder, pillaging, and assault, asserting no evidence for some of the counts.[184] For instance, the Document Containing Charges charged twelve different incidents of murder, yet only made factual allegations as to four.[185] Moreover, the Pre-Trial Chamber also found that the Prosecution had failed to establish a substantial contribution by the Defendant to the acts alleged, which is perhaps unsurprising since the Defendant apparently functioned as the paramilitary group's France-based press secretary rather than as a military commander or political leader.[186]

A potential case against Islamic State presents the Office of the Prosecutor—which increasingly has turned toward gender-based and sexual crimes[187]—with an opportunity that has evaded it until now. It may be able to make out a stronger case against some members of Islamic State, so long as it puts together its evidence carefully and makes considered decisions about which officials to charge. Reports emerging from Islamic State-controlled territory suggest that proof of instructions or knowledge of the acts of persecution, often lacking in the case of higher-ups, may be somewhat clearer in the case of Islamic State. Islamic State keeps extensive records on the identities of its fighters.[188] These individuals fight in units that "rotat[e] between active frontline duty, days off in 'liberated' areas[,] and other deployments 'on base.'"[189] Re-

183. The Pre-Trial Chamber, in rejecting the application, centered its decision on the Prosecution's failure to prove that the individual defendant substantially contributed to the underlying crimes. *See Mbarushimana*, Case No. ICC-01/04-01/10-465-Red, Decision on the Confirmation of Charges, ¶¶ 293-303.

184. The Court criticized the prosecution for its vague and incomplete statement of the facts as to the alleged underlying crimes: "[T]he Chamber wishes to highlight that the charges and the statements of facts in the [Document Containing Charges] have been articulated in such vague terms that the chamber had serious difficulties in determining, or could not determine at all, the factual ambit of a number of the charges." *Id.* ¶ 110.

185. *Id.*; *see also* CHAPPELL, *supra* note 13, at 122 (noting the broad charges against Mbarushimana and the problems with the prosecution's evidence).

186. *Mbarushimana*, Case No. ICC-01/04-01/10-465-Red, Decision on the Confirmation of Charges, ¶¶ 5, 7-8.

187. *See supra* note 170.

188. *See* Landay et al., *supra* note 23 ("[The Islamic State fatwa contained a] ruling on proper procedure for filling out the personal details of prospective fighters: name, gender, and communications method—telephone, telegram, Skype or the mobile messaging service WhatsApp.").

189. Lister, *supra* note 24, at 22.

ports also suggest the organization generates paper records that could be used to establish levels of hierarchy, including the documentation of reallocation and payroll costs, and memoranda and reports to superiors on expenditures.[190] In a possible prosecution, these might be useful in establishing the identity of perpetrators, the existence of chains of command (both military and civilian), and the requisite mens rea.

In addition to admitting the reports of journalists and rapporteurs, the Prosecutor of the ICC may be able to obtain testimony from Yazidi survivors of violence. Several Yazidi survivors have addressed the UN and international media outlets,[191] suggesting that they may be willing to testify publicly against Islamic State members. Since Islamic State is both a military and a political bureaucracy, multiple theories of liability could apply to its senior leaders, including Baghdadi, should the path to jurisdiction over his actions become clear.[192] The particular theory of liability for an Islamic State member—direct liability, solicitation, aiding and abetting liability, conspiracy, and command responsibility—will depend on that member's role in the organization.[193]

---

190. *See* Hannah Allam, *Records Show How Iraqi Extremists Withstood U.S. Anti-Terror Efforts*, MCCLATCHY DC (June 23, 2014, 5:03 PM), http://www.mcclatchydc.com/news/nation-world/world/article24769573.html [http://perma.cc/SE5C-XFD3] (reporting, based on access to declassified documents from the Department of Defense, that reallocation and payroll costs for Islamic State fighters have made up more than half of all expenditures, and noting extensive bookkeeping including reports to superiors detailing gifts made to tribes, recommendations to avoid graft, and other proposals); *see also* Lister, *supra* note 24, at 21-22 (discussing the generation and expenditure of income by Islamic State).

191. The most prominent of these women is Nadia Murad Basa Tahee, who has spoken to the UN Security Council. *See* Somini Sengupta, *U.N. Council To Adopt Sanctions Against ISIS*, N.Y. TIMES (Dec. 16, 2015), http://www.nytimes.com/2015/12/17/world/middleeast/un-council-to-adopt-sanctions-against-isis.html [http://perma.cc/C2AF-HR34]. Others consented to be interviewed on television and in print, albeit with protections for their identities. *See, e.g.*, Lewis, *supra* note 119; Zainab Salbi, *Rape Survivor Who Escaped ISIS Discusses Torture She Was Subjected to*, N.Y. TIMES LIVE (June 23, 2015), http://nytlive.nytimes.com/womenintheworld/2015/06/23/rape-survivor-who-escaped-isis-discusses-torture-she-was-subjected-to [http://perma.cc/QJB7-2B4Y]. The Rome Statute allows for substantial protection for witnesses who wish to remain anonymous. *See* Rome Statute, *supra* note 10, art. 68; Luping, *supra* note 77, at 483; *Witnesses*, INT'L CRIM. CT., http://www.icc-cpi.int/about/witnesses [http://perma.cc/NTR5-QDD9].

192. *See supra* Section III.A.1.

193. While technically the theories of individual criminal responsibility under the Rome Statute—comparable to capacious theories of liability in U.S. criminal law—could capture even low-level Islamic State collaborators who did not directly take part in or order violence, for policy reasons it is impossible to imagine the Prosecutor bringing such a case. The relatively low capacity of the ICC and concerns about its legitimacy serve as a check on over-criminalization at the international level. *See, e.g.*, *Situations Under Investigation*, INT'L CRIM. CT., http://www.icc-cpi.int/pages/situations.aspx [http://perma.cc/BK5J-5GUQ] (report-

The ICC admits diverse forms of evidence, including NGO publications and news reports,[194] and tends to accept most evidence offered when making admissibility determinations[195] on an article-by-article basis. This Note cites reports from reputable news outlets, Islamic State press releases and media materials, and NGO and think tank reports. All of these sources would be viable sources of evidence at an ICC trial. While we would need to know more before assessing the strength of the overall evidence, the evidence that appears to be available is promising.

B. Charging Islamic State with Gender-Based Persecution Under Article 7(1)(h) of the Rome Statute

The ICC has never decided a gender-based persecution case on the merits. Nor does the Rome Statute alone tell us how the Court would apply this charge. Like many domestic criminal statutes, judges must interpret its terms in order to give it sufficient specificity. Nonetheless, several potential sources of information shed light on the gender-based persecution charge, including the drafting history of the Rome Statute,[196] the practices of international criminal

---

ing that, in total, there are fourteen cases currently proceeding at the ICC). In urging the Prosecutor to consider bringing charges against midlevel Islamic State officials, this Note is not suggesting she charge and make an example of, say, an Islamic State driver. It is merely suggesting that she consider charging midlevel commanders who have both participated in and ordered acts of persecution, arguing that these individuals are not substantially less culpable than high-level officials.

194. *See* Prosecutor v. Mbarushimana, Case No. ICC-01/04-01/10-465-Red, Decision on the Confirmation of Charges, ¶¶ 75-78 (Dec. 16, 2011), http://www.icc-cpi.int/CourtRecords/CR2011_22538.pdf [http://perma.cc/P9FX-BCLS] (holding that evidence from a Human Rights Watch report on the situation in Rwanda is admissible); Prosecutor v. Mbarushimana, Case No. ICC-01/04-01/10-11-Red2, Prosecutor's Application Under Article 58 (Aug. 20, 2010), http://www.icc-cpi.int/CourtRecords/CR2011_22538.pdf [http://perma.cc/P9FX-BCLS] (citing frequently to news reports by Reuters and AFP, press releases by Rwandan rebel group, and reports of NGOs in Statement of Facts); Wairagala Wakabi, *Judges Admit NGO Reports into Evidence Against Bemba*, INT'L JUST. MONITOR (July 8, 2013), http://www.ijmonitor.org/2013/07/judges-admit-ngo-reports-into-evidence-against-bemba [http://perma.cc/LK6U-NKSF].

