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Reimagining Justice for Gender-Based Crimes at the Margins: New Legal Strategies for Prosecuting ISIS Crimes Against Women and LGBTIQ Persons

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REIMAGINING JUSTICE FOR GENDER-BASED CRIMES
AT THE MARGINS: NEW LEGAL STRATEGIES
FOR PROSECUTING ISIS CRIMES AGAINST
WOMEN AND LGBTIQ PERSONS

LISA DAVIS*

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INTRODUCTION

After the Islamic State of Iraq and Syria (ISIS)¹ took control of large swaths of territory in Syria and Iraq, credible reports began

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1. ISIS is also known as the Islamic State of Iraq and the Levant (ISIL) and the Islamic State (IS).

emerging of militia forces enforcing strict gender regulations on social behavior for both women and men, torturing and killing those who do not conform to the militia's rigid gender policies.² Human rights advocates have documented brutal accounts of sexual violence, shootings, beheadings, stoning, and burnings of men, women and youth, including those who are, or are perceived as, lesbian, gay, bisexual, transgender, and queer (LGBTQ),³ simply for defying the militia's narrowly defined gender roles.⁴ ISIS fighters have forced women into sexual slavery.⁵ They have killed women doctors who do not comply with rigid dress codes when they interfere with the performance of their medical duties.⁶ They have executed women for being politicians, journalists, or for serving in other professional jobs⁷ not

2. See Lisa Davis, *Iraqi Women Confronting ISIL: Protecting Women's Rights in the Context of Conflict*, 22 SW. J. INT'L L. 27, 28–29 (2016) (discussing Iraqi women and LGBT rights violations in the context of the ISIL conflict).

3. To date, there have not been any documented cases of crimes committed against intersex persons by ISIS. This does not, however, mean that the strategies for prosecuting gender-based crimes committed by ISIS should not or could not apply to cases of gendered crimes committed against real or perceived intersex persons.

4. See HUMAN RIGHTS & GENDER JUSTICE CLINIC (HRGJ) OF CUNY SCHOOL OF LAW, MADRE & THE ORGANIZATION OF WOMEN'S FREEDOM IN IRAQ (OWFI), COMMUNICATION TO ICC PROSECUTOR PURSUANT TO ARTICLE 15 OF THE ROME STATUTE REQUESTING A PRELIMINARY EXAMINATION INTO THE SITUATION OF: GENDER-BASED PERSECUTION AND TORTURE AS CRIMES AGAINST HUMANITY AND WAR CRIMES COMMITTED BY THE ISLAMIC STATE OF IRAQ AND THE LEVANT (ISIL) IN IRAQ 1, 8 (2017), <https://www.madre.org/sites/default/files/PDFs/CUNY%20MADRE%20OWFI%20Article%2015%20Communication%20Submission%20Gender%20Crimes%20in%20Iraq%20PDF.pdf> [<http://perma.cc/9S4X-4BR2>] [hereinafter HRGJ CLINIC ET AL. ART. 15 COMMUNICATION]; *The Wrong Kind of Woman: A Timeline of ISIS Killings Due to Gender Expression*, MADRE (May 3, 2017), <https://www.madre.org/press-publications/human-rights-report/wrong-kind-woman-timeline-isis-killings-due-gender-expression> [<http://perma.cc/FJ4Q-5RPF>] [hereinafter *The Wrong Kind of Woman*]; *Timeline of Publicized Executions for Alleged Sodomy by the Islamic State Militias*, OUTRIGHT ACTION INT'L (June 30, 2016), <https://www.outrightinternational.org/content/timeline-publicized-executions-alleged-sodomy-islamic-state-militias> [<http://perma.cc/4UKN-W8ZP>] [hereinafter *Timeline of Publicized Executions*]; see also, e.g., Yifat Susskind, *What Will It Take to Stop ISIS Using Rape as a Weapon of War?*, MADRE (Feb. 17, 2015), <https://www.madre.org/press-publications/article/what-will-it-take-stop-isis-using-rape-weapon-war> [<https://perma.cc/SXT4-YZ56>].

5. HRGJ CLINIC ET AL. ART. 15 COMMUNICATION, *supra* note 4, at 1.

6. See Nawzat Shamdeen, *Veils, Gloves and Violence New Extremist Rules See Women Disappear From Mosul's Streets*, NIQASH (Aug. 21, 2014), <http://www.niqash.org/en/articles/society/3521/E44> [<https://perma.cc/Q5DV-YQR3>].

7. See U.N. OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS & U.N. ASSISTANCE MISSION FOR IRAQ (UNAMI) HUMAN RIGHTS OFFICE, REPORT ON THE PROTECTION OF CIVILIANS IN ARMED CONFLICT IN IRAQ: 11 SEPTEMBER–10 DECEMBER 2014 10 (2014), http://www.ohchr.org/Documents/Countries/IQ/UNAMI_OHCHR_Sep_Dec_2014.pdf [<https://perma.cc/5HXS-RAZW>] [hereinafter U.N. HIGH COMM'R & UNAMI REPORT, 11 SEPT.–10 DEC. 2014]; see also U.N. OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS & U.N. ASSISTANCE MISSION FOR IRAQ (UNAMI), REPORT ON THE PROTECTION OF CIVILIANS IN ARMED CONFLICT IN IRAQ: 1 MAY–31 OCTOBER 2015 8–9, 11 (2016), <http://www.ohchr.org/Documents/Countries/IQ/UNAMIRreport1May31October2015.pdf> [<https://perma.cc/LE9X-LP4Z>] [hereinafter U.N. HIGH COMM'R & UNAMI REPORT 1 MAY–31 OCT. 2015].

deemed appropriate for their prescribed gender roles. ISIS fighters beat men who are unable or unwilling to grow beards.⁸ They threw men accused of homosexual behavior off buildings to their death.⁹ ISIS issued death warrants to women accused of lesbian behavior.¹⁰ ISIS has killed youth because of their alternative forms of personal expression, including having stylish haircuts or wearing western clothing such as skinny jeans, labeling them as “faggots.”¹¹ These killings and other violations are evidence of a systematic persecution of persons based on gender.

While the International Criminal Court (ICC) has prosecuted a range of sexual violence crimes, it has yet to convict crimes of gender-based persecution like those committed by ISIS as well as other armed actors.¹² As the international community continues to grant broader recognition of individuals’ rights to be free from discrimination and violence on the basis of gender, including gender expressions based on sexual orientation and gender identity, the time is ripe for the ICC to act. At the same time, in Iraq, discussions are underway on how to proceed with the prosecutions of ISIS fighters that have been captured and are being held without charge under Iraq’s Administrative Law.

For this reason, on November 8, 2017, advocates filed a new submission—the first of its kind—to the International Criminal

8. See Gianluca Mezzofiore, *Isis: ‘Beard police’ to enforce shaving ban in Mosul*, INT’L BUS. TIMES (June 1, 2015), <http://www.ibtimes.co.uk/isis-beard-police-enforce-shaving-ban-mosul-1503787> [http://perma.cc/VH92-55HD]; Johnlee Varghese, *Mosul: ISIS Imprisons Men for 3 Months, Threatens to Behead them for Shaving Beard*, INT’L BUS. TIMES (May 15, 2015), <http://www.ibtimes.co.in/mosul-isis-imprisons-men-3-months-threatens-behead-them-shaving-beard-632542> [http://perma.cc/P8MD-W36U]; Oliver Wheaton, *Isis has a new ‘beard police’ to enforce shaving ban*, METRO (June 1, 2015), <http://www.metro.co.uk/2015/06/01/isis-has-a-new-beard-police-to-enforce-shaving-ban-5224911> [http://perma.cc/7HFC-DP3V].

9. Tom Foreman, *The gunman, ISIS and a war on sexual minorities*, CNN (June 13, 2016), <http://www.cnn.com/2016/06/13/world/isis-persecution-lgbt/index.html> [http://perma.cc/BX5Z-9GLZ]; Benjamin Gilbert, *Gruesome Photos Allegedly Show Islamic State Throwing Gay Men Off a Tall Building*, VICE NEWS (Jan. 17, 2015), <https://news.vice.com/article/gruesome-photos-allegedly-show-islamic-state-throwing-gay-men-off-a-tall-building> [http://perma.cc/L9N5-8CMP]; Ishaan Tharoor, *The Islamic State’s shocking war on gays*, WASH. POST (June 13, 2016), https://www.washingtonpost.com/news/world-views/wp/2016/06/13/the-islamic-states-shocking-war-on-homosexuals/?utm_term=.35dece9c48d1 [http://perma.cc/F4QF-MCQ4].

10. Document # 110 (June 28, 2016) (on file with MADRE).

11. See U.N. HIGH COMM’R & UNAMI REPORT, 1 MAY–31 OCT. 2015, *supra* note 7, at 19; Michael K. Lavers, *Islamic State executes teenager for ‘homosexuality’*, WASH. BLADE (Jan. 3, 2016), <http://www.washingtonblade.com/2016/01/03/report-islamic-state-executes-teenager-for-homosexuality> [http://perma.cc/K2A8-7X3L]; Morgan Winsor, *ISIS Bans Skinny Jeans: Islamic State Arrests Men Caught Wearing Tight Pants In Raqqa*, INT’L BUS. TIMES (Apr. 3, 2015), <http://www.ibtimes.com/isis-bans-skinny-jeans-islamic-state-arrests-men-caught-wearing-tight-pants-raqqa-1869358> [http://perma.cc/K476-83VG].

12. See HRGJ CLINIC ET AL. ART. 15 COMMUNICATION, *supra* note 4, at 4.

Court (ICC), to advance protection of the rights of women and lesbian, gay, bisexual, transgender, intersex, and queer¹³ people. Filed jointly by three organizations—MADRE, the Human Rights and Gender Justice (HRGJ) Clinic of the City University of New York (CUNY) School of Law, and the Organization of Women's Freedom in Iraq (OWFI)—and with help from the law firm Debevoise & Plimpton, the petition argues that the international community should prosecute ISIS fighters for crimes committed on the basis of gender, including discrimination based on sexual orientation and gender identity.¹⁴

War-time abuses against people who are marginalized within their societies are rarely documented. As a result, such violations are excluded from human rights discourse and from justice processes. In effect, they are left out of history. For this reason, Iraqi activists, at great personal risk, have been documenting these crimes. Not only those committed by ISIS, but also by Iraqi government forces and other militias.¹⁵ They have preserved critical "information about perpetrators and their larger criminal networks."¹⁶ Many of these same documenters have "also provide[d] safe passage and shelter to [people] at imminent risk of sexual slavery or death."¹⁷

This is the first time the world has seen this kind of robust documentation of crimes against women and LGBTIQ persons for transgressing gender norms during an armed conflict. The submission therefore offers a new opportunity to challenge this type of violence. Of course, knowledge of egregious crimes committed against women and perceived or actual LGBTIQ persons in armed conflict itself is not new. At the world's first international criminal prosecutions in Nuremberg, Germany, rape and sexual slavery of women and torture of LGBTIQ persons were acknowledged but never prosecuted.¹⁸

In the 1990s, with the creation of the International Criminal Court, gender-based forms of violence started to gain recognition as violations of international criminal law.¹⁹ At the time, women's rights

13. See *supra* note 3.

14. HRGJ CLINIC ET AL. ART. 15 COMMUNICATION, *supra* note 4, at 1.

15. See Davis, *supra* note 2, at 72.

16. *Id.* at 71.

17. *Id.*

18. See Patricia Viseur-Sellers discussion at the CUNY Law School event, *Prosecuting ISIS Crimes against Women and LGBTI Persons*, YOUTUBE (Nov. 13, 2017), <https://www.youtube.com/watch?v=-u5G2haD3vo> [<http://perma.cc/MZ8M-52G8>]. This two-part event was held at CUNY School of Law as part of the Abraham and Rachel Slatkin-Belsky Distinguished Lecturer Series.

19. Parallel to this process, gender-based crimes were also starting to gain recognition in the International Criminal Tribunals for the former Yugoslavia and Rwanda

advocates rallied drafters of the Rome Statute, which governs the ICC, to abandon the “outrages upon personal dignity” language traditionally used to describe sexual violence.²⁰ They succeeded in broadening the category of sexual violence to include not only rape, but also sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and other previously undefined forms of sexual violence.²¹ Advocates also succeeded in substituting the word “gender” for “sex” in the Rome Statute—an advance hailed as one of the most important safeguards for gender justice under international criminal law and a major achievement of global women’s movements in the 1990s.²² Yet since then, the full understanding of “gender” under the Rome Statute has not been applied.

At the international level, efforts are being undertaken to hold ISIS fighters accountable. In 2011, the United Nations (U.N.) Security Council granted jurisdiction to the ICC to investigate and prosecute crimes committed by ISIS in Libya.²³ By 2015, the Permanent Mission of the United States and Chile to the United Nations convened the first Arria Formula to ever address LGBTIQ rights within the U.N. Security Council.²⁴ This meeting specifically addressed the situation under ISIS. A year later, the U.N. Commission of Inquiry on Syria concluded that “ISIS has [indeed] committed the crime of genocide as well as multiple crimes against humanity and war crimes against the Yazidis.”²⁵ Last fall, the Security Council asked the U.N. Secretary-General to establish an independent investigative team to support Iraq’s domestic efforts to hold ISIS accountable for its war crimes, crimes against humanity and genocide committed in Iraq.²⁶ Additionally, several European governments have initiated

largely due to women’s human rights advocates’ work documenting these cases and raising awareness about them with the international community. *See, e.g.,* Rhonda Copelon, *Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law*, 46 MCGILL L.J. 217, 217 (2000); Patricia Viseur-Sellers, *Gender Strategy Is Not A Luxury for International Courts*, 17 AM. U. J. GENDER SOC. POL’Y & L. 301, 304–05 (2009).

20. Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (entered into force 21 October 1950). *See also* Copelon, *supra* note 19, at 220–21, 230 (using the language “outrages against personal dignity”).

21. *Id.* at 234.

22. *Id.* at 236.

23. S.C. Res. 1970, ¶ 4 (Feb. 26, 2011).

24. *See* Jessica Stern, *The U.N. Security Council’s Arria-Formula Meeting on Vulnerable Groups in Conflict: ISIL’s Targeting of LGBTI Individuals*, 48 N.Y.U. J. INT’L L. & POL. 1191, 1191–92 (2016).

25. Human Rights Council, “They came to destroy:” ISIS Crimes Against the Yazidis, U.N. Doc. A/HRC/32/CRP.2 (June 15, 2016).

26. S.C. Res. 2379, ¶ 2 (Sept. 21, 2017).

or concluded criminal proceedings against nationals who are accused of ISIS membership and criminal activity. In 2015, Europol reported that ninety-four percent of prosecutions for terrorist offences in Europe concluded with guilty verdicts—the majority of which concerned offences related to the conflicts in Syria and Iraq.²⁷

What is missing, however, from these criminal justice initiatives is holistic accountability for gendered crimes committed by ISIS.

In response, in 2017, and with the support of U.N. Women, CUNY Law School convened a meeting with experts on LGBTIQ rights and international criminal law from around the world.²⁸ Together, they crafted the strategy for the petition to the ICC and for ensuring the safety and security of those associated with it, including Iraqi groups named in the petition. Activists also held a series of consultations with Iraqi women's organizations in-country. For safety reasons, the decision was taken not to translate the submission into Arabic, and several contributing groups decided to leave their name off the official submission.

CUNY Law's HRGJ Clinic, OWFI, and MADRE are seizing this pivotal moment in history to broaden the discourse on gender. Through their petition to the ICC, they seek to expand the understanding of discrimination, including where gender, sexual orientation, and gender identity intersect. The groups' coordinated advocacy and movement-building strategy was explored in a symposium held at CUNY Law School the day before the petition was submitted, entitled, "Prosecuting ISIS Crimes against Women and LGBTIQ Persons" joined by ICC Chief Prosecutor Fatou Bensouda.²⁹ At the end of the event, the groups filed the official Article 15 Communication.

The success of this submission could change the landscape of international criminal law, both highlighting and redressing the long-standing targeting of civilians based on gender, sexual orientation, and gender identity in the context of war and conflict. Appropriate action by the International Criminal Court and the international community at large would set a new precedent for prosecuting gender-based crimes and create a new tool for human rights advocates worldwide.