195. *See* Keith Hyatt, *Open Source Evidence on Trial*, 125 YALE L.J. F. 323 (2016), http://www.yalelawjournal.org/forum/open-source-evidence-on-trial [http://perma.cc/RPB8-TQLK] ("As construed by the court, and in theory, the Rules require that evidence be admitted or rejected based on its (1) relevance, (2) probative value, and (3) prejudicial impact. In practice, though, most evidence is admitted, and questions about the evidence go to its weight rather than its admissibility." (citations omitted)).

196. *See* Moshan, *supra* note 15; Chella, *supra* note 15.

tribunals that antedate the Rome Statute,[197] and other bodies of international law.[198] This Note is the first to analyze and apply one of these sources: the statements of the ICC's Pre-Trial Chamber on pending cases charging political[199] and ethnic persecution,[200] two charges with elements analogous to those of gender-based persecution. Because it represents the views of ICC judges on the proper definition of crimes under the Rome Statute, the jurisprudence of the Pre-Trial Chamber is a particularly valuable source of information for the Islamic State case.

The Pre-Trial Chamber is a panel of three ICC judges that decides the validity of the Prosecutor's initial indictments.[201] A Pre-Trial Chamber proceeding's closest analogue in U.S. criminal law is the preliminary hearing, where a

---

197. *See, e.g.*, A. Widney Brown & Laura Grenfell, *The International Crime of Gender-Based Persecution and the Taliban*, 4 MELBOURNE J. INT'L L. 347 (2003).

198. *See* Oosterveld, *supra* note 10.

199. *See* Prosecutor v. Blé Goudé, Case No. ICC-02/11-02/11, Decision on the Confirmation of Charges Against Charles Blé Goudé (Dec. 11, 2014), http://www.icc-cpi.int/CourtRecords/CR2015_05444.pdf [http://perma.cc/YHA4-45U8]; Prosecutor v. Laurent Gbagbo, Case No. ICC-02/11-01/11, Decision on the Confirmation of Charges Against Laurent Gbagbo (June 12, 2014), http://www.icc-cpi.int/CourtRecords/CR2015_04777.pdf [http://perma.cc/L82U-C5Q2]; 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 (Jan. 23, 2012), http://www.icc-cpi.int/CourtRecords/CR2012_01006.pdf [http://perma.cc/8XPN-R7S3]; Prosecutor v. 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 (Jan. 23, 2012), http://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/09-01/11-373 [http://perma.cc/6LLF-F5K5]; Prosecutor v. 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" (June 27, 2011), http://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/11-12 [http://perma.cc/4345-MGVE]; *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 (Mar. 2, 2012), http://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/11-01/12-2-Red [http://perma.cc/4RFZ-SEK9] (finding substantial grounds for a finding of political persecution on the basis of the same set of facts as *Laurent Gbagbo*).

200. *See* Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Decision on the Prosecutor's Application Under Article 58 (July 13, 2012), http://www.icc-cpi.int/CourtRecords/CR2012_07506.pdf [http://perma.cc/MQA7-BML4]; Prosecutor v. Hussein, Case No. ICC-02/05-01/12, Decision on the Prosecutor's Application Under Article 58 Relating to Abdel Raheem Muhammad Hussein (Mar. 1, 2012), http://www.icc-cpi.int/CourtRecords/CR2012_03574.pdf [http://perma.cc/MGF2-52XS]; Prosecutor v. Harun, Case No. ICC-02/05-01/07, Decision on the Prosecution Application Under Article 58(7) of the Statute (Apr. 27, 2007), http://www.icc-cpi.int/CourtRecords/CR2007_02898.pdf [http://perma.cc/6X9Q-Y2VE].

201. Jocelyn Courtney & Christodoulos Kaoutzanis, *Proactive Gatekeepers: The Jurisprudence of the ICC's Pre-Trial Chambers*, 15 CHI. J. INT'L L. 519, 528 (2015).

prosecutor presents evidence to a judge who then decides whether to allow a trial to proceed following a defendant's arrest.[202] As at a preliminary hearing, the standard of proof that the Prosecutor must meet in front of the Pre-Trial Chamber is lower than that which is required to convict an individual of the same crime.[203] However, the Prosecutor must meet this lower evidentiary burden for each element of the crime charged.[204]

Because the Pre-Trial Chamber must assess the evidence for every element of a given crime before allowing an indictment to proceed, it necessarily enumerates and clarifies the elements of those crimes, including crimes of persecution, in its rulings. For instance, in order to assess whether a charge of rape may proceed at the ICC, the Pre-Trial Chamber would clarify that rape requires both penetration and force or coercion.[205]

Using the Chamber's jurisprudence on the analogous charges of political and ethnic persecution, this Section breaks down the charge of gender-based persecution into its constituent elements and assesses each element in terms of the Pre-Trial Chamber's interpretations of its requirements. I then consider how each element, as construed by the Pre-Trial Chamber, might be satisfied by the evidence we have of Islamic State's actions against Yazidi women. While I use the Pre-Trial Chamber's jurisprudence to analyze the particular case of Islamic State's crimes against Yazidi women, the Pre-Trial Chamber case law could also apply to assessing possible charges of gender-based persecution in

---

202. Office of the U.S. Attorneys, *Preliminary Hearing*, U.S. DEP'T JUST., http://www.justice.gov/usao/justice-101/preliminary-hearing [http://perma.cc/EB2C-XC39].

203. In a preliminary hearing, the standard of proof is probable cause, rather than the reasonable doubt standard that would apply at trial. *See id.* A lower standard of proof also obtains at the ICC. *See* Courtney & Kaoutzanis, *supra* note 201, at 522.

204. The Pre-Trial Chamber's judgments, called Decisions to Confirm Charges, generally attempt to consider each element of a crime systematically when evaluating the evidence presented. Moreover, the Pre-Trial Chambers have gone beyond mechanically applying the elements of the Rome Statute and have created their own law giving specificity to the actus reus requirements of the Statute. *See* Courtney & Kaoutzanis, *supra* note 201, at 525-29.

205. *See, e.g.*, Prosecutor v. Bemba Gombo, 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, ¶¶ 161-62 (June 15, 2009), http://www.icc-cpi.int/CourtRecords/CR2009_04528.pdf [http://perma.cc/HA9G-8PJ5] (citing the definition of the crime of rape in the *Elements of Crimes*, which requires penetration plus "force" or "coercion," and clarifying the definition by noting that coercion "does not require physical force. Rather, 'threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or military presence.'" (citing Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment ¶ 688 (Sept. 2, 1998))).

other situations. The next Part considers how the Prosecutor might bring the charge in other situations.

Article 7(1)(h) of the Rome Statute details the crime of persecution, defining it as "[p]ersecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender . . . or other grounds," "in connection with . . . any crime within the jurisdiction of the Court," "as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[206]

According to the UN's *Elements of Crimes*,[207] a nonbinding guide to the Rome Statute that is frequently cited at the ICC,[208] the Prosecutor must show six elements to prove persecution.[209]

1. **The widespread or systematic element:** The persecutory conduct must have occurred "as part of a widespread or systematic attack directed against [a] civilian population."[210]

2. **The mens rea element:** The persecutor must have known the persecutory conduct to be part of a widespread or systematic attack directed against a civilian population.[211]

3. **The severe deprivation of fundamental rights element:** The persecutory conduct must have led to a "severe deprivation" of "rights" that are "fundamental" in international law.[212]

---

206. Rome Statute, *supra* note 10, arts. 7(1), 7(1)(h).

207. Preparatory Comm'n for the Int'l Criminal Court, *Report of the Preparatory Commission for the International Criminal Court: Addendum, Part II, Finalized Draft Text of the Elements of Crimes*, U.N. Doc. PCNICC/2000/1/Add.2 (Nov. 2, 2000) [hereinafter *Elements of Crimes*].

208. While the *Elements of Crimes* are not binding on the Court, the ICC has repeatedly looked to them as persuasive authority when construing the Rome Statute. *See* Herman von Hebel, *The Making of the Elements of Crimes*, *in* THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 3 (Roy S. Lee ed., 2001).

209. I derive the elements directly from the text of the Statute. *See* Rome Statute, *supra* note 10, arts. 7(1), 7(1)(h), 7(2)(g), 7(3). My breakdown is also identical to the breakdown of the *Elements of Crimes*, which other scholars have adopted in the past. *See, e.g.*, Oosterveld, *supra* note 10, at 63 n.67.

210. Rome Statute, *supra* note 10, art. 7(1); *see also Elements of Crimes*, *supra* note 207, at 15 ("The conduct was committed as part of a widespread or systematic attack directed against a civilian population.").

211. Rome Statute, *supra* note 10, art. 7(1); *see also Elements of Crimes*, *supra* note 207, at 15 ("The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.").

4. **The nexus element:** The individuals must have been deprived "by reason of" their membership in a covered category.[213]

5. **The group element:** The deprivation must have occurred on "political, racial, national, ethnic, cultural, religious, [or] gender" grounds,[214] with gender limited explicitly by the statutory text to its binary conception (deprivation by reason of being "male" or "female").[215]

6. **The other criminal acts element:** The targeting must have occurred in connection with one or more individual persecutory acts criminalized under Article 7 of the Rome Statute – such as rape, murder, or torture – or in connection with "any [other] crime within the jurisdiction of the Court."[216]

Because this Note is concerned with the crime of gender-based persecution, the fifth element – whether the alleged persecution targeted a particular group – is already satisfied for purposes of my analysis. The Note will only address evidence of targeting based on gender, which is one of the listed impermissible grounds. For purposes of my argument, then, I combine the nexus element and the group element to ask whether the victims of gender-based persecution were targeted "by reason of" their gender.

1. The Widespread or Systematic Element

"Widespread or systematic" is an intensity criterion; it refers to how intense the "attack directed against any civilian population" must be before it constitutes a crime against humanity. The "widespread or systematic" requirement "exclud[es] random or isolated acts of violence from the notion of crimes

212. Rome Statute, *supra* note 10, art. 7(2)(g); *see also Elements of Crimes*, *supra* note 207, at 15 ("The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights." (footnote omitted)).

213. Rome Statute, *supra* note 10, art. 7(2)(g); *see also Elements of Crimes*, *supra* note 207, at 15 ("The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.").

214. Rome Statute, *supra* note 10, art. 7(1)(h); *see also Elements of Crimes*, *supra* note 207, at 15 (listing targeting on "political, racial, national, ethnic, cultural, religious, [and] gender" grounds as an element of the "crime against humanity of persecution").

215. *See supra* note 10.

216. Rome Statute, *supra* note 10, art. 7(1)(h).

against humanity."[217] Instead, the "established jurisprudence of the ICC" requires it to inquire into the "large-scale nature of the attack and the number of targeted persons."[218] Islamic State's attack on Yazidi populations and minority populations in Syria and Iraq more generally, during which Islamic State took the Yazidi women captive, satisfies this element.

The "widespread" component was elaborated in *Prosecutor v. Saif Al-Islam Gaddafi*, where the Court found that an attack on Libyan opposition protesters was "widespread" because it occurred in the cities "where more than 50% of the Libyan population resides," and because there were grounds to believe that hundreds of civilians were killed, hundreds injured, and hundreds arrested by the security forces.[219] Similarly, in *Prosecutor v. Laurent Gbagbo*, the Pre-Trial Chamber found that an attack that left 316 members of the Ivorian opposition dead and wounded was "widespread" because it "involved a large number 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."[220]

The attack on the Yazidis and others falls within the meaning of "widespread" as articulated in *Gaddafi* and *Laurent Gbagbo*. At one point, Islamic State controlled a territory up to the size of Jordan, far larger than the entire city of Abidjan in *Laurent Gbagbo*.[221] A UN report indicates that thousands of people have been killed by Islamic State,[222] far more than the hundreds killed and injured in the attacks at issue in *Gaddafi* and *Laurent Gbagbo*.[223] And Islamic State's campaign of attacks has extended over a period of years, much longer

---

217. Prosecutor v. Harun, Case No. ICC-02/05-01/07, Decision on the Prosecution Application Under Article 58(7) of the Statute, ¶ 62 (Apr. 27, 2007), http://www.icc-cpi.int/CourtRecords/CR2007_02898.pdf [http://perma.cc/6X9Q-Y2VE].

218. Prosecutor v. Laurent Gbagbo, Case No. ICC-02/11-01/11, Decision on the Confirmation of Charges Against Laurent Gbagbo, ¶ 222 (June 12, 2014), http://www.icc-cpi.int/CourtRecords/CR2015_04777.pdf [http://perma.cc/L82U-C5Q2].

219. Prosecutor v. 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", ¶¶ 32-35 (June 27, 2011), http://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/11-12 [http://perma.cc/4345-MGVE].

220. *Laurent Gbagbo*, Case No. ICC-02/11-01/11, Decision on the Confirmation of Charges Against Laurent Gbagbo, ¶¶ 204, 224.

221. George Packer, *The Common Enemy*, NEW YORKER (Aug. 25, 2015), http://www.newyorker.com/magazine/2014/08/25/the-common-enemy [http://perma.cc/KZQ5-LJZT].

222. *See Report on the Protection of Civilians in the Armed Conflict in Iraq: 1 May – 31 October 2015*, *supra* note 39.

223. *See* sources cited *supra* note 199.

than the four months in *Laurent Gbagbo*.[224] The organization held thousands of square miles of territory by 2014 and began its drive to amass territory in Iraq as early as 2007.[225] If the attacks in *Gaddafi* and *Laurent Gbagbo* constitute "widespread" attacks, then Islamic State's must, too.

The Pre-Trial Chamber has found attacks "systematic" where there is evidence of either a policy to attack civilians[226] or of a "common pattern" to the attacks.[227] The existence of a policy may be inferred from coordinated actions that appear designed to achieve a particular goal. For example, in *Gaddafi*, the Pre-Trial Chamber accepted evidence of a series of coordinated actions as proof of a "State policy" to quell demonstrations. These actions included acts of the Libyan security forces, speeches of Said and Muammar Gaddafi denouncing the opposition, and a threatening mass text message sent via the state-owned telecommunications system.[228]

---

224. *See* sources cited *supra* note 20.

225. *See* Lister, *supra* note 24, at 4, 9.

226. Prosecutor v. Harun, Case No. ICC-02/05-01/07, Decision on the Prosecution Application Under Article 58(7) of the Statute, ¶ 62 (Apr. 27, 2007), http://www.icc-cpi.int/CourtRecords/CR2007_02898.pdf [http://perma.cc/6X9Q-Y2VE] ("[T]he existence of a State or organizational policy is an element from which the systematic nature of an attack may be inferred."); Prosecutor v. 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", ¶¶ 22-35 (June 27, 2011), http://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/11-12 [http://perma.cc/4345-MGVE] (inferring from, among other things, behavior of security forces, speeches of the Gaddafis, and a threatening mass text sent by state telecommunications provider that an attack on opposition "was widespread and systematic and in furtherance of a State policy aimed at deterring and quelling" a series of demonstrations).