This Article will argue that ISIS's gender-based crimes should be viewed through the legal framing of the societal construct of gender. Evidence exists that ISIS committed systematic gender-based persecution constituting crimes against humanity and committed

27. EUROPOL, EUROPEAN UNION TERRORISM SITUATION AND TREND REPORT 2016 18, 20 (2016), <https://www.europol.europa.eu/activities-services/main-reports/european-union-terrorism-situation-and-trend-report-te-sat-2016> [<http://perma.cc/J5RP-DUCE>].

28. Patricia Viseur-Sellers discussion at the CUNY Law School event, *supra* note 18.

29. *Id.*

the war crime of torture based on gender discrimination. Its members should therefore be prosecuted for these gender-based crimes. Part I of this Article will begin with an exploration of why prosecutions of gender-based crimes are necessary for building both peace and a just society. Part II will provide an analysis of three forms of gender persecution as crimes against humanity committed by ISIS: gender roles, dress and behavior, which are manifested in their underlying crimes of rape, torture, and murder. Part III of this Article will discuss two provisions under the Rome Statute for prosecuting gender based crimes, specifically gender-based persecution as a crime against humanity and torture as a war crime based on gender discrimination. Part IV will discuss the interest of justice for prosecuting ISIS perpetrators who have committed gender-based crimes.

I. WHY PROSECUTE GENDER-BASED CRIMES?

Women's human rights law professor Rhonda Copelon³⁰ once reflected on the question, "[i]f the sexual violence crimes are listed [in the Rome Statute], and therefore squarely on the [ICC] prosecutor's checklist, why does gender integration matter?"³¹ Her answer was simple. History teaches that crimes against women are largely invisible and treated as if they are of secondary importance. Historically trivialized, rape and other forms of gender-based violence have been given a second-tier status, somehow not reaching the gravity of other grave acts and are often siloed to the "privacy" or "family" sphere, in which state regulation is undesired.³² Gender-based crimes committed against LGBTIQ persons and other minorities were missing from the discourse altogether.³³

30. Professor Rhonda Copelon cofounded the HRGJ Clinic at CUNY School of Law. Formerly known as the International Women's Human Rights (IWHR) Clinic, the HRGJ Clinic enables students and activists around the world to participate in a range of precedent-setting legal and advocacy campaigns. The HRGJ Clinic's amicus briefs in the International Criminal Tribunals for Rwanda and the former Yugoslavia contributed to the recognition in international law of rape as a crime of genocide and torture. The HRGJ Clinic's work with the U.N. Committee Against Torture, and other international bodies, contributed to the recognition that gender crimes, such as domestic and other forms of gender violence, can constitute torture under the U.N. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment. Rhonda Copelon also played a significant role in the advocacy efforts for the drafting of the Rome Statute and is honored by the Gender Justice Legacy Wall of the Women's Initiatives for Gender Justice. See *Gender Justice Legacy Wall*, WOMEN'S INITIATIVES FOR GENDER JUSTICE, <http://4genderjustice.org/gender-justice-legacy-wall> [<https://perma.cc/7JWL-AVAZ>].

31. Copelon, *supra* note 19, at 234.

32. See, e.g., Viseur-Sellers, *supra* note 19, at 303–05 (discussing the treatment of sexual violence crimes as of secondary importance and the obstacles to prosecuting such crimes in the early years of the international criminal tribunals).

33. See Joey L. Mogul, Andrea J. Ritchie & Kay Whitlock, *QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES* 121–22 (Michael Bronski ed.,

Before the 1990s, gender-based violence was largely treated as a private issue.³⁴ Embedded in family and traditional norms, gender-based violence was considered less severe than more visibly recognized abuses, which perpetuated a competition between rights. Copelon reasoned this is because in all societies, women are less powerful than men, leaving them less protected.³⁵

Private sphere violations include domestic violence, rape, female genital mutilation, “honor” killings, and dowry murders, whereas public abuses tended to consist of traditionally defined physical torture, arbitrary detention, forced disappearances, and arbitrary or summary executions. International human rights law focused on the latter, considering them to be grave violations of human rights perpetrated almost exclusively by states.³⁶

Denied the ability to exercise their rights to make decisions about their sexuality, reproductive choices, where they work, if they inherit, and whom they marry, women’s violations have persisted in the shadows of more prioritized human rights violations that have been openly legitimated. The effect of this discrimination becomes more devastating when added to oppression and discrimination based on race, ethnicity, nationality, sexual orientation, or gender identity.³⁷ Feminist scholar Charlotte Bunch³⁸ notes, “[f]emale subordination runs so deep that it is still viewed as inevitable or natural, rather than seen as a politically constructed reality maintained by patriarchal

2011) [hereinafter Mogul et al.]; Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. REV. 1418, 1434, 1468 (2012); Julie Goldscheid, *Gender Neutrality, The “Violence Against Women” Frame, and Transformative Reform*, 82 UMKC L. REV. 623, 624 (2014).

34. Lisa Davis, *The Gendered Dimensions of Torture: Rape and Other Forms of Gender-Based Violence as Torture Under International Law*, in TORTURE AND ITS DEFINITION IN INTERNATIONAL LAW: AN INTERDISCIPLINARY APPROACH 315, 316 (Metin Başoğlu ed., 2017).

35. See Copelon, *supra* note 19, at 223.

36. Davis, *supra* note 34, at 321 (citing Julie Mertus & Pamela Goldberg, *A Perspective on Women and International Human Rights After the Vienna Declaration: The Inside/Outside Construct*, 26 N.Y.U. J. INT’L L. & POL. 201, 204, 209 (1994)).

37. See Mogul et al., *supra* note 33, at 121–22; Crenshaw, *supra* note 33, at 1434; Goldscheid, *supra* note 33, at 624 (discussing the way gender violence is framed in law, policy, and popular rhetoric). The continued use of the gender-specific “violence against women” framework “implies that men are not also victims of abuse and reinforces a binary view of gender that is inconsistent with queer, feminist and other critical theory.” *Id.* at 623.

38. Charlotte Bunch is the Founding Director and Senior Scholar of the Center for Women’s Global Leadership at Rutgers University and a Board of Governor’s Distinguished Service Professor in Women’s and Gender Studies. In 1996, Professor Bunch was inducted into the National Women’s Hall of Fame.

interests, ideology, and institutions.”³⁹ The result has been the historical perpetuation of institutionalized discrimination towards those who seek justice for egregious forms of gender-based violence.⁴⁰

Gender crimes such as femicides, “honor” killings, female genital mutilation, dowry deaths, as well as forced marriage, forced prostitution, and other forms of sexual slavery are often skewed as manifestations of religious extremism, shifting the focus from local problems to “fanatic practices.”⁴¹ Copelon reminds us that, “these are simply ritualized and openly legitimated versions of the implicitly accepted violence in the everyday—the intimidation, humiliation, beating, rape and killing of women in intimate relationships for some form of resistance to their gender.”⁴²

At the heart of gender violations is its justification as a form of punishment for deviating from societies’ prevailing gender roles, behaviors, activities and attributes, or to succinctly put it, gender narratives. These culturally prescribed narratives dictate oppressive roles for women and gender non-conformers (including, but not limited to, LGBTIQ persons), encourage impunity and promulgate misogyny. These gender narratives also intertwine with harmful narratives used to reinforce systems of racism and xenophobia.

Today, beyond the scope of sexual violence committed against women, gender crimes are largely left out of post-conflict justice mechanisms and processes. Often times, such crimes go undocumented and are excluded from prosecutors’ lists of charges, with the result that victims are denied redress and never have the opportunity to name their perpetrators. These omissions reinforce the varying degrees of cultural acceptance of gendered violence that exist in every society and violate the fundamental right to non-discrimination.

39. Charlotte Bunch, *Women’s Rights as Human Rights: Toward a Re-Vision of Human Rights*, 12 HUM. RTS. Q. 486, 491 (1990).

40. Such a de-prioritization of protection has far-reaching implications for gender-based violence. See, e.g., Lisa Davis, *ISIL, the Syrian Conflict, Sexual Violence, and the Way Forward: Syrian Women’s Inclusion in the Peace Processes*, 48 N.Y.U. J. INT’L L. & POL. 1157, 1173 (2016) (“[A] multitude of studies and reports have demonstrated [that] discrimination and inequality systematized in rigid gender power relations and codified in heteronormative, patriarchal structures, foster discriminatory social, cultural, and economic norms.”). *Id.* See also L. Camille Massey & Sushma Kapoor, *The search for an AIDS vaccine continues: Efforts to develop an AIDS vaccine are overlooking problems faced by women and girls in the developing world*, OTTAWA CITIZEN (Aug. 13, 2006) (examining why AIDS vaccines are often left out of discussions about prevention technologies for women).

41. Rhonda Copelon, *International Human Rights Dimensions of Intimate Violence: Another Strand in the Dialectic of Feminist Lawmaking*, 11 AM. U. J. GENDER SOC. POL’Y & L. 865, 871–72 (2003).

42. *Id.* at 871. See generally Lisa Davis, *Still Trembling: State Obligation Under International Law to End Post-Earthquake Rape in Haiti*, 65 U. MIAMI L. REV. 867, 869 (2011) (discussing how discrimination makes women and girls more vulnerable to the impact of crisis including sexual violence).

II. GENDER-BASED CRIMES COMMITTED BY ISIS

In June 2014, after seizing Iraq's second largest city, Mosul, ISIS fighters immediately moved to impose their extremist agenda directly on the bodies of women, requiring women and girls to fully cover their bodies starting from the age of seven.⁴³ Within days of their takeover, credible reports emerged of ISIL fighters abducting and raping women.⁴⁴ Militia members began knocking on the doors of houses, distributing a "Bill of the City" that ordered women to stay home.⁴⁵ Witnesses began reporting that ISIS members were beating women with sticks for not wearing veils in Mosul's markets.⁴⁶

ISIS's written dogma positions wives, mothers, and daughters as enslaved chattel or subhuman, relegated to the domestic sphere to be used to build the caliphate.⁴⁷ The organization focuses on controlling and containing women's and girls' bodies by promoting some of the most egregious forms of gender-based violence, including rape, forced marriage, sexual enslavement, and trafficking. For example, in a protocol on slavery, ISIS encourages gender-based violence against the women and girls that it captures and enslaves. According to the protocol, "[i]t is permissible to have sexual intercourse with the female

43. Davis, *supra* note 2, at 28; *see also* Human Rights Council, The Threat of ISIL and the Situation of Women in Iraq, U.N. Doc. A/HRC/S-22/NGO/13, at 2 (Aug. 29, 2014); Shamdeen, *supra* note 6.

44. Human Rights Council, *supra* note 43. *See also* Jeffrey Marcus, *U.N. Report Details ISIS Abuse of Women and Children*, N.Y. TIMES (Oct. 3, 2014), <http://www.nytimes.com/2014/10/04/world/middleeast/un-report-isis-abuse-women-children.html> [<http://perma.cc/NDR5-46YM>]; Hajer Naili, *Iraq Women's Shelter Responds to Growing Crisis*, WOMEN'S ENEWS (June 19, 2014), <http://womensenews.org/story/war/140618/iraq-womens-shelter-responds-growing-crisis> [<http://perma.cc/6N23-7Y27>].

45. AL-KHANSSAA BRIGADE, WOMEN OF THE ISLAMIC STATE: A MANIFESTO ON WOMEN 25 (Charlie Winter trans., 2015), <https://therinjfoundation.files.wordpress.com/2015/01/women-of-the-islamic-state3.pdf> [<https://perma.cc/6WHG-YFTP>]; Rukmini Callimachi, *For Women Under ISIS, a Tyranny of Dress Code and Punishment*, N.Y. TIMES (Dec. 12, 2016), <http://www.nytimes.com/2016/12/12/world/middleeast/islamic-state-mosul-women-dress-code-morality.html> [<http://perma.cc/68LU-5JFS>]; Mona Mahmood, *Double-layered veils and despair . . . women describe life under Isis*, GUARDIAN (Feb. 17, 2015), <https://www.theguardian.com/world/2015/feb/17/isis-orders-women-iraq-syria-veils-gloves> [<http://perma.cc/7X69-RS4Y>]; Syria: *Extremists Restricting Women's Rights*, HUMAN RIGHTS WATCH (Jan. 13, 2014), <https://www.hrw.org/news/2014/01/13/syria-extremists-restricting-womens-rights> [<http://perma.cc/F6CG-T6QF>]. Note that ISIS allows a woman to leave under limited circumstances, for example, when traveling from her father's house to her husband's house and to her final resting place if she has passed away.

46. U.N. OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS & UNAMI, REPORT ON THE PROTECTION OF CIVILIANS IN ARMED CONFLICT IN IRAQ: 6 JULY–10 SEPTEMBER 2014 11 (2014) [hereinafter U.N. HIGH COMM'R & UNAMI REPORT, 6 JULY–10 SEPT. 2014]; HRGJ CLINIC ET AL. ART. 15 COMMUNICATION, *supra* note 4, ¶ 52 (citing Documentation #161).

47. *See, e.g., Islamic State (ISIS) Releases Pamphlet On Female Slaves*, MEMRI (Dec. 3, 2014) (on file with author); AL-KHANSSAA BRIGADE, *supra* note 45, at 26.

captive,” and “[i]t is permissible to beat the female slave. . . .”⁴⁸ According to ISIS’s contorted religious interpretation, its fighters perform virtuous religious acts when they commit rape and sexual assaults.⁴⁹ ISIS punishes violations of its repressive gender norms through “fines, lashings and even execution.”⁵⁰

ISIS also applies strict gendered regulations to men and boys, “promot[ing] a militarized, violent form of masculinity [that] condones exerting patriarchal power in the public and private spheres.”⁵¹ Its construction of ideal masculinity justifies abuse of men, women, boys and girls, including those perceived as LGBTQ.⁵² According to its online magazine, *Dabiq*, by joining ISIS’s militia, men are refusing “a life of humiliation.”⁵³ The group banned access to the Internet, cell phones, and satellite dishes in areas it controlled, claiming that “satellite channels normalise men being effeminate and sissies.”⁵⁴ Its magazine urges male fighters to strictly obey their military commanders,⁵⁵ while telling them to expect obedience from women. “To Our Sisters” advises that “if the weapon of the men is the assault rifle and the explosive belt, then . . . the weapon of the women is good behavior.”⁵⁶

ISIS claims to provide men the opportunity to be “true” men and that “true” masculinity depends on women also submitting to ISIS’s oppressive gender roles, because “[i]f women were real women then men would be real men.”⁵⁷ This construction of masculinity

48. *Islamic State (ISIS) Releases Pamphlet On Female Slaves*, *supra* note 47.

49. Rukmini Callimachi, *ISIS Enshrines a Theology of Rape*, N.Y. TIMES (Aug. 13, 2015), <https://www.nytimes.com/2015/08/14/world/middleeast/isis-enshrines-a-theology-of-rape.html> [<https://perma.cc/6KZ5-CDK9>]. It should be noted that all major religions have experienced contortion by extremists seeking to justify heinous crimes including rape, torture, or murder.

50. Human Rights Council, Technical assistance provided to assist in the promotion and protection of human rights in Iraq, ¶ 31, U.N. Doc. A/HRC/30/66 (July 27, 2015).

51. HRGJ CLINIC ET AL. ART. 15 COMMUNICATION, *supra* note 4, at 17–18.

52. *See supra* note 3.

53. ‘Īsā Ibn Sa’d Āl ‘Ūshan, *Advice to the Mujāhidīn: Listen and Obey*, 12 DABIQ 10, <https://clarionproject.org/docs/islamic-state-isis-isil-dabiq-magazine-issue-12-just-terror.pdf> [<http://perma.cc/LY5V-73UG>]; HRGJ CLINIC ET AL. ART. 15 COMMUNICATION, *supra* note 4, at 17–18 (citing Documentation #168).

54. Babak Dehghanpisheh & Michael Georgy, *Documents show Islamic State obsessions: beards and concubines*, REUTERS (Nov. 1, 2016), <https://in.reuters.com/article/mideast-crisis-mosul-islamicstate/documents-show-islamic-state-obsessions-beards-and-concubines-idINKBN12W4LJ> [<http://perma.cc/7YQL-H3S3>].

55. ‘Ūshan, *supra* note 53, at 9–10; HRGJ CLINIC ET AL. ART. 15 COMMUNICATION, *supra* note 4, at 17–18 (citing Documentation #168).

56. Umm Sumayyah al-Muhājirah, *A Jihād Without Fighting*, 11 DABIQ 40, 44, <https://clarionproject.org/docs/Issue%2011%20-%20From%20the%20battle%20of%20Al-Ahزاب%20to%20the%20war%20of%20coalitions.pdf> [<http://perma.cc/2E6D-XMC8>].

57. Dyan Mazurana, Dallin Van Leuven & Rachel Gordon, *Gender Under A Black Flag: ISIL Recruitment*, WORLD PEACE FOUND. (Aug. 19, 2015), <https://sites.tufts.edu/re>

undergirds ISIS's violent opposition to same-sex intimacy. ISIS frames its notion of masculinity in opposition to "America and Western Europe" which it uses as a stand-in for "bestiality, transgenderism, sodomy, pornography, feminism, and other evils."⁵⁸ *Dabiq* readers are told that *fitrah*, or proper predisposition to religiosity under Islam, is manifest in 'the attraction of man to woman and woman to man,' while 'sodomites' represent the worst of sexual perversion, and are worthy of death."⁵⁹ In an explicit linking of ISIS's misogyny and homophobia, the magazine warns that "as the *fitrah* continues to be desecrated day by day in the West and more and more women abandon motherhood, wifehood, chastity, femininity, and heterosexuality, the true woman in the West has become an endangered creature."⁶⁰

A. Dress Codes and Gender Roles for Women

Shortly after rising to power, ISIS lawmakers quickly drafted the *Women of the Islamic State: Manifesto and Case Study*, prescribing a subordinate role for women and justifying inequality between men and women.⁶¹ The Manifesto explains, "[i]t is the fundamental function of a woman to become a mother and serve her husband and children. Women can only leave the house in exceptional circumstances—to wage Jihad, when there are no men available, or to study religion."⁶² The "Research and Fatwa Department" regulates all aspects of dress and appearance for men and women, from prohibiting behaviors, such as women sitting on chairs, and gender intermingling in public places.⁶³

According to OWFI, which has been documenting ISIS gender crimes since the fall of Mosul in June 2014 and through its re-take-over, "[m]any women were beaten because they were not wearing headscarves inside their home due to ISIL criminals raiding houses

inventingpeace/2015/08/19/gender-under-a-black-flag-isil-recruitment [http://perma.cc/77PM-AJBF].

58. *The Fitrah Of Mankind And the Near-Extinction of the Western Woman*, 15 DABIQ 20, <https://clarionproject.org/factsheets-files/islamic-state-magazine-dabiq-fifteen-breaking-the-cross.pdf> [http://perma.cc/CGX8-4Z8F].

59. HRGJ CLINIC ET AL. ART. 15 COMMUNICATION, *supra* note 4, at 18.

60. *The Fitrah Of Mankind And the Near-Extinction of the Western Woman*, *supra* note 58, at 25; HRGJ CLINIC ET AL. ART. 15 COMMUNICATION, *supra* note 4, at 19 (citing Documentation #108).

61. MAH-RUKH ALI, REUTERS INST. FOR THE STUDY OF JOURNALISM, ISIS AND PROPAGANDA: HOW ISIS EXPLOITS WOMEN 13 (2015).

62. *Id.*; HRGJ CLINIC ET AL. ART. 15 COMMUNICATION, *supra* note 4, at 19.

63. HRGJ CLINIC ET AL. ART. 15 COMMUNICATION, *supra* note 4, at 17 (citing Documentation #130, #134); Meira Svirsky, *12 Rules for Living Under ISIS: Follow or Be Killed*, CLARION PROJECT (Jan. 28, 2015), <https://clarionproject.org/rules-living-under-isis-follow-or-be-killed-25> [http://perma.cc/ZS6Q-HG8N].

and suddenly (sic).”⁶⁴ OWFI further explains that violating ISIS’s dress code could result in imprisonment or enslavement.⁶⁵ In the Almajmu’at Althaqafiyah area of Iraq, ISIS sentenced one woman to fifty lashes in public as punishment for violating the dress code.⁶⁶ ISIS militia members have also been known to carry out punishments for women wearing colors other than black.⁶⁷ In the Alarabi area, the punishment for any girl as young as four years old not wearing black clothes was twenty lashes.⁶⁸ For girls older than twelve years, the first offense punishment was eighty lashings and 100 lashings for married women.⁶⁹

The all-women ISIS member morality patrol, known as the Diwan Al-Hisbah, monitors women in public streets, physically assaulting dress code offenders.⁷⁰ By October 2015, members of the all-female police force under Diwan Al-Hisbah, Al-Khansa’ Brigade, started imposing torture and sometimes death as punishment to gender transgressors.⁷¹ They used an instrument known as the “biter,” a metal device with teeth that cuts into flesh.⁷² The “biter” is used for a first infraction “if the wom[an] is not wearing veil again they would lash her.”⁷³ News media have reported similar practices in Mosul and in the Anbar province when they were under the control of the militia, sometimes resulting in serious wounds or death.⁷⁴

64. Document #136 (Aug. 7, 2016) (on file with MADRE).

65. Document #93 (May 8, 2016) (on file with MADRE).

66. Document #136, *supra* note 64.

67. Priyanka Boghani, *How ISIS Is Using Women to Police Other Women*, PBS (July 13, 2015), <https://www.pbs.org/wgbh/frontline/article/how-isis-is-using-women-to-police-other-women> [http://perma.cc/Y6WS-7MHA].

68. Document #95 (May 14, 2016) (on file with MADRE).

69. *Id.*

70. Shamdeen, *supra* note 6.

71. HRGJ CLINIC ET AL. ART. 15 COMMUNICATION, *supra* note 4, at 20; Henry Holloway, *ISIS unleash lady jihadi BITING BRIGADE armed with ‘metal jaws’ to tear women to death*, DAILYSTAR (Feb. 8, 2017), <https://www.dailystar.co.uk/news/latest-news/586098/ISIS-Mosul-Al-Khansa-Metal-Jaws-Religious-Police-Islamic-State-Women-Crimes-Black-Jihadi> [http://perma.cc/2U7H-M3AS]; Abdelhak Mamoun, *ISIS executes 3 women by “biter” in central Mosul*, IRAQI NEWS (Dec. 28, 2015), <https://www.iraqinews.com/iraq-war/isis-executes-3-women-biter-central-mosul> [http://perma.cc/CMV4-EQB6].

72. HRGJ CLINIC ET AL. ART. 15 COMMUNICATION, *supra* note 4, at 19; Holloway, *supra* note 71.

73. Document #47 (Jan. 9, 2015) (on file with MADRE).

74. *E.g.*, Patrick Cockburn, *Isis in Mosul: Brutal metal instrument used to clip women’s flesh shows increasing barbarity within ‘caliphate’s’ own walls*, INDEPENDENT (Feb. 24, 2016), <http://www.independent.co.uk/news/world/middle-east/isis-in-mosul-iraq-caliphate-brutal-metal-instrument-used-to-clip-womens-flesh-a6893876.html> [https://perma.cc/GV8Y-M3VH]; Abdelhak Mamoun, *All-female team to bite, pinch women not wearing veils western Anbar*, IRAQI NEWS (Jan. 8, 2015), <https://www.iraqinews.com/features/female-team-bite-pinch-women-not-wearing-veils-western-anbar> [https://perma.cc/BM4R-RBPQ]; Mamoun, *supra* note 71.

One young woman who fled to a refugee camp shared how ISIS members assaulted her sister with the device for forgetting to wear her gloves in public.⁷⁵ She recalled that her sister described the weapon as “more painful than labor pains.”⁷⁶ In another case, Brigade members beat a pregnant woman to death because she lifted her *niqab* to drink water.⁷⁷

Under the former ISIS regime in Iraq, women were disproportionately punished for behavior deemed to fall outside the confines of their gender roles. One of the most common charges brought against women was adultery or sex outside of marriage, which carries the punishment of death by stoning.⁷⁸ For example in early in 2016, when ISIS militia members discovered two teenage girls in the same house as two young men, the men were each flogged fifty times; the two girls, ages sixteen and seventeen, were publically stoned to death.⁷⁹ In 2016, four women in Mosul were brutally stoned to death after they were discovered to have been raped by ISIS fighters.⁸⁰ They were convicted of adultery by the self-appointed ISIS court for “permitting” the fighters to rape them.⁸¹

ISIS has also prohibited women from most public occupations, only allowing them to work outside of the home in a limited capacity.⁸² This left professional women, particularly politicians and lawyers, at risk of execution for their previous employment.⁸³ The militia did make an exception for medical professionals, such as doctors and nurses, primarily when it faced a critical need for medical

75. Cockburn, *supra* note 74.

76. *Id.*

77. HRGJ CLINIC ET AL. ART. 15 COMMUNICATION, *supra* note 4, at 19–20.

78. Julian Robinson, *Two teenage girls are stoned to death by ISIS after they were found in a house with two men—who were each flogged 50 times*, DAILYMAIL (Feb. 26, 2016), <http://www.dailymail.co.uk/news/article-3465227/Two-teenage-girls-stoned-death-ISIS-house-two-men-flogged-50-times.html> [<http://perma.cc/Z82L-DBKQ>]; Document #5 (Oct. 27, 2014) (on file with MADRE); Document #99 (June 4, 2016) (on file with MADRE); Document #166 (Feb. 1, 2017) (on file with MADRE).

79. Robinson, *supra* note 78.

80. Simon Tomlinson, *Four women are raped by ISIS fighters and then stoned to death in Mosul as punishment for ‘committing adultery,’* DAILY MAIL (Feb. 15, 2016), <http://www.dailymail.co.uk/news/article-3447570/Four-women-raped-ISIS-fighters-stoned-death-Mosul-punishment-committing-adultery.html> [<http://perma.cc/BN5M-JSFJ>].

81. *Id.*

82. U.N. HIGH COMM’R & UNAMI REPORT, 11 SEPT.–10 DEC. 2014, *supra* note 7, at 12–13.

83. U.N. HIGH COMM’R & UNAMI REPORT, 6 JULY–10 SEPT. 2014, *supra* note 46, at 10 (documenting cases of targeted assassinations of female professionals). *See also The Wrong Kind of Woman*, *supra* note 4; *ISIL unlawful ‘shari’a courts’ meting out ‘monstrous’ punishments, UN warns*, U.N. NEWS CTR. (Jan. 20, 2015), <http://www.un.org/apps/news/story.asp?NewsID=49848#.WBjCfi0rKUK> [<http://perma.cc/SZU2-TPXZ>].

assistance.⁸⁴ Similarly, they made exceptions for some teachers and civil service administrators.⁸⁵

Women whom ISIS allowed to work were subjected to strict dress codes.⁸⁶ Two months into ISIS's occupation of Mosul, a group of women doctors wrote an open letter to ISIS fighters demanding relief from the dress code that inhibited them from performing their medical duties.⁸⁷ The open letter explained:

Female doctors have continued to work in order to aid the sick and injured of Mosul, a city that is in a critical condition because of the IS' control over the city . . . [Yet] the IS group has imposed the *niqab* on female doctors in hospitals, with fighters at hospital entrances in order to stop any female doctors coming or going unless they're wearing the *niqab* and gloves. When women doctors tried to convince them that they couldn't do their jobs and treat patients dressed like this, the IS men abused the doctors verbally and began threatening them.⁸⁸

Two days after the letter was sent, the author, "Dr. Ghada Shafiq, a gynecologist who worked at Mosul's General Hospital, was attacked and stabbed to death by militia members" at her home.⁸⁹

When ISIS militia members capture a person accused of homosexual behavior, fighters immediately search the victim's phone and social media content.⁹⁰ In one instance, ISIS executed two young women on charges of being lesbians simply for having suspected "lesbian" content on their phones.⁹¹ ISIS is also known to thoroughly examine institutional records for documentation on alleged gender transgressions.⁹² Those who have lived under ISIS's rule report that

84. Louisa Tarras-Wahlberg, *Promise of Paradise? A Study on Official ISIS-Propaganda Targeting Women* 27 (2016) (thesis).

85. *Id.* at 37; AL-KHANSSAA BRIGADE, *supra* note 45, at 25; U.N. HIGH COMM'R & UNAMI REPORT, 11 SEPT.–10 DEC. 2014, *supra* note 7, at 12–13.

86. *The Wrong Kind of Woman*, *supra* note 4. "Women have been banned from working outside their homes—the only exceptions are obstetricians and nurses." Shamdeen, *supra* note 6.

87. Shamdeen, *supra* note 6; HRGJ CLINIC ET AL. ART. 15 COMMUNICATION, *supra* note 4, at 22.

88. HRGJ CLINIC ET AL. ART. 15 COMMUNICATION, *supra* note 4, at 22.

89. *Id.*

90. *Why my own father would have let IS kill me*, BBC NEWS (July 23, 2015), <http://www.bbc.com/news/magazine-33565055> [<http://perma.cc/3ZJJ-NVNX>].

91. HRGJ CLINIC ET AL. ART. 15 COMMUNICATION, *supra* note 4, at 25 (citing Documentation No. 110).

92. *E.g.*, Aaron Y. Zelin & Jacob Olidort, *The Islamic State's Views on Homosexuality*, WASH. INST. FOR NEAR E. POLICY (June 14, 2016), <http://www.washingtoninstitute.org/policy-analysis/views/the-islamic-states-views-on-homosexuality> [<http://perma.cc/YMC4-W4RB>].

when people are captured, their phones, computers, and personal contacts are searched.⁹³ Prior to ISIS's reign in Iraq, a lesbian couple was suspended from Mosul University when they were caught kissing at school.⁹⁴ When ISIS took over the city, they kicked down the doors to the University and searched through the institution's records.⁹⁵ After finding documentation of the two women's suspensions, ISIS issued a warrant for their deaths.⁹⁶ After a grueling and life-threatening trek, the women managed to flee to safety.⁹⁷ During their daring escape, the two young women risked their lives, walking at night through a heavy concentration of land-mines and potential ISIS sniper fire over the Hamrin mountains.⁹⁸

B. Gender Regulations Imposed on Men

Just as women's and girls' gender roles, including their dress, behaviors, activities, and attributes, assigned to them are heavily regulated by ISIS, so are those of men and boys. ISIS dictates rigid definitions for masculine and effeminate appearances that often conflate certain socially constructed attributes with assigned heterosexual and homosexual behaviors. The absence of certain masculine characteristics is enough to run the risk of being labeled as effeminate and consequently accused of homosexuality regardless of actual sexual orientation.

For example, a key indicator of masculinity under ISIS is the ability to grow a robust beard.⁹⁹ In Mosul, militia members distributed a leaflet forbidding men from shaving their beards because "no one does this except men who are effeminate."¹⁰⁰ Members also circulated leaflets claiming that barbers and hairdressers are an "accessory to sin" if they shave or trim men's beards and would be detained if they did so.¹⁰¹ Male youth who did not (or could not)¹⁰²

93. *Id.*

94. HRGJ CLINIC ET AL. ART. 15 COMMUNICATION, *supra* note 4, at 24 (citing Documentation No. 168).

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. Johnlee Varghese, *Isis Bans Men from Shaving, Says Those Without Beard are Effeminate*, INT'L BUS. TIMES (Apr. 30, 2015), <http://www.ibtimes.co.in/iraq-isis-bans-men-shaving-beard-mosul-says-those-who-do-so-are-effeminate-630922> [<http://perma.cc/9CJZ-Y4RJ>].

100. *Id.*; See also Varghese, *supra* note 8.