227. Prosecutor v. Laurent Gbagbo, Case No. ICC-02/11-01/11, Decision on the Confirmation of Charges Against Laurent Gbagbo, ¶ 223 (June 12, 2014), http://www.icc-cpi.int/CourtRecords/CR2015_04777.pdf [http://perma.cc/L82U-C5Q2] ("[The systematic requirement] has been consistently understood in the jurisprudence of the Court as pertaining to the organized nature of the acts of violence and the improbability of their random occurrence. . . . [A]ccording to the jurisprudence of the Court, the systematic nature of an attack can 'often be expressed through patterns of crimes' . . . . " (quoting Case No. ICC-02/11-14, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, ¶ 54 (Mar. 10, 2011), http://www.icc-cpi.int/CourtRecords/CR2011_16756.pdf [http://perma.cc/KP83-PVD5](footnote omitted)); *see also Harun*, Case No. ICC-02/05-01/07, Decision on the Prosecution Application Under Article 58(7) of the Statute, ¶ 63 ("There are reasonable grounds to believe that the above-mentioned acts [of the Janjaweed] often shared a common pattern.").

228. *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", ¶¶ 25-31. The Pre-Trial Chamber has also addressed the question of when an act may be "directed against a civilian" population in a few cases – though not every

Islamic State behavior satisfies the "systematic" element, too: evidence suggests Islamic State has persecuted Yazidis as part of both a policy and a pattern of systematically attacking civilians. Islamic State publications on polytheistic minorities and women slaves suggest that its attacks on Yazidis and captivity of the Yazidi women are part of a "policy" to target both.[229] For instance, Islamic State's Western-facing propaganda magazine *Dabiq* published a long justification of its treatment of Yazidis in 2014.[230] *Dabiq* referred to enslavement, concubinage, and the impregnation of women slaves as "firmly established aspect[s] of the [Shariah]."[231] Reports from Syria and Iraq as well as UN Special Representative Zainab Bangura's comments to the *Middle East Eye* also confirm that the attacks on Yazidis and the enslavement of Yazidi women form a pattern and suggest a state policy.[232] Islamic State has captured and sold thousands of Yazidi women and has displaced thousands of Yazidi villagers from their homes—evidence of a pattern of enslavement and attacks.[233] Moreover, the rigorously organized captivity of the Yazidi women itself suggests pre-planning—and, hence, a policy. According to news reports, Islamic State maintains a highly developed bureaucratic system for transporting, selling, and keeping track of the roughly three thousand Yazidi women it currently holds captive.[234]

2. *The Mens Rea Element*

Like most domestic crimes in the United States, international crimes include a mens rea element. As Article 7(1)(h) indicates, individual criminal responsibility requires that the individual have "knowledge" of the civilian "attack" that gave rise to the persecution.[235] In other words, the individual

case—where persecution has come before it, implying that in some cases this criterion may be met self-evidently. *See* Rome Statute, *supra* note 10, art. 7(1)(h). These cases similarly suggest that a policy to attack civilians is sufficient to prove that an attack is "directed" against them—rather than harming them incidentally—and that patterns of attack or speeches threatening attacks on civilians constitute evidence of such a policy. *See* Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Decision on the Prosecutor's Application Under Article 58 ¶¶ 20-21 (July 13, 2012), http://www.icc-cpi.int/CourtRecords/CR2012_07506.pdf [http://perma.cc/MQA7-BML4].

229. *See supra* Part I.

230. *The Revival of Slavery Before the Hour*, *supra* note 53.

231. *Id.* at 17.

232. *See supra* notes 44-46 and accompanying text.

233. *See supra* Part I.

234. *See* Callimachi, *Theology of Rape*, *supra* note 1.

235. Rome Statute, *supra* note 10, art. 7(1)(h).

defendant need not intend the overall attack on civilians for a finding of liability, but he or she must be aware of it. The *Elements of Crimes* also suggests that the statute be read to require that the individual defendant be aware that the course of conduct constituting persecution was "widespread or systematic."[236] Article 7(2)(a) of the Rome Statute further clarifies that the existence of a policy to attack civilians is necessary to find knowledge of a civilian attack.[237] In the particular case of Islamic State, then, the same evidence that suffices to show a "systematic" Islamic State policy to target civilians, as discussed above, would also be required to satisfy the mens rea element of the crime.

In some cases, a policy to attack civilians is explicit, whereas in other cases it may be inferred. In *Prosecutor v. Ruto*, for instance, the Pre-Trial Chamber found 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.[238] Where the existence of such a policy is not overt, the Pre-Trial Chamber has inferred knowledge of an attack from patterns of behavior by official organs subject to centralized control.[239] In *Gaddafi*, for instance, the Court did not mention the mens rea requirement in its persecution analysis. Instead, the Court found "reasonable grounds to believe that Muammar Gaddafi, either directly or through the State apparatus, ordered the Security Forces to 'discipline' opposition members," on the basis of evidence

236. *Elements of Crimes*, *supra* note 207, at 15 ("The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.").

237. Rome Statute, *supra* note 10, art. 7(2)(a); *see also* Prosecutor v. 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, ¶ 163 (Jan. 23, 2012), http://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/09-01/11-373 [http://perma.cc/6LLF-F5K5] (noting Article 7(2)(a)'s requirement that "an attack [be] committed pursuant to or in furtherance of a State or organizational policy to commit such attack"); Prosecutor v. Laurent Gbagbo, Case No. ICC-02/11-01/11, Decision on the Confirmation of Charges Against Laurent Gbagbo, ¶ 214 (June 12, 2014), http://www.icc-cpi.int/CourtRecords/CR2015_04777.pdf [http://perma.cc/L82U-C5Q2] (noting, in clarifying the meaning of "policy," that "it is only necessary to establish that the [defendant] had knowledge of the attack in general terms . . . . [T]he requirement of knowledge 'should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack . . . .'").

238. *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.

239. *See Laurent Gbagbo*, Case No. ICC-02/11-01/11, Decision on the Confirmation of Charges Against Laurent Gbagbo, ¶ 215 ("[I]n accordance with the established jurisprudence of the Court, an attack which is planned, directed or organized – as opposed to spontaneous or isolated acts of violence – will satisfy the policy criterion, and that there is no requirement that the policy be formally adopted." (footnote omitted)).

that the Forces "were deployed throughout Libya," recruited new members including mercenaries, and took steps to cover up the murders and other crimes complained of in the application.[240] In other words, the Court found that there was evidence of intent to attack a civilian population—a higher level of mens rea than necessary to sustain the charge. *Gaddafi* suggests that evidence of a widespread and coordinated pattern of behavior by direct perpetrators along with evidence of the defendant's command or control of those perpetrators may be enough to establish that the defendant possessed the requisite mens rea.

However, while *Gaddafi* suggests that it is possible to infer the existence of an official policy from a pattern of behavior,[241] this inference is unnecessary in the case of Islamic State. Islamic State has issued fatwas that authorize its members to brutalize women captives, and victims have indicated that rape is part of the organization's pseudo-religious ideology.[242] Moreover, Islamic State's own public relations materials acknowledge that the organization promotes attacks on "infidels."[243] The content of these official communications and the victims' representations indicate an organizational policy to target civilians that is comparable to the policy expressed in the speeches in *Ruto*.

Because both *Ruto* and *Gaddafi* deal with charges against high-level officials who presumably had a role in setting the policy of targeting civilians in conflict, it is not precisely clear how the mens rea requirement as articulated in those cases would map on to midlevel officials of Islamic State. However, it is fair to assume that a midlevel official who *administers* an organizational policy to attack civilians (for instance, by commanding a group of fighters on the orders of superiors) would have knowledge of this organizational policy. At the same time, the mens rea requirement might exclude low-level provincial collaborators who are unaware of Islamic State organizational policies to attack civilians.

3. *The Severe Deprivation of Fundamental Rights Element*

Moving on from mens rea, persecution is an "intentional and severe deprivation of fundamental rights contrary to international law by reason of the

240. Prosecutor v. 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" ¶¶ 29-32 (June 27, 2011), http://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/11-12 [http://perma.cc/4345-MGVE].

241. *See id.* ¶¶ 76-81.

242. *See supra* notes 47-55 and accompanying text.