101. Wheaton, *supra* note 8.

102. Mezzofiore, *supra* note 8 (noting that ISIS handed out leaflets in the Iraqi city of Mosul ordering all men to grow full beards or face punishment. ISIS states that shaving

grow beards were often targets of torture and execution, having been labeled as gay or “less masculine” based on appearance alone.¹⁰³ The Mosul Eye reported mass arrests of young men for shaving their beards.¹⁰⁴ ISIS jailed the men for three months and threatened them with beheading if they removed their beards again.¹⁰⁵ After escaping ISIS occupation, one young man from Mosul reflected: “My facial hair is just slow to come out for my age. . . . [T]hey deal ruthlessly with anyone who opposes or ignores their instructions.”¹⁰⁶

Men were additionally forbidden from wearing skinny jeans or tight clothing,¹⁰⁷ having western haircuts, or giving someone else a western haircut.¹⁰⁸ Punishments for breaking these rules ranged from jail time and public floggings to execution by stoning, beheading, firing squad, or being pushed off of tall buildings. Additionally, the husbands of married women who break gender rules may face punishment of death for their complacency in their wives’ defiance.¹⁰⁹ For example, one resident of the formerly ISIS-controlled town of Tikrit explained how ISIS fighters would knock on the doors of homes to monitor dress code compliance, proclaiming they would flog any man who accompanied a woman not wearing a veil.¹¹⁰

There have been numerous documented executions committed by ISIS militants who punish people accused of homosexual behavior.¹¹¹ Individuals labeled as homosexual, whether true or not, are routinely targeted for death. While all of ISIS’s executions run the medieval gamut, its most common form of execution for LGBTQ¹¹² persons involves throwing victims from tall buildings to their death.¹¹³ A bag filled with weights is placed around the victim’s neck so that the body falls on its head upon impact.¹¹⁴ Other forms of execution involve gunfire, immolation, or beheading. In some instances, victims are

facial hair is *haram* (forbidden) under their extremist interpretation of Islamic Law.); Varghese, *supra* note 8; Wheaton, *supra* note 8.

103. U.N. HIGH COMM’R & UNAMI REPORT, 1 MAY–31 OCT. 2015, *supra* note 7, at 19.

104. Varghese, *supra* note 8.

105. *Id.*

106. Wheaton, *supra* note 8.

107. Winsor, *supra* note 11.

108. Patrick Cockburn, *Life Under ISIS: Eighty Lashes for Cutting His Cousin’s Hair*, NEWSWEEK (May 1, 2016), <http://www.newsweek.com/eighty-lashes-cutting-cousin-hair-454099> [<http://perma.cc/KBJ5-HZ6V>].

109. Documents #13–16 (Nov. 7, 2014) (on file with MADRE).

110. *Id.*

111. *E.g.*, OutRight Action International has documented 23 individuals killed for being (perceived as) LGBTQ, *Timeline of Publicized Executions*, *supra* note 4.

112. *See supra* note 3. To date, there have not been any documented cases of intersex killings.

113. *See* Foreman, *supra* note 9; Gilbert, *supra* note 9; Tharoor, *supra* note 9.

114. Document #56 (Aug. 27, 2015) (on file with MADRE).

bludgeoned to death, their heads crushed by heavy cement blocks.¹¹⁵ In other instances, they are raped beforehand.¹¹⁶ Family members who try to intervene are often threatened, attacked, or disappear.

ISIS does not require direct evidence to support allegations of homosexual behavior, which is often conflated with broader gender transgressions.¹¹⁷ Witnesses report that numerous youth accused of homosexuality were tortured or executed as punishment because they were considered physically handsome, effeminate, or for wearing western hairstyles or clothing.¹¹⁸ In 2016, the U.N. Assistance Mission for Iraq (UNAMI) reported the brutal public flogging of thirty-six young men by ISIS for wearing skinny jeans.¹¹⁹

ISIS brands the homes of victims' families accused of homosexual behavior with the phrase "[o]ne of the houses of the Lot tribe" above their front doors.¹²⁰ Family members are warned that the punishment for removing the label is death.¹²¹ In one horrific story documented by OWFI, ISIS immolated four young Iraqi men in their early twenties on charges of homosexuality.¹²² An eyewitness reported that ISIS put the four young men in a rectangular hole two meters deep and wide.¹²³ Attaching the four young men together with metal chains, ISIS militants proceeded to put benzene on the victims and burn them to death.¹²⁴

C. Sexual Slavery as a Form of Gender Oppression

When first captured by ISIS, women and girls are evaluated for sexual slavery. They are separated from the boys, men, and older women within their families.¹²⁵ ISIS acquires some of its sexual slave

115. Document #140 (Aug. 20, 2016) (on file with MADRE).

116. Lavers, *supra* note 11.

117. See HRGJ CLINIC ET AL. ART. 15 COMMUNICATION, *supra* note 4, at 17 (discussing the conflation between heterosexual and homosexual behaviors). "Men that do not display masculine characteristics as defined by ISIS risk being labeled as effeminate, and thus accused of homosexuality regardless of their actual sexual orientation." *Id.*

118. Documents #55 & #56 (Aug. 27, 2015) (on file with MADRE); See also Winsor, *supra* note 11.

119. U.N. HIGH COMM'R & UNAMI REPORT, 1 MAY–31 OCT. 2015, *supra* note 7, at 19.

120. HRGJ CLINIC ET AL. ART. 15 COMMUNICATION, *supra* note 4, at 26–27 (citing Documentation #55).

121. *Id.*

122. *Id.* at 30 (citing Documentation #69).

123. *Id.*

124. *Id.*

125. *E.g.*, Human Rights Council, Report of the Office of the United Nations High Commissioner for Human Rights on the human rights situation in Iraq in the light of abuses committed by the so-called Islamic State in Iraq and the Levant and associated groups, ¶ 36, U.N. Doc. A/HRC/28/18 (Mar. 27, 2015).

captives through a “bargaining procedure” where militia soldiers threaten male family members with arrest or death if they refuse to hand over female members of their families.¹²⁶ Other times, ISIS militants have forced women into marriage as ransom for the return of kidnapped family members.¹²⁷

ISIS then transports young women to a detention center, usually an old school or office building converted into a makeshift prison.¹²⁸ Upon arrival, they are often beaten and raped. Captives are numbered, inspected, and evaluated on their beauty and fitness before they are given as “gifts,” forced into marriage, or sold at slave market auctions¹²⁹ or at roadside sales.¹³⁰ One survivor explained how she endured frequent beatings, including one that left her unable to walk for days.¹³¹ After a failed attempt to escape, one woman reported that her “owner” killed her children and raped her as punishment.¹³² Another survivor recounted her time in captivity:

From 9:30 in the morning, men would come to buy girls to rape them. I saw in front of my eyes ISIS soldiers pulling hair, beating girls, and slamming the heads of anyone who resisted. They were like animals. . . . Once they took the girls out, they would rape them and bring them back to exchange for new girls.¹³³

126. U.N. OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS & UNAMI, A CALL FOR ACCOUNTABILITY AND PROTECTION: YEZIDI SURVIVORS OF ATROCITIES COMMITTED BY ISIL 14–17 (2016); Callimachi, *supra* note 49; Kenneth Roth, *Slavery: The ISIS Rules*, HUMAN RIGHTS WATCH (Sept. 5, 2015), <https://www.hrw.org/news/2015/09/05/slavery-isis-rules> [<http://perma.cc/J4JS-K4C7>].

127. Document #7 (Nov. 3, 2014) (on file with MADRE).

128. U.N. OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS & UNAMI, *supra* note 126, at 14.

129. The “Committee for the Buying and Selling of Slaves,” requires bids to be submitted in sealed envelopes at the time of purchase. Human Rights Council, *supra* note 25, ¶ 58. This central committee authorizes the opening of slave markets in specific towns, empowering a local committee or commander to take charge of the auction. *Id.*

130. *See id.* ¶ 55 (noting how ISIS sells Yazidi women and girls at auction in slave markets, or *souk sabaya*, or to individual buyers who come to the holding centers); Human Rights Council, *supra* note 125, ¶ 37.

131. Nahlah Ayed, *They raped us; they killed our men’: Psychologist helps Yazidi women recover from trauma of ISIS captivity*, CBS NEWS (Jan. 9, 2017), <http://www.cbc.ca/news/world/yazidis-psychologist-germany-refugees-1.3923901> [<http://perma.cc/228S-63JY>]; James Novogrod & Richard Engel, *ISIS Terror: Yazidi Woman Recalls Horrors of Slave Auction*, NBC NEWS (Aug. 25, 2015, 12:26 PM), <http://www.nbcnews.com/storyline/isis-uncovered/isis-terror-yazidi-woman-recalls-horrors-slave-auction-n305856> [<http://perma.cc/BV7H-V67U>]; Lin Taylor, *As Islamic State weakens, step up efforts to free Yazidi sex slaves, survivor says*, REUTERS (Nov. 6, 2017), <https://www.reuters.com/article/us-mideast-crisis-iraq-yazidi/as-islamic-state-weakens-step-up-efforts-to-free-yazidi-sex-slaves-survivor-says-idUSKBN1D6125> [<http://perma.cc/NTD9-RRC7>].

132. Human Rights Council, *supra* note 25, ¶ 67.

133. *Iraq: ISIS Escapees Describe Systematic Rape*, HUMAN RIGHTS WATCH (Apr. 14, 2015), <https://www.hrw.org/news/2015/04/14/iraq-isis-escapees-describe-systematic-rape> [<http://perma.cc/F7R2-6VHV>].

The widespread use of sexual violence against women and girls is deeply entrenched in the radical theology and gender policies of the Islamic State.¹³⁴ Rape and sexual slavery are systematically enacted by ISIS military operations as parts of a larger plan to control gender norms and the ethno-religious make-up of future generations in Iraq, as well as for economic gain and to demonstrate territorial control.

ISIS's online English magazine, *Dabiq*, features an article titled, "The Revival of Slavery" calling on militia members to "embrace[] the practice of sexual slavery and trafficking as a means to eradicate 'pagan' Yazidi women and girls from the Muslim world."¹³⁵ Such policy propaganda reinforces the Islamic State's normalization of female subordination through gender roles, defining women as the personal property of men and reinforcing methodologies for controlling that narrative through the use of rape, sexual slavery, murder,¹³⁶ and other forms of torture.¹³⁷

The militia's sexual enslavement policy serves as a centerpiece for its larger military strategy in acquiring territory, controlling civilians, and recruiting fighters.¹³⁸ A detailed reprint of an ISIS "frequently asked questions" pamphlet for militia members explains that all non-Muslim women may be considered "spoils of war" subject to lawful capture and rape.¹³⁹ While non-Muslims are intensely

134. See generally *infra* Section II.A.

135. See ORG. OF WOMEN'S FREEDOM IN IRAQ ET AL., SEEKING ACCOUNTABILITY AND DEMANDING CHANGE: A REPORT ON WOMEN'S HUMAN RIGHTS VIOLATIONS IN IRAQ UNDER THE UN CONVENTION AGAINST TORTURE 13–14 (2015), <http://www.law.cuny.edu/academics/clinics/iwhr/publications/Seeking-Accountability-and-Demanding-Change.pdf> [<http://perma.cc/FAL2-GF9W>].

136. Murder is a form of violence in itself and often coupled with torturous acts in its facilitation. Stonings, beheadings, and being set on fire and thrown from tall buildings are examples of acts of torture used in the facilitation of murder.

137. See, e.g., Michael Georgy, *Captive Islamic State militant says mass rapes were 'normal'*, REUTERS (Feb. 17, 2017), <http://www.reuters.com/article/us-mideast-crisis-mosul-prisoners-idUSKBN15W1N0> [<http://perma.cc/278Q-9XC6>]. ISIS militant Amar Hussein claims to have raped over 200 women from Iraqi minorities with little regret. *Id.* Hussein explained that his commanders gave him and others militia members approval to rape "as many Yazidi and other women as they wanted." *Id.* "'Young men need this,' . . . 'This is normal.'" *Id.*

138. Sec. Council, Rep. of the Secretary-General on the threat posed by ISIL (Da'esh) to international peace and security and the range of United Nations efforts in support of Member States in countering the threat, ¶¶ 9, 28, U.N. Doc. S/2016/92 (Jan. 29, 2016) (noting how "control over women's sexuality and reproduction is integral to the nation-building aspirations of ISIL and its affiliates").

139. Roth, *supra* note 126. See also Human Rights Council, *supra* note 25, ¶ 54. The pamphlet is available in the original Arabic through the Middle East Media Research Institute. See *Islamic State (ISIS) Releases Pamphlet On Female Slaves*, *supra* note 47. The detailed pamphlet translated by Human Rights Watch was not the first admission by official ISIS sources that the militant organization is engaged in sexual slavery, and in particular sexual slavery of Yazidi women and girls. There is "[a] growing body of internal policy memos and theological discussions" that have been used to establish

targeted, Muslim women have also been forced to marry fighters, raped, and taken into sexual slavery.¹⁴⁰ The pamphlet envisions women captives as legal property: “It is permissible to buy, sell, or give as a gift female captives and slaves, for they are merely property, which can be disposed of as long as that doesn’t cause [the Muslim ummah] any harm or damage.”¹⁴¹ The pamphlet details ISIS policies on slaveholding, setting conditions for punishments, and providing explanations for who controls legal title of slaves, including policies governing joint ownership and inheritance of slaves when an “owner” dies.¹⁴²

III. PROSECUTING GENDER-BASED CRIMES UNDER THE ROME STATUTE

In the aftermath of World War II, as two of the first acts to enshrine international human rights and humanitarian law, the U.N. General Assembly adopted the Universal Declaration of Human Rights¹⁴³ and the Convention on the Prevention and Punishment of the Crime of Genocide.¹⁴⁴ While the Nuremberg tribunals started to take form, advocates also proposed the creation of a more permanent tribunal, but the proposal to establish an international court to prosecute individuals responsible for atrocities committed against humanity would wait another fifty years before its revival.

By the early 1990s, the movement for an international criminal court began to gain speed. In 1995, the U.N. General Assembly passed a resolution creating a Preparatory Committee (PrepCom) to prepare the text of the statute that would govern it.¹⁴⁵ Three

guidelines for ISIS regulated slavery issued by the Islamic State Research and Fatwa Department. See Callimachi, *supra* note 49. An October 2014 article entitled, “The Revival of Slavery” in the ISIS propaganda magazine *Dabiq* also describes the policy, although in fewer specifics. See, e.g., Robert Mackey, *Islamic State Propagandists Boast of Sexual Enslavement of Women and Girls*, N.Y. TIMES (Oct. 14, 2014), <https://www.nytimes.com/2014/10/15/world/middleeast/islamic-state-propagandists-admit-sexual-enslavement-of-yazidis.html> [<http://perma.cc/G8M7-JHJV>].

140. Document #136 (Aug. 7, 2016) (on file with MADRE); Document #204 (Sept. 6, 2017) (on file with MADRE); Document #207 (Aug. 11, 2017) (on file with MADRE); Document #217 (Oct. 11, 2017) (on file with MADRE); Document #228 (Nov. 26, 2017) (on file with MADRE).

141. Roth, *supra* note 126. See also Human Rights Council, *supra* note 25, ¶ 62.

142. The pamphlet outlines specific rules for joint ownership of slaves, including whether men may rape female slaves owned by their wives or other men, when women can be separated from their children, and allows for punishments for unwanted behaviors. Human Rights Council, *supra* note 25, ¶ 75.

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

144. G.A. Res. 260 (III)A, Convention on the Prevention and Punishment of the Crime of Genocide (Dec. 9, 1948).

145. G.A. Res. 50/46, ¶¶ 2–4 (Dec. 11, 1995).

years later, the General Assembly convened the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome, Italy, for the finalization and adoption of its Convention, better known as the "Rome Conference." The outcome of the Rome Conference was completion of the Rome Statute, containing 128 articles, and adopted by an overwhelming majority of states in a vote of 120 to seven with twenty-one countries abstaining.¹⁴⁶ By 2002, the Rome Statute entered into force, formally establishing the International Criminal Court.¹⁴⁷

State delegations at the Rome Conference relied heavily on the thoughtful engagement of international lawyers and activists for advice. Housed in New York City under the fiscal sponsorship of the international women's human rights organization, MADRE, the Women's Initiatives for Gender Justice (Women's Initiatives) (known then as the Women's Caucus for Gender Justice),¹⁴⁸ was an active member of the umbrella coalition called the Non-Governmental Organization Coalition for an International Criminal Court.¹⁴⁹ Copelon recalls, "[w]omen brought to the caucus many different experiences and perspectives. These were informed by regional diversity and a broad range of experience of advocacy in domestic courts and legislatures, meeting at international conferences, monitoring the ad hoc tribunals, and working with survivors of sexual violence."¹⁵⁰

Members of the Women's Initiatives worked diligently to call attention to the gender gaps in the draft statute. Advocates provided delegates with memoranda detailing the issues and proposing practical recommendations to the draft language, supported by international human rights and humanitarian law.¹⁵¹ While at first only a handful of delegates initially supported the cause, by the time the Rome Conference came about, momentum started to build and support increased. Apart from engagement with the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW),

146. The seven countries that voted against the treaty were Iraq, Libya, Qatar, Yemen, China, Israel, and the United States.

147. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

148. The Women's Initiatives for Gender Justice is an international women's human rights organization that advocates for gender through the ICC and domestic mechanisms, including peace negotiations and justice processes. WOMEN'S INITIATIVES FOR GENDER JUSTICE, <http://www.4genderjustice.org> [<http://perma.cc/F3LD-FD98>].

149. See, e.g., Cate Steains, *Gender Issues*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE—ISSUES, NEGOTIATIONS, RESULTS 360 (1999).

150. Copelon, *supra* note 19, at 233.

151. See *id.* at 234. See also Barbara Bedont, *Gender-Specific Provisions in the Statute of the International Criminal Court*, in ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 183–84 (Flavia Lattanzi & William A. Schabas eds., 1999).

the magnitude of participation by women's rights advocates with an international treaty was unprecedented. Patricia Viseur-Sellers¹⁵² reflects that "the participation of women's rights activists on issues of international criminal and humanitarian law (as opposed to human rights law) was another phenomenal step in 'genderizing' the structural content of international law as it pertains to the 'masculine' arenas of war, genocide and crimes against humanity."¹⁵³

The end result was a draft convention with 116 articles and about 1,700 brackets containing language that delegates could not agree on. However, what stayed intact and without brackets, indicating points of agreement, was the language women's advocates fought for pertaining to sexual violence as an enumerated category.¹⁵⁴ The first Preparatory Commission then sent the draft convention to the six-week-long Rome conference.¹⁵⁵ There, delegates were to flesh out the final document and pass it along to the second Preparatory Commission, which was to draft the accompanying documents to the statute that would delineate procedure, evidence, and provide supplementary definition of the crimes.¹⁵⁶ The final result was the Rome Statute.

The Rome Statute is the first treaty to recognize sexual and gender-based violence as serious crimes under international law, reflecting major historical advances.¹⁵⁷ Women's rights activists successfully advocated to abandon the "outrages upon personal dignity" language that traditionally defined rape as an offense to honor and broadened the category of sexual violence to not only include rape, but also sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and other undefined forms of sexual violence.¹⁵⁸ Article 7 on crimes against humanity codifies

152. Patricia Viseur-Sellers is a special advisor on gender for prosecution strategies to the prosecutor of the International Criminal Court. Viseur-Sellers is also a Visiting Fellow at Kellogg College of Oxford University, where she lectures on international criminal law. She served as a legal advisor on gender and a trial attorney at the International Criminal Tribunals in the former Yugoslavia and Rwanda.

153. E-mail from Patricia Viseur-Sellers, Special Advisor on Gender for Prosecution Strategies, to Lisa Davis, Assoc. Professor of Law and Co-Dir. of the Human Rights and Gender Justice Clinic at the CUNY Sch. of Law (July 23, 2015) (on file with author).

154. Preparatory Comm'n for the Int'l Criminal Court, Rep. of the Preparatory Commission for the International Criminal Court: Finalized draft text of the Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2, at arts. 7(1)(g)-6, 8(2)(b)(xxii)-6 (Nov. 2, 2000).

155. Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/13.

156. *Id.* ¶¶ 4–11.

157. Viseur-Sellers, *supra* note 19, at 314–15.

158. Preparatory Comm'n for the Int'l Criminal Court, *supra* note 154, at arts. 7(1)(g)-1, 8(2)(b)(xxii). See Janet Halley, *Rape at Rome: Feminist Interventions in the*

“gender” among its enumerated classes of persecution.¹⁵⁹ It further holds that other “form[s] of sexual violence of comparable gravity” are also punishable under the statute.¹⁶⁰ Similarly, Article 8 on war crimes includes “any other form of sexual violence also constituting a grave breach of the Geneva Conventions.”¹⁶¹ While Article 6 on genocide does not make specific reference to rape, case law has established that rape conduct may also constitute an act of genocide.¹⁶²

This language was not won without a fight. Copelon explains that the strategy for defining and listing sexual violence crimes was intended to equate the gravity of sexual violence to other crimes punishable under the principle of universal jurisdiction.¹⁶³ The early drafts of the statute had reverted to framing sexual violence crimes as an issue of shame, largely due to the then-sizeable opposition to recognizing sexual violence as a serious international crime. Some delegates had called for it to be stuffed back into the rubric of “humiliating and degrading treatment.”¹⁶⁴ Through key organizing and advocacy, women’s rights advocates were able to broaden the awareness of delegates. Ultimately, their efforts paid off and significant gains were made.

A. Gender-Based Persecution as a Crime Against Humanity

Changing the word “sex” for the more inclusive and accurate term “gender” under the enumerated categories of persecution in the Rome Statute is considered one of the most important safeguards for gender justice to happen under international criminal law.¹⁶⁵ Delegates who favored the term “gender” understood the need to comprehensively address major atrocities, including crimes against humanity. They recognized advances under international refugee law that acknowledge inhuman treatment suffered by women who transgress their societies’ restrictive gender roles.¹⁶⁶

Criminalization of Sex-Related Violence in Positive International Criminal Law, 30 MICH. J. INT’L L. 1, 13 (2008).

159. Rome Statute, *supra* note 147, at art. 7(1)(h).

160. *Id.* at art. 7(1)(g).

161. *Id.* at art. 8(2)(b)(xxii).

162. Delegates were disinclined to tinker with the 1948 Genocide Convention’s definition of genocide. It should also be noted that ‘Rape conduct’ is also an element of criminal responsibility for other crimes, including the crime of torture.

163. Copelon, *supra* note 19, at 234.

164. *Id.*

165. Valerie Oosterveld, *The Definition of “Gender” in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?*, 18 HARV. HUM. RTS. J. 55, 82 (2005).

166. *Id.* at 59 n.25.

The word “gender” appears nine times in the Rome Statute, including in the application and interpretation of law, in conducting investigations, and in the treatment of witnesses and victims of sexual and gender-based violence.¹⁶⁷ The description of victims under the Court’s jurisdiction as experiencing sexual and/or gender-based violence was not contested.¹⁶⁸

One of the last usages of the term “gender” within the Statute to be discussed at the Rome Conference was the category of “gender-based persecution” under crimes against humanity.¹⁶⁹ A handful of states, led by the Vatican (a union that Copelon and others coined the “Unholy Alliance”),¹⁷⁰ sought to limit both women’s and LGBTIQ persons’ rights. They opposed a variety of proposed language including, for example, the crime of forced pregnancy, as well as persecution based on gender.¹⁷¹ While these bigoted viewpoints were consistently present in the negotiations, the overwhelming majority of delegates favored the accepted definition of “gender” today and embraced the recognition of its social construction.¹⁷² Valerie Oosterveld¹⁷³ notes that many were actually surprised there was any contention around the term at all.¹⁷⁴ Delegates in favor of a more inclusive term argued that to omit the term “gender” would be “a backward and inappropriate step, given developments in international [law].”¹⁷⁵

Opponents, on the other hand, feared that use of the term “gender” would lead to the expansion of the definition of “sex” beyond a binary to include five or even six categories, namely, male, female, gay, lesbian, and transgender, coined by Doris Buss as the “five genders” argument, and potentially include the offensive categorical

167. *Id.* at 57.

168. *Id.* at 60. Oosterveld notes that while there was some contention, it was not about the use of the term “gender” in this instance. *Id.* at n.29. Oosterveld notes, “[t]his last provision gained wide acceptance and was not bracketed, while the previous provisions were bracketed because delegates debated whether the text should make separate mention of the Prosecutor’s role in protecting victims and witnesses.” *Id.* at 60.

169. 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, 49 (2006).

170. Copelon, *supra* note 19, at 236. For a discussion on the Vatican and Christian fundamentalist opposition to women and lesbian, gay, bisexual, transgender (LGBT) rights, see Doris E. Buss, *Finding the Homosexual in Women’s Rights: The Christian Right in International Politics*, 6 INT’L FEMINIST J. POL. 257 (2004).

171. Copelon, *supra* note 19, at 234–36.

172. *Id.* at 236.

173. Valerie Oosterveld currently serves as Associate Dean at Western Law School in Ontario, Canada.

174. Oosterveld, *supra* note 165, at 65.

175. Steains, *supra* note 149, at 372.

term “hermaphrodites.”¹⁷⁶ Buss explains that at the Beijing conference,¹⁷⁷ the Christian Right believed the attempt to include the word “gender” was part of a feminist conspiracy to expand the biological categories of male and female, in which “a person can decide whether to be male, female, homosexual, lesbian, or transgendered. Some may want to try all five in time.”¹⁷⁸

This small handful of delegates proposed the wording of “men, women and children” as a substitute for “gender.”¹⁷⁹ They argued that “gender” has no clear definition whereas “sex” defines differences along a biological construction.¹⁸⁰ Moreover, they feared the recognition of the social construction of gender roles would negate the patriarchal response to violence against women. At stake in replacing “gender” with “sex” was not only the risk of further concretizing women’s rights as secondary rights, but also the exclusion of rights for LGBTIQ persons altogether.

The proposal was flat out rejected.¹⁸¹ Copelon reflects that while these bigoted views wielded a heavy hand in the negotiations, they were not representative of the overwhelming majority of delegates who favored the more inclusive term “gender” and embraced the recognition of its social construction.¹⁸² Delegates in favor of “gender” argued that the term needed to represent the accurate reflection of the state of international law at the end of the 1990s and thus needed to reflect its social construction.¹⁸³ They pointed to the fact that “gender” was a generally accepted term used by the United Nations because it encompasses both biological and sociological aspects whereas the term “sex” refers only to biological distinctions.¹⁸⁴

Oosterveld, who served as a member of the Canadian delegation to the first PrepCom meeting, is widely recognized for her significant contribution to the success in raising awareness within the delegation of the need for gender sensitivity.¹⁸⁵ She played a critical

176. Sally Baden & Anne Marie Goetz, *Who Needs [Sex] When You Can Have [Gender]? Conflicting Discourses on Gender at Beijing*, 56 FEMINIST REV. 3, 19, 30 (1997); Buss, *supra* note 170, at 269; Oosterveld, *supra* note 165, at 72.

177. *Fourth World Conference on Women*, UN WOMEN (Sept. 1995), <http://www.un.org/womenwatch/daw/beijing/fwcwn.html> [<http://perma.cc/48YG-Z3C4>].

178. Buss, *supra* note 170, at 269.

179. Oosterveld, *supra* note 165, at 64.

180. See, e.g., Steains, *supra* note 149, at 373.

181. Copelon, *supra* note 19, at 233.

182. *Id.*

183. *Id.* at 236.

184. *Id.* at 237.

185. Gina E. Hill, *A Case of NGO Participation: International Criminal Court Negotiations*, in CRITICAL MASS: THE EMERGENCE OF GLOBAL CIVIL SOCIETY 129, 134 (James W. St. G. Walker & Andrew S. Thompson eds., 2008).

role in facilitating delegates' understanding and awareness of the activists' concerns. Oosterveld recalls that the term "gender" (as opposed to "sex") was carefully chosen "to provide broad guidance to decision-makers so that they understand that gender is a construct built upon social understandings of what is expected of those of the male and female biological sex."¹⁸⁶

Cate Steains reminds us that the inclusion of the term "gender" in the Rome Statute "clearly did not occur in a vacuum."¹⁸⁷ Rather, it was rooted in developing international human rights and humanitarian law and was also a response to the women's rights and human rights movements.¹⁸⁸ At the time of the Rome Conference, the two most prevalent definitions of gender adopted by the United Nations both referred to "gender" as a social construct, as all U.N. definitions do today.¹⁸⁹ The first definition, adopted in 1995, finds that, "[t]he term 'gender' refers to the ways in which roles, attitudes, values and relationships regarding women and men are constructed by all societies all over the world. Therefore, while the sex of a person is determined by nature, the gender of that person is socially constructed."¹⁹⁰ The second states: "As sex refers to biologically determined differences between men and women that are universal, so gender refers to the social differences between men and women that are learned, changeable over time and have wide variations both within and between cultures."¹⁹¹ According to Steains, along with the United Nations's definition of gender, reports on a broad swath of gender-based violence examples were circulated and discussed between delegates, including ones that highlighted the very fact that women or men can be targeted for deviating from prescribed gender roles.¹⁹² One such example included the Report of the U.N. Secretary-General to the Beijing Platform for Action, which

186. Oosterveld, *supra* note 169, at 77.

187. Steains, *supra* note 149, at 358.

188. *Id.*

189. Valerie Oosterveld, *Constructive Ambiguity and the Meaning of "Gender" for the International Criminal Court*, 16 INT'L FEMINIST J. POL. 563, 571 (2014).

190. Oosterveld, *supra* note 165, at 67 (quoting Report of the Expert Group Meeting on the Development of Guidelines for the Integration of Gender Perspectives into United Nations Human Rights Activities and Programmes, U.N. ESCOR, Comm'n on Hum. Rts. 52d Sess., Agenda Items 9, 21, ¶ 13 U.N. Doc. E/CN.4/1996/105 (1995)).

191. *Id.* (quoting Integrating the Human Rights of Women Throughout the United Nations System: Report of the Secretary General, U.N. ESCOR, 53d Sess., ¶ 10, U.N. Doc. E/CN.4/1997/40 (1996)). Similarly, a study submitted by the Secretary-General in 2002 defined "gender" as referring to "the socially constructed roles as ascribed to women and men, as opposed to biological and physical characteristics." U.N. Secretary-General, *Women, Peace, and Security*, ¶ 12, U.N. Doc. S/2002/1154 (2002).

192. See generally Steains, *supra* note 149.

was distributed to delegates during discussions on the definition of gender. The Report acknowledges that gender roles are constructed in “social and economic contexts” and “can change over time.”¹⁹³

Ultimately, the delegates reached a consensus, albeit with an unusual footnote to the word gender¹⁹⁴: “it is understood that the term ‘gender’ refers to the two sexes, male and female, within the context of society.”¹⁹⁵ Opponents of the term “gender” felt that they had accomplished limiting the scope of the definition to a male-female binary.¹⁹⁶ Advocates in support of the term “gender” felt content since the phrase “within the context of society” codifies the “socially constructed understandings of what it means to be male or female.”¹⁹⁷

Copelon found such a definition to be inclusive of sexual orientation or gender identity.¹⁹⁸ She explains that “even the accepted definition of ‘gender’ necessarily embraces discrimination based upon a decision not to behave according to a prescribed gender role, whether it be in the realm of housekeeping, work, or sexuality.”¹⁹⁹ Copelon also alludes to the question: when there is uncertainty in

193. U.N. Secretary-General, *Implementation of the Outcome of the Fourth World Conference on Women*, ¶ 9, U.N. Doc. A/51/322 (Sept. 3, 1996).

194. Oosterveld, *supra* note 165, at 56.

195. Rome Statute, *supra* note 147, at art. 7(3).

196. Today, under international law and broadly accepted medical science, sexual orientation is neither defined as a choice or a sex. The archaic notion of a “sex binary” that was invoked during the negotiations has since been debunked by medical science and refuted by international human rights experts. *See, e.g.*, Human Rights Council, Rep. of the Special Rapporteur on extrajudicial, summary or arbitrary executions on a gender-sensitive approach to arbitrary killings, U.N. Doc. A/HRC/35/23 (June 6, 2017). Medical science has established that “sex characteristics, which, either at birth or in developmental stages, do not fit the medical or societal standards of binary biological sex with regards to sexual and reproductive anatomy.” *Id.* ¶ 18. *See also* THE YOGYAKARTA PRINCIPLES (Nov. 2006), stating:

Gender identity is understood to refer to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.

Id. at 6. The Human Rights Council also notes that some countries, such as Bangladesh, Pakistan, and India, have long recognized a third sex. Human Rights Council, *supra*, ¶ 18.

197. Oosterveld, *supra* note 165, at 64. Oosterveld reminds us that the statute’s reference to “the two sexes, male and female” does not render the definition equivalent to “sex” because of the phrase “within the context of society.” *Id.* at 72. Rather, the more plain-meaning interpretation of the Statute’s definition is that the social understanding of “gender” is limited to “the two sexes, male and female.” *Id.* Oosterveld poignantly notes, “A biological foundation is quite different from biological *determinism*, unless taken to an extreme.” *Id.* For a discussion on the conflation of the terms “sex” and “gender” and the terms “gender” and “woman,” see *id.* at 71, 77–79. For a discussion on the definition of “gender” under refugee law, see *id.* at 67–68.

198. Copelon, *supra* note 19, at 237.

199. *Id.*

a legal human rights definition, who would argue that one should err on the side of supporting discrimination?²⁰⁰

Michael Bohlander contends that the interpretation of gender as a social construct, which would consequently include gender expression based on sexual orientation or gender identity, was not plausible for the Rome Statute drafters, since a minority of states that participated in the PrepCom meetings criminalized LGBT²⁰¹ behavior in their domestic jurisdictions.²⁰² He concludes that accepting such a definition would have implied that states with deficient or contrary laws to the principles of the Rome Statute would be automatically considered unable to conduct domestic prosecutions and consequently be subjected to the ICC's intervention.²⁰³

Bohlander does not take into account that several other crimes recognized by the Court, such as the recruitment of child soldiers, rape, and early and forced marriage, were also not outlawed, and in some cases, legalized by numerous states that participated in the PrepCom meetings. For example, while about thirty-seven percent of countries still criminalize homosexuality,²⁰⁴ over seventy-five percent continue to allow some form of forced/underage marriage²⁰⁵ under law.²⁰⁶

Furthermore, most Rome Statute signatories lack adequate domestic laws for punishing crimes against humanity, genocide, or war crimes. Signatories to the Rome Statute did indeed agree to

200. *Id.*

201. Intersex issues were not discussed.

202. Michael Bohlander, *Criminalising LGBT Persons Under National Criminal Law and Article 7(1)(h) and (3) of the ICC Statute*, 5 GLOBAL POLY 401, 409 (2014).

203. *Id.*

204. AENGUS CARROLL & LUCAS RAMÓN MENDOS, ILGA, STATE SPONSORED HOMOPHOBIA: A WORLD SURVEY OF SEXUAL ORIENTATION LAWS: CRIMINALISATION, PROTECTION AND RECOGNITION 37 (2017), http://ilga.org/downloads/2017/ILGA_State_Sponsored_Homophobia_2017_WEB.pdf [<http://perma.cc/KZ22-CZ6J>].

205. *Women, Business and the Law*, WORLD BANK, <http://wbl.worldbank.org/data/exploretopics/protecting-women-from-violence> [<http://perma.cc/H98Y-6DTN>] (holding about 143 out of 189 countries, or 75.6 percent). According to the U.N. Committee on the Rights of Child, the minimum age for marriage is 18 years for both men and women. Comm. on the Rights of the Child, Gen. Com. No. 4, Adolescent health and development in the context of the Convention on the Rights of the Child, ¶ 16, U.N. Doc. CRC/GC/2003/4 (July 1, 2003). The Convention on the Elimination of Discrimination against Women (CEDAW) also prohibits child marriage, as does CEDAW's General Recommendation No. 21. *See id.* at art. 16.

206. Note the data for the criminalization of homosexuality and forced/underage marriage is taken from two different sources. *See* Bohlander, *supra* note 202. The World Bank data set looks at 189 countries, whereas the ILGA data set looks at 193 countries. *Compare Women, Business and the Law*, *supra* note 205, with CARROLL & MENDOS, *supra* note 204, at 16. Out of the 37 states that were present at the drafting of the Rome Statute, 32 still criminalize homosexuality, and 28 continue to provide legal exceptions to under-age marriage. *See Women, Business and the Law*, *supra* note 205.

complementary jurisdiction of the Court superseding national jurisdiction where laws are absent or contrary to international law, including internationally recognized norms and standards.²⁰⁷ In these situations, the United Nations and the broader international community have worked with states to develop and pass comprehensive laws that bring international law into their national jurisdictions.²⁰⁸ Other times, states have opted for hybrid courts where local and international judges work together on domestic tribunals.²⁰⁹ The court has stepped in only in the instances where a state is deemed not to have the capacity or will to hold domestic proceedings against war criminals and other armed actors that violate crimes under the Rome Statute.²¹⁰

Today, the United Nations and the broader international community define “gender” as a social construct.²¹¹ In the last two decades, international human rights law and jurisprudence has born this out, as numerous regional and U.N. bodies and agencies, including treaty bodies, experts, and jurists, have adopted language that accounts for the social construction of gender identity.²¹²

The Office of the Prosecutor (OTP) for the ICC reflects this understanding as well. In 2014, the OTP issued a comprehensive policy paper on sexual and gender-based crimes, stating: “‘Gender’, in accordance with article 7(3) of the Rome Statute . . . refers to males and females, within the context of society. This definition acknowledges the social construction of gender, and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and to girls and boys.”²¹³ Accordingly, the policy paper distinguishes “gender” from the term “sex,” which refers to “the biological and physiological characteristics that define men and women.”²¹⁴ Yet, since its formation nearly twenty years ago, application of gender-based

207. Article 21 holds that the Court will apply:

[G]eneral principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

Rome Statute, *supra* note 147, at art. 21(1)(c).

208. Wayne Sandholtz, *Implementing the International Criminal Court*, 2014 AM. POLITICAL SCI. ASS'N 1, 9–10 (Aug. 15, 2014).

209. *International Tribunals: Hybrid Courts*, GRADUATE INST. GENEVA (Dec. 22, 2017), <http://libguides.graduateinstitute.ch/icl/hybrid> [<http://perma.cc/7RDQ-QM53>].

210. Sandholtz, *supra* note 208, at 5.

211. Oosterveld, *supra* note 165, at 67–70.

212. See *infra* Section III.C for a deeper discussion on international jurisprudence.

213. OFFICE OF THE PROSECUTOR, INT'L CRIMINAL COURT, POLICY PAPER ON SEXUAL AND GENDER-BASED CRIMES 3 (2014), <https://www.icc-cpi.int/iccdocs/otp/otp-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf> [<http://perma.cc/9XJN-UECG>].

214. *Id.* (citing *What do we mean by “sex” and “gender”?*, WORLD HEALTH ORG.).

persecution based on gender transgressions has yet to happen; there has likely never been a call for the ICC to investigate atrocities committed on the basis of gender crimes at the margins. Moreover, until the rise of ISIS, there has never been a robust body of documented evidence with which to bring persecution charges for crimes based on the social construction of gender.

While gender-based persecution has not been squarely addressed by previous international criminal tribunal cases, the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) have taken into account how discrimination based on transgressing prescribed gender roles and behaviors fueled crimes. In *Nahimana*, Tutsi women were perceived as violating prescribed gender behavior and labeled as “femme[s] fatale[s]” and “seductive agents of the enemy” which the court noted had motivated sexual attacks and killings against them.²¹⁵ In *Kvočka*, the Trial Chamber held that sexual violence was a “natural or foreseeable consequence[]” of women held in detention and “guarded by men with weapons who were often drunk, violent, and physically and mentally abusive and who were allowed to act with virtual impunity.”²¹⁶ On appeal, the Trial Chamber further clarified that discriminatory intent is not voided by personal motivations to commit sexual assault.²¹⁷ In *Akayesu*, the Trial Chamber entered the first conviction of sexual violence as a crime of genocide in an international tribunal and promulgated a definition of rape at the international level.²¹⁸ In 2012, in the *Lubanga* case, the International Criminal Court explicitly named “sexual orientation” as a protected class in accordance in Article 21(3) of the Rome Statute in its discussion on reparations.²¹⁹ Oosterveld reminds us that these cases provide the ICC with a starting point of analysis of gender-based

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

216. Prosecutor v. Kvočka, Case No. IT-98-30/1-T, Judgment, ¶ 327 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 2, 2001).

217. Prosecutor v. Kvočka, Case No. IT-98-30/1-A, Judgment on Appeal, ¶¶ 369–70 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 28, 2005). See Patricia Viseur-Sellers, *Individual(s’) Liability for Collective Sexual Violence*, in GENDER AND HUMAN RIGHTS 189–92 (Karen Knop ed., 2004).

218. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶¶ 596–98 (Sept. 2, 1998).

219. Prosecutor v. Thomas Lubanga Dyilo, Case No. CC-01/04-01/06, Decision establishing the principles and procedures to be applied to reparations (Aug. 7, 2012). The Trial Chamber states, “reparations shall be granted to victims without adverse distinction on the grounds of gender, age, race, . . . sexual orientation, national, ethnic or social origin, wealth, birth or other status.” *Id.* The Court refers to principle 25 of the U.N. Basic Principles on Reparations, which states that the application of those principles must be “consistent with international human rights law” and be “without any discrimination of any kind or on any ground, without exception.” *Id.* at n. 380 (citing U.N. Basic Principles, 25).

persecution.²²⁰ For example, if not for the *Akayesu* decision, the connections between sexual violence, torture, and the crime of genocide may have gone overlooked in the Rome Statute.²²¹ Such tribunal cases can help provide key legal interpretations for the International Criminal Court.

B. Gender-Based Torture as a War Crime

ISIS gender-based crimes also meet the requisite elements to constitute the war crime of torture on the basis of gender. In contrast to crimes against humanity and genocide, in order for an offense to be considered a war crime, it must occur during an officially recognized armed conflict.²²² While taking into consideration the elements of the specific crime and jurisdictional prerequisites, the ICC also factors in whether such crimes were committed as a part of a plan or policy or on a large scale.²²³ For an offense to rise to the level of a war crime, it must also be recognized by customary international law as a crime that would give rise to individual criminal responsibility.²²⁴ While there are different factors the court takes into consideration when classifying an armed conflict, the definition of the crime of torture itself does not differ whether the crime is committed in the context of an international or non-international conflict.²²⁵

In addition to international human rights law, both humanitarian law and international criminal law were informed by torture's customary definition enshrined under article 1 of the U.N. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT or Torture Convention).²²⁶ Consequently, the definition of torture under article 1 laid the foundation for the elements of torture as a war crime and crime against humanity.²²⁷

220. Oosterveld, *supra* note 165, at 60.

221. Valerie Oosterveld, *Gender-Sensitive Justice and the International Criminal Tribunal for Rwanda: Lessons Learned for the International Criminal Court*, 12 NEW ENG. J. INT'L & COMP. L. 119, 122–23 (2005). Oosterveld notes how PrepCom delegates adopted wording from the *Akayesu* decision and added a footnote to the elements of the crime of genocide that “causing serious bodily or mental harm . . . may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment.” *Id.* (citing Rome Statute, *supra* note 147, at art. 6(b) n.3).

222. Rome Statute, *supra* note 147, at art. 8.

223. *Id.*

224. *Id.* at art. 25.

225. *See, e.g.*, Prosecutor v. Delalić, IT-96-21-T, Judgment, ¶ 443 (Nov. 16, 1998).

226. G.A. Res. 39/46, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 10, 1984).

227. Patricia Viseur-Sellers, *Sexual Torture as a Crime Under International Criminal and Humanitarian Law*, 11 N.Y.C. L. REV. 339, 342 (2008).

Article 1 of the Convention [Against Torture] informed humanitarian law and international criminal law, as well as human rights law, of torture's

The Torture Convention is the only legally binding instrument at the international level that exclusively addresses the prevention and elimination of the practice of torture for states, calling on states to actively prevent and eradicate it.²²⁸ Today, 162 states, including the Republic of Iraq, have ratified the Torture Convention.²²⁹ Broken down, the Torture Convention requires four elements for a finding of torture: (1) the intentional infliction (2) of severe physical or mental pain or suffering (3) for specified purposes, such as interrogation, punishment or intimidation or coercion of the victim or a third person, or, “for any reason based on discrimination of any kind” and (4) when perpetrated or instigated by or “with the consent or acquiescence of a public official or other person acting in official capacity.”²³⁰

During the PrepCom, delegates turned to the CAT’s definition of torture, which they considered to reflect customary international law and to be applicable to international humanitarian law.²³¹ The decision was made to base the definition of the war crime of torture on the CAT, taking verbatim portions of the Convention’s definition. Specifically, the first three elements of the CAT were adopted by the Rome Statute with the Statute’s fourth and fifth elements distinguishing the perpetrator as an armed actor as opposed to a state actor.²³² It was pointed out by several delegation members that

customary definition. As a result, the first judgments delivered by the Yugoslav Tribunal and Rwandan Tribunal that addressed torture referred to the customary definition contained in the Convention to enunciate the elements of torture as a war crime and as a crime against humanity.

Id. (citing Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998); Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶¶ 159–64 (Dec. 10, 1998); Prosecutor v. Delalić, Case No. IT-96-21-T, Judgment, ¶¶ 452–69 (Nov. 16, 1998)).

228. For a robust discussion on the absolute and peremptory prohibition of torture and other forms of ill-treatment under treaty-based and customary international law, see Jordan J. Paust, *The Absolute Prohibition of Torture and Necessary and Appropriate Sanctions*, 43 VAL. U. L. REV. 1535 (2009).

229. *Ratification of 18 International Human Rights Treaties*, U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM’R, <http://indicators.ohchr.org> [<http://perma.cc/RKR3-ZFB5>].

230. G.A. Res. 39/46, *supra* note 226, at art. 1, ¶ 1.

231. Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations of the Elements of Crimes*, MAX PLANCK Y.B. OF UNITED NATIONS L. 341, 366–67 (2003).

232. Preparatory Comm’n for the Int’l Criminal Court, *supra* note 154, at art. 8(2)(c)(i)-4:

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.
2. The perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind.
3. Such person or persons were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities.
4. The perpetrator was aware of the factual circumstances that established this status.

many judgements of the *ad hoc* Tribunals also adopted language from the CAT.²³³

The Torture Convention does not qualify or limit the purpose of “discrimination of any kind” to specific categories or protected classes.²³⁴ Consequently, it should be interpreted by its plain meaning. While on its face, this definition includes gender discrimination, including sexual orientation and gender identity (SOGI) discrimination, SOGI is also recognized as a category of discrimination under the Torture Convention.²³⁵

In 2007, the Committee Against Torture (CAT Committee) adopted General Comment No. 2 (CAT Comment No. 2), consolidating decades of international developments on the understanding of gender-based torture as a human rights violation.²³⁶ CAT Comment No. 2 reaffirms that gender is indeed a social construction and highlights the often-obscured roles of gendered discrimination in facilitating the practice of torture.²³⁷ It clarifies that both women and men, and more specifically persons who deviate from their culturally assigned heteronormative gender roles, are at risk of gender discrimination.²³⁸ It prohibits such discrimination, finding that states have the responsibility to protect against gender-motivated crimes of torture, explicitly including when directed against LGBTIQ people and other gender transgressors.²³⁹ Expounding on this, Manfred Nowak, in his role as the U.N. Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, emphasized that “the purpose element is always fulfilled if the acts can be shown to be gender-specific” because of the inherent discriminatory nature of gender-based violence.²⁴⁰

5. The conduct took place in the context of and was associated with an armed conflict not of an international character.

6. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

233. Dörmann, *supra* note 231, at 402–03. *See also* Viseur-Sellers, *supra* note 227, at 348–49.

234. Some treaties have limited the scope of “discrimination of any kind” relative to the respective rights they uphold. For example, article 2 of The International Covenant on Economic, Social and Cultural Rights calls on states to guarantee that the rights of the Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. G.A. Res. 2200A (XXI) (Dec. 16, 1966).

235. G.A. Res. 39/46, *supra* note 226, at art.1.

236. Comm. Against Torture, Gen. Comment No. 2, ¶ 18, U.N. Doc. CAT/C/GC/2 (2008).

237. *Id.* ¶ 22.

238. *Id.*

239. *Id.* ¶ 21.