243. *See supra* note 52.

identity of the group or collectivity."[244] "Intentional and severe" is, like "widespread and systematic," an intensity requirement. The complained-of deprivation of rights must meet this threshold to be cognizable.[245] In addition, while commentators have not fully settled the question of which rights are "fundamental" in international law,[246] many of the rights contained in the Universal Declaration of Human Rights, such as the rights to life, liberty, and security of person, as well as the rights to be free from slavery and torture,[247] are generally considered "fundamental."[248]

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."[249] The Prosecutor's application had alleged that the violence at issue in the case "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."[250] Thus "severity of deprivation" appears to assess

244. Rome Statute, *supra* note 10, art. 7(2)(g).

245. *See Elements of Crimes*, *supra* note 207, at 15 ("The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights.").

246. Some commentators question the notion that some rights are more "fundamental" than others, though various UN bodies continue to use this phrasing. *See, e.g.*, Theodor Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT'L L. 1 (1986).

247. One measure of whether a right is fundamental is that it is a *jus cogens* norm—a norm from which there is no derogation, and a violation of which any state may punish. These violations include genocide, piracy, slavery, and torture, as well as widespread and systematic deprivations of the rights of minorities. *See* Karen Parker, Jus Cogens*: Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411, 427-42 (1989). Islamic State has committed four of the above five.

248. *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948). The Universal Declaration of Human Rights states many "fundamental human rights." *See id.* at pmbl. The International Court of Justice has referred to the "fundamental principles enunciated in the Universal Declaration of Human Rights." United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. 3, 42 (May 24).

249. 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 (Jan. 23, 2012), http://www.icc-cpi.int/CourtRecords/CR2012_01006.pdf [http://perma.cc/8XPN-R7S3].

250. 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), http://www.icc-cpi.int/CourtRecords/CR2012_01006.PDF [http://perma.cc/9CA9-MUEA].

both the magnitude of the population whose rights were deprived and the gravity of those deprivations as to each individual.[251]

Yazidi women have experienced deprivations of a severity akin to what the pleading in *Kenyatta* alleged Kenyan opposition members had experienced. The Yazidi women in this case have suffered similar harms in similar numbers. A UN report indicates that, as of August 2016, nearly 2,000 of these women were still held in slavery, with approximately 1,000 having escaped.[252] The women are subjected to repeated rapes and beatings[253] and often murdered, in unknown numbers, for resisting their captors.[254] The Pre-Trial Chamber has already found mass rapes to constitute a violation of fundamental rights in its opinion in *Kenyatta*.[255]

The treatment of Yazidi women violates many of their fundamental rights. Their confinement, enslavement, and repeated sexual victimization are deprivations of the fundamental rights to life and liberty as well as the rights to be free from enslavement and torture.[256]

---

251. *See also* Prosecutor v. 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", ¶¶ 42-65 (June 27, 2011), http://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/11-12 [http://perma.cc/4345-MGVE] (finding victims were "severely deprived of fundamental rights" via murders, severe injuries, torture, and denial of medical care for the injured, among other acts.).

252. United Nations Assistance Mission for Iraq – Human Rights Office, *A Call for Accountability and Protection: Yezidi Survivors of Atrocities Committed by ISIL*, OFF. UN HIGH COMMISSIONER FOR HUM. RTS. (Aug. 2016), http://www.uniraq.org/images/humanrights/UNAMI%20OHCHR_Report%20Yezidi%20Survivors%20A%20Call%20for%20Justice_FINAL_12Aug2016.pdf [http://perma.cc/UB72-35RF].

253. *See supra* note 44 and accompanying text.

254. Women in the World Staff, *19 Women Burned to Death After Refusing To Have Sex with ISIS Fighters*, N.Y. TIMES LIVE (June 6, 2016), http://nytlive.nytimes.com/womeninthe world/2016/06/06/19-women-burned-to-death-after-refusing-to-have-sex-with-isis-fighters [http://perma.cc/T2TX-4EUS].

255. 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, ¶¶ 281-83 (Jan. 23, 2012), http://www.icc-cpi.int/CourtRecords/CR2012_01006.pdf [http://perma.cc/8XPN-R7S3].

256. *See* Universal Declaration of Human Rights, *supra* note 248, arts. 3-5.

4. *The Nexus with Group Element*

According to the *Elements of Crimes*, proving gender-based persecution requires evidence of a "nexus."[257] The complained-of deprivations of rights must occur "by reason of" the group's identity, here, gender identity.[258] Nexus requirements can be particularly challenging to make out because they contain a complicated element of mens rea. They demand proof not just that a certain act occurred, or even that the perpetrator intended both the act and its result, but that the perpetrator had a biased motive for undertaking the act—or, in other words, targeted individuals *because* of their identities as members of a certain group.[259] The Court has suggested that two types of evidence may show nexus in persecution cases: evidence of an official policy to victimize a Rome-Statute-covered group, and evidence of a pattern of targeting that group.

Pre-Trial Chamber case law provides a guide for how nexus can be found on the basis of an explicit, official organizational policy to target a covered group.[260] Though evidence of an overt policy to persecute a particular group because of bias can be difficult to obtain, the Pre-Trial Chamber has inferred nexus from a pattern of acts committed against a covered group. For instance, in the Pre-Trial Chamber's ruling on the confirmation of charges in *Prosecutor v. Harun*, it 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 Militia/Janjaweed launched attacks against

---

257. Nexus requirements may be most familiar to readers from asylum law. An individual must generally be persecuted "by reason of" her membership in a political group, ethnic group, or other protected category to qualify for asylum. *See, e.g.*, JAMES C. HATHAWAY & MICHELLE FOSTER, THE LAW OF REFUGEE STATUS 362 (2d ed. 2014) ("[R]efugee law requires that there be a nexus between who the claimant is or what she believes and the risk of being persecuted in her home state.").

258. *See Elements of Crimes*, *supra* note 207, at 15 ("The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.").

259. *See* Oosterveld, *supra* note 10, at 81-86.

260. *See* Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Decision on the Prosecutor's Application Under Article 58, ¶ 27 (July 13, 2012), http://www.icc-cpi.int/CourtRecords/CR2012_07506.pdf [http://perma.cc/MQA7-BML4] (finding that the rebel group "promoted a policy aimed at targeting 'non-originaires' civilians of Ituri, mainly Lendu, in order to expel them"); Prosecutor v. 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 (Jan. 23, 2012), http://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/09-01/11-373 [http://perma.cc/6LLF-F5K5] (finding a nexus on the basis of speeches by Ruto and other leaders encouraging supporters to target members of the opposing political group and orders by lower-level commanders to attack these individuals).

specific localities believing that they were predominantly inhabited by the Fur population."[261] Similarly, in its ruling on the confirmation of charges in *Laurent Gbagbo*, the Pre-Trial Chamber found "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.[262] The evidence for this claim was, again, a pattern of attacks. Government forces had targeted participants at pro-opposition demonstrations, as well as "inhabitants of areas perceived as supporting" the opposition.[263]

In the case of Islamic State, the organization appears to have both a policy to attack and a pattern of targeting Yazidi women because of their gender. The incorporation of sexual and gender-based violence into Islamic State ideology strongly suggests that Islamic State has adopted a policy of persecuting women. Publicly available fatwas and publications attributed to Islamic State extensively detail rules for the treatment of *women* slaves in particular.[264] These statements explicitly condone the sale of women and refer to intercourse with women slaves and to permissible and impermissible forms of beating.[265] Press reports indicate that perpetrators told victims that rape is not only condoned but encouraged by Islamic State religious leaders.[266] And a large bureaucracy, based at Islamic State headquarters in Raqqa, exists to coordinate the transportation and sale of the women (and not men). These facts all strongly suggest an official policy of targeting women for sale, and likely also for rape and slav-

261. 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), http://www.icc-cpi.int/CourtRecords/CR2007_02898.pdf [http://perma.cc/6X9Q-Y2VE].