240. Manfred Nowak (Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, ¶ 30, U.N. Doc. A/HRC/7/3 (Jan. 15, 2008).

Furthermore, the list of prohibited purposes in the Rome Statute's Elements of Crimes²⁴¹ is not exhaustive and does not preclude the ICC from providing further clarification. In *Prosecutor v. Krnojelac*, the Trial Chamber clarified that the purposes element of torture sets it apart from other criminal offenses.²⁴² "Torture as a criminal offence is not a gratuitous act of violence; it aims, through the infliction of severe mental or physical pain, to attain a certain result or purpose."²⁴³ Building on this, the ICTY has also emphasized that such conduct need not be perpetrated solely for the prohibited purpose.²⁴⁴ Instead, "the prohibited purpose must simply be part of the motivation behind the conduct and need not be the predominating or sole purpose."²⁴⁵

C. Recognizing Sexual Orientation and Gender Identity as Protected Classes Under Customary International Law

While behaviors that transgress gender roles derive from normative conceptions of sexual orientation and gender identity fall under the umbrella protection defined in gender as a protected class, SOGI also deserves the protection and recognition of a protected class afforded under customary international law.

In 1981, the world witnessed the breakthrough case of *Dudgeon v. United Kingdom*, where the European Court of Human Rights found that a nineteenth century law still in force in Northern Ireland criminalizing male homosexual acts violated the right to privacy under Article 8 of the European Convention on Human Rights.²⁴⁶ By 1999, as international law began codifying SOGI rights more

241. Preparatory Comm'n for the Int'l Criminal Court, *supra* note 154, at art. 8(2)(a)(ii)-1.

242. *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Judgment, ¶ 180 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 15, 2002).

243. *Id.*

244. *Prosecutor v. Delalić*, Case No. IT-96-21-T, Judgment, ¶ 470 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1996).

245. *Id.* See also *Prosecutor v. Kunarac*, Case No. IT-96-23/1-A, Judgment, ¶ 155 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002).

246. *Dudgeon v. United Kingdom*, App. No. 7525/76 Eur. Comm'n H.R. Dec. & Rep. 22 (1981) (finding the decision 15 to four). Although the law was not being enforced, Dudgeon challenged that, as a homosexual, he ran the risk of prosecution. Interestingly, the same law had been repealed in England and Wales. The court has gone on to consistently hold that LGBT persons are afforded rights under the European Convention. See, e.g., *X. v. Turkey*, App. No. 24626/09 Eur. Ct. H.R. 10–11 (2012) (solitary confinement in prison motivated by prisoner's sexual orientation is discriminatory inhuman or degrading treatment); *Identoba v. Georgia*, App. No. 73235/12 Eur. Ct. H.R. 19, 21 (2015) (failure of the police to adequately protect the LGBT march from violent counterprotesters and subsequent failure to conduct a proper investigation into those crimes violates prohibition on inhuman or degrading treatment).

broadly, the European Court of Human Rights followed suit, expanding its scope of liability from violations of the right to privacy to the inclusion of SOGI as a protected class against discrimination.²⁴⁷

While they have become more nuanced over the years, many of the references to sexual orientation and gender identity throughout the U.N. human rights system stem from the landmark decision in 1994 by the U.N. Human Rights Committee monitoring compliance with the International Covenant on Civil and Political Rights (ICCPR) in *Toonen v. Australia*.²⁴⁸ The Committee held that sexual orientation was included in the ICCPR's antidiscrimination provisions as a protected status.²⁴⁹ The *Toonen* decision, like the *Dudgeon* decision for Europe, marked a turning point in the recognition of gay and lesbian rights within the U.N. human rights system.²⁵⁰

Beyond the CAT and Human Rights Committees, General Comments and Recommendations of other U.N. treaty bodies recognize SOGI rights as well.²⁵¹ Beginning in 2000, the CESCR Committee has listed sexual orientation as protected grounds from discrimination numerous times.²⁵² By 2009, the CESCR Committee crystalized

247. See *Lustig-Prean & Beckett v. United Kingdom*, App. Nos. 31417/96 and 32377/96 Eur. Ct. H.R. 37 (1999); *Smith & Grady v. United Kingdom* App. No. 33985/96, Eur. Comm'n H.R. Dec. & Rep. 85 (1999) (holding that such discriminatory policies "were founded solely upon the negative attitudes of heterosexual personnel towards those of homosexual orientation" and cannot justify discrimination "any more than similar negative attitudes towards those of a different race, origin or colour").

248. Rep. of the Human Rights Comm., ¶ 8.6, U.N. Doc A/49/40 (1994) (holding that a Tasmanian law criminalizing consensual sexual contact between men was not "essential to the protection of morals in Tasmania" and arbitrarily interfered with the petitioner's rights under article 17 of the ICCPR (right to privacy)).

249. *Id.* ¶ 6.11.

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

251. See generally Expert Op. of Professor M. Cherif Bassiouni, ¶¶ 22–26, *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304 (D. Mass. 2012) (No. 3:12-cv-30051) (arguing that sexual orientation and gender identity is considered a group status under international law jurisprudence).

252. See Comm. on Econ., Soc. & Cultural Rights, Gen. comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights), ¶ 65(a), U.N. Doc. E/C.12/GC/23 (2016); Comm. on Econ., Soc. & Cultural Rights, Gen. comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), ¶ 23, U.N. Doc. E/C.12/GC/22 (2016); Comm. on Econ., Soc. & Cultural Rights, Gen. comment No. 20: Non-discrimination in economic, social and cultural rights, ¶ 32, U.N. Doc. E/C.12/GC/20 (2009); Comm. on Econ., Soc. & Cultural Rights, Gen. comment No. 18: The Right to Work (art. 6), ¶ 12(b)(i), U.N. Doc. E/C.12/GC/18 (2006); Comm. on Econ., Soc. & Cultural Rights, Gen. comment No. 15 (2002): The right to water, ¶ 13, U.N. Doc. E/C.12/2002/11 (2003); Comm. on Econ., Soc. & Cultural Rights, Gen.

its jurisprudence through its General Comment No. 20 recognizing sexual orientation and gender identity as protected classes under “other status.”²⁵³ Similarly, the CEDAW Committee has found that “[s]tates parties must legally recognize [and prohibit] such intersecting forms of discrimination” including where sex and gender intersect with sexual orientation.²⁵⁴ The Convention on the Rights of the Child,²⁵⁵ the International Convention on the Elimination of All Forms of Racial Discrimination (CERD),²⁵⁶ and the Convention on the Rights of Persons with Disabilities all find sexual orientation and gender identity among the prohibited grounds of discrimination under their respective treaties.²⁵⁷ All seven of these treaties have been widely

comment No. 14 (2000): The right to the highest attainable standard of health, ¶ 18, U.N. Doc. E/C.12/2000/4 (2000).

253. Comm. on Econ., Soc. & Cultural Rights, Gen. comment No. 20, *supra* note 252, ¶ 32.

254. Comm. on the Elimination of Discrimination against Women, Gen. recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, ¶ 18, U.N. Doc. CEDAW/C/GC/28 (2010). This recommendation states:

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

See, e.g., Comm. on the Elimination of Discrimination against Women, Gen. recommendation No. 33 on women’s access to justice, ¶ 8, U.N. Doc. CEDAW/C/GC/33 (2015); Comm. on the Elimination of Discrimination against Women, Gen. recommendation No. 27 on older women and protection of their human rights, ¶ 13, U.N. Doc. CEDAW/C/27 (2010).

255. *See* Comm. on the Rights of the Child, Gen. comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health, ¶¶ 8–11, U.N. Doc. CRC/C/GC/15 (2013); Comm. on the Rights of the Child, Gen. comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, ¶ 55, U.N. Doc. CRC/C/GC/14 (2013); Comm. on the Rights of the Child, Gen. comment No. 13 (2011); The right of the child to freedom from all forms of violence, ¶ 72(g), U.N. Doc. CRC/C/GC/13 (2011); Comm. on the Rights of the Child, Gen. comment No. 4 (2003); Adolescent health and development in the context of the Convention on the Rights of the Child, ¶ 6, U.N. Doc. CRC/GC/2003/4 (2003); Comm. on the Rights of the Child, Gen. comment No. 3 (2003); HIV/AIDS and the rights of the child, ¶ 8, U.N. Doc. CRC/GC/2003/3 (2003).

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

257. Comm. on the Rights of Pers. with Disabilities, Gen. comment No. 3 (2016) on women and girls with disabilities, ¶ 4(c), U.N. Doc. CRPD/C/GC/3 (2016). *See also* Comm. on the Rights of Persons with Disabilities, Concluding observations on the initial report

ratified, ranging from eighty-three percent to ninety-nine percent of all U.N. Member States, evidencing states' behaviors.²⁵⁸

In the late 1990s, reports of violence and discrimination committed against LGBTIQ individuals began to gain visibility in Special Rapporteur reports, and in 2003, the U.N. General Assembly officially recognized sexual orientation as a protected class against extrajudicial, summary, or arbitrary executions through its resolutions.²⁵⁹ Since then, the Special Rapporteurship has gone on to report on killings committed due to the victim's gender identity and gender expression, explicitly including LGBTIQ individuals.²⁶⁰

Since then, numerous U.N. Resolutions have cited to sexual orientation or gender identity rights.²⁶¹ U.N. General Assembly resolutions have also recognized that killing-based sexual orientation or gender identity "may under certain circumstances amount to genocide, crimes against humanity or war crimes, as defined in international law, including in the Rome Statute of the International Criminal Court."²⁶² Consequently, the General Assembly specifically calls on states to "to bring those responsible to justice before a competent, independent and impartial judiciary at the national or, where appropriate, international level"²⁶³

Like the General Assembly, joint statements and resolutions on LGBTIQ rights have also been delivered at the former U.N. Commission on Human Rights, and at its replacement, the U.N. Human Rights Council. In what human rights defenders consider to be a landmark accomplishment for LGBTIQ rights, on June 17, 2011, the Human Rights Council passed the *Joint Statement on Ending Acts of Violence and Related Human Rights Violations based on Sexual Orientation and Gender Identity*.²⁶⁴ Supported by eighty-five states

of the Islamic Republic of Iran, ¶¶ 12(b), 13(c), 19(c), 35(c), U.N. Doc. CRPD/C/IRN/CO/1 (2017).

258. See *Ratification of 18 International Human Rights Treaties*, *supra* note 229.

259. G.A. Res. 57/214, ¶ 6 (Feb. 25, 2003).

260. See, e.g., Human Rights Council, *supra* note 196, ¶ 23.

261. G.A. Res. 67/168, ¶ 6(b) (Mar. 15, 2013). The U.N. General Assembly urges states to "ensure the effective protection of the right to life of all persons, to conduct . . . prompt, exhaustive and impartial investigations into all killings, including . . . killings of persons . . . because of their sexual orientation or gender identity." See, e.g., G.A. Res. 69/182, ¶ 6(b) (Jan. 30, 2015); G.A. Res. 65/208, ¶ 6(b) (Mar. 30, 2011); G.A. Res. 63/182, ¶ 6(b) (Mar. 16, 2009); G.A. Res. 61/173, ¶ 5(b) (Mar. 1, 2007); G.A. Res. 59/197, ¶ 8(c) (Mar. 10, 2005); G.A. Res. 57/214, ¶ 6 (Feb. 25, 2003).

262. G.A. Res. 69/182, at 2 (Jan. 30, 2015).

263. *Id.* ¶ 6(b).

264. Human Rights Council, Greece, Ireland, France, Norway, Slovenia, South Africa, Sweden, Switzerland: revised draft resolutions, U.N. Doc. A/HRC/17/L.9/Rev. 1, at 1 (2011); See Press Release, Int'l Serv. for Human Rights, Historic Decision: Council passes first-ever resolution on sexual orientation and gender identity (June 17, 2011), <http://www>

from all regions of the world, the Resolution demonstrates the significant trend in state support for prohibiting discrimination based on sexual orientation.²⁶⁵

That same year, the Organization of American States (OAS) General Assembly passed a Resolution in the Americas condemning violence and discrimination committed on the basis of sexual orientation or gender identity.²⁶⁶ The OAS also created an LGBTIQ Unit, later succeeded by a Rapporteurship on the Rights of Lesbian, Gay, Bisexual, Trans and Intersex Persons dedicated to monitoring the human rights situation of LGBTIQ individuals.²⁶⁷ The Inter-American Commission on Human Rights (IACHR or Inter-American Commission) has issued eleven precautionary measures for LGBTIQ persons, related almost exclusively to violence and death threats perpetrated against LGBTIQ activists.²⁶⁸ In 2012, the Inter-American Court of Human Rights followed suit when it established sexual orientation and gender identity as protected categories under the American Convention in the case of *Atala Riffo and Daughters v. Chile*.²⁶⁹

.ishr.ch/news/historic-decision-council-passes-first-ever-resolution-sexual-orientation-gender-identity [http://perma.cc/294L-LTWD].

265. See *UN Human Rights Council: A Stunning Development Against Violence*, HUMAN RIGHTS WATCH (Mar. 23, 2011), <http://www.hrw.org/news/2011/03/22/un-human-rights-council-stunning-development-against-violence> [http://perma.cc/8NZ6-R5ZM]. This was an increase from 54 states that issued a joint statement in 2006 proclaiming that existing human rights standards apply to LGBT persons and calling upon the Council to take action. H.E. Wegger Chr. Strømme, *2006 Joint Statement: 3rd Session of the Human Rights Council*, ARC INT'L (Dec. 1, 2006), <http://arc-international.net/global-advocacy/sogi-statements/2006-joint-statement> [http://perma.cc/55PH-BK6V].

266. Human Rights, Sexual Orientation, and Gender Identity, AG/RES.2653 (XLI-O/11) (June 7, 2011), <https://www.oas.org/en/iachr/lgtbi/docs/GA%20Res%20%202721.pdf> [http://perma.cc/DCD2-7CLV]. More broadly, the Resolution condemns violence, harassment, discrimination, exclusion, stigmatization, and prejudice based on sexual orientation and gender identity. *Id.*

267. Press Release, Org. of Am. States, The IACHR creates Rapporteurship to address issues of Sexual Orientation, Gender Identity, Gender Expression, and Body Diversity (Nov. 25, 2013), http://www.oas.org/en/iachr/media_center/PReleases/2013/094.asp [https://perma.cc/FE3Y-ZXNY].

268. See, e.g., *Precautionary Measures: PM 155/13—Caleb Orozco, Belize*, INTER-AMERICAN COMM. HUMAN RIGHTS, <http://oas.org/en/iachr/decisions/precautionary.asp> [http://perma.cc/C7VF-QPPF] (precautionary measures granted for Caleb Orozco, an LGBTIQ human rights defender in Belize, subjected to death threats, harassment and attacks); *Precautionary Measures: PM 153/11-X and Z, Jamaica*, INTER-AMERICAN COMM. HUMAN RIGHTS, <http://www.oas.org/en/iachr/decisions/precautionary.asp> [http://perma.cc/HT7B-W2KM] (precautionary measures for two unnamed individuals in Jamaica victimized on account of their sexual orientation).

269. *Atala Riffo v. Chile*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. No. 239, ¶ 91 (Feb. 24, 2012). For a discussion on the *Atala* case, see Lisa Davis remarks in *The Global Struggle for LGBTQ Rights: Legal, Political, and Social Dimensions*, 37 WOMEN'S RTS. L. REP. 229, 270 (2016); Jessica Stern, *Creating Legacy Today: The First LGBTQ Ruling by the Inter-American Court of Human Rights*, 15 CUNY L. REV. 247, 249 (2012).

The European Union has also been a longstanding champion of LGBTIQ rights. The Charter of Fundamental Rights expressly lists sexual orientation as a ground protected against discrimination.²⁷⁰ It became binding European Union law in 2009.²⁷¹ Following the European Union's lead, the Council of Europe Parliamentary Assembly adopted a resolution in 2010 condemning violence and discrimination committed on the basis of sexual orientation and gender identity and echoing the European Court's view that "negative attitudes on the part of a heterosexual majority against a homosexual minority cannot amount to sufficient justification for discrimination, any more than similar negative attitudes towards those of a different sex, origin or colour."²⁷²

In 2014, the African Commission on Human and Peoples' Rights (African Commission) adopted a resolution urging parties to the African Charter on Human and Peoples Rights to take the necessary measures to prevent and prosecute violence committed on the basis of real or perceived sexual orientation or gender identity.²⁷³ The resolution came on the heels of a 2011 decision when a coalition of local and international organizations led by OutRight Action International (then known as the International Gay and Lesbian Human Rights Commission) successfully lobbied the African Commission to recognize gender and sexual orientation as prohibited grounds of discrimination in guidelines issued to assist states' parties in complying with their obligations to protect economic, social, and cultural rights.²⁷⁴

270. *Charter of Fundamental Rights of the European Union*, Resolution No. 1210 (2000) art. 21(1). In addition to the protections against sexual orientation discrimination explicit in this treaty, the Court of Justice of the European Union ("Court of Justice") has established that discrimination against transgender persons is "sex" discrimination. Moreover, the Court of Justice has held that sexual orientation can be a particular social group for the purposes of asylum in part because "it is common ground that a person's sexual orientation is a characteristic so fundamental to his identity that he should not be forced to renounce it." *Joined Cases C-199/12, C-200/12 & C-201/12, X, Y, Z v. Minister voor Immigratie en Asiel*, 2013 E.C.R. I-0000.

271. *EU Charter of Fundamental Rights*, EUR. COMM'N, http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm [<http://perma.cc/875R-W4WY>].

272. EUR. PARL. ASS., *Discrimination on the basis of sexual orientation and gender identity*, 17th Sess., Res. No. 1728 (Apr. 29, 2010).

273. *See 275: Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity*, AFR. COMM'N ON HUMAN & PEOPLES' RIGHTS (May 12, 2014), <http://www.achpr.org/sessions/55th/resolutions/275> [<http://perma.cc/YQ7M-66X7>].

274. AFRICAN COMM'N ON HUMAN AND PEOPLES' RIGHTS [ACHPR], *PRINCIPLES AND GUIDELINES ON THE IMPLEMENTATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS* ¶ 1(d) (2011), http://www.achpr.org/files/instruments/economic-social-cultural/achpr_instr_guide_draft_esc_rights_eng.pdf [<https://perma.cc/4U2U-6Z3J>].

The U.N. High Commission for Refugees (UNHCR) has also recognized the role of socially constructed gender roles in the persecution of LGBTIQ refugees. In 2012, it released guidelines addressing refugee claims based on sexual orientation and gender identity, recognizing that LGBTIQ individuals are often persecuted because of “non-compliance with expected cultural, gender and/or social norms and values.”²⁷⁵ The guidelines further explain that LGBTIQ individuals are protected as a particular social group, as well as under the religion and political opinion grounds, under the 1951 Refugee Convention.²⁷⁶ Recently the UNHCR released a report putting forth best practices for helping LGBTIQ refugees in which it attributed “social hostility toward LGBTI[Q] persons . . . to broader contextual factors, such as ‘patriarchy,’ ‘conservatism,’ ‘cultural taboos,’ ‘religion,’ and/or traditional practices.”²⁷⁷

D. Recognition Does Not Always Equal State Law or Practice

Routine gendered violence committed against women, LGBTIQ persons, and other gender transgressors comes not only in the form of state action, but also from states’ unwillingness to protect against such violence, often due to societal and institutional gender discrimination.²⁷⁸ While direct commission of gender-based violence by state actors is a reality, the unacknowledged discrimination and violence committed by private actors is also promulgated by intentional omissions of interference by states. Omissions include failure to establish laws protecting against gender-based violence, as well as state failure to enforce those laws. This deep-seated gender discrimination embedded in culture and tradition, and reinforced by public institutions, leads to impunity for gender-based violence against those whose gender expression deviates from their culturally assigned roles.

275. U.N. High Comm’r for Refugees, Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, ¶ 15, U.N. Doc. HCR/GIP/12/09 (2012), <http://www.unhcr.org/509136ca9.pdf> [<http://perma.cc/X38E-8F23>].

276. *Id.* ¶ 40.

277. U.N. HIGH COMMISSIONER FOR REFUGEES (UNHCR), PROTECTING PERSONS WITH DIVERSE SEXUAL ORIENTATIONS AND GENDER IDENTITIES: A GLOBAL REPORT ON UNHCR’S EFFORTS TO PROTECT LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND INTERSEX ASYLUM-SEEKERS AND REFUGEES 15 (2015), <http://www.refworld.org/docid/566140454.html> [<http://perma.cc/BK9T-X3VZ>].

278. See Davis, *supra* note 34, at 357. This Article provides a robust discussion on institutional discrimination, its causes and consequences as well as advocates’ work to address it.

Some scholars question whether “within the context of society” means that the context of rights is confined to a local societal understanding.²⁷⁹ In other words, should gender violations be measured against the norms of the society in which armed conflict is taking place? In this anthropological perspective, if a form of gender abuse was already practiced and accepted, then such an offense would only be prosecutable if the conduct surpassed the normal oppression allowed by the society. For example, if forced marriage of a child is allowed for girls as young as nine, but no younger, then forced marriage of young girls would only be a prosecutorial offense if the crime happened to a girl younger than nine (and meeting all of the required elements).

This is not so. Valerie Oosterveld reminds us that the ICC does not need to accept a society’s discriminatory framework each time it determines whether gender was the basis for persecution.²⁸⁰ Instead, the ICC examines violations based on when victims were subjected to codified abuses for transgressing societal gender regulations.²⁸¹ Valerie Oosterveld notes several reasons why the court applies this gender analysis within a specific society:

Under the Rome Statute, the examination of a specific society is done for several reasons, including, to understand how gender is constructed in that particular society, to understand the role that discrimination plays in maintaining that gender construct, to examine whether a particular victim fell within or outside of that gender construct and mode of discrimination, and to evaluate all of these considerations in light of international law²⁸² when determining whether particular acts amount to violations of fundamental rights.²⁸³

Oosterveld also notes that, the “context of society” does not only refer to domestic societies, but also the international society’s shared understanding of definitions, rights and norms.²⁸⁴

On an individual liability level, a perpetrator cannot hide behind the technicality of law when cultural developments make painfully clear and foreseeable that certain elements of already-criminalized

279. *Id.* at 341.

280. Oosterveld, *supra* note 165, at 75.

281. *Id.* at 75–76.

282. See Rome Statute, *supra* note 147, at art. 21(3).

283. Oosterveld, *supra* note 169, at 75. “The fact that the international society condemns discrimination on the basis of sex and violence against women must be taken into account, not only when generally considering the meaning of gender, but also when deciding what amounts to persecution.” *Id.* at 75–76. For a discussion of the factors ICC judges might consider with respect to the context of any given society, see *id.* at 74–76.

284. *Id.* at 75–76.

conduct are also considered unacceptable. Similarly, a state's indifference or inaction to crimes brought to its attention serve to encourage perpetrators, or in effect gives them permission. Consequently, international human rights bodies have consistently held states liable when perpetrators enjoy state-facilitated impunity, as well as when their individual authorities are complicit in such acts.²⁸⁵

The problem of state or institutional lack of will to prevent, punish, and prosecute gender-based crimes is not new. This could not be more evident than in the implementation of women's rights enshrined under customary international law. While countries all over the world have expanded women's legal rights over the last quarter century, these laws, often celebrated on paper, do not always provoke action.²⁸⁶ The result has been that an inadequate "infrastructure of justice—the police, the courts and the judiciary—is failing women, which manifests itself in poor services and hostile attitudes from the very people whose duty it is to fulfill women's rights."²⁸⁷

One such example is the treatment of sexual violence under international law. While the prohibition against rape is widely recognized as a right under international human rights law and international humanitarian law and is enshrined under customary international law, the practice of rape by both private and armed actors persists, largely due to pervasive culturally perpetuated gender-based discrimination that fuels state inaction.²⁸⁸ During the mid-90s movement to codify rape as a form of torture under certain egregious circumstances, Professor Rhonda Copelon reminds us how one of the Inter-American Commission members said, "You put it in, you take it out. I don't see what the big deal is,"²⁸⁹ referring to the rape of a woman through sexual penetration.

By 2001, the international community was shocked at the discovery of eight women and girls who had been sexually tortured, killed and left in an old cotton field in Ciudad Juárez, Mexico.²⁹⁰ The case eventually reached the Inter-American Court of Human Rights, where the court affirmed that the violence committed in Ciudad

285. Comm. Against Torture, Gen. comment No. 2, ¶ 18, U.N. Doc. CAT/C/GC/2 (2007) (clarifying that where gender-based violence amounts to torture, "its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts").

286. U.N. WOMEN, PROGRESS OF THE WORLD'S WOMEN: IN PURSUIT OF JUSTICE 8 (2011).

287. *Id.*

288. Rhonda Copelon, *Gender Violence as Torture: The Contribution of CAT General Comment No. 2*, 11 N.Y.C. L. REV. 229, 235–37 (2008).

289. *Id.* at 236.

290. See Ginger Thompson, *Wave of Women's Killings Confounds Juárez*, N.Y. TIMES (Dec. 10, 2002), <http://www.nytimes.com/2002/12/10/world/wave-of-women-s-killings-confounds-juarez.html> [<http://perma.cc/7SHK-HFUM>].

Juárez was indeed part of a pattern of systematic and discriminatory gender-based violence.²⁹¹ The court pointed out the subordination of women reflected in Mexico's policies and practices.²⁹²

In her expert testimony to the court, Rhonda Copelon affirmed that "such discrimination is not based upon biological sex difference alone but also the social construction—through, for example, differential legal penalties and rights, economic and social opportunities, and cultural demands and stereotypes . . . [that] define the conduct that is considered appropriate to, or conversely 'transgressive' for each."²⁹³ She goes on to explain that, "although women are disproportionately the victims of gender violence, men and boys may also be victims of gender violence, such as in violence inflicted upon boys recruited as child soldiers or upon gay or transgender males, examples of vulnerability and transgression, respectively."²⁹⁴

Three years earlier, the court's decision in *Castro-Castro v. Peru*²⁹⁵ laid the groundwork for the *Cotton Fields* decision—that the disproportionate effect of abusive treatment on a victim is as important to the definition of gender-based violence, as the actual act of violence, and consequently its inherently discriminatory nature.²⁹⁶ In *Castro*, the court concluded that "[t]here is no torture that does not take the victim's gender into account."²⁹⁷

Citing the IACHR Rapporteur and the U.N. Rapporteur on extrajudicial executions, the court agreed that "[w]hen the perpetrators are not held to account, as has generally been the situation in Ciudad Juárez, the impunity confirms that such violence and discrimination is acceptable, thereby fueling its perpetuation," and that "[t]he events in Ciudad Juárez thus constitute a typical case of gender-based crimes which thrive on impunity."²⁹⁸ Consequently, the court held

291. *Gonzalez, Monreal and Monarrez ("Cotton Field") v. Mexico*, CTR. FOR WOMEN, PEACE & SEC., <http://blogs.lse.ac.uk/vaw/landmark-cases/a-z-of-cases/gonzalez-et-al-v-mexico/#Decision> [<http://perma.cc/3REQ-UN8X>]. See also Expert Test. of Professor Rhonda Copelon, ¶ 16, *Gonzalez, Herrera Monreal, and Ramos Monarrez v. The United Mexican States*, Inter-Am. Ct. H.R. No. 496, 497, 498 (Apr. 28, 2009) (revised June 12, 2009). Professor Rhonda Copelon notes that "[d]isproportion in this context does not require statistical showing, but rather, . . . [a] disproportionate impact may turn on whether the same treatment of women and men had a *qualitatively* as well as *quantitatively differential* or added effect on women." *Id.*

292. See *Miguel Castro-Castro Prison v. Peru*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. No. 160, ¶ 401 (Nov. 25, 2006).

293. Expert Test. of Professor Rhonda Copelon, *supra* note 291, ¶ 9.

294. *Id.* at n. 7.

295. See *Miguel Castro-Castro Prison*, *supra* note 292, ¶¶ 206, 223.

296. See *id.* ¶ 303.

297. *Id.* ¶ 260(q).

298. LAURENCE BURGORGUE-LARSEN & AMAYA ÚBEDA DE TORRES, THE INTER-AMERICAN COURT OF HUMAN RIGHTS: CASE LAW AND COMMENTARY 430 (Rosalind Greenstein trans., 2011).

the Government of Mexico culpable for not only failing to adequately investigate the murders and punish the perpetrators, but also for failing to bring charges against authorities for their negligence.²⁹⁹

As demonstrated in the cases above, a key component to the legal recognition of gender discrimination that undergirds gender-based crimes is its disproportionate effect on gender transgressors. This is not to conclude that every incident of violence against a gender transgressor is an act of gender-based violence. Copelon explains that “it depends on identifying the targets or those affected as well as the characteristics of the context, purpose and the violence itself.”³⁰⁰ Similarly, as Madeleine Rees points out, “[a] real gender analysis [looks] at the structures of power, who has it, who owns it, and how it impacts on men and women in all areas of their lives.”³⁰¹ The Office of the Prosecutor’s approach to criminalizing gender crimes is based on agreed-upon international standards rather than individual context and recognizes this structural power analysis of gender oppression.³⁰²

IV. IN THE INTEREST OF JUSTICE: WHY A LEGAL CHALLENGE UNDER GENDER NOW?

The recognition of rape as torture was pivotal towards international recognition of gender discrimination, providing a recourse to survivors who might otherwise have had none. It has become a tool to prosecute armed actors in conflict, hold states accountable, and rewrite the international gender narrative that rape is neither a spoil of war nor an inevitable societal occurrence. This achievement under international human rights and international criminal law was hard-fought and based on years of lawyering and advocacy by the international women’s movement. A key component to their success was combining advocacy with legal strategy.

The International Criminal Court was created to address grave atrocities committed against humanity. The Rome Statute explicitly requires the ICC to apply and interpret the law in a non-discriminatory manner, “consistent with internationally recognized human

299. See González et al. (“Cotton Field”) v. Mexico, Preliminary Objection, Judgment, Inter-Am. Ct. H.R. No. 205, ¶ 602 (Nov. 16, 2009). See also Judith Matloff, *Six women murdered each day as femicide in Mexico nears a pandemic*, AL JAZEERA AM. (Jan. 4, 2015), <http://america.aljazeera.com/multimedia/2015/1/mexico-s-pandemicfemicides.html> [<http://perma.cc/U887-2BGH>].

300. Expert Test. of Professor Rhonda Copelon, *supra* note 291, ¶ 15.

301. Madeleine Rees, Sec’y Gen. of the Women’s Int’l League for Peace & Freedom, Address at 2014 Peace Fellows Seminar, Bradford Univ. (Oct. 26, 2014), <https://wilpf.org/madeleine-rees> [<http://perma.cc/W274-E6H5>].

302. See *id.*

rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.”³⁰³ The failure to investigate, prosecute, and punish the crimes against humanity deliberately and systematically committed against women or LGBTIQ persons would violate both the letter and the spirit of the Rome Statute and go against the tides of evolving customary international law.

Gender oppression is always felt more acutely when intertwined with discrimination based on race, ethnicity, nationality, disability status, sexual orientation, gender identity, or other status. Viewing gendered violence through the lens of socially constructed narratives addresses its underlying causes: the structural inequality reflected in, and perpetrated by, such violence. This makes room for more tailored solutions that address root problems instead of prescribing remedies based on a fragmented or individual analysis. The Trial Chamber in *Furundžija* held “[t]he general principle of respect for human dignity is the basic underpinning and indeed the very *raison d’être* of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law.”³⁰⁴ Gender strategies in the tribunals grew from the notion that women’s rights are human rights. Today, advocates are calling for a “gender equal world.”³⁰⁵

303. Rome Statute, *supra* note 147, at art. 21(3).

304. Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 183 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

305. *In a gender equal world, girls must have choices for their future*, UN WOMEN (Feb. 6, 2017), <http://asiapacific.unwomen.org/en/news-and-events/stories/2017/02/international-day-of-zero-tolerance-for-fgm> [<http://perma.cc/AR5Z-ZUU2>]. See Press Release, U.N. Women, UN Women announces four new HeForShe Thematic Champions to accelerate progress towards gender equality (Mar. 7, 2017), <http://www.unwomen.org/en/news/stories/2017/3/press-release-un-women-announces-four-new-heforshe-thematic-champions> [<http://perma.cc/5K7E-KVZ4>].