262. 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 (Mar. 2, 2012), http://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/11-01/12-2-Red [http://perma.cc/4RFZ-SEK9].

263. *Id.* ¶ 205; *see also* Prosecutor v. Blé Goudé, Case No. ICC-02/11-02/11, Decision on the Confirmation of Charges Against Charles Blé Goudé ¶ 122 (Dec. 11, 2014), http://www.icc-cpi.int/CourtRecords/CR2015_05444.pdf [http://perma.cc/YHA4-45U8] (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]").

264. *See supra* Part I.

265. *See supra* notes 118-123 and accompanying text.

266. *E.g.*, Callimuchi, *Theology of Rape*, *supra* note 1.

ery specifically.[267] But even if that evidence were not sufficient, the ICC could alternatively infer a nexus from an apparent pattern of rapes, beatings, and sales of women captives.[268]

5. *The Other Criminal Acts Element*

The Rome Statute notes that persecution may only be found "in connection with" some act criminalized elsewhere in the Rome Statute.[269] An analogy to the domestic law of hate crimes proves useful here as well: a hate crime may only be charged where some other underlying crime is also charged, like murder or battery.[270] The requirement that gender-based persecution occur "in connection with" one of these other Rome Statute crimes seems designed to ensure that relatively trivial acts of discrimination, like forcing women to remain in the home or conscripting only men in a draft, do not form the basis for international criminal liability.

In addition to criminalizing certain composite crimes that originated in international law, such as gender-based persecution and genocide, the Rome Statute outlaws numerous acts that also appear in most countries' domestic criminal laws, including murder and willful killing,[271] serious bodily and mental harm,[272] enslavement,[273] and torture.[274] It also contains other non-composite crimes that emerge more often in the context of international law, such as inhuman treatment,[275] sexual slavery,[276] forced pregnancy,[277] enforced

---

267. *See id.* A Yazidi activist accused Islamic State of preplanning the sale of women and girls: "I spoke by telephone to the first family who arrived at the Directory of Youth in Mosul, and the hall was already prepared for them. They had mattresses, plates and utensils, food and water for hundreds of people." *Id.*

268. *See supra* notes 118-123 and accompanying text.

269. Rome Statute, *supra* note 10, art. 7(1)(h).

270. Hate or bias motivation historically was charged as an enhancement to the underlying crime rather than an element of the same crime partly for this reason, though the Supreme Court held this practice unconstitutional because of its effect on criminal sentencing. Apprendi v. New Jersey, 530 U.S. 466 (2000).

271. Rome Statute, *supra* note 10, arts. 6(a), 7(1)(a).

272. *Id.* art. 6(b).

273. *Id.* art. 7(1)(c).

274. *Id.* arts. 7(1)(f), 8(2)(a)(ii).

275. *Id.* art. 8(2)(a)(ii).

276. *Id.* arts. 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi).

277. *Id.*

sterilization,[278] and "[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part."[279] In the cases that have been brought before the Pre-Trial Chamber, Rome Statute crimes that have been used to satisfy the "other criminal acts" requirement for an ethnic or political persecution charge include murder,[280] rape,[281] forced displacement,[282] torture,[283] severe deprivation of physical liberty or prolonged arbitrary detention,[284] and pillaging.[285]

---

278. *Id.*

279. *Id.* art. 6(c).

280. Prosecutor v. Blé Goudé, Case No. ICC-02/11-02/11, Decision on the Confirmation of Charges Against Charles Blé Goudé, ¶ 122 (Dec. 11, 2014), http://www.icc-cpi.int/CourtRecords/CR2015_05444.pdf [http://perma.cc/YHA4-45U8]; 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 (Mar. 2, 2012), http://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/11-01/12-2-Red [http://perma.cc/4RFZ-SEK9]; Prosecutor v. Hussein, Case No. ICC-02/05-01/12, Decision on the Prosecutor's Application Under Article 58 Relating to Abdel Raheem Muhammad Hussein ¶ 11 (Mar. 1, 2012), http://www.icc-cpi.int/CourtRecords/CR2012_03574.pdf [http://perma.cc/MGF2-52XS]; 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, ¶ 281 (Jan. 23, 2012), http://www.icc-cpi.int/CourtRecords/CR2012_01006.pdf [http://perma.cc/8XPN-R7S3]; Prosecutor v. Gaddafi, ICC-01/11, 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", ¶ 64 (June 27, 2011), http://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/11-12 [http://perma.cc/4345-MGVE]; Prosecutor v. Harun, Case No. ICC-02/05-01/07, Decision on the Prosecution Application Under Article 58(7) of the Statute, ¶ 74 (Apr. 27, 2007), http://www.icc-cpi.int/CourtRecords/CR2007_02898.pdf [http://perma.cc/6X9Q-Y2VE].

281. *Blé Goudé*, Case No. ICC-02/11-02/11, Decision on the Confirmation of Charges Against Charles Blé Goudé, ¶ 122; *Simone Gbagbo*, Case No. ICC-02/11-01/11, Decision on the Prosecutor's Application Pursuant to Article 58 for a Warrant of Arrest Against Simone Gbagbo, ¶ 204; *Hussein*, Case No. ICC-02/05-01/12 Decision on the Prosecutor's Application Under Article 58 Relating to Abdel Raheem Muhammad Hussein, ¶ 11; *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, ¶ 281; *Harun*, Case No. ICC-02/05-01/07, Decision on the Prosecution Application Under Article 58(7) of the Statute ¶ 74.

282. *Hussein*, Case No. ICC-02/05-01/12, Decision on the Prosecutor's Application Under Article 58 Relating to Abdel Raheem Muhammad Hussein, ¶ 11; *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, ¶ 281; *Harun*, Case No. ICC-02/05-01/07, Decision on the Prosecution Application Under Article 58(7) of the Statute, ¶ 74.

283. *Hussein*, Case No. ICC-02/05-01/12, Decision on the Prosecutor's Application Under Article 58 Relating to Abdel Raheem Muhammad Hussein, ¶ 11; *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" ¶¶ 42, 46; *Ha-*

Islamic State persecution of Yazidi women easily satisfies this "in connection with"[286] requirement. The Yazidi women themselves have been raped, tortured, subjected to prolonged arbitrary detention, enslaved, and forcibly displaced, all of which are Rome Statute crimes under Articles 7 and 8.[287]

This Part aims to show that there is a plausible road to prosecuting at least some members of Islamic State for gender-based persecution. Though any trial will raise complicated issues of individual criminal liability, prosecutors may eventually be able to gather clear and systematic evidence about Islamic State's membership and hierarchy and may also be able to obtain evidence of a policy of targeting civilians because of the nexus of their gender and ethnicity. Though the full extent of evidence against Islamic State will not become obvious until more of the group's documents are obtained, the case presents an opportunity to develop international criminal law in a necessary direction. While it might be difficult to establish jurisdiction over top Islamic State leaders, there may be sufficient evidence to link members of the organization at all levels to the persecution of Yazidis. Although the Chief Prosecutor has opposed charging midlevel operatives with crimes thus far,[288] the evidence emerging from Syria and Iraq suggests that a case against Islamic State members is a strong and urgent one in which the Court can establish the elements of the crime of gender-based persecution.

IV. GENDER-BASED PERSECUTION AND THE EVOLUTION OF THE ICC

A prosecution against Islamic State members for crimes against Yazidi women not only might succeed at the ICC but also would come at a critical time. In October 2016, after years of complaints that the Office of the Prosecu-

run, Case No. ICC-02/05-01/07, Decision on the Prosecution Application Under Article 58(7) of the Statute, ¶ 74.

284. *Hussein*, Case No. ICC-02/05-01/12, Decision on the Prosecutor's Application Under Article 58 Relating to Abdel Raheem Muhammad Hussein, ¶ 11; *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", ¶¶ 42-46; *Harun*, Case No. ICC-02/05-01/07, Decision on the Prosecution Application Under Article 58(7) of the Statute, ¶ 74.

285. *Hussein*, Case No. ICC-02/05-01/12, Decision on the Prosecutor's Application Under Article 58 Relating to Abdel Raheem Muhammad Hussein, ¶ 11; *Harun*, Case No. ICC-02/05-01/07, Decision on the Prosecution Application Under Article 58(7) of the Statute, ¶ 74.

286. Rome Statute, *supra* note 10, art. 7(1)(h).

287. *Id.* arts. 7, 8.

288. *See supra* note 171 and accompanying text.

tor had disproportionately and inappropriately targeted African leaders,[289] three African states—Burundi,[290] South Africa,[291] and the Gambia[292]—announced their intention to withdraw from the Court. (Russia, which had signed but never ratified the Rome Statute, subsequently withdrew its signature in a largely ceremonial gesture apparently designed to undermine the Court.[293]) While the leaders of Burundi and the Gambia at the time of withdrawal might well be reasonable subjects for international criminal liability themselves,[294] the loss of South Africa, which played a pivotal role in negotiating the Rome Statute during the Mandela government,[295] is a major blow to the Court.

Thus, the ICC faces a defining moment for its legitimacy.[296] Criticisms of its excessive focus on African countries and African leaders were linked to particular charging decisions[297] that led some observers to the conclusion that the

---

289. *See* Abdul Tejan-Cole, *Africa and the International Criminal Court: Legitimacy and Credibility Challenges*, *in* SHIELDING HUMANITY: ESSAYS IN INTERNATIONAL LAW IN HONOUR OF JUDGE ABDUL G. KOROMA 426 (Charles C. Jalloh & Olufemi Elias eds., 2015).

290. Ignatius Ssuuna, *Burundi Lawmakers Vote To Withdraw from ICC; Would Be 1st*, ASSOCIATED PRESS (Oct. 12, 2016), http://bigstory.ap.org/article/4a52816b54ef4e2d89ac6aa9d9c7c8e9/burundi-lawmakers-vote-withdraw-icc-would-be-1st [http://perma.cc/8C8B-VQNZ].

291. Sewell Chan & Marlise Simons, *South Africa To Withdraw from International Criminal Court*, N.Y. TIMES (Oct. 21, 2016), http://www.nytimes.com/2016/10/22/world/africa/south-africa-international-criminal-court.html [http://perma.cc/DU7B-GJWJ].

292. Joe Bavier et al., *Gambia Announces Withdrawal from International Criminal Court*, REUTERS (Oct. 26, 2016, 11:22 AM), http://www.reuters.com/article/us-gambia-icc-idUSKCN12P335 [http://perma.cc/EJ83-W8LW]. Fatou Bensouda, the Chief Prosecutor of the ICC, is a Gambian. *See id.*

293. *See* Andrew Osborn et al., *Russia Withdraws Backing for International Criminal Court Treaty*, REUTERS (Nov. 16, 2016, 9:59 AM), http://www.reuters.com/article/us-russia-icc-withdrawal-idUSKBN13B1KJ [http://perma.cc/J38Y-RT8L].

294. Murithi Mutiga, *Burundi Civil War Fears as President Accused of Campaign of Murder*, GUARDIAN (Jan. 5, 2016), http://www.theguardian.com/world/2016/jan/05/burundi-pierre-nkurunziza-police-protest-crack-down [http://perma.cc/MT3J-EKLW]; Jeffrey Smith, *The Worst Dictatorship You've Never Heard of*, FOREIGN POL'Y (Apr. 21, 2016), http://foreignpolicy.com/2016/04/21/the-worst-dictatorship-youve-never-heard-of-gambia [http://perma.cc/GD9N-FV36].

295. Chan & Simons, *supra* note 291.

296. *See* Simon Allison, *African Revolt Threatens International Criminal Court's Legitimacy*, GUARDIAN (Oct. 27, 2016), http://www.theguardian.com/law/2016/oct/27/african-revolt-international-criminal-court-gambia [http://perma.cc/QB2G-MMNS].

297. *See, e.g.*, Somini Sengupta, *Omar Al-Bashir Case Shows International Criminal Court's Limitations*, N.Y. TIMES (June 15, 2015), http://www.nytimes.com/2015/06/16/world/africa/sudan-bashir-international-criminal-court.html [http://perma.cc/6WFA-KSUU] (charting ICC attempts to prosecute Omar Al-Bashir of Sudan without substantial international

Court was politicized or even biased, undermining its status as a neutral arbiter.[298] If the ICC is to emerge as a legitimate institution, it must pivot its focus, redefining the scope of its own action from a narrow focus on African states to a broader focus on the world's worst crimes.

In this context, bringing a popular and widely desired case against Islamic State could serve as the course-correction that the Court needs. The time for an accounting for Islamic State's acts may be drawing nearer – though any possible criminal trial is still years off, given the slow and painstaking nature of international criminal justice.[299] Recent advances by U.S.-backed forces in Iraq and Libya liberated the key cities of Falluja and Surt from Islamic State control, and Iraqi fighters are gradually retaking the city of Mosul.[300] In May 2016, two months after the Obama Administration declared Islamic State treatment of Yazidis to be genocide, *Politico* reported that the White House and State Department had begun to discuss potential paths to international legal accountability for Islamic State, such as a trial at the ICC or the establishment of a dedicated international criminal tribunal,[301] though legal accountability may be

consensus); James Verini, *The Prosecutor and the President*, N.Y. TIMES (June 22, 2016), http://www.nytimes.com/2016/06/26/magazine/international-criminal-court-moreno-ocampo-the-prosecutor-and-the-president.html [http://perma.cc/5EEF-3UYH] (chronicling the controversy over charging Uhuru Kenyatta of Kenya with crimes related to election violence, and detailing apparent problems with the ICC's case).

298. *See* Sengupta, *supra* note 297 (noting that "world powers have used [the ICC] selectively to advance their own interests," citing examples from France and Palestine, and asserting that the Kenyatta and Bashir indictments undermined the Court's "reputation for neutrality").

299. *See Length of Proceedings*, *supra* note 60, ¶ 8 ("Due to the fact that international crimes typically involve atrocities committed on a massive scale, international criminal justice has to cope with cases which are more extensive and complex than most national cases . . . . [V]olumes of documentary evidence will have to be translated and evaluated."). International criminal justice relies on slow processes, and the relative jurisdictional complexity of a case against Islamic State means that a particularly strong international consensus must develop before it may proceed. *See* Nahal Toosi, *Obama Exploring How To Prosecute Islamic State for Genocide*, POLITICO (May 26, 2016, 5:19 AM), http://www.politico.com/story/2016/05/isil-genocide-obama-war-crimes-223526 [http://perma.cc/9VHU-AP37].

300. *See, e.g.*, Tim Arango, *Yes, ISIS Is Losing in Iraq. No, It's Not in Its Death Throes.*, N.Y. TIMES (May 17, 2016), http://www.nytimes.com/2016/05/18/world/middleeast/isis-bombing-baghdad-iraq-market.html [http://perma.cc/U6BE-8Z3Q]; McLaughlin & Alkhshali, *supra* note 38; Eric Schmitt, *U.S. Says Its Strikes Are Hitting More Significant ISIS Targets*, N.Y. TIMES (May 25, 2016), http://www.nytimes.com/2016/05/26/us/politics/us-strikes-isis-targets.html [http://perma.cc/TH7X-P2RH]; Declan Walsh, *Militias in Libya Advance on ISIS Stronghold of Surt with Separate Agendas*, N.Y. TIMES (June 1, 2016), http://www.nytimes.com/2016/06/02/world/africa/militias-in-libya-advance-on-isis-stronghold-of-surt-with-separate-agendas.html [http://perma.cc/U6N6-2QAC].

301. Toosi, *supra* note 299.

deprioritized in the Trump Administration. The news that international human rights lawyer Amal Clooney had agreed to represent Yazidi survivors in pressing for a case at the ICC confirms that transnational forces of diplomacy and publicity are aligning to lobby for an international trial.[302] In a context of increasing dissatisfaction with the ICC, the failure of the Prosecutor to take steps against Islamic State in the face of so much outrage has arguably further harmed the Court's legitimacy.

Bringing a case against members of Islamic State would put the Prosecutor in the relatively powerful position of consolidating a norm against gender-based persecution after international outrage. As observed earlier, international law can play a role in norm formation at different points in the process of consolidation: sometimes it begins a process of norm formation, and sometimes it caps a process that already has occurred.[303] The sharp international outcry against the treatment of Yazidi women suggests that a norm against gender-based persecution by nonstate actors is already in the process of forming. The ICC might be able to capitalize on this momentum to embark on a relatively uncontroversial prosecution. Moreover, a prosecution of members of Islamic State – a nonstate armed group – does not run up against the norm of respect for state sovereignty that has been so problematic for the ICC.

The Office of the Prosecutor can and should take advantage of the political demand for a trial and the developed evidentiary record of Islamic State atrocities to hold Islamic State officials accountable for their crimes against Yazidi women.[304] Questions about the ICC's neutrality and the scope of its activity indicate that the Court may soon undergo what Steven Koh calls a "*Marbury* moment," a point in its early history when it is called on to "rul[e] on the nature of its own authority" in order to become legitimate.[305] Doing so in the context of a case broadly viewed as justified could help the Court to establish this authority.[306]

---

302. *See* Lin Taylor, *Human Rights Lawyer Amal Clooney To Defend Yazidi Women, ISIS Sex Slaves*, REUTERS (June 10, 2016), http://www.reuters.com/article/us-britain-yazidi-clooney-idUSKCNoYW21M [http://perma.cc/3ZCC-6G7L].

303. *See supra* Section II.B.

304. While the Prosecutor will not be able to collect some types of evidence until after the conflict has ended, her office may be able to take certain steps now: for instance, it can begin speaking to women who have escaped Islamic State and may be able to serve as witnesses.

305. Steven Arrigg Koh, Marbury *Moments*, 54 COLUM. J. TRANSNAT'L L. 116, 118 (2015).

306. *Cf. id.* ("Such *Marbury* moments invariably create controversy, but those that succeed do so when the judicial and political actors within the relevant jurisdiction ultimately accept the court's decision.").

A prosecution of Islamic State members could set the ICC on a new path. The first successful prosecution to be brought under the gender-based persecution portion of the Rome Statute is critical for the same reason that a first prosecution under any domestic criminal statute would be. The judgment will create precedent, and the clear precedent that emerges from a strong first case will likely make subsequent cases easier to bring. But the Office of the Prosecutor should not stop there. This Note's analysis of Pre-Trial Chamber jurisprudence sheds new light on how the gender-based persecution charge could be employed to hold other aggressors accountable for their gender-based crimes (though the evidentiary record in other cases may place some limits on the charge's usefulness). The Office of the Prosecutor might seize the opportunity to change the direction of the Court with a series of prosecutions signaling a change in focus, once it has established gender-based persecution as a viable charge.

For instance, A. Widney Brown and Laura Grenfell have suggested that the Afghan Taliban's targeting of women for harsh restrictions on their behavior, dress, and activity constitutes gender-based persecution.[307] Members of the Taliban have stoned women to death for "adultery," [308] have beaten women for violating extremely restrictive laws about dress and public comportment,[309] and have thrown acid on the faces of girls who attend school.[310] In 2012, members of the Taliban infamously boarded a school bus and shot fourteen-year-old Malala Yousufzai in the head in retribution for her advocacy of children's rights.[311] Drawing on the jurisprudence of the International Criminal Tribunals for Yugoslavia and Rwanda, Brown and Grenfell suggest that the violations of victims' rights in these cases may be severe enough to form the basis for a charge of gender-based persecution.[312]

---

307. *See* Brown & Grenfell, *supra* note 197, at 349-51.

308. *See, e.g.*, Rod Nordland & Jawad Sukhanyar, *Afghan Mullah Leading Stoning Inquiry Condones Practice*, N.Y. TIMES (Nov. 7, 2015), http://www.nytimes.com/2015/11/08/world/asia/afghan-mullah-leading-stoning-inquiry-condones-practice.html [http://perma.cc/7PVV-LHBQ].

309. Brown & Grenfell, *supra* note 197, at 366.

310. Dexter Filkins, *Afghan Girls, Scarred by Acid, Defy Terror, Embracing School*, N.Y. TIMES (Jan. 13, 2009), http://www.nytimes.com/2009/01/14/world/asia/14kandahar.html [http://perma.cc/2FBC-7NEP].

311. Declan Walsh, *Girl Shot by Taliban in Critical Condition After Surgery*, N.Y. TIMES (Oct. 10, 2012), http://www.nytimes.com/2012/10/11/world/asia/girl-shot-by-taliban-in-critical-condition-after-surgery.html [http://perma.cc/W7LD-XZ5D].

312. Brown & Grenfell, *supra* note 197, at 361-73.

The Office of the Prosecutor could also consider charging gender-based persecution in the DRC. The conflict there has smoldered for roughly two decades[313] and displays high levels of gender-based targeting of women for what doctors in the region have called rape with extreme violence, a particularly brutal form of rape that often involves either gang rape or penetration with objects designed to damage the internal organs.[314] It remains unclear what the incidence of rape among the male population is in these situations; a very high incidence of male rape could indicate that the targeting is not gender-based.[315] However, Denis Mukwege, a human rights activist and gynecologist in the DRC, has said that the high incidence of rape with extreme violence in the country is partly the result of the country's hierarchical gender roles and patterns of discrimination against women.[316]

CONCLUSION

International criminal law must recognize and punish the systematic abuse of women, men, girls, and boys by reason of their gender, just as it recognizes and punishes systematic abuse grounded in ethnicity or political views. Because of the particular horror of the acts described in this Note and the clear evidence emerging from seized documents and press reports, a prosecution of Islamic State members could be a paradigm case for developing the crime of gender-based persecution. Though the path to jurisdiction and admissibility is by no means clear, the international legal community should prioritize a prosecution of Islamic State members in order to secure justice for Yazidi victims and survivors of both genocide and gender-based persecution. If our promises to

313. *DR Congo: Chronology*, HUM. RTS. WATCH (Aug. 21, 2009), http://www.hrw.org/news/2009/08/21/dr-congo-chronology [http://perma.cc/BRJ4-MMKB].

314. *See* Denis Mukengere Mukwege & Cathy Nangini, *Rape with Extreme Violence: The New Pathology in South Kivu, Democratic Republic of Congo*, 6 PLOS MEDICINE 1-2 (Dec. 2009), http://journals.plos.org/plosmedicine/article/asset?id=10.1371/journal.pmed.1000204 [http://perma.cc/BU94-USTM].

315. Among women, at least, studies indicate that the rate of rape in the DRC is extraordinarily high. *See* Jeffrey Gettleman, *Congo Study Sets Estimate for Rapes Much Higher*, N.Y. TIMES (May 11, 2011), http://www.nytimes.com/2011/05/12/world/africa/12congo.html [http://perma.cc/29EQ-XQDU].

316. Megan Bradley, *Sexual and Gender-based Violence in the Democratic Republic of the Congo: Opportunities for Progress as M23 Disarms?*, BROOKINGS INST. (Nov. 13, 2013), http://www.brookings.edu/blogs/africa-in-focus/posts/2013/11/12-sexual-gender-based-violence-congo-bradley [http://perma.cc/J4FK-XDPR] ("In his speech at Brookings, Dr. Mukwege stressed that the roots of wartime rape lie in the gender inequalities that characterize societies not only in Africa but around the world; conflict merely amplifies these pre-existing inequalities.").

each other are to have any meaning at all, we must firmly declare our disapproval of those who doubly persecute other human beings and offer our support for those who are doubly victimized